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WITH TABLE OF PACIFIC CASES IN WHICH REHEARINGS
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(58 Wash. 123)

STATE v. WILSON.

(Supreme Court of Washington. April 1, 1910.)
ASSAULT AND BATTERY (§ 91*) — EVIDENCE — SUFFICIENCY.

Evidence held to sustain a conviction of assault and battery.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 136; Dec. Dig. § 91.*]

Department 2. Appeal from Superior Court, Okanogan County; E. W. Taylor, Judge.

John M. Wilson was convicted of assault and battery, and he appeals. Affirmed.

Perry D. Smith and E. K. Pendergast, for appellant. Wm. C. Brown, for the State.

PER CURIAM. Upon an information charging mayhem, the defendant was convicted, and adjudged guilty, of assault and battery, and has appealed.

The undisputed evidence shows that the appellant and one Lee Hager, the prosecuting witness, lived on adjoining farms; that they were not friendly; that on the morning of the trouble involved in this action the appellant called Hager to take some of his cattle out of appellant's field; that Hager started towards appellant's land to do so, but at all times remained upon his own premises; that appellant, meeting him, made certain charges against Hager, who finally responded by calling appellant a liar; that thereupon appellant, as he expressed it, went through a fence after Hager; that during the fight which ensued appellant bit off a portion of one of Hager's fingers, and otherwise injured him; that appellant was not hurt; and that Hager was the smaller and weaker man of the two.

The only assignment presented is that the trial court erred in one of its instructions to the jury. This instruction related to an assault committed by one party upon the land of another, whom he assaulted. It is not necessary to quote the instruction at length. Although it was somewhat rambling, argumentative, and not well framed, we cannot hold it so misstates any principle of law applicable to the issues in this case as to con-

stitute prejudicial error. In any event, after a careful reading of all the evidence, including that of the appellant himself, we are satisfied that the jury could not have returned any verdict more favorable to the appellant, even though the instruction had not been given.

The judgment is affirmed.

(32 Nev. 327)

LEEPER v. JAMISON et al. (No. 1,802.)

(Supreme Court of Nevada. April 2, 1910.)
MUNICIPAL CORPORATIONS (§ 182*)—OFFICERS —REMOVAL.

Const. art. 15, § 11, provides that when the tenure of any office is not declared by law, the office shall be held during the pleasure of the power making the appointment. *Held*, that where the term of office of the chief of police is not specified by law or city charter, an incumbent may be removed at will without his resignation, and the acceptance by the mayor and council of an incumbent's resignation constitutes a removal, though the resignation was executed many months before for a special purpose, and had no force as such, and was not to be presented.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 182.*]

Appeal from District Court, Washoe County.

Action by R. C. Leeper against Lyle Jamison and others, City Council of the City of Reno, and another. Defendants had judgment, and plaintiff appeals. Affirmed.

W. D. Jones, for appellant. Summerfield & Curlier and Frank D. King, for respondents.

TALBOT, J. Plaintiff brought this action to obtain a judgment declaring that he is the chief of police of the city of Reno, and as such entitled to an accrued salary of \$2,047.75. From a decision adverse to him in the district court, he has appealed.

The case was tried upon an agreed statement of facts, from which it appears that the plaintiff was appointed and became chief of police on the 14th day of May, 1907; that on the 9th day of December, 1907, while the mayor and city council were in regular session, the mayor delivered to the clerk of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
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council a writing signed by the plaintiff, stating that he tendered his resignation as chief of police, to take effect at once, and asking that it be accepted; and thereupon the office of chief of police was declared to be vacant and a successor to plaintiff was nominated and appointed and the appointee qualified and entered upon, and has since continued to perform, the duties of the office. According to the stipulated facts, this writing had been signed and delivered by the plaintiff to the mayor on the 13th day of May, 1907, for the purpose of protecting the mayor from the criticism of certain persons who were opposing the plaintiff for the nomination and appointment to the office, and had been left with the mayor under the promise that it would not be used for any other purpose, nor as a resignation of the office by the plaintiff.

A number of questions have been presented and argued relating to the force and effect of the writing, but these need not be considered at length, for it may be conceded that the writing had no force as a resignation when it was never executed nor authorized by the maker to be delivered or used for that purpose. As no term for the office of chief of police is specified in the charter nor by law, the incumbent could be removed at will without any resignation being filed and without any reason being given by the mayor or council for his removal, under section 11 of article 15 of the state Constitution, which provides that when the tenure of any office is not declared by law, the office shall be held during the pleasure of the power making the appointment. Many cases sustaining this proposition are cited in the brief.

The judgment of the district court is affirmed.

NORCROSS, C. J., and SWEENEY, J.,
concur.

(32 Nev. 351)

STATE v. O'KEEFE et al. (No. 1,849.)

(Supreme Court of Nevada. April 2, 1910.)

1. BAIL (§ 58*)—CRIMINAL PROSECUTIONS—RECOGNIZANCE—DESCRIPTION OF OFFENSE—SUFFICIENCY.

In a recognizance, the details of the offense need not be stated with the particularity required by indictment, but it suffices if any word is used by way of recital which is commonly employed to designate the particular offense.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 263-277; Dec. Dig. § 58.*]

2. BAIL (§ 58*)—CRIMINAL PROSECUTIONS—RECOGNIZANCE—DESCRIPTION OF OFFENSE—SUFFICIENCY.

Criminal Practice Act, § 511 (Comp. Laws, § 4476), provides that the recognizance shall be substantially in the form there given, and in a space contemplated for the name of the crime are the words, in parentheses, "designating it generally." Civil Practice Act, § 71 (Comp. Laws, § 3166), provides that the court shall dis-

regard any error or defect in the proceedings which shall not affect the substantial rights of the parties. *Held*, that a recognizance reciting that "an indictment having been found charging W. with the crime of uttering and passing false paper," etc., sufficiently designated the crime without stating that the false paper was passed with intent to defraud.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 58.*]

Appeal from District Court, Esmeralda County.

Action by the state of Nevada against Daniel O'Keefe and others. From the judgment, plaintiff appeals. Reversed, with directions.

Geo. Springmeyer, Asst. Dist. Atty., for the State. Frederick W. Hankey, for respondents.

TALBOT, J. This action was brought to recover on a recognizance, given under section 511 of the Criminal Practice Act (Comp. Laws, § 4476), by which one W. J. Wheaton, who had been indicted, obtained his release and failed to appear for trial. General demurrers to the complaint were sustained, and the state has appealed from a judgment rendered in favor of the respondents for costs. The only question presented is whether the recital "an indictment having been found * * * charging W. J. Wheaton with the crime of uttering and passing false paper" is such a defective reference to the crime as to invalidate the recognizance and prevent it from being enforced. The statute states that the recognizance should be substantially in the form there given; and in a space contemplated for the name of the crime are the words, in parentheses, "designating it generally."

The authorities are not uniform. It is claimed that it was necessary to state in the recognizance that the false paper was passed with intent to defraud, for without such intent there would be no guilt. This would be true if we were considering the necessary allegations of an indictment, but the cases very generally hold that the details of the offense need not be stated with the particularity required by indictment. In *State v. Birchim*, 9 Nev. 99, this court said: "The rules governing the construction of commitments and recognizances are essentially different. The common law has always protected the subject against arbitrary imprisonment by requiring the causes of his detention to be expressed upon the commitment. * * * A recognizance, however, is the voluntary act of the obligors, and assumes the existence of a valid commitment. The reasons for setting forth the particulars of the offense in commitments do not exist in the case of recognizances, and the construction given in the words 'nature of the offense,' as they occur in section 166 [Comp. Laws, § 4136], is inapplicable to the same words in section 504 [section 4469]."

* * * The object of this section is to provide a form which the magistrate may be required to accept. A failure to follow the form would not release the obligors from their liability. 2 Ld. Raym. 1138, 1459; Phelps v. Parks, 4 Vt. 488; [State v. Cannon] 34 Iowa, 323."

Respondents rely in part upon, and it is said the district court was moved by, the opinions in *Belt v. Spaulding*, 17 Or. 130, 20 Pac. 829, U. S. v. Sauer (D. C.) 73 Fed. 671, and various Texas decisions. This federal case was in that state, and it was held that the form of the bailbond taken by the United States commissioner should conform in all substantial particulars to the requirements of the state in which the commissioner was sitting. The opinion in *Belt v. Spaulding* was written more than 20 years ago by one of the justices of the Supreme Court of Oregon, and another justice concurred in the result, apparently leaving the language approved by a single judge. The Supreme Court of Colorado, in an opinion rendered last year in *Marmaduke v. People*, 45 Colo. 357, 101 Pac. 337, said: "We are aware of the technical rule adopted in *Belt v. Spaulding*, 17 Or. 130 [20 Pac. 827], but are not impressed with the logic of that case and decline to follow it." The Criminal Code of Texas being more stringent than ours in its provisions "that the offense of which the defendant is accused be distinctly named in the bond and that it appear therefrom that he is accused of some offense against the laws of the state" (article 309, subd. 3), the decisions there are not considered directly applicable under our statute. Among the cases cited by the appellant which support the more liberal rule are ones in which the terms used by way of recital of the offense were "resisting process" (*Browder v. State*, 9 Ala. 58); "stealing from the mail" (U. S. v. Dennis, Fed. Cas. No. 14,949); "stealing from a store" (*Young v. People*, 18 Ill. 566); "carrying concealed weapons" (*Hall v. State*, 9 Ala. 827); "offense of misdemeanor" (*Vinson v. Northen*, 94 Ga. 698, 19 S. E. 991); "the offense of larceny" (*Foote v. Gordan*, 87 Ga. 277, 13 S. E. 512); "a charge of killing one T. W." (*State v. Williams*, 17 Ark. 371); and "with the offense of V. L. O. L." (*Allen v. Com. [Ky.]* 73 S. W. 1027). Other cases are presented in which designations similar in principle and omitting to state that the offense had been committed with felonious intent or guilty knowledge were held not to invalidate the recognizance. In *People v. Gillman*, 125 N. Y. 372, 26 N. E. 469, the court enforced a recognizance which followed the statutory form, but in which there was an omission to fill the blank in the recital intended for the specification of the nature of the crime. There was a provision in New York somewhat similar to section 71 of our Practice Act (Comp. Laws, § 3166), which provides "that the court shall in every

stage of the action disregard any error or defect in the proceedings which shall not affect the substantial rights of the parties." It was said that "an error or mistake in the undertaking will not render it invalid unless it have actually prejudiced the defendant or tend to his prejudice in respect to a substantiation right. That, obviously, is not the effect here of the omission. As formerly, so now, being the voluntary act of the party, the undertaking permits the presumption of the regularity of the proceedings, and by coming into the proceeding in that manner, in behalf of the accused, the surety will be presumed to know upon what charge the prisoner was held by the sheriff. The statement of the offense charged, therefore, is not of the essence of the undertaking of bail, nor does it bear very materially upon the obligation. It is rather a matter for recital, and it bears upon the completeness of the instrument in form and historical detail." No doubt if the recital of the offense in the recognizance had contained all the details required to be stated in an indictment, the defendants would have signed and executed the instrument. It must be presumed that they were aware of the offense for which Wheaton had been indicted or they would not have sought his release. The real purposes of the recognizance were to obtain his discharge from custody, which they secured, and to guarantee the state the payment of the amount of the bail in case he failed to appear when required by the court.

We think the liberal rule is more strongly supported by the decisions, tends more to serve the ends of justice without doing any real wrong to persons who may sign recognizances, and is more in keeping with our statutory provisions requiring only a substantial compliance with the form for recognizances, which directs only a general designation of the offense, and the section authorizing disregard of errors which do not prejudice. The recital in the recognizance that an indictment had been found charging Wheaton with the crime of uttering and passing false paper leads to the inference that he had been charged by the grand jury with uttering and passing false paper in such a manner as to constitute a crime, and consequently with intent to defraud. The assertion that he was indicted for crime, without further statement, would be about as definite as the references in some of the recognizances which have been upheld, such as that the accused had been charged with "felony" or "misdemeanor."

We need not determine whether a recognizance would be good which failed to make any reference to the offense such as the one which was enforced in the New York case, but as held in *Marmaduke v. People*, 45 Colo. 357, 101 Pac. 337, supra, we believe it is sufficient if any word is used by way of recital

in the recognizance which is commonly employed to designate the particular criminal offense. The views we have expressed are in harmony with the liberal doctrine in regard to the recital in recognizances heretofore announced in *State v. Birchlim*, 9 Nev. 99, and *State v. Murphy*, 23 Nev. 398, 48 Pac. 628.

The judgment is reversed, and the district court is directed to overrule the demurrers to the complaint and allow the defendants to answer if they desire.

NORCROSS, C. J., and SWEENEY, J.,
concur.

(32 Nev. 342)

COLLINS v. NAT C. GOODWIN & CO., Inc.
(No. 1,853.)

(Supreme Court of Nevada. April 4, 1910.)

1. NEW TRIAL (§ 131*)—STATEMENT—SETTLEMENT AND AUTHENTICATION.

Civ. Prac. Act (Comp. Laws, § 3292) § 197, provides that a party preparing the statement on motion for new trial shall serve the same on the adverse party who may propose amendments thereto, and shall within five days after the service on him of the statement serve the same with the statement on the moving party, who shall within five days give notice to the adverse party if he declines admitting the amendments, or they shall be deemed accepted. At any time thereafter either party may have the statement settled by the judge or referee on two days' notice. When the statement is agreed to, it shall be accompanied by the certificate of the parties or their attorney that the same has been agreed on. When settled by the judge or referee it shall be accompanied by his certificate, etc. *Held*, that though, where no objection to a proposed amendment is made within the time specified, the amendment is deemed to have been accepted by the adverse party, and the statement is in effect agreed on by the parties, the same should be allowed and certified before being used on the motion.

[Ed. Note.—For other cases, see *New Trial*, Dec. Dig. § 131.*]

2. NEW TRIAL (§ 131*)—STATEMENT—WAIVER OF SETTLEMENT.

Where the parties submit a motion for a new trial on the statement as agreed on, they waive the objection that the statement was not properly allowed and certified.

[Ed. Note.—For other cases, see *New Trial*, Dec. Dig. § 131.*]

3. APPEAL AND ERROR (§ 627*)—DELAY IN FILING TRANSCRIPT.

Where the transcript on appeal is not filed within the time prescribed by Supreme Court rule 3 (73 Pac. xii), the appeal will be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2744; Dec. Dig. § 627.*]

Appeal from District Court, Washoe County.

Action by Kathryn A. Collins against the Nat C. Goodwin & Company, Incorporated. Plaintiff had judgment, and defendant appeals. On motion to dismiss appeal. Motion granted.

Dodge & Barry, for appellant. James Glynn, and A. E. Painter, for respondent.

SWEENEY, J. This is a motion under the provisions of rule 3 of this court (73 Pac. xii) to dismiss an appeal from an order denying a motion for a new trial. The following facts appear from the papers on file in support of the motion: "That on July 23, 1908, judgment was entered in favor of the plaintiff for the sum of \$1,625 damages. That on July 31, 1908, notice of intention to move for a new trial was duly filed and served. That on November 21, 1908, statement on motion for a new trial was filed and served. That on December 29, 1908, proposed amendment to statement on motion for a new trial was filed and served by plaintiff. That no written notice declining to accept said proposed amendment was filed in said cause. That on January 5, 1909, plaintiff filed and served notice of motion to settle statement on January 9, 1909. That no order of court appears of record relating to such settlement. That on January 16, 1909, argument on motion for a new trial was set for hearing on January 23, 1909. That on January 23, 1909, the following order was made and entered of record in said cause: 'Defendant's motion for a new trial coming on regularly to be heard, Dodge & Barry, appearing as attorneys for the defendants, and Lorrin Andrews, Esq., appearing as attorney for the plaintiff. The motion was argued by counsel for the respective parties. Defendant offered in evidence all the files in said case, and statement on motion for a new trial. Order admitted in evidence and considered as read. Ordered motion stand submitted.' That on April 2, 1909 (in pursuance of certain prior orders not necessary to quote), the following order was made and entered in the cause: 'Whereas it appearing to the satisfaction of the court that the plaintiff has filed herein her consent to the judgment entered herein, being reduced to the sum of \$625, the said consent being pursuant to an order of the court heretofore made on the 30th day of March, 1909. It is therefore ordered that said judgment be reduced to the sum of \$625 and it is further ordered that the motion of the defendant for a new trial, be and the same is hereby denied.' That on May 3, 1909, notice of appeal from the order of April 2, 1909, denying motion for a new trial was filed and served, and on the same date an undertaking on appeal in due form was filed."

It is the contention of counsel for the appellant that the motion to dismiss ought not to prevail for the reason that the statement on motion for a new trial was never settled by the trial court. This contention, under the facts disclosed, we think is without merit.

Section 197 of the Civil Practice Act, relative to statements on motion for a new trial, provides: "The party preparing the statement * * * after having filed the same with the clerk, and had such filing entered

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and endorsed, shall serve the same on the adverse party, on the same day, who may propose amendments thereto, * * * and shall, within five days after the service on him of the statement, file his amendment with the clerk and, * * * shall on the same day, serve the same, with the statement, on the moving party, who shall, within five days thereafter, give written notice to the adverse party if he declines admitting the amendments, or they shall be deemed accepted. At any time thereafter either party may have the statement settled by the judge or referee upon two days' notice thereof to the other party. * * * When the statement is agreed to it shall be accompanied with the certificate, either of the parties themselves in fact or their attorney, that the same has been agreed upon, and is correct. When settled by the judge or referee, it shall be accompanied with his certificate that the same has been allowed by him and is correct. When no amendments have been filed, the statement shall be accompanied with the certificate of the clerk of that fact. * * * The several periods of time limited may be enlarged. * * * (Comp. Laws, § 3292).

The amendment offered by the plaintiff to the defendant's statement on motion for a new trial is deemed to have been accepted by the defendant and, therefore, the statement in effect, agreed upon by the parties. There was then nothing more for the judge to settle than if no amendment had been proposed. Where no amendments have been filed, the certificate of the clerk to that effect is sufficient authentication. *Borden v. Bender*, 18 Nev. 49; *Tull v. Anderson*, 15 Nev. 426. The statement should be certified to in some appropriate manner, and it is irregular for the court to pass upon the motion in the absence of some such certification. But if, as a matter of fact, it appears that the statement has been settled or agreed upon to all intents and purposes, and counsel submit the motion to the court upon the statement without question, as was done in this case, they will be deemed to have waived the formality of certification. There has been no contention that the ruling on the motion was inadvertently or improvidently made before the statement was certified to, and no motion to vacate the order on that ground was made. *Crosby v. North Bonanza M. Co.*, 23 Nev. 70, 75, 42 Pac. 583. As counsel cannot now be heard to question the want of certification to the statement on motion for a new trial, it follows that no valid reason appears for appellant's delay in sending the statement or transcript on appeal to this court.

The case at bar may be distinguished from the case of *Young v. Updike*, 29 Nev. 303, 89 Pac. 457, relied on by counsel for appellant, not only because of the fact that different statutory provisions were involved,

but for the further reason that in the latter case no question of waiver was involved.

The motion to dismiss the appeal is granted.

NORCROSS, C. J., and TALBOT, J., concur.

(41 Mont. 51)

MILEY v. NORTHERN PAC. RY. CO.

(Supreme Court of Montana. March 26, 1910.)

1. APPEAL AND ERROR (§ 1111*)—DISMISSAL OF ACTION.

A motion by respondent to dismiss the action will not be granted by the Supreme Court on appeal, such court having authority to dismiss only actions or proceedings commenced therein.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1111.*]

2. PLEADING (§ 63*)—SPECIAL STATUTE—PROOF.

One seeking recovery under a special statute creating a new liability must plead and prove the facts showing his right to recover under such statute.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 133; Dec. Dig. § 63.*]

3. CARRIERS (§ 307*)—CARRIAGE OF PASSENGERS—CONTRACTS LIMITING LIABILITY—REDUCED FARE.

In the absence of statutory restrictions, a railway company may for a reduced fare sell a particular form of ticket whereby its liability is restricted and its obligations curtailed.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1038, 1252-1259; Dec. Dig. § 307.*]

4. CARRIERS (§ 20*)—FAILURE TO STOP AT STATION—ACTION FOR STATUTORY PENALTY—STATUTES—CONSTRUCTION.

Under Rev. Codes, § 4330, requiring railroad corporations, on tender of the "regular rates of fare," to furnish tickets entitling the purchasers to ride, and providing that any railroad failing to furnish tickets or refusing the passage which the same call for, must pay to the person so refused \$200, one purchasing a ticket at a reduced rate may not recover the penalty on failure of the railroad to stop at the station named in the ticket.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 20.*]

Appeal from District Court, Park County; Frank Henry, Judge.

Action by Alta Miley against the Northern Pacific Railway Company. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Reversed and remanded.

Wm. Wallace, Jr., John G. Brown, and R. F. Gaines, for appellant.

HOLLOWAY, J. During the month of July, 1908, the Northern Pacific Railway Company was operating a double train service over its Park branch, between Livingston and Gardiner. On that line of road, and between the regular stations at Emigrant and Electric, there is a flag station known as "Dalleys." At the time in question passenger train No. 103, which left Livingston in the forenoon, did not stop at Dalleys, but passenger

train No. 101, which left Livingston in the afternoon, did stop at that point to let off or take on passengers. On July 4, 1908, the plaintiff purchased from the Northern Pacific ticket agent at Livingston a round trip ticket for passage to Dalleys and return, and boarded train No. 103 for the purpose of making her journey. When the train conductor came to collect her ticket, he informed her that the train she was then on did not stop at Dalleys, and she was thereupon forced to alight at Emigrant, which was the nearest station to Dalleys at which the train did stop. She brought this action, and in her complaint assumes to state two causes of action; the first founded upon the defendant's common-law liability, and the second upon the provisions of section 4330 of the Revised Codes of Montana. The first cause of action seems to have been abandoned at the trial; at least the instructions given by the court only submitted to the jury the second cause of action, and upon that cause of action a verdict was returned in favor of the plaintiff for the statutory penalty of \$200; and from the judgment entered on the verdict, and from an order denying it a new trial, the railway company appealed. The respondent did not make any appearance in this court, but apparently confessed error by asking this court to dismiss the action. This motion we cannot grant. It is only an action or proceeding commenced in this court that we have any authority to dismiss under any circumstances. To dismiss the appeals would amount to an affirmance of the judgment and order, and, as there are not any grounds urged for such action, we are left to consider on the merits the questions raised, or such of them as may be necessary to a determination of the appeals.

The evidence offered by the plaintiff discloses that the ticket she purchased was an excursion ticket, issued on account of the fourth of July holiday, and that it was sold to her for \$1.20, whereas the regular round trip fare from Livingston to Dalleys was \$1.80. Section 4330, Revised Codes, under which this recovery was had, reads as follows: "Every railroad corporation must provide, and on being tendered the regular rates of fare, furnish to every person desiring a passage on their passenger cars, a ticket which entitles the purchaser to a ride, and to the accommodations provided in their cars, from the depot or station where the same is purchased, to any other depot or station on the line of their road. Every such ticket entitles the holder thereof to ride on their passenger cars to the station or depot of destination, or any intermediate station, and from any intermediate station to the depot of destination designated in the ticket, at any time within six months thereafter. Any corporation failing so to provide and furnish tickets, or refusing the passage which the same calls for when sold, must pay to the person so refused the sum of two hundred dollars."

We do not deem it advisable to determine some of the important questions suggested by appellant's brief. This cause has not been argued for respondent, and we reserve our decision upon those questions until such time as they may arise and be fully presented. Section 4330 creates a liability, on the part of the railway company, where none existed before, and since this action was tried upon the theory of the company's liability under the statute, and not otherwise, the only question with which we need concern ourselves at this time is: Does the plaintiff make out a case entitling her to the penalty provided in that section? In *Kelly v. Northern Pacific Ry. Co.*, 35 Mont. 243, 88 Pac. 1009, this court said: "In order to settle the rule in this state, we decide that, where a party relies for recovery upon a special statute creating a liability where none existed before, he must set forth in ordinary and concise language a statement of facts showing his right to recover under that statute." Of course, it follows that the proof must then conform to the facts pleaded.

It will be observed that section 4330 does not absolutely require the railway company to furnish a ticket good from Livingston to Dalleys upon every train running upon the Park branch; at the utmost it can only be said that it makes such requirement provided the regular fare is tendered; and, as to whether the section goes to this extent, we reserve our decision. The plaintiff did not tender or pay the regular fare. She purchased an excursion ticket for which she paid a special or reduced fare; and that, in the absence of statutory restrictions, a railway company may for a reduced fare sell a particular form of ticket, whereby its liability is restricted and its obligations curtailed, is recognized by the authorities generally. *Rose v. Northern Pacific Ry. Co.*, 35 Mont. 70, 88 Pac. 767, 119 Am. St. Rep. 836.

Since the plaintiff insists that she is entitled to recover the penalty provided by section 4330 above, by reason of the fact that she was not permitted, by virtue of the ticket she had purchased, to ride from Livingston to Dalleys and to alight at that station from the train upon which she sought carriage, she must show that she met the requirements of that section, which have to do with the passenger as distinguished from the carrier; and, as we have just observed, the first requirement is that she should have tendered the regular fare for her ticket, and this she did not do. Our Constitution (section 7, art. 15), our Codes, this court, in *Rose v. Northern Pacific Ry. Co.*, above, and *Brian v. Oregon Short Line R. Co.*, 40 Mont. —, 105 Pac. 489, and the authorities generally, recognize the distinction between a ticket sold at the regular fare, and one sold at a reduced fare or special price. The plaintiff sought to make her journey upon train No. 103, and the trouble arose because that train would not stop at Dalleys to let her off. There is

evidence that she was misled by the ticket agent; but that evidence has to do only with the first cause of action, which did not go to the jury. It could not have any application to the cause of action for the statutory penalty. Whatever right section 4330 may confer upon a passenger who has paid or tendered the regular fare for his ticket, it does not assume to confer any whatever upon a person who has purchased a ticket at a price below the regular fare, as plaintiff in this instance did; and since the plaintiff does not bring herself within the class of persons for whose benefit section 4330 was enacted, she cannot maintain an action for the penalty which that section provides.

The judgment and order are reversed, and the cause is remanded.

Reversed and remanded.

BRANTLY, O. J., and SMITH, J., concur.

(41 Mont. 39)

IN RE HOBBS' ESTATE.

ROE v. TREMBLAY.

(Supreme Court of Montana. March 26, 1910.)

1. WILLS (§ 45*)—TESTAMENTARY CAPACITY. One in a weakened condition physically from the effects of disease, but sound mentally and able to understand the disposition of his property provided for in his will, possesses testamentary capacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 92; Dec. Dig. § 45.*]

2. WILLS (§ 220*) — VALIDITY — RIGHT TO QUESTION.

An heir at law of a testator is in a position to contest the validity of a gift in a will revoking all former wills.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 532-537; Dec. Dig. § 220.*]

3. WILLS (§ 215*) — VALIDITY—PROCEEDINGS TO QUESTION.

Under Rev. Codes, §§ 7397, 7399, 7402, providing that on a will contest questions affecting the validity of a will must on request be tried by jury, etc., and that the court if satisfied that the will was duly executed, and that the testator was of sound mind, and did not act under duress or undue influence, should probate the will, etc., the validity of a will which provides for payment of debts and appoints an executor, but which disposes of the bulk of the estate to charity in violation of sections 4761 and 4762, relating to testamentary gifts to charity, cannot be raised in proceedings for the probate of the will, but can only be determined after the admission of the will to probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 522, 523; Dec. Dig. § 215.*]

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

Proceedings by Mathilda Tremblay for the probate of the will of John Hobbs, in which Mary H. Roe appeared as a contestant. From a judgment denying the probate, contestee appeals. Reversed and remanded.

John N. Booth, P. I. Cole, D. F. Smith, T. E. Brady, and Veazey & Veazey, for appellant. J. G. Bair, Wm. F. O'Leary, and J. W. Freeman, for respondent.

SMITH, J. On February 11, 1907, Mathilda Tremblay, also known as Sister Mary Julian, filed her petition in the district court of Teton county praying that the last will and testament of John Hobbs, deceased, dated February 5, 1907, be admitted to probate. The following is a copy of the alleged will:

"I, John Hobbs, of sound and disposing mind and memory, do hereby make, publish and declare this, my last will and testament, hereby revoking any and all former wills by me at any time heretofore made.

"First: I direct that all my just debts be paid, including funeral expenses, and all expense of last sickness.

"Second: I direct that my executrix herein named shall have a suitable monument erected at my grave, not to cost more than Five Hundred Dollars (\$500.00).

"Third: To my brother and sisters, nieces and nephews, I will and bequeath the sum of One Dollar (\$1.00) each.

"Fourth: The balance and residue of my estate, both real and personal, I will, devise and bequeath unto Mathilda Tremblay (Sister Mary Julian) to be by her used in such manner and benefits as she may see fit.

"Fifth: I hereby name, constitute and appoint as the executrix of this will, Mathilda Tremblay, (Sister Mary Julian), and request that she be permitted to execute the duties of this trust without being required to give bond.

"Sixth: I hereby revoke any former wills or bequests by me at any time heretofore made."

On March 2, 1907, Mary G. Roe filed her written contest, wherein she alleged that she is a sister of deceased; that he left no surviving issue, wife, father, or mother; that, at the time of the execution of the will he was not of sound or disposing mind or capable of making a will; that the so-called will was executed "under influence of the importunities, suggestions or persuasions of said Mathilda Tremblay or of some other person or persons unknown, and is not the free and voluntary act of the said John Hobbs"; that "said pretended will was unduly executed"; that it was understood and agreed between Hobbs and Mathilda Tremblay that the latter was to take the property for the use and benefit of the Sisters of Charity of Providence, a benevolent and charitable organization; that the pretended will was executed less than 30 days prior to the death of Hobbs, and the property was left to proponent for the purpose of avoiding, if possible, the force and effect of the provisions of sections 1758 and 1759 of the Code

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of Civil Procedure (now sections 4761, 4762, Rev. Codes). The affirmative allegations of the so-called contest were put in issue by an answer. The cause was tried to the district court of Teton county, sitting with a jury, which returned the following special findings: "(1) Was John Hobbins, deceased, of sound and disposing mind at the time of making the will in question of February 6, 1907? Answer: No. (2) Did John Hobbins, deceased, make the will in question and therein name Mathilda Tremblay as principal beneficiary with the understanding and agreement between himself and herself that she would take the property of the deceased as trustee and for the purpose of distributing same to the society or organization which conducts and operates what is known as the Columbus Hospital in the city of Great Falls, Mont.? Answer: Yes. (3) Was the will in question duly executed? Answer: No. (4) Was the will in question made as the free and voluntary act of John Hobbins, deceased? Answer: No." A judgment was entered rejecting the alleged will and refusing to admit the same to probate. From this judgment and an order denying a new trial, the proponent has appealed.

Before proceeding to an examination of the matters argued in this court, it may be well to dispose of finding No. 3, in which the jury determined that the will was not duly executed. They probably misunderstood the import of this question. It should have been decided by the court in the affirmative. The testimony shows beyond doubt that all necessary statutory formalities were complied with, if deceased was of sufficient mental capacity to execute a will.

Three questions are offered for our solution: (1) It is contended that contestant, Mary G. Roe, is without right to oppose the probate of the offered will on account of the fact that she has no interest in the estate; that prior to its execution deceased had on March 18, 1890, made another will, by which he left all of his property to his nephew John Roe, which former will is still in force if not legally revoked by later wills. (2) It is most seriously argued by counsel that findings Nos. 1 and 4 are without substantial support in the testimony. (3) The last point is that the district court of Teton county sitting as a court of probate with limited jurisdiction had no authority in this proceeding to try the question whether the devise and bequest to the proponent are void by virtue of the statute above referred to.

Disposing first of the second question, we have carefully read and examined all of the evidence in the record, and conclude therefrom without hesitation that there is no substantial testimony to warrant the first and last findings. While it is true that in a will executed one day prior to the one offered for probate the testator described himself as being of the same age as he was

at the time of executing the will of March 18, 1890, and that in the offered will he undertakes to leave \$1 to his "brother, sisters, nieces and nephews," when in fact he had never had a brother, we do not regard these matters as of sufficient weight or importance to overcome the positive testimony of those who were frequently present in the room of the deceased at different times for 48 hours immediately before his death and at the time of the execution of the will, and of other witnesses who had known him well for years. These witnesses testified categorically that, while he was in a weakened condition physically from the effects of the disease known as erysipelas, he was nevertheless capable and sound mentally and fully understood the contents of the will and the disposition of his property thereby provided for. This testimony was uncontradicted, and we find nothing suspicious or improbable about it. There is no evidence whatever that the making and execution of the will were not free and voluntary acts of the deceased. No necessity exists for incumbering this opinion with a narrative or summary of the testimony on this point. It may be found in the record on file in the clerk's office. We conclude, therefore, that the court below was in error in adopting findings Nos. 1 and 4, and interrogatories 1 and 4 should have been answered in the affirmative.

2. The foregoing disposes incidentally of appellant's first contention, for the reason that the offered will revokes all former wills, and therefore any heir at law of deceased is in a position to raise the third question submitted for determination. The matter also becomes immaterial in view of the disposition hereafter to be made of the third contention.

3. Sections 4761 and 4762 of the Revised Codes read as follows:

"Sec. 4701. No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society, or corporation or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made, at least thirty days prior to such death, such devise or legacy, and each of them, shall be valid: Provided, that no such devises or bequests shall collectively exceed one-third of the estate of the testator, leaving legal heirs, and in such case a pro rata deduction from such devises or bequests shall be made, so as to reduce the aggregate thereof to one-third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law.

"Sec. 4762. No estate, real, or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses except the same be done by let-

ters duly executed at least thirty days before the decease of the testator, and if so made at least thirty days prior to such death, such devise or legacy and each of them shall be valid: Provided, that the prohibition contained in this section shall not apply to cases where not more than one-third of the estate of the testator shall be bequeathed or devised for charitable or benevolent purposes."

Appropriate and timely objection was made by proponent to the consideration by the court of the legal effect of the fourth clause of the will, and it is now insisted that the court erred in submitting interrogatory numbered 2, relating thereto, to the jury. We are of opinion that this contention must be upheld. Section 7397, Rev. Codes, provides that upon the contest of a will the following issues of fact may be tried: "(1) The competency of the decedent to make a last will and testament. (2) The freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence. (3) The due execution and attestation of the will by the decedent or subscribing witnesses; or, (4) Any other questions substantially affecting the validity of the will, must, on request of either party in writing filed three days prior to the day set for hearing, be tried by a jury. If no jury is demanded, the court or judge must try and determine the issues joined. On the trial, the contestant is plaintiff and the petitioner is defendant."

It will be observed that the statute refers in terms to issues of fact after a demurrer has been overruled. The fourth paragraph of the section is somewhat general in terms, but the questions therein referred to are those substantially affecting the validity of the will itself, and not any particular devise or bequest therein provided for. The fact that the bulk of the estate is given to the proponent can make no difference in principle. The will provides for the payment of debts and appoints an executrix and is therefore complete without clause 4. See *Mulholland v. Gillan*, 25 R. I. 87, 54 Atl. 928. Article 2, c. 2, Rev. Codes, in which section 7397 is found, is entitled: "Contesting Probate of Wills." Section 7399, Rev. Codes, provides that, upon return of the special verdict, "judgment of the court must be rendered either admitting the will to probate or rejecting it." Section 7402, Rev. Codes, provides that if the court or judge is satisfied upon the proof taken, or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, a certificate of the proof and the facts found, signed by the judge and attested by the seal of the court, must be attached to the will.

Thus the will is admitted to probate. There is not any indication in the article of the Code under consideration that the validity or invalidity of specific bequests or devises may be considered in this proceeding; and there is no authority in the court to do so, unless perchance a determination of such question would affect the validity of the entire will, which is not the case here. The issue indicated may be tried and determined in appropriate proceedings instituted after the will is formally admitted to probate. This court in *State ex rel. Donovan v. District Court*, 25 Mont. 355, 65 Pac. 120, said: "But the contest of a will does not involve the question whether the property has escheated or will escheat, nor the question whether the property or its proceeds should be deposited in the State Treasury for the benefit of nonresident alien heirs. Neither question can be adjudicated upon the contest of a will or of its probate. The office of a contest is to attack the validity of a purported will. Its object is to have such will rejected. Consideration of the question of title, except in so far as it may be essential to ascertain whether the contestant is an interested person, within the meaning of sections 2329 and 2340 of the Code of Civil Procedure [of 1895], would be without the legitimate scope of the proceeding."

In *Barney v. Hayes*, 11 Mont. 99, 27 Pac. 384, Mr. Chief Justice Blake, speaking for this court, said: "It would be improper for us to express an opinion upon the interpretation of said will until the issues of fact have been tried and determined according to law." The Supreme Court of California in *Re Sanderson*, 74 Cal. 199, 15 Pac. 753, said: "In cases of contests of a will the issues must be such as that the determination of them will leave to the court no office except to enter a judgment admitting the will to probate or rejecting it." In *Estate of Mary Cobb*, 49 Cal. 599, it was said: "The other questions attempted to be raised by the objections filed concern the construction to be placed upon the will, and cannot be considered until it shall have been admitted to probate." In the case of *Wood v. Sawyer*, 61 N. C. 251, it was held that when a paper, purporting to be a will, and executed with the requisite formalities by a person competent to make a will, is offered for probate, it must be established without regard to the construction of its contents, and without consideration of trusts declared therein. In the *Matter of the Will of McLaughlin*, 1 Tuck. (N. Y.) 79, the surrogate said: "It is the factum of the document that is then [at time of application for probate] under consideration." The Supreme Court of California in the *Matter of the Estate of Pforr*, Deceased, 144 Cal. 121, 77 Pac. 825, held that a will regular in form and properly executed cannot be denied probate on the ground that

some of its provisions are invalid. See, also, *Bliss v. Macomb*, Probate Judge, 129 Mich. 127, 88 N. W. 890.

We conclude that the court erred in refusing to admit the will to probate. The judgment is therefore vacated and set aside, and the order denying a new trial is reversed. The cause is remanded with directions to admit the will to probate.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J.,
concur.

(41 Mont. 33)

RUMPING v. RUMPING.

(Supreme Court of Montana. March 26, 1910.)

1. DIVORCE (§ 226*)—ALIMONY—SUIT MONEY—APPLICATION FOR ALLOWANCE—BURDEN OF PROOF.

Under Rev. Codes, § 3677, providing that while a divorce action is pending the court may require the husband to pay as alimony any money necessary to enable the wife to prosecute or defend the action, the burden is not on the wife to show affirmatively that her application for suit money is made in good faith, and that there is a probability of her success.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 652; Dec. Dig. § 226.*]

2. NEW TRIAL (§ 79*)—GROUNDS—INSUFFICIENCY OF EVIDENCE—FINDINGS BY COURT.

On motion by defendant for new trial on the grounds that the evidence was insufficient to justify the findings, that it was insufficient to justify the decision, and that the decision was against law, the court might pass on such grounds, though in adopting the findings and making its special findings in plaintiff's favor it necessarily passed on such grounds before.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 165½; Dec. Dig. § 79.*]

3. APPEAL AND ERROR (§§ 1054, 1056*)—HARMLESS ERROR—RULINGS ON EVIDENCE—EQUITY CASES.

The rule that, in an equity case, error in admitting or excluding evidence is not ground for reversal does not apply where the evidence was of import, and by the ruling of the court thereon it is reasonably apparent that it was so regarded by the court, and for that reason probably affected the result reached.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4192; Dec. Dig. §§ 1054, 1056.*]

4. NEW TRIAL (§ 13*)—GROUNDS.

It is the duty of the court to grant a new trial if on hearing of the motion it concludes that substantial error was committed on the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 19; Dec. Dig. § 13.*]

5. DIVORCE (§ 212*)—TEMPORARY ALIMONY—NECESSITY.

A wife applying for temporary alimony pending a divorce action must show the necessity for the allowance.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 616, 617; Dec. Dig. § 212.*]

6. DIVORCE (§ 224*)—ALIMONY—SUIT MONEY.

The rules requiring a showing of necessity, governing allowances for suit money and expenses of litigating a divorce action, are the

same as those applying to allowances for temporary alimony.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 646; Dec. Dig. § 224.*]

7. DIVORCE (§ 227*)—ALIMONY—SUIT MONEY.

In a divorce action, the court is never warranted in allowing more suit money than is necessary for the purpose to which it is to be applied.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 653, 654; Dec. Dig. § 227.*]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

Action by John H. Rumping against Eva Rumping. From an order allowing defendant \$50 suit money, and \$150 to cover the cost of the stenographer's transcription of his notes, plaintiff appeals. Modified and affirmed.

R. A. Carleton, for appellant. Clayberg & Horsky, for respondent.

HOLLOWAY, J. This cause was heretofore before this court on appeal by defendant from a judgment in favor of the plaintiff. *Rumping v. Rumping*, 36 Mont. 39, 91 Pac. 1057, 12 L. R. A. (N. S.) 1197. The judgment was reversed, and thereafter the defect in the complaint, which was pointed out by this court, was cured by amendment. The cause, having been brought to issue and transferred to Lewis and Clark county for trial, was tried, and a general verdict in plaintiff's favor returned. The district court adopted the jury's finding, made some specific findings of fact, and rendered judgment in plaintiff's favor, dissolving the bonds of matrimony. On April 5, 1909, the defendant gave notice of her intention to move for a new trial, specifying as the grounds thereof (1) insufficiency of the evidence to justify the findings made; (2) insufficiency of the evidence to justify the decision of the court; (3) the decision of the court is against law; (4) errors of law occurring at the trial and excepted to by this defendant, and further gave notice that the motion would be made upon a bill of exceptions thereafter to be prepared. On April 10th the defendant filed and served her notice of motion, and motion for an order of court directing the plaintiff to pay into court, for the use of defendant, an amount of money sufficient to defray costs already incurred, to pay further expense of litigation, and to pay for a transcription of the stenographer's notes of the testimony and proceedings had upon the trial, for the preparation of her bill of exceptions. This motion was supported by the affidavit of defendant, which, after itemizing the expense already incurred, alleges that the transcript of the stenographer's notes will cost "approximately \$100," and that to further prosecute her motion for new trial will cost her \$50. Upon the hearing of this motion affidavits, oral testimony, and documentary evidence were presented, and upon consideration thereof the court made

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

an order allowing the defendant \$50 for suit money, and \$150 to cover the cost of the stenographer's transcription of his notes. From this order the plaintiff appealed.

Section 3677, Rev. Codes, provides: "While an action for divorce is pending the court or judge may, in its or his discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." Appellant concedes that under the provisions of this section the allowance of money to the defendant to carry on the litigation with the plaintiff was a matter within the sound legal discretion of the trial court or judge, but insists that before the order could properly be made, these facts must appear: (a) That the application is made in good faith; (b) that there is a probability of defendant's success; and (c) that the allowance is necessary. If by this we are to understand counsel for appellant to contend that upon the hearing of the motion the burden is upon the moving party to make these facts appear affirmatively, then we do not agree with him, except as to the third one, and think the authorities do not support his position. The subject is treated at length in 14 Cyc. On page 754 the author says: "If it appears to the satisfaction of the court that the suit by the wife has not been instituted in good faith to secure a divorce, but merely to collect money from the husband, or to compel him to support her, alimony pendente lite will not be allowed." Again, on page 753, it is said: "No allowance for temporary alimony should be made, if it appears of record that the suit of the applicant, or the defense interposed by her, as the case may be, is without any just or reasonable foundation, so that there is no probability of her success." It will be observed that these rules do not, either expressly or by implication, impose upon the moving party the burden of showing affirmatively the facts mentioned. Our Code gives to the losing party—the defendant in this instance—the absolute right to move for a new trial, even in an equity suit, if she complies with the statute relative to the procedure, and whatever criticism may justly be made of the practice, so long as it is authorized by law, the right cannot be denied to a litigant.

It is aptly said that the first, second, and third grounds of the motion for a new trial were necessarily passed upon by the court adversely to the defendant, when that court adopted the finding of the jury and made its special findings in plaintiff's favor; and, while this is true, the same court may nevertheless again pass upon them, in considering the motion for a new trial. *White v. Barling*, 86 Mont. 413, 93 Pac. 848. It is said by counsel for appellant in his brief: "The fourth and last ground, 'errors of law occurring at the trial,' etc., is likewise unavailing, for the reason that in an equity case errors in admitting or excluding evidence are

no ground for reversal. If, upon the whole case, the conscience of the chancellor is satisfied that justice has been done, the law is satisfied, and the judgment cannot be reversed"—and *Bank v. Greenwood*, 16 Mont. 395, 41 Pac. 250, 851, is relied upon. In the case just cited this court said: "This court will not grant a new trial merely on the ground that the judge received improper testimony on the trial of the issue, or that he rejected that which was proper, if, on the whole facts and circumstances the chancellor is satisfied the result ought not to have been different if such testimony had been rejected in the one case or received in the other." The same rule is stated in *Montana Ore Pur. Co. v. Boston & Montana O. C. & S. Min. Co.*, 25 Mont. 427, 65 Pac. 420. But in the later case of *Anaconda Copper Min. Co. v. Heinze*, 27 Mont. 161, 69 Pac. 909, this court, in speaking of the rule as announced in 25 Mont. above, said: "This rule, however, has no application where the error complained of is fundamental, and it is not reasonably apparent that it did not result in prejudice. If the evidence admitted or excluded is trifling or unimportant as compared with the competent evidence admitted and considered, and if its exclusion or admission could not have affected the result reached, the judgment or order appealed from will not be reversed on the ground of error in admitting or excluding it. Where, however, the evidence in question is of import, and by the ruling of the court thereon it is made reasonably apparent that it was so regarded by the court, and for that reason probably affected the result reached, the judgment or order based upon it cannot be sustained. The statement made in the case cited is not properly guarded, but it must be interpreted in the light of the conditions there presented. So interpreted, it is apparent that this court did not intend to lay down the broad declaration that a judgment or order made in an equity case will never be reversed upon appeal, on the ground that the trial court has erred in admitting and excluding evidence."

So that, in the present case, if the trial court upon hearing the motion for a new trial should conclude that substantial error had been committed upon the trial of the case, it not only could, but it would be its duty to grant a new trial. Whether or not there is any probability of such result being reached, we cannot have any means of knowing. The record of the trial is not before us; but from the fact that the judge who presided at the trial of the case on the merits also granted this order we must assume that he, who was familiar with all the proceedings, deemed that there are for presentation, on the motion for new trial, questions which are fairly debatable. While the evidence adduced upon the hearing of this motion tends to show that the underlying motive which prompts the defendant in prolonging the litigation is a desire to harass the plaintiff and

to burden him with costs and expenses, we are not prepared to say that the proof is so far conclusive that she ought to be denied the means of presenting her motion for a new trial, so long as the trial court evidently deemed the motion not altogether without merit.

We agree with counsel for appellant that it was incumbent upon the moving party to show the necessity for the allowance. In 14 Cyc. 752, it is said: "The wife must show upon her application for temporary alimony that she has no means under her control sufficient to maintain herself pending the litigation. If she has sufficient means of her own to provide for her separate maintenance, no such alimony will be allowed." It is conceded, also, that the rules governing allowances for suit money and expenses of litigation are the same as those which apply to allowances made for temporary alimony. The evidence offered on the hearing of this motion discloses that the cost of the transcription of the stenographer's notes of the proceedings will be approximately \$100. The order makes an allowance of \$150 for that purpose. It is scarcely necessary to say that a court is never warranted in allowing more than is necessary for the purpose to which it is to be applied; and we imagine that the amount of the order was a mere clerical misprision, and should be corrected to correspond with the proof. If it should hereafter appear that \$100 is not sufficient to meet the particular purpose, the court can, and doubtless will, make a further order covering the deficiency; but, upon the record as it now stands, the cause should be remanded to the district court, with directions to modify the order, by decreasing the amount thereof, for transcribing the stenographer's notes, from \$150 to \$100, and as thus modified the order should be affirmed, and it is so ordered. Had the appellant called to the attention of the district court or judge the mistake in the order which we have just considered, doubtless it would have been corrected and the expense of this appeal avoided. As he did not do so, he will be taxed with the costs of the appeal.

Modified and affirmed.

BRANTLY, C. J., and SMITH, J., concur.

(41 Mont. 28)

PAINE et al. v. BRITISH-BUTTE MINING CO.

(Supreme Court of Montana. March 26, 1910.)

1. APPEAL AND ERROR (§ 917*)—RULINGS ON PLEADINGS—REVIEW.

An order sustaining a demurrer which attacks the complaint on several grounds must be sustained if any ground justifies the ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3706-3709; Dec. Dig. § 917.*]

2. TROVER AND CONVERSION (§ 32*)—RIGHT TO SUE.

A plaintiff in an action for conversion must allege a general or special ownership in the property in controversy and a right to the immediate possession of it at the time of the conversion.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 197; Dec. Dig. § 32.*]

3. TROVER AND CONVERSION (§ 32*)—COMPLAINT—ALLEGATIONS.

A plaintiff in an action for conversion may plead that at the time of the conversion he was the owner and entitled to the immediate possession of the property, or he may set forth the facts showing his title and right of possession, but the averments of such facts must be clear and precise and certain to common intent.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 197; Dec. Dig. § 32.*]

4. TROVER AND CONVERSION (§ 32*)—COMPLAINT—ALLEGATIONS.

Where plaintiff in an action for conversion sets forth specifically his chain of title to the property in controversy, a general allegation of ownership will not cure any defect in the chain relied on, and where he undertakes to disavow his title and follows the facts averred by the declaration that "thereby," or "by virtue thereof," he became the owner, the concluding declaration will not be treated as an allegation of ownership, but as the mere consequences flowing from the facts set forth, and the sufficiency of the complaint must be determined by reference to the facts set forth.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 197; Dec. Dig. § 32.*]

5. TROVER AND CONVERSION (§ 32*)—COMPLAINT—ALLEGATIONS.

As against a special demurrer for ambiguity and uncertainty, a complaint in an action for conversion is not sufficient which merely alleges facts from which title in plaintiff may be inferable, and where no direct allegation of ownership is made, title in plaintiff, as distinguished from any one else, must be the inevitable inference from the facts stated.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 197; Dec. Dig. § 32.*]

6. CORPORATIONS (§ 123*)—COMPLAINT—SUFFICIENCY.

A complaint in an action for conversion of corporate stock which alleges that a third person, for a valuable consideration, assigned the same in blank and delivered the same to plaintiff, who thereby became and was the owner thereof and entitled to have the same transferred on the books of the corporation, and that the corporation refused to make the transfer and converted the stock to its own use, without alleging that the consideration passed from plaintiff, or that the stock was delivered with intent to transfer title to him, is insufficient on demurrer because the complaint is as consistent with ownership in some third person as in plaintiff.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 133.*]

Smith, J., dissenting.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by William A. Paine and others, co-partners under the firm name of Paine, Webster & Co., against the British-Butte Mining Company. From a judgment for defendant on sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Forbis & Evans and John E. Corette, for appellants. Kirk, Bourquin & Kirk, for respondent.

HOLLOWAY, J. A demurrer having been sustained to the third amended complaint filed in this action, and plaintiffs, having declined to plead further, suffered judgment to be rendered and entered against them, and appealed to this court.

The complaint in question alleges that the plaintiffs are copartners, doing business as Paine, Webber & Co.; that the defendant is a corporation having its principal office in Butte, with its president and secretary residing there; that it has a capital stock, represented by shares evidenced by stock certificates, and that the president and secretary are authorized to make transfers of stock upon the records of the corporation. It is then alleged that on February 1, 1908, N. J. Lloyd and Burt Adams Tower each owned 2,500 shares of the capital stock of the defendant company, and each held a certificate evidencing his ownership. The complaint then contains this allegation: "(5) That on the 1st day of February, 1908, the said Lloyd and Tower for a valuable consideration transferred and assigned the said shares of stock and the certificates representing the same in blank, and delivered the same and the whole thereof to these plaintiffs, who thereby became and were owners and holders thereof, and entitled thereto, and entitled to have the same transferred upon the books of the said defendant company." It is further alleged that plaintiffs presented the said certificates to the officers of the defendant company, at its office in Butte, and demanded that the stock be transferred of record and new certificates issued to plaintiffs in lieu of the certificates so presented; that the defendant and its officers neglected and refused to make such transfer or to issue or deliver to plaintiffs new certificates representing the shares of stock so sought to be transferred, and by reason of such refusal the defendant company thereby converted such shares of stock to its own use. The complaint then sets forth the damages which plaintiffs have sustained by reason of the alleged conversion, and concludes with the usual prayer. The demurrer attacks the complaint on the ground, among others, that it is ambiguous and uncertain. The order of the court is a general one, and if any ground to the demurrer will justify the court's ruling, it must be sustained.

In an action for conversion the plaintiff must allege a general or special ownership in the property and a right to the immediate possession of it at the time of the conversion. *Raymond v. Blancgrass*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A. (N. S.) 976; *Harrington v. Stromberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413. "It is sufficient to allege merely that at the time of the conversion the plaintiff was the owner and entitled to the immediate possession of the goods. Such an

avermment is an affirmation of a fact, and is not open to the objection that it is a mere legal conclusion." 21 Ency. Pleading & Practice, 1063. But the plaintiff is not confined to this particular form of pleading. He may set forth the facts showing his title and right of possession. "Allegations respecting title, being averments of material and traversable facts, must be clear and precise; but certainty to a common intent seems all that is necessary, and it has been held that where the inevitable inference from facts alleged and from all the averments of the pleading construed together is that either realty or personalty is the property of a named person, the pleading is not demurrable by reason of failure to make a clear and specific averment of title." 21 Ency. Pleading & Practice, 715. "Where, however, the pleader sets forth specifically the links in his chain of title, a general allegation of ownership will be treated as a mere conclusion from the facts stated, and will not cure any defect in the chain relied upon." *Gruwell v. Seybolt*, 82 Cal. 7, 22 Pac. 938. If the plaintiff undertakes to deraign his title and follows the facts stated, by the declaration that "thereby" or "by virtue thereof" the plaintiff became the owner, such concluding declaration will not be treated as an allegation of ownership, but as the mere consequences flowing from the facts of deraignment set forth. *Turner v. White*, 73 Cal. 299, 14 Pac. 794; 21 Ency. Pleading & Practice, 719. In other words, under such circumstances the concluding declaration does not add anything whatever of virtue to the pleading, but its sufficiency will be tested by reference to the facts set forth in the deraignment. As against a special demurrer for ambiguity and uncertainty, a complaint is not sufficient which merely alleges facts from which title in plaintiff may be inferable. If the direct allegation of ownership is not employed, then title in plaintiff, as distinguished from title in any one else, must be the inevitable inference from the facts stated. 81 Cyc. 49, 81; 21 Ency. Pleading & Practice, 716.

It is true that the allegations of this complaint are not inconsistent with the idea of plaintiffs' ownership; but that is not sufficient. As was said by this court, in *Becker v. Commissioners*, 11 Mont. 490, 28 Pac. 1116: "But, because the language of a pleading is not inconsistent with a state of facts, that is not alleging such state of facts. The complaint must allege the cause of action, and not simply set up matter which happens not to negative a cause of action. The cause of action must be found in the words of the complaint."

The complaint alleges that Lloyd and Tower for a valuable consideration transferred and assigned their shares of stock, and the certificates representing the same, in blank, and delivered them to plaintiffs. There is not any allegation that the consideration passed from the plaintiffs, nor that the cer-

tificates were delivered with the intent to transfer title to plaintiffs; nor, indeed, that they were transferred or assigned to plaintiffs. For the sake of illustration merely, let us assume that John Doe furnished the money to purchase these certificates and delivered it to plaintiffs with directions to them to purchase the stock for him; that plaintiffs undertook to do so gratuitously; that they purchased the stock for Doe, paying Doe's money for it, and that Lloyd and Tower each thereupon assigned his certificate in blank and delivered it to plaintiffs. Under such circumstances every allegation of this complaint would be literally true, and yet the stock would belong to John Doe, and the plaintiffs would not have any interest in it whatever. This illustration is employed merely to show that under possible circumstances the allegations of the complaint are just as consistent with the idea of ownership in some third person, as with the idea of ownership in plaintiffs themselves. "The pleader is not at liberty to leave his pleading open to different constructions, and then take his choice between them." *Langsdale v. Woollen*, 120 Ind. 78, 21 N. E. 541; 31 Cyc. 72. If the facts are that Lloyd and Tower for a valuable consideration passing to them from plaintiffs assigned their certificates in blank, and delivered them to plaintiffs for the purpose and with the intent of transferring ownership to plaintiffs, then the complaint could properly allege that Lloyd and Tower sold, assigned, and transferred their stock to plaintiffs, and those facts would fully sustain the allegation. There is not any excuse whatever for uncertainty in this pleading. In the complaint now under consideration plaintiffs have made their fourth attempt to state a cause of action which they could have stated by employing the general allegation of ownership and right of possession, in common use in actions for conversion, or the form of allegation indicated above. The language employed by this court in *Becker v. Commissioners*, above, is applicable here: "It was such a simple matter to allege these facts constituting a cause of action—the appellant had such abundant opportunity to allege them, if they were true—and as he refused to do so, apparently with deliberation, it would seem that the pleader considered that he had set out his alleged cause of action as fully as the facts warranted."

We think the complaint is ambiguous and uncertain, and that the district court was fully justified in sustaining the special demurrer which pointed out the objection we have considered. The judgment is affirmed. Affirmed.

BRANTLY, C. J., concurs.

SMITH, J. I dissent. The decision is too technical. In my judgment the allegation

that plaintiffs "thereby became the owners and holders thereof," while somewhat in the nature of a conclusion, should be considered as supplementing the preceding allegations. No harm can result from requiring the defendant to answer, thus enabling the court to pass upon the actual facts in the case.

(37 Utah, 312)

KURTZ v. OGDEN CANYON SANITARIUM CO. et al. (UTAH & O. LUMBER CO. et al., Interveners).

(Supreme Court of Utah. March 11, 1910. On Application for Rehearing, April 5, 1910.)

1. PARTIES (§ 1*)—CAPACITY TO SUE.

Every natural person of lawful age has legal capacity to sue.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. DESCENT AND DISTRIBUTION (§ 90*) — MORTGAGES—FORECLOSURE—PARTIES PLAINTIFF.

An heir and distributee of a decedent's estate who was appointed in the order of distribution as trustee for the other heirs is a proper party plaintiff to sue for the foreclosure of a trust deed held by such decedent's estate, as assignee, for security, such appointment being made at the request of all the heirs interested in the claim secured.

[Ed. Note.—For other cases, see Descent and Distribution, Dec. Dig. § 90.*]

3. EXECUTORS AND ADMINISTRATORS (§ 315*) —ORDER OF DISTRIBUTION—COLLATERAL ATTACK.

The court having jurisdiction of all the heirs of a decedent's estate and of the subject-matter, an order of distribution is not subject to collateral attack on the ground that the provision therein appointing one of the distributees as trustee for the other heirs for the foreclosure of a mortgage held by the estate, was in excess of the court's power.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 315.*]

4. PLEADING (§ 193*)—GROUNDS FOR DEMURRER—MISJOINDER OF CAUSES.

The objection to a complaint that several causes of action have been "commingled in one statement as one cause of action" is not a ground for demurrer under Comp. Laws 1907, § 2962, as a misjoinder of "several causes of action."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 435; Dec. Dig. § 193.*]

5. PLEADING (§ 368*)—COMPLAINT—COMMINGLING OF CAUSES.

The remedy for commingling in one statement several causes as one cause of action is a motion to require plaintiff to separately state his cause of action, as required by Comp. Laws 1907, § 2961.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1194; Dec. Dig. § 368.*]

6. ACTION (§ 48*)—JOINDER OF CAUSES—SEPARATE NOTES COLLATERAL TO SAME MORTGAGE.

The causes of action on separate notes secured by the same mortgage may be joined in one action for foreclosure.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 48.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

7. MORTGAGES (§ 581*) — FORECLOSURE — ATTORNEY'S FEES—EVIDENCE AS TO AMOUNT.

Under Comp. Laws 1907, § 3505, providing that the attorney's fee in foreclosure proceedings shall be fixed by the court, notwithstanding any stipulation in the mortgage to the contrary, the court may hear testimony of attorneys to aid it in fixing a reasonable fee, though the mortgage provides a definite amount therefor.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 581.*]

8. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR.

Evidence, even if improperly admitted, which does not change the result is not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

9. CORPORATIONS (§ 478*) — MORTGAGES — DEBTS SECURED.

A resolution of corporate directors authorized the giving of a note to cover two items of indebtedness due to the payee, and the transfer to the payee of a trust deed, or mortgage, to be held as collateral to secure such note. In the note it was stated that the trust deed was "deposited as collateral security for the payment of this note, and of any and all claims, demands, or other indebtedness due, or not due." *Held*, that the security of the trust deed did not cover another note, subsequently made by the corporation, to the same payee, but not mentioned in the resolution.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 478.*]

10. CORPORATIONS (§ 477*)—MORTGAGES—DELIVERY.

A corporation executed a mortgage in form of a trust deed to secure bonds to be issued. The bonds were not negotiated, but the corporation becoming indebted for borrowed money on notes indorsed by one of its directors, and such director having died, and his administrator having paid the indebtedness, and the claim against the corporation having been distributed among the heirs of the deceased director, and one of the distributees appointed to collect the claim against the corporation, a note for the amount was given such distributee by the corporation, and the mortgage was transferred as collateral. *Held* that, there being no evidence of fraud in thus securing the debt paid by the corporate director, the mortgage lien is valid, the effect being the same as if it had been executed and delivered for the purpose of securing the corporate debt.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 477.*]

11. CORPORATIONS (§ 545*) — INSOLVENCY — PREFERENCES TO DIRECTORS.

Where a corporation received the exclusive benefit of the money borrowed for it on the indorsement of one of its directors, a corporate mortgage given to secure the estate of such director, who paid the debt, is not a giving of an unlawful preference to a corporate director.¹

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 545.*]

12. CORPORATIONS (§ 538*) — INSOLVENCY — EVIDENCE OF INSOLVENCY.

That a corporation is insolvent at the time its mortgage is foreclosed does not show that it was insolvent when the mortgage was given.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2151; Dec. Dig. § 538.*]

13. CORPORATIONS (§ 482*) — MORTGAGES — FORECLOSURE OF TRUST DEED — PARTIES PLAINTIFF.

Where corporate bonds and deed of trust for security were never actually negotiated, nor delivered for the purpose for which they were executed, but the deed subsequently became operative as security for a corporate debt, with which the trustee had no connection, such trustee is not a proper party plaintiff to sue for the foreclosure of the trust deed.²

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 482.*]

On Application for Rehearing.

14. CORPORATIONS (§ 482*) — MORTGAGES — FORECLOSURE—PARTIES PLAINTIFF.

A corporation executed a trust deed to secure bonds to be issued. The bonds were not negotiated, but, the corporation having become indebted for borrowed money, the deed and bonds were, by authority of a corporate resolution, delivered as "security for the payment of said money," as evidenced by the collateral corporate note. *Held*, that on default in the payment of such note, the payee could sue to foreclose the trust deed.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 482.*]

Appeal from District Court, Second District; J. A. Howell, Judge.

Action by J. H. Kurtz against the Ogden Canyon Sanitarium Company, and C. D. Clark, defendants, and the Utah & Oregon Lumber Company, J. H. Winslow, Sr., and the Shupe-Williams Candy Company, interveners. Plaintiff had judgment, and interveners appeal. Modified and affirmed.

H. H. Henderson, T. D. Johnson, and John C. Davis, for appellants. Maginnis & Corn and A. G. Horn, for respondent.

FRICK, J. The plaintiff brought this action against the Ogden Canyon Sanitarium Company, hereinafter styled "company," and one C. D. Clark to foreclose a mortgage executed in the form of a trust deed in which said Clark was named trustee. The mortgage was delivered to plaintiff as collateral security, as will more fully appear hereafter. All of the other defendants intervened in the action as judgment creditors of said company, and claimed that their judgment liens were prior in right to the mortgage lien of plaintiff. The court found in favor of the plaintiff, declared said mortgage to be a prior and paramount lien, entered judgment and decree of foreclosure, and ordered the land described in said mortgage (which was all the land in which said company had any interest) sold, and the proceeds of sale to be applied first on the debt secured by said mortgage, and the balance, if any, on said judgment liens. The defendants and interveners join in the appeal. The findings of fact fairly reflect the pleadings and the evidence. In view of the questions which are raised by the appeal, we deem it best to

¹ Wells v. Scott, 18 Utah, 127, 55 Pac. 31; National Bank v. Scott, 18 Utah, 400, 55 Pac. 374.

² Stevens v. Improvement Co., 20 Utah, 287, 58 Pac. 343.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

state at least the substance of the findings.

The court found: That the company aforesaid, in August 1905, issued and delivered to one C. D. Clark, as trustee, 50 coupon bonds of \$1,000 each, bearing 6 per cent. interest, and that on said date, in connection with said bonds, and to secure their payment, said company also executed and delivered to said Clark, as trustee, a certain "deed of trust and mortgage" whereby said company conveyed to said trustee certain lands situated in Weber county, Utah; that said trust deed was duly filed for record, and, on October 13, 1905, was duly recorded in the mortgage records of said Weber county; that said company at various times between December, 1905, and December, 1906, had duly executed and delivered to the Pingree National Bank of Ogden, Utah, certain promissory notes as evidences of loans made by said bank to said company, which, together with interest, on August 30, 1906, amounted to the sum of \$14,921.90; that said notes were given for money actually received from said bank, which money was used by said company in improving its property and to pay its debts; that said notes were also signed by certain individuals as makers who at the time were directors of said company, but no part of the money obtained as aforesaid was used by said individuals who signed the notes as aforesaid, but that said individuals, although apparently makers of said notes, were in fact sureties, and the debt incurred by the loans from said bank was the sole debt of said company; that thereafter, on or about the 15th day of October, 1905, to secure the payment of the notes and indebtedness aforesaid, said company directed said trustee to deliver to said bank said bonds and trust deed, and that the same were at said time delivered to said bank to secure the payment of said notes and indebtedness; that one T. J. Kurtz, who was a director of said company, personally signed the notes aforesaid, and that he died on the 18th day of November, 1905, and thereafter, on the 11th day of December, 1905, the plaintiff, J. H. Kurtz, a brother and heir of said T. J. Kurtz, was duly appointed administrator of the estate of said T. J. Kurtz, deceased, and that said J. H. Kurtz duly qualified as such administrator and continued to act as such until said estate was fully administered; that during the month of August, 1906, said bank presented its claim evidenced by said notes against the estate of said T. J. Kurtz, the signer thereof which claim was thereafter duly allowed by said administrator, and said allowance was approved by the district court of Weber county, Utah; that at the time of the death of said T. J. Kurtz said company was also indebted to him for moneys advanced by him to it which with accrued interest amounted to the sum of \$1,491.54; that on the 30th day of August,

1906, the directors of said company adopted a certain resolution, the substance of which is as follows: That whereas said company was at that time indebted to the Pingree National Bank in the sum of \$14,921.90 for money borrowed by said company; and whereas the trust deed and bonds before mentioned had been delivered to said bank as collateral security for said indebtedness, and said bank now holds the same as security for the loans aforesaid; and whereas T. J. Kurtz, during his lifetime, signed the notes held by said bank for the money borrowed from it by said company, and while said Kurtz appeared as a maker of said notes, he in truth was but surety for said company; and whereas said T. J. Kurtz has since died and J. H. Kurtz (the plaintiff) has been duly appointed administrator of the estate of said T. J. Kurtz, deceased, and the claim of said bank has been presented for payment to said administrator and has been allowed by him, which allowance has been approved by the district court of Weber county; and whereas said company at this time is without funds to pay the debt due the said bank, who is pressing the said administrator for payment, therefore it was resolved that if said administrator will pay the debt owing by said company to said bank the president and secretary of said company are instructed to execute and deliver to said J. H. Kurtz, as administrator, the promissory note of said company for the full amount paid by him to said bank, which note shall be payable in six months from this date and bear 8 per cent. interest; that the company consents that upon payment of the debt due to said bank by said administrator the mortgage or deed of trust and bonds held by said bank issued by it be transferred to said administrator, and that in case the interest on said note should not be paid when due the whole of said note shall become due, and that said "J. H. Kurtz as administrator as aforesaid shall hold the notes and obligations issued to the said Pingree National Bank, together with the said bonds and deed of trust, as good and valuable security for the payment of said money." It was further resolved that whereas said company is also indebted to the estate of said T. J. Kurtz in the sum of \$1,419.54 that said sum be included in the note to be delivered as aforesaid, and that said trust deed and bonds shall also be held as security for said sum.

The note authorized by the foregoing resolution was duly executed and delivered. It was dated August 30, 1906, and was payable in six months from date. The amount specified in the note is \$16,341.44. This was the amount, with accrued interest, that was due to the bank and to the estate of T. J. Kurtz at that date. In the note for said sum of \$16,341.44, in referring to the security, namely, the bonds and mortgage or trust deed aforesaid, it is stated that they were

"deposited as collateral security for the payment of this note and of any and all claims, demands or other indebtedness due or not due." The court found that the matters contained in the foregoing resolutions were true, and further found that the proposition made by the company to said administrator as embodied in the resolutions aforesaid was by him submitted to the district court of Weber county in which the estate of T. J. Kurtz was being administered, and said court authorized the said administrator to pay the debt owing to said bank by said company and to receive the note of said company with the securities as above stated.

The estate of T. J. Kurtz was distributed to his heirs, eight in number, including J. H. Kurtz, the plaintiff, some time after the order aforesaid was made and before this action was commenced. In the decree of distribution the notes and mortgage upon which this action is based were distributed to the plaintiff as trustee in trust for the other heirs, the amount coming to each being fixed by the court, and the right of plaintiff to maintain this action is based upon that decree. The court further found that the property mentioned in the mortgage was, during the three years preceding the commencement of this action, occupied by said "company as a health resort, and that the value of said property during said years was largely speculative; that when this action was commenced said company was insolvent; that prior thereto the company was a going concern, but was embarrassed at all times to pay its debts for want of ready money, and that said company had property ample to pay its debts, if the same could be converted into cash, and at all times prior to the commencement of this suit was engaged in carrying out the objects for which it was incorporated, and that there was no fraud nor intent to defraud any one connected with the loans of the plaintiff or the Pingree National Bank, but at the time of said transactions it was bona fide the intent and effort of all parties to continue the defendant company's business and to extend the time of payment of their due obligations." The court also found that said company was indebted in the sum of \$1,500 upon a note executed and delivered to plaintiff December 22, 1906, and that \$1,500 was a reasonable attorney's fee for the foreclosure of the mortgage. The note provided for a 10 per cent. attorney's fee. It was also found that the judgments of the interveners, upon which their complaints in intervention were based, were obtained on May 18, 1907, and on August 22, 1908.

The court ordered judgment for plaintiff as follows: (1) For \$16,341.44 and interest on the note of August 30, 1906; (2) for \$1,500, with interest, on the note of December 22, 1906; and (3) for \$1,500 as attorney's fee. All of these claims were declared prior and paramount to all other liens, and were

to be first paid out of the proceeds of the sale of the property. The court found all the affirmative allegations of fraud and wrongdoing alleged by the interveners to be untrue, entered judgment in favor of them for the amounts of their judgments, but declared their liens subsequent and inferior to plaintiff's mortgage lien, and ordered that any surplus proceeds derived from the sale of the mortgaged premises, after paying plaintiff's lien, be divided pro rata among the interveners, and in accordance with the amounts of their judgments. We remark that the plaintiff in his complaint prayed for the appointment of a receiver to take charge of the property and assets of the company. The court duly appointed a receiver, and it seems he is winding up the affairs of the company as an insolvent corporation.

All of the appellants join in the assignments of error. The errors assigned are very numerous, but counsel for the interveners have condensed the grounds upon which they claim either a reversal or a modification of the judgment. The grounds stated by them are, in substance, as follows: That the action should be dismissed (1) because plaintiff is not the real party in interest and has not legal capacity to sue; (2) because the complaint fails to state a cause of action. The grounds upon which it is urged the judgment should be reversed are: (1) Because several causes of action are improperly joined and commingled in one cause of action; (2) because the court erred both in overruling and sustaining certain objections to certain evidence. That the judgment should be reversed or modified: (1) Because the court erred in allowing the item of \$1,500 as attorney's fee; (2) because the court erred in allowing the amount of \$1,500 evidenced by the note of December 22, 1906; (3) because the court did not eliminate and deduct from the \$16,341.44 a certain claim amounting to \$256.24, and, finally, because the court erred in not declaring the mortgage or trust deed void as against the claims of the interveners and in not declaring their judgment liens prior and paramount liens. It is conceded, however, that, inasmuch as a receiver has been appointed and the assets of the company are in the custody of the court, the court may have power to direct that all the assets of the corporation be converted into cash and to order the funds so obtained to be distributed pro rata among the creditors of said company.

Passing now to a consideration of the alleged errors, we shall refer to the demurrers first. The company demurred to the complaint upon the grounds that "plaintiff has not legal capacity to sue" and "that the complaint does not state facts sufficient to constitute a cause of action." The demurrer was overruled. The defendant Clark demurred upon the grounds just stated, and upon the further ground "that several causes of action have been improper-

ly united in one cause of action." The interveners attempted to raise the same objections at the trial by objecting to the introduction of any evidence in support of the allegations of the complaint. The first three grounds before stated are based upon the demurrers and the objections of the interveners. The contention that the plaintiff had not legal capacity to sue is clearly untenable. Every natural person of lawful age has legal capacity to sue and nothing to the contrary appeared on the face of the complaint. The objection that he was not the real party in interest and therefore could not maintain the action is likewise without merit. The district court distributed to plaintiff in trust the claims sued on in this action. This, the record shows, was with the consent and at the request of all the heirs interested in said claims. Appellants, however, contend that the court had no power to distribute the estate of T. J. Kurtz in the manner and for the purpose aforesaid. The court clearly had jurisdiction of both the parties in interest (the heirs) and of the subject-matter (the estate), and hence what the court did, if erroneous, was, nevertheless, not void, and is not subject to collateral attack. The objectors in this case could not have assailed the decree of distribution by a direct attack because they were not interested, and if this be so, then, for a much stronger reason, they cannot assail the decree collaterally. The plaintiff clearly had the right to sue in his own name, and all the other heirs are bound by the judgment by reason of their consent to have the plaintiff act for them, if for no other reason. That they are so bound is all that the appellants can require. The court, therefore, committed no error in its rulings respecting the matters just referred to.

The objection that "several causes of action have been improperly united in one cause of action" cannot be sustained. In section 2962, Comp. Laws 1907, it is provided that a party may demur upon the ground "that several causes of action have been improperly united." This provision applies in case a pleader sets forth several causes of action in his complaint which cannot be properly joined in the same action. The demurrer in the case at bar is based upon the ground that several causes of action have been commingled in one statement as one cause of action. This is not a ground of demurrer, but is a ground for a motion to require the plaintiff to separately state his causes of action as provided in the last subdivision of section 2961. Phillips' Code Pleading, § 201. True, a party may demur upon the ground of improper union although the causes of action are mingled in one statement, if the union is not permissible under the provisions of the Code. In the case at bar while each of the two notes sued on constituted a cause of action, these two causes of action could properly have been united

in one complaint. If the demurrer, therefore, had been based upon the statute, the court still would not have erred in overruling it, because the causes of action upon the two notes could properly be united in one complaint. Nor did the court err in overruling the demurrer upon the ground that the complaint did not state a cause of action.

The contention that the court erred in overruling appellants' objection to the testimony relating to the attorney's fee is untenable. Under our statute (section 3505), the matter of allowing attorney's fees in foreclosure cases is, to a large extent, left to the discretion of the court. The court has a right to fix the fee at a lesser sum regardless of a stipulation for a larger one. The court, therefore, was authorized to hear the testimony of other attorneys to aid it in fixing a reasonable fee.

The assertion that the court erred in allowing any attorney's fee is without merit. The note for \$16,341.44 expressly provided for an attorney's fee of 10 per cent. We can see no more reason for denying an attorney's fee in this case than in any other of foreclosure. This objection must be overruled.

Nor can the assignment that the court erred in excluding the statement of a certain witness for the interveners of what was said at a particular meeting of the board of directors with respect to what was intended by the board be sustained. Under the issues and in the face of the written evidence before the court, oral evidence upon the subject referred to in the statement of the witness was wholly immaterial, if not improper. Further, even if the statement offered had been admitted, the result still would have to be the same. In either view, therefore, the court's ruling was not prejudicial.

The contention that the court erred in allowing the claim for the \$1,500 represented by the note of December 22, 1906, and in rendering judgment for the plaintiff and against the company thereon cannot be sustained. But the contention that the court erred in its findings, conclusions, and judgment that said sum of \$1,500 was secured by the mortgage or trust deed, and hence was prior in right to the judgment liens of the interveners, in our opinion, in view of the undisputed facts, cannot be upheld. In the resolution by which the trust deed was directed to be delivered to the plaintiff as security, two and only two claims are specifically mentioned. One is the amount which was owing and then due from the company to the bank, and the other was the amount owing and also then due from the company to T. J. Kurtz. These two sums amounted to \$16,341.44, and were evidenced by the note authorized by the board of directors. True, in the note itself the clause which we have heretofore quoted is contained. But either the president or secretary, or some one else inserted said clause in the note. The president and secretary could not exceed

the authority conferred on them by the board of directors, and that authority was limited, in that it authorized the mortgage or trust deed to be delivered as security only for the amount specified in the resolutions which became both the guide and authority for the president and secretary. The president and secretary apparently had no other authority to deliver said mortgage except the authority conferred on them by the resolutions. Plaintiff's counsel do not claim that the resolutions conferred authority to deliver the mortgage as security for the \$1,500 claimed, but they do contend that the clause in the note referred to was sufficient authority. In addition to this counsel contend that the company having obtained and retained the benefit of the \$1,500, and by recognizing the note given as evidence of the same as a subsisting obligation it is estopped from urging that the trust deed and mortgage did not secure that note. As between the plaintiff and the company this argument would have much force, and especially since the corporation is insolvent and is in the hands of a receiver for the purpose of winding up its affairs. But as between the liens of the plaintiff and the judgment liens of the interveners the question is different. The interveners have the right to insist that unless the claims of the plaintiff are in fact secured by a prior lien his general claims must be reduced in right to the general claims of all the corporate creditors. Further, that in view that the corporation is insolvent and its property and assets are in the hands of a receiver for the purpose of winding up the corporate affairs, all the claims of general creditors must prorata and none should be preferred. In view, therefore, that there is no evidence that the board of directors of the company authorized the president and secretary, or any other officer of said company, to deliver the mortgage or trust deed to plaintiff to secure any other amount than the two specific amounts named in the resolutions adopted by the board of directors, we are of the opinion that the court erred in finding and adjudging that the claim for \$1,500 aforesaid was secured by the mortgage and trust deed, and that plaintiff by reason thereof was entitled to a prior and paramount lien for said sum against the mortgaged premises over the judgment liens of the interveners.

The contention that the court erred in not deducting the amount of the note for \$256.34 from the larger sum of \$16,341.44 cannot be sustained. This amount was clearly included within the resolutions as a debt owing from the company and no good reason is made to appear why said sum should be excluded.

The assignment that the court should have disallowed the entire claim of plaintiff, or, at least, should have declared the mortgage and trust deed as of no effect as against the judgment liens of the interveners is, in our

opinion, not well founded. The contention that in securing plaintiff's claim the company while insolvent preferred the claim of an officer or director to the prejudice of the general creditors, in view of the record in this case, cannot be sustained. There is not a scintilla of evidence of actual fraud or of any attempt by any officer or director as a creditor to obtain an undue advantage over other creditors of the company. The money borrowed from the bank was all obtained for legitimate purposes and was all applied to the use and benefit of the company. The original bonds were never negotiated to any one and thus never became an outstanding liability of the company. The trust deed was, however, executed and thereafter delivered and made effective for a special purpose, namely, to secure the debt owing by the company to the bank. In delivering the mortgage or trust deed for that purpose it in legal effect was the same as if the mortgage or trust deed had been executed and delivered for the express purpose of securing the bank debt. When this debt was subsequently taken up by plaintiff as administrator of the estate of T. J. Kurtz with the consent of the board of directors of the company, and at their solicitation, and the time of the payment of the bank debt was extended for six months, all of which was evidenced by the note for \$16,341.44, the delivery of the mortgage and trust deed to plaintiff thenceforth constituted security for the debts mentioned in the resolutions, and the mortgage, in legal effect, was the same as if it had been executed and delivered for the purpose only of securing the debts aforesaid.

This also answers the objection that the action was premature because no demand was made as provided in the bonds. The bonds never became of any effect whatever because never negotiated for any purpose.

Nor is the contention that since the trust deed and bonds were delivered as collateral security they should have been sold as such security is usually sold of any force. Under the facts and circumstances of this case it is useless to discuss such a contention. The trust deed was in fact delivered to secure plaintiff's debt. The plaintiff had no right to negotiate the bonds of the company, and if he had it would have been a useless ceremony to offer the paper of an insolvent concern. Plaintiff did the only thing he could do, which was to bring an action in equity to foreclose the mortgage.

Nor can we see wherein the facts of this case bring it within the doctrine that insolvent corporations may not prefer the claims of officers or directors. We are of the opinion that the facts of this case bring it clearly within the rule laid down by this court in the cases of Wells Fargo & Co. v. Geo. M. Scott & Co., 18 Utah, 127, 55 Pac. 81, and National Bank of the Republic v.

Geo. M. Scott & Co., 18 Utah, 400, 53 Pac. 374.

Nor is the contention that the company was in fact insolvent at the time of the transactions complained of sustained by any proof whatever. True, it is contended that since the plaintiff alleged its insolvency when this action was commenced in 1907, and the court so found, that therefore we should assume that the company was insolvent at all times prior to that time. We think that the court's findings on that subject fairly reflect the evidence, and although we are urged to do so, there is no good reason shown why we should disturb the findings.

The contention by the trustee, C. D. Clark, that he was the only proper person to bring suit because he was appointed trustee in the trust deed and bonds, if not already answered by us, is determined adversely to his contention in the case of *Stevens, etc., Co. v. Implement Co.*, 20 Utah, 267, 53 Pac. 843. If there is any distinction between the case at bar and the *Stevens* Case, supra, it is this, that in this case there is much stronger reason for holding that said C. D. Clark was not a necessary party to the action because in this case the instruments in which he was designated as trustee never were actually negotiated nor delivered for the purpose for which they were originally issued but the trust deed subsequently became operative for a different purpose and with that purpose the trustee named therein never had any, nor was intended to have any, connection. In view of the circumstances of this case, Trustee Clark, for all legal and practical purposes, was eliminated from the transaction.

The judgment of the district court is affirmed with the exception of that part which declares the claim of \$1,500 evidenced by the note of December 22, 1906, a prior and paramount lien against the property mentioned in the trust deed or mortgage. For the purpose of correcting the error in that regard the case is remanded to the district court of Weber county with directions to modify the conclusions of law and the judgment to the effect that said sum of \$1,500 is not a prior and paramount lien against the mortgaged premises, but that such claim should be classed among the general claims against said corporation, and in winding up its affairs and in distributing its assets among its creditors said claim should prorate with all the other general claims. In all other things the judgment and decree of the district court is affirmed. Each party is required to pay his own costs on this appeal.

STRAUP, C. J., and McCARTY, J., concur.

On Application for Rehearing.

FRICK, J. Counsel for all of the appellants join in a petition for a rehearing in which they strenuously insist that we, in legal effect, have made a contract for the parties different from the one they themselves

made, and that after making such a contract for them we have permitted one of the parties to pursue a remedy not contemplated by the contract as made. If counsel's assertion were correct, or if in our judgment there were any reasonable ground even upon which to base it, we should not hesitate to grant a rehearing. The whole contention is, however, based upon the resolution adopted by the board of directors of the company upon which respondent based his right to foreclose the mortgage referred to in the opinion. Counsel, in substance, now contend that the mortgage was originally given to secure certain bonds to the amount of \$50,000, due in 10 years from August, 1905; that the mortgage was delivered to respondent as collateral security only to secure the payment of the sums of \$14,021.90 and \$1,419.54, aggregating the sum of \$16,341.44, which became due and payable in six months from August 30, 1906; that neither by the terms of said bonds, nor of the mortgage, nor by reason of any other breach, any cause of action had accrued to respondent when this action was commenced, and hence that this action to foreclose was premature. In making this contention counsel entirely ignore the legal purport and effect of the resolution of the board of directors which authorized the execution of the note and delivery of the mortgage upon which this action is grounded. So that there might be no misconception in this regard we, in the original opinion, quoted that portion of the resolution under which respondent claimed the right to foreclose the mortgage in question. We now, without quoting it again, merely call attention to the language used. The language is not, as contended by counsel, that the mortgage was to be delivered merely as collateral, but the language is that the mortgage was to be delivered as "security for the payment of said money." By "said money" is meant the \$16,341.44 which was made payable in six months from the time said resolution was passed, and every act, word, and deed of the parties to said transaction, as shown by the evidence adduced at the trial, documentary and otherwise, indicate that the property described in the mortgage was intended as a pledge to secure the payment of respondent's claim, and that the respondent should have the usual statutory remedy in case of default of payment that all other mortgagees have under the terms of our statute. In view that the original bonds never were sold or negotiated no other conclusion than the one just stated is permissible. We cannot assume that the parties intended that the respondent should not enjoy the usual remedy to enforce the collection of his claim that all other mortgagees enjoy, when no such intention was indicated in the resolution or agreement, and when a contrary intention is indicated by the language used in the resolution aforesaid. When the property described in the mortgage was in fact pledged to secure the payment of re-

spondent's claim, and when that claim was past due, by what authority can this court say that respondent shall be deprived of his legal remedy to enforce payment? We have always assumed that courts were instituted to enforce contracts and to apply the remedies provided by law for their enforcement. This is all the district court did in this case, and this is all that we have approved in the original opinion. In our judgment there can be no doubt whatever that the board of directors of the company in delivering the mortgage to respondent intended that the property therein described should constitute security for the payment of the \$16,341.44, and that when that amount should become due and remain unpaid that respondent should have his remedy by the statutory action to foreclose said mortgage, and to sell the property therein described the same as he might have foreclosed any mortgage given to secure a debt under the statutes of this state.

It is also contended that we erred in apportioning costs. As we view the case, no other apportionment would reflect justice. There being no cause shown why a rehearing should be granted, the application should be, and it accordingly is, denied.

STRAUP, C. J., and McCARTY, J., concur.

(37 Utah, 238)

HORTON v. ROGHAAR.

(Supreme Court of Utah. March 9, 1910.)

BOUNDARIES (§ 48*)—ESTABLISHMENT—ESTOPPEL.

Plaintiff, the owner of land in a city block, sold a portion of it to defendant. Neither party knew the location of the boundaries except as described by deed, there being no monuments on the ground, but it was understood that defendant would have the land surveyed when ready to build. Thereafter defendant, on the advice of plaintiff's father who acted for plaintiff, had a survey made by the city engineer, built a house, and erected a fence around the premises according to such survey. Plaintiff's father saw the improvements being made, but made no objection to the boundaries as fixed by the survey. *Held*, that plaintiff was estopped from thereafter asserting that such boundaries were incorrect, it appearing that a change to the line claimed by plaintiff would result in bringing defendant's line so near his house as to materially damage his property.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 48.*]

Appeal from District Court, Second District; J. S. Howell, Judge.

Action by Alvin E. Horton against Andries Roghaar. Judgment for defendant, and plaintiff appeals. Affirmed.

J. M. Kimball and Joseph Chez, for appellant. T. D. Johnson, for respondent.

McCARTY, J. This is an action in ejectment brought by plaintiff to recover possession of a strip of ground 3 feet and 9 inches in width and 125 feet in length, situate in

Ogden City, Utah. From a judgment rendered in favor of defendant plaintiff appeals. The material facts in the case are about as follows:

On August 30, 1902, one Joseph H. Horton sold and conveyed to his son Alvin E. Horton, plaintiff herein, a part of lots 5 and 6, block 16, plat "B," Ogden City survey. This land, the dimensions of which were 150 feet north and south by 125 feet east and west, is situated about midway between the northwest and the southwest corners of block 16, and abuts upon Monroe avenue, a street running north and south in Ogden City. At the time this conveyance was made, the grantor, Joseph H. Horton, owned the balance of the ground in block 16 lying south of the 150 feet mentioned. No survey of any kind was made of the land conveyed by Horton to his son. Nor were there any stakes, fences, or other objects thereon indicating the location of either the north or south boundary line. This land remained unimproved and was a part of an open field until October, 1906, when Alvin E. Horton (plaintiff and appellant) contracted to sell to one Van Woerkom a strip of ground 40 feet wide by 125 feet long off from the north side of the 150 feet which he had purchased from his father. At the same time he sold to respondent a piece of ground 40 feet wide and 125 feet long south of and contiguous to the strip that he had contracted to sell to Van Woerkom. The recitals in the deed to respondent, so far as material here, are as follows: "Beginning at a point 287 feet south of the northwest corner of said lot 6 and running thence south 40 feet, thence east 125 feet, thence north 40 feet, then west 125 feet to beginning." At the time respondent received his deed there were no stakes, fences, or monuments on the ground, nor on the parcels of ground lying contiguous thereto, to indicate the location of its boundaries. In fact, the record affirmatively shows that neither appellant nor respondent knew the exact, or even approximate, location of the boundaries, except as the same was described by the calls in the deed. On this point appellant testified as follows: "Q. When you made the deal, you didn't sell any particular 40 feet to either of them; just sold each of them 40 feet of land in there for so much money? A. Well, I sold them on the north starting from the north end of my land and running 80 feet south. Q. Did you tell them where the land was? A. No, sir. Q. Nothing there to indicate your line; no fence, or anything? A. No, sir. * * * Q. How did you expect them to locate it on the ground? Did you tell them to get it surveyed, or anything of that sort? A. No. I supposed they would get it surveyed when they wanted to locate the ground. Q. That was your supposition when you gave these deeds, when they got ready to build on the land they would get it surveyed?

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

A. Yes, sir. Q. And then go to improving it. That is the way you understood it at that time? A. That is the way I understood it; yes, sir. * * * Q. Didn't Mr. Roghaar (respondent) tell you he was buying the land to build a home on? A. Yes; he told me, I think, that he intended to build." The day after respondent received the deed to his land, appellant left the state and did not return until November, 1907. The evidence, without conflict, shows that during appellant's absence from the state his father was authorized to, and did, attend to his business. Respecting the authority of his father to act for him in matters pertaining to this land during his absence from the state, appellant testified in part as follows: "Q. How did you expect them to get it (referring to the land)? A. Why, I supposed they would have it surveyed. * * * Q. And you went away? A. Yes, sir. Q. And you left your matters, when you did go away, in the hands of your father to attend to for you while you were gone, if any of your matters came up? A. Yes, sir." His father also testified to the same thing. Some time in October, 1906, and after respondent had received a deed to his land, he went to Joseph H. Horton, plaintiff's father, and spoke to him about having the ground surveyed so they would know where the lines and corners of their respective parcels of land were. On this point Joseph H. Horton testified as follows: "Q. Do you remember of Mr. Roghaar coming to you before he began work at all and speaking to you about where his land was, telling you he wanted to begin and build, and you told him he had better have it surveyed? A. Yes, sir."

In pursuance of the tacit understanding respondent had with appellant at the time he received his deed, as shown by appellant's testimony hereinbefore referred to, and the request made of him by Joseph H. Horton to get the ground surveyed, respondent went to the office of the city engineer of Ogden City, and there made arrangements for a survey of the land as described in his deed. The city engineer, a few days thereafter, surveyed the ground and marked it off by driving a stake at each corner. He also furnished respondent a sketch or plat showing the dimensions and exact location of the boundaries of the land. In making the survey of this land the city engineer used as a starting point a monument established at the northwest corner of block 16, known as one of the city monuments of an official survey made of Ogden City about the year 1889 or 1890, and then followed the calls in the deed. Soon after the survey was made, respondent commenced the erection of a house on the land. The house was built in the center of the lot. This left a vacant space of six feet on either side of the building. There is a door at the south side of the house and a short flight of steps extending from the doorsill to the ground or walk between the house and the south boundary of the lot. After the completion of the

house, which cost about \$2,500 to build, respondent built a picket fence in front of the house and on the west line of his premises as fixed by the survey, and erected a tight board fence around the other three sides of his lot. During the time the house was in course of erection Joseph H. Horton, who was looking after and attending to appellant's business affairs, lived within 300 feet of respondent's premises and was in that vicinity almost daily, and observed the work as it progressed from the time respondent began excavating for the foundation until the house and the other improvements mentioned were completed, and made no objection to the boundaries of respondent's lot as fixed by the city engineer.

About the year 1879 Joseph H. Horton, who was, at that time, the owner of all of lots 5 and 6 in block 16, inclosed them with a fence. The evidence tends to show that this fence was the exterior boundary of said lots as located by a survey made of Ogden City about the year 1878, the stakes and monuments of which have long since disappeared. The fence on the north side of the block is 3 feet and 9 inches north of the north boundary line of the block as fixed by the official survey of Ogden City made about the year 1889 or 1890. Appellant insisted in the court below, and he contends here, that the old fence marks the true boundary line of block 16 on the north, and that therefore the south line of respondent's lot is 3 feet and 9 inches north of where it was located by the city engineer. The evidence shows that if the fence complained of were moved north 3 feet and 9 inches it would practically be against the steps leading from the south door of the house to the walk, and it necessarily follows that this would not only greatly inconvenience respondent in his use and occupation of the house, but the property as a whole would be materially damaged thereby.

Defendant in his answer, among other things, alleged "that plaintiff is, and should be held to be, estopped to claim that he is the owner of any part of the land occupied and improved by this defendant." On the issues tendered by this allegation of defendant's answer, the court found: "That the plaintiff is and should be held to be estopped from asserting that the land surveyed and improved by defendant as hereinbefore stated is not the land mentioned and described in the said deed from plaintiff to defendant." Counsel for appellant contend that the evidence is insufficient to justify this finding. They contend, and it is admitted, that appellant did not know, at the time he executed the deed in question, where the true line was between his own land and the land which he had sold to respondent. Counsel also assert that soon after the deed was executed appellant left the state and therefore had nothing to do with directing the survey

made by the city engineer and knew nothing of the improvements that were made on the land by respondent until after they were completed, and that therefore the principle of estoppel has no application in this case. Appellant testified that when he went out of the state his father, Joseph H. Horton, attended to his business. Joseph H. Horton also testified to the same thing. Therefore appellant is bound by what his father, acting within the scope of his authority, did in the premises. Furthermore, appellant testified that he understood, when he executed the deed to the premises, that respondent would get the land surveyed when he got ready to build upon it. And this is just what respondent did. He went to the office of the city engineer and made arrangements to have the land surveyed. The land as so surveyed was marked off on the ground and the boundary lines clearly indicated by stakes placed thereon by the city engineer. And, as we have observed, appellant's father lived within 300 feet of the premises in question and was in the immediate vicinity thereof almost daily during the time respondent was building his house and making other valuable improvements. On this point appellant's father testified in part as follows: "I am a contractor and builder; that has been my business for 30 or 40 years. * * * I saw the house going up. I saw them dig the cellar. I saw them laying the foundation. I knew it (the house) was going up. I think the house was finished before the fence was built. When the fence had been put up by them I went and had a talk." The evidence, without conflict, shows that no objection was made to the boundaries as established by the city engineer until after these improvements were practically all made. Suppose, for example, that appellant, or his father, had made arrangements with the city engineer to make the survey in question, or had gotten some other party to survey or mark off the land, and respondent had gone on and made his improvements, would it be seriously contended that appellant would not be bound by the boundaries thus established? We think not. Appellant is in the same position as though he and the respondent had agreed upon a practical location of the boundary line, and respondent had with the knowledge and acquiescence of appellant gone on and made the improvements mentioned.

Under the facts and circumstances of the case we are clearly of the opinion that appellant is estopped from asserting any claim or right to the strip of land in dispute, and that the court did not err in so finding.

The judgment is affirmed, with costs to respondent.

STRAUP, C. J., and FRICK, J., concur.

(47 Colo. 490)

NORTHERN COLORADO IRR. CO. v.
POUPPIRT et al.

(Supreme Court of Colorado. Feb. 7, 1910.
Rehearing denied April 4, 1910.)

1. APPEAL AND ERROR (§ 19*)—REVIEW—EXISTENCE OF ACTUAL CONTROVERSY.

Where the court granted a peremptory writ of mandamus compelling defendant to deliver during the season of 1905 certain quantities of water to plaintiffs, at a prescribed price, defendant cannot, long after the season was over, demand a decision on appeal of the questions litigated and determined below, whether the writ has or has not been performed, since such a decision would have no effect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80; Dec. Dig. § 19.*]

2. APPEAL AND ERROR (§ 19*)—REVIEW—DECISIONS REVIEWABLE—MANDAMUS—ACTUAL CONTROVERSY.

In mandamus to compel defendant to furnish water for plaintiffs at a certain price, for a certain season, where defendant claimed a larger price under a contract, an order requiring plaintiffs to deposit with the clerk a sum equal to the amount claimed by defendant, so much thereof to be delivered to defendant as the court determined it entitled to, did not affect the right of the parties to have the questions involved reviewed after the season for which the water was to be furnished was closed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80; Dec. Dig. § 19.*]

3. MANDAMUS (§ 10*)—SUBJECTS AND PURPOSES OF RELIEF—RIGHT TO WATER FOR IRRIGATION PURPOSES.

A perpetual right to the use of water for irrigation is not the subject-matter of adjudication by mandamus.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 10.*]

4. WATERS AND WATER COURSES (§ 257*)—IRRIGATION—RIGHT TO SUPPLY OF WATER—RATE—OFFICIAL ESTABLISHMENT—COLLATERAL ATTACK.

Where defendant irrigation company was a party to a statutory proceeding before the county commissioners in which the rate for water was fixed, the adjudication of the board cannot be collaterally attacked by it in mandamus to compel it to furnish water for a certain season at the rate fixed by the county commissioners; the decision of the commissioners being conclusive till judicially overturned on a direct attack.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 312; Dec. Dig. § 257.*]

5. MANDAMUS (§ 10*)—SCOPE OF REMEDY—CONTRACT RIGHTS.

Where plaintiffs brought mandamus to compel defendant water company to furnish water at rates fixed by the county commissioners, defendant cannot set up a contract with plaintiff for a higher rate in defense of the proceeding; mandamus not being an appropriate remedy for the determination of contract rights.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 37; Dec. Dig. § 10.*]

Error to District Court, Adams County;
F. T. Johnson, Judge.

Mandamus by the People, on the relation of Emele R. Poupirt and others, against the Northern Colorado Irrigation Company, to compel defendant to deliver to plaintiffs water for irrigating their agricultural lands. From a judgment awarding the peremptory

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

writ, defendant brings error. Modified and affirmed.

Hugh Butler, for plaintiff in error. Henry C. Allen, for defendants in error.

CAMPBELL, J. This is an action of mandamus to compel defendant to carry in its canal and deliver to plaintiffs water for irrigating their agricultural lands. To the judgment awarding the peremptory writ defendant prosecutes error. As the application was on notice, the alternative writ of mandamus was not granted, and upon final hearing the peremptory writ issued in the first instance. The petition for the writ alleges, in substance, that plaintiffs are owners of agricultural lands which lie under defendant's canal, and sets up facts which plaintiffs say constitute them appropriators of water from the Platte river, and which make defendant a quasi public carrier for hire and charged with the duty to carry in its canal and deliver to the respective consumers thereunder the quantity of water belonging to them on payment of the legal charge therefor. For our present purpose we shall treat the petition as sufficiently alleging these ultimate facts. The petition then states that in the appropriate statutory proceedings provided for such purpose, before the proper board of county commissioners, to which defendant was a party and in which it appeared, a determination was made and an order entered compelling defendant to carry and deliver to its consumers water at the rate of \$1 per acre during the irrigating season of 1905, instead of \$1.75 per acre, which it had theretofore charged them and proposed to continue to exact, which order and adjudication are still in full force and effect; that plaintiffs, respectively, have tendered to defendant this legally fixed charge for the carriage and delivery of water during such season, which defendant has refused to accept. After defendant's motion to dismiss, based upon various grounds, was denied and its demurrer overruled, defendant filed an answer denying generally the material allegations of the complaint, and, in a separate defense, alleged, in substance, that plaintiffs' asserted constitutional and statutory right to have defendant carry and deliver to them water at the rate fixed by the board of county commissioners was surrendered and relinquished by virtue of a certain contract, which is set forth in extenso, which the parties voluntarily made and by which alone their rights in controversy are to be determined, whereby plaintiffs agreed to, and are bound to, pay, before defendant is required to carry and deliver water, the contract price or charge of \$1.75 per acre during each irrigation season. The trial court on final hearing found the issues for plaintiffs, that the contract pleaded was null and void, and that the charge for carriage is

that fixed by the board of county commissioners, and thereupon granted the peremptory writ commanding defendant to carry and deliver during the season of 1905 the respective designated quantities of water to the different plaintiffs upon the payment, or tender of payment, of the rate of \$1 per acre.

Numerous questions are raised and argued by counsel, which, in the view we take of the case, are not involved and should not be here decided. While it does appear by some of the averments and the prayer of the complaint that plaintiffs are asking a decree establishing in them a perpetual right to the use of water, these averments may properly be, and were below, treated as surplusage. *Townsend v. Fulton Irr. Ditch Co.*, 17 Colo. 142, 29 Pac. 453; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 28 Pac. 966, 31 Am. St. Rep. 275; *Agricultural Ditch Co. v. Rollins*, 42 Colo. 267, 93 Pac. 1125. That the trial court so regarded them is apparent from its writ which limited the relief to the single irrigating season of 1905.

The mandate of the peremptory writ has, or has not, been performed. If it was performed by defendant, as stated by counsel for plaintiffs at the oral argument and not denied, defendant is not in a position to have a decision upon this review of the questions litigated and determined below. If the writ was not complied with, even if defendant is entitled to a reversal of the judgment, any order as to the merits that could be made here would be either useless or impossible of performance. The irrigation season of 1905 has long since passed, and it would be absurd now to make an order either denying or granting the writ prayed for. In addition to cases cited, see *Wheeler v. N. O. I. Co.*, 10 Colo. 582, 596-597, 17 Pac. 487, 3 Am. St. Rep. 603. The circumstance, which is a mere incident in the course of the trial, that plaintiffs were required, by an order of court, to deposit with the clerk a sum equal to \$1.75 per acre, all, or part of which, was to be delivered to defendant, depending upon what the final determination was, does not affect this conclusion, or entitle either party to a review of the main questions sought to be raised here. This was expressly decided at this term in *City and County of Denver et al. v. Brown et al.*, 108 Pac. 971. We might say upon the authority of the *Townsend Case* fortunately for the defendant the adjudication is limited to the petitioners' claim for water for the season of 1905 and for costs. For the reason given we shall modify and affirm the decree. In doing so it is proper to observe that, in a mandamus proceeding, a perpetual right to the use of water for irrigation is not the subject-matter of adjudication. With respect to the fixing of the rate by the county commissioners, we also remark that the defendant here was a party to that statutory proceeding and the adjudication of the board can-

not be collaterally attacked in this mandamus action, as apparently defendant tried to do below. So long as that adjudication continues in force, or until relief therefrom in some appropriate proceeding is afforded, the defendant must comply therewith, and carry and deliver water in accordance with the rate thereby fixed.

It was wrong also for the trial court, in this action, to determine the rights of the parties under the contract pleaded. Its decision is therefore set aside on that issue. As we have said, the adjudication of the board of commissioners until it is otherwise judicially determined measures the rights of these parties as to the rate for carrying and delivering water. It is true that defendant interposed this defense and asked to have a decree determining that plaintiffs must pay the contract charge rather than that fixed by the county board. In one point of view it might be said that, having invoked the decision, it should be bound by it, though unfavorable. Defendant does not now complain that this action did not afford the proper remedy for the adjudication, but that the point was not well decided. We think, under our practice, this issue was not properly triable in a mandamus action, and, though the parties consent, we will not permit the practice, followed below, to gain a foothold in this jurisdiction. If the defendant company is dissatisfied with the rate as fixed by the county board, we have already held it cannot obtain relief in the pending action. If the rate is confiscatory, in an equity suit its enforcement might be enjoined, as was done in the case of Montezuma County v. Montezuma W. & L. Co., 39 Colo. 166, 89 Pac. 794. If the plaintiffs have, by reason of a contract, lost or waived their constitutional and statutory right to have the carriage rate fixed by the board of county commissioners, defendant must in some other and proper action or proceeding obtain a decree so declaring. Until it does so, or until it is properly relieved of the burden of complying with the statutory adjudication fixing the rate, it must carry and deliver water in accordance therewith. As the only object of this action was to require a carriage and delivery of water for the one season of 1905, and, for the reasons above indicated, another or different order should not now be entered here modifying or changing the order of the trial court awarding the permanent writ, the decree is modified by omitting therefrom the determination concerning the alleged contract rights of the parties, and, as so modified, it is affirmed, without prejudice to the rights of the parties under the contract set up in defendant's answer, which rights will remain the same as before the decision below, and subject to future determination in an appropriate ac-

tion. The cause will be remanded to the district court to modify its decree accordingly.

Modified and affirmed.

MUSSER and BAILEY, JJ., concur.

(47 Colo. 461).

BROWN v. HOLLOWAY'S ESTATE.

(Supreme Court of Colorado. Nov. 1, 1909.
Rehearing Denied April 4, 1910.)

1. APPEAL AND ERROR (§ 4*)—MODE OF REVIEW—CLAIM AGAINST DECEDENT'S ESTATE.

The Supreme Court does not have jurisdiction to review, by appeal, a judgment for an estate in an action on a claim against it, but may review the judgment by writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8-21; Dec. Dig. § 4.*]

2. SALES (§ 90*)—ORAL CONTRACT—MERGER IN SUBSEQUENT CONTRACT.

A written contract, executed after the making of an oral contract for the purchase of horses for resale, which modified the terms of the oral contract by providing that the seller should receive a greater price for certain kinds of horses than under the oral agreement, to the extent of all or a part of the buyer's profit on them, merged the oral agreement into the written, so that the seller waived any claim for damages for breach of the oral agreement.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 253; Dec. Dig. § 90.*]

3. PRINCIPAL AND AGENT (§ 171*)—AUTHORITY OF AGENT—RATIFICATION BY PRINCIPAL—ACCEPTING BENEFITS UNDER CONTRACT.

Where the seller executed a written contract for the resale of horses to another and acted upon it by selling horses thereunder and receiving the profits of a resale, he is estopped to deny the validity of the contract on the ground that the buyer's daughter had no authority to act for him in executing it.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 651; Dec. Dig. § 171.*]

4. EVIDENCE (§ 391*) — PAROL EVIDENCE — VARYING CONTRACTS—CONTRACTS OF SALE.

Where a prior oral contract for the sale of horses was merged into a written contract executed by the parties, the seller's statements at the time of executing the written contract that it would be satisfactory, provided he procured his full purchase price according to the terms of the oral agreement, were ineffectual as attempting to vary the terms of the written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1729-1732; Dec. Dig. § 391.*]

Appeal from District Court, City and County of Denver; F. T. Johnson, Judge.

Action by E. W. Brown against the estate of Joseph Holloway, deceased. From a judgment for defendant, plaintiff appeals. Appeal dismissed, and case redocketed on writ of error. Affirmed.

Macbeth & May, for appellant. W. W. Dale, for appellee.

HILL, J. The verified claim of the appellant against the estate of Joseph Holloway,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

deceased, was filed in the county court of the city and county of Denver, as follows:

Estate of Joseph Holloway, Deceased,

To E. W. Brown, Dr.

To damages by failure to take and pay for 245 horses delivered by E. W. Brown for the deceased, in Denver during the life of deceased, in accordance with agreement between said Brown and deceased, by which such horses were to be so delivered and paid for at the agreed price of \$50.00 per head.....	\$12,500 00
Less amount subsequently received and credited in reduction of damages sustained	2,000 00
Total	\$10,500 00

This claim was disallowed by the county court, and an appeal was taken to the district court, where upon trial to a jury a motion for nonsuit was granted and judgment entered in favor of the administratrix of said estate for her costs (amount unstated), from which this appeal is taken.

This court has jurisdiction to review the judgment by writ of error, but not on appeal. In such circumstances our statute provides that the appeal shall be dismissed and the cause redocketed on error. Orders so providing are therefore entered. *D. & R. G. R. R. Co. v. Peterson*, 30 Colo. 77, 69 Pac. 578, 97 Am. St. Rep. 76; *Edmonston et al. v. Ascough*, 43 Colo. 53, 95 Pac. 813.

The contention of the appellant is that, after selling a portion of one car of horses to Mr. Holloway, he requested him to bring up two more car loads from New Mexico, and he would make a contract with him for the purchase of more horses; that, thereupon, he shipped two more car loads and Mr. Holloway, after looking them over, made an oral agreement with the appellant to accept anywhere up to 500 head that would correspond or compare on an average with the two car loads then shipped, and agreed to pay \$50 per head; that under this arrangement the appellant, at Holloway's request, turned over to Clark (who had corrals in Denver) the two car loads and, under the contract, continued to ship others which averaged as good, a portion of which were accepted; that Mr. Holloway died in the East on or about March 17, 1902; that at the time of his death there were 245 of Brown's horses, which had been shipped under this contract, awaiting acceptance by Holloway in Clark's yards at Denver; that his representatives refused to take or pay for the horses then on hand, and they were left on the hands of Brown to dispose of as best he could, which he did, but with the result that he received therefor \$10,500 less than the original contract price.

It is questionable whether the evidence sustains appellant's contention as to the substance of the original contract. It shows that Mr. Holloway, during his lifetime, was engaged in buying a large number of horses, by him turned over to the British government, and that all such had to bear the scrutiny of

inspection and be subject to certain tests. The district judge stated it was his opinion that a part of the original agreement was that the horses should meet the requirements of the officials for the British government and be subject to such approval. It has been held by this court that the evidence to support a claim against an estate should be clear and convincing as to its existence, as well as the amount of the claim. *Clarke v. Estate of Roberts*, 38 Colo. 316, 87 Pac. 1077. But this contention, as well as the right of the trial judge to make findings of fact upon granting a nonsuit in an action at law being tried before a jury, need not be passed upon here.

The evidence is undisputed that, before Mr. Holloway's death (when he was sick in the East), the appellant went to his home here in Denver and advised his daughter that a large number of the horses were here ready for acceptance; that she stated to him she did not know what to do, she had received a telegram that her father was sick, not expected to live, and he had better come back again and see her brother, Sidney; that he went back again to the home that day, or the next, saw Sidney (a young man), and they still did not know exactly how the business would be handled; that the result of this last conference was that an agreement in writing was signed by the appellant, and Holloway's name attached thereto by his daughter, Miss Marian, which agreement reads as follows: "Denver, Colo., March 17, 1902. This article of agreement made by and between J. Holloway, his heirs, executors, or assigns, party of the first part, and E. W. Brown and G. P. Anderson, party of the second part, to wit: That said party of the second part agrees to send all of his horses 280 head in number to the Westfield farm to be fed hay and said horses to have the use of a corral to remain in until the day of inspection when all of those that are deemed fit to show are to be shown. For all of those horses that pass in the B class said party of the second part shall receive the sum of sixty dollars (\$60) and for all those horses that pass in C class said party of the second part is to receive the sum of fifty (\$50). For all feed given to said horses the said party of the second part agrees to pay to said party of the first part the actual first cost of same with cost of delivering same added. Said party of the second part further agrees that all of said horses shall be holding as security to said party of the first part for all feed or expense on said horses and men. Said party of the second part further agrees that said horses shall be held by said party of the first part to secure any money advanced to the said party of the second part by said party of the first part. Said party of the second part declares that all of said horses belong to them clear of incumbrance whatsoever. [Signed] J. Holloway, by Mar-

ian Holloway. E. W. Brown. G. P. Anderson."

Previous to this time Miss Holloway had written checks and made payments for her father during his lifetime in this business of purchasing horses for the English government. The evidence is not clear whether this contract was made before or after the father's death, but under it the horses then on hand were taken to the farm therein named. A part were shown to the officials of the English government, and portions of those shown were accepted and paid for at the prices named in this written contract, the money accepted by Mr. Brown, and the remainder sold to other parties, but at a less price than \$50 per head.

The testimony of the failure or refusal of Mr. Holloway, his heirs, executors, administrators, or assigns, to comply with the conditions of the first contract, is very unsatisfactory. It will be noted that Mr. Brown only made two trips to the Holloway home, both the same day, or the second the succeeding day. It does not show the two children, Marian and Sidney, were the only heirs of the deceased, and, if Mr. Holloway was then dead, no administrator had been appointed nor any reasonable time elapsed for the appointment of one; but there is no positive evidence that Mr. Holloway was dead at the time this contract was made. The better inference (which is all the evidence would warrant upon the subject) is that it was made when he was yet alive, in anticipation of his death, and at the solicitation of Mr. Brown, who acted thereunder and accepted its benefits. Had the result turned out one way, it would have been better for him than the original oral agreement, as claimed by him. The contract purported to be the contract of Mr. Holloway. His name was signed thereto by his daughter, who had theretofore written a number of his checks in payment for horses thus purchased, and who transacted portions of his other business. If Mr. Holloway was then alive, there was no evidence introduced showing that the daughter had no right to make the contract as she did. The appellant accepted it, acted under it, and has had the benefit of it. We think that, by its execution, all oral contracts with Holloway concerning the sale and purchase of these same horses were merged into this written agreement; that the plaintiff thereby waived any claim for damages by virtue of any alleged breach of said former oral agreement; that it was properly admitted in evidence; and, under such circumstances, the appellant is estopped from denying its validity. *Arthur v. Israel*, 15 Colo. 147, 25 Pac. 81, 10 L. R. A. 693, 22 Am. St. Rep. 381; *Jones v. Langhorne*, 19 Colo. 206, 34 Pac. 997; *Farrer v. Caster*, 17 Colo. App. 41, 67 Pac. 171; *Kerr v. Burns et al.*, 42 Colo. 285, 93 Pac. 1120; *Herman on Estoppel & Res*

Judicata, vol. 2, § 1039; *Cyc.* vol. 16, pp. 789, 791, and cases there cited.

The contention urged so earnestly by counsel for appellant that the sale under the oral agreement was an uncompleted sale, and when acceptance was refused it was the appellant's duty to dispose of the horses to the best advantage, that upon account thereof he had a right to provide for their disposition through the heirs of the deceased, and for that reason the arrangement with them was a separate matter and was in no way a waiver of his claim against the estate, is not sustained by the record. The written contract purports to be a contract with Mr. Holloway himself. Its language simply shows a modification of the terms and conditions of the sale by which the horses were to be accepted. It provides the appellant was to receive a greater price for certain kinds of horses received by the British government than he would have under the oral agreement, to wit, all or a part of Mr. Holloway's profit. We think this evidenced an intent upon his part to merge the oral agreement into this contract and accept its provisions in lieu thereof. His alleged statements to the contrary, wherein he told the son and daughter at the time of its execution that the agreement would be satisfactory, conditional that he thus secured his full purchase price for the horses, per the terms of the former oral agreement, were at best statements attempting to vary the terms of a written contract, which statements were made at the time of its execution and could have no effect thereon.

The judgment will be affirmed.

Affirmed.

STEELE, C. J., and GABBERT, J., concur.

(47 Colo. 516)

BUCKHORN PLASTER CO. et al. v. CONSOLIDATED PLASTER CO.

WILD et al. v. SAME.

(Supreme Court of Colorado. Feb. 7, 1910.

Rehearing Denied April 4, 1910.)

1. APPEAL AND ERROR (§ 1099*)—LAW OF THE CASE—QUIETING TITLE.

Where, in a suit to quiet title, judgment for defendant is reversed because defendant was not in a position to deny title of plaintiff, such holding is the law of the case on a subsequent appeal in which the facts are the same.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

2. CORPORATIONS (§ 313*)—CORPORATE PROPERTY—POSSESSION OF OFFICER.

Where several corporations and an individual owning gypsum mills and quarries form a consolidated corporation to which each of the parties lease their mills, etc., and the individual is made general manager of the corporation, the individual cannot repudiate the transaction and take possession of his holding, and defend suit to quiet title, since the manager of the cor-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

poration cannot dispute the title of property which he holds for them, even though he is also owner and lessor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1387; Dec. Dig. § 313.*]

3. FRAUDS, STATUTE OF (§ 158*)—ORAL AGREEMENT—PERFORMANCE—SUFFICIENCY OF EVIDENCE.

On an issue whether an oral agreement for the dismantling of a gypsum mill belonging to a consolidated corporation, and the construction of a new mill adjacent to another mill which had been leased to the corporation, was to be governed by the former lease, evidence of performance of the oral agreement held sufficiently clear to take it out of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 158.*]

4. LIS PENDENS (§ 24*)—ASSIGNEE PENDENTE LITE—NECESSITY OF BRINGING IN.

Generally a voluntary assignee pendente lite need not be made a party to a bill, or be brought before the court, for every one purchasing pendente lite, is treated as a purchaser with notice, except as otherwise provided by statute.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. §§ 38-46; Dec. Dig. § 24.*]

5. PARTIES (§ 51*)—NEW PARTIES—SUPPLEMENTAL BILL.

A supplemental bill is proper to bring in as a party one who has acquired an interest in the subject-matter of controversy, since the commencement of the suit, as assignee or successor to an original defendant; and hence where, on reversal of a judgment for defendant in an action to quiet title, defendant pending suit sells his interest to another, who, in turn, also sells it, both of the purchasers are properly made parties to the suit on remittitur of the cause on appeal by supplemental bill, under Civ. Code, § 16, providing that, when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them brought in.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 51.*]

6. MONOPOLIES (§ 21*)—UNLAWFUL COMBINATION—PERSONS WHO MAY OBJECT—ESTOPPEL TO OBJECT.

Where an owner of a plaster mill leased his mill and quarry to a consolidated corporation, and became general manager of the corporation, and thereafter repudiated the transaction and took possession of the property leased, he could not defend his possession on the ground that the corporation was an unlawful combination to affect prices.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 21.*]

7. CORPORATIONS (§ 377*)—HOLDING STOCK IN OTHER CORPORATION—RIGHT TO OBJECT.

Where an owner of a plaster mill leased his mill to a consolidated corporation, and became general manager thereof, and thereafter repudiated the transaction and took possession of the leased property, he could not defend his possession on the ground that the consolidated corporation had no right to hold stock in another corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 377.*]

8. VENDOR AND PURCHASER (§. 243*)—BONA FIDE PURCHASERS—ACTUAL NOTICE—ADMISSIBILITY OF EVIDENCE.

In an action to quiet title to land, in which purchasers from defendant had been made parties by supplemental bill, a contract of defendant indemnifying the purchasers against the claims of plaintiff is admissible in evidence to show

that the purchaser had notice of the claim of plaintiff.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 243.*]

9. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, under the facts, the judgment rendered is the only one that could be rendered, error in the admission of evidence is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4175, 4177; Dec. Dig. § 1052.*]

10. LANDLORD AND TENANT (§ 5*)—NATURE OF TRANSACTION—CONSIDERATION.

Where a gypsum mill owner leases his mill and quarry to a consolidated corporation in consideration of an interest in the stock of such corporation, the transaction is a lease, though no rent is stipulated for and the corporation did not agree to work the quarry or remove any rock, since the consideration of a lease may be paid in whole at the inception of the term.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 5.*]

11. CONTRACTS (§ 170*)—CONSTRUCTION—CONSTRUCTION BY PARTIES.

In construing a contract, the court will follow the construction placed on it by the parties themselves.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.*]

12. LANDLORD AND TENANT (§ 17*)—LEASE OF CONTRACT FOR USE—CONSTRUCTION BY PARTIES.

A gypsum mill owner turned over his mill and quarry to a consolidated corporation in consideration of stock in the corporation, and the agreement provided that the corporation might discontinue the use and operation of the mill at any time, and that, when it did so, the owner might operate on his own account. The owner attempted to repudiate the transaction, and in so doing admitted that the transaction was a lease. *Held*, that he could not contend that the agreement was a contract for use at the option of the owner, and not a lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 17.*]

13. LANDLORD AND TENANT (§ 37*)—LEASES—CONSTRUCTION.

Leases must be construed according to the intention of the parties, and with reference to the subject-matter.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 98; Dec. Dig. § 37.*]

14. LANDLORD AND TENANT (§ 101*)—TERMINATION OF LEASE—DESTRUCTION OF IMPROVEMENTS.

If by a lease land is demised on which improvements stand, the destruction of the latter does not terminate the lease unless it is so agreed.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 314, 315; Dec. Dig. § 101.*]

15. LANDLORD AND TENANT (§ 101*)—TERMINATION OF LEASE—DESTRUCTION OF BUILDING—ORAL AGREEMENTS.

An owner of a gypsum mill and quarry leased his mill "and the land whereon the same is situated, to wit, a tract of land one hundred feet square," and did not provide that it was to terminate in case the mill was destroyed. Thereafter an oral agreement was entered into that a new mill which was to be erected was to come in under the terms of the old lease, and the agreement was taken out of the statute of frauds by performance. *Held*, that the lease of the new mill was for the lease of the land, and a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

destruction of the new mill by fire did not terminate the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 101.*]

16. LANDLORD AND TENANT (§§ 101, 123*)—AMOUNT GRANTED BY LEASE.

The grant of an entire structure carries with it the land on which it is located, and where a consolidated corporation was the sole lessee of a gypsum mill, and was given the exclusive right to occupy the mill when it so desired, the land on which the mill was located passed by virtue of the lease, though the land was not expressly mentioned, and a destruction of the mill was not a termination of the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. §§ 101, 123.*]

17. LIS PENDENS (§ 11*)—PENDENCY OF ACTION—PURCHASE PENDING WRIT OF ERROR.

The fact that purchasers pendente lite purchased at a time when the judgment had been rendered in favor of their grantor, and an appeal had been taken, but never perfected, would not make them any the less bound by the judgment rendered on error, where they knew that a writ of error had been sued out, though without supersedeas.

[Ed. Note.—For other cases, see *Lis Pendens*, Dec. Dig. § 11.*]

18. LIS PENDENS (§ 13*)—APPLICATION OF STATUTES—CONSTRUCTIVE NOTICE.

Code, § 36, providing that only from the time of filing notice of lis pendens shall the pendency of an action involving title to realty be constructive notice of such suit to a purchaser or incumbrancer of the property involved, has no application to one who has actual knowledge of the pendency of the action.

[Ed. Note.—For other cases, see *Lis Pendens*, Dec. Dig. § 13.*]

En Banc. Error to District Court, Larimer County; James E. Garrigues, Judge.

Suit by the Consolidated Plaster Company against Alfred Wild and others. From a judgment for complainant, the Buckhorn Plaster Company and Alfred Wild, defendants, severally bring error. Affirmed.

Cranston, Pitkin & Moore (Hugh Butler, of counsel), for plaintiffs in error. L. R. Rhodes and N. Walter Dixon, for defendant in error.

GABBERT, J. The ultimate question involved in these cases is the right of possession and control of a certain government subdivision of land, and a structure known as the "Loveland Buckhorn Mill," and appurtenances, together with the land upon which the mill is situate. The Consolidated Plaster Company brought suit originally against Alfred Wild to quiet title to the property involved. The judgment was in favor of the defendant. The company brought the case to this court for review on error, where the judgment was reversed and the case remanded for a new trial. Upon filing the remittitur the Consolidated Plaster Company filed a supplemental complaint, to which the Buckhorn Plaster Company and James W. Auld were made defendants. The trial of the issues made by the pleadings resulted in a judgment for the plaintiff company. From this judgment the respective plaintiffs in error

have brought the case here for review separately; and as the questions involved are similar, and the rights of the plaintiffs in error are more or less dependent upon the rights of each other, they will be considered together.

The original complaint was an ordinary one to quiet title. The remaining pleadings, except the supplemental complaint, are voluminous, and we will assume, without stating them in detail or effect, that they present for consideration the questions which the respective plaintiffs in error have presented for determination. The testimony is also voluminous, and the facts thereby established, or only such parts thereof as are necessary to consider in determining these questions, will be stated. In 1892 the Stewart Stucco & Cement Company owned a mill located at Colorado Springs and gypsum beds situated in El Paso county. The Rocky Mountain Plaster & Stucco Manufacturing Company owned a mill located at Red Butte, Wyo., and gypsum beds located near that place. The Denver Gypsum Company owned a mill located upon leased property in the city of Denver, and held a leasehold interest in gypsum beds situate in Larimer county. Mr. Wild owned a mill located near Loveland, known as the "Buckhorn Mill," and also owned certain lands and nearby gypsum beds. These several concerns were competitors in business, and in 1892 they effected a permanent consolidation by organizing the Consolidated Plaster Company, a corporation with a capital stock of \$20,000, which was equally divided between the owners of the above-named plants, in consideration of which they leased to it their respective plants and gypsum beds for a period of 20 years—the term of the corporate existence of the lessee, the Consolidated Plaster Company. Mr. Wild was elected a director and vice president and general manager of the new company, and, in the capacity of manager, entered into the possession of the plant, and beds located near Loveland, and operated them for the company until some time in 1902, when he notified the other officials of the company that he had withdrawn from the consolidation and had taken possession of the Buckhorn plant for himself, and on his own account. This action on the part of Mr. Wild was the basis of the suit originally instituted against him by the Consolidated Plaster Company. The judgment of the trial court in that case was against the plaintiff, upon the ground that it was not in possession of the property at the time it instituted its action. This judgment was reversed for the reason that the manager of a corporation cannot acquire a hostile possession of its property, of which he is in charge and control as such manager, so as to prevent it from maintaining an action to quiet title under our Civil Code (section 255), which provides that such action may be brought by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

any person in possession by himself or his tenant of real property against any person who claims an estate therein adverse to him for the purpose of determining such adverse claim. Consolidated Plaster Co. v. Wild, 42 Colo. 202, 94 Pac. 285.

It is again urged upon our attention that the trial court erred in finding at the second trial that the Consolidated Plaster Company was in possession of the premises in controversy at the time it commenced its suit. The facts bearing on that question are no different from what they were when the case was here before for review, and what was then determined under these facts on that question is the law of the case; but, aside from this, there can be no question but that the attempt on the part of Mr. Wild to take possession of the premises in dispute in his own right was a nullity. He was plaintiff's manager, and in that capacity was in the possession and control of its property. While still sustaining that relation, he undertook to take possession for himself. This he could not do, for the reason that one who holds possession of real estate as manager for another cannot dispute that other's title, or, while sustaining such relation to his principal, convert its possession through him into one for himself. It is now urged that Wild's right as owner and landlord should be considered, and for this reason he could assume possession of the property himself. We do not see how this can possibly make any difference. He had leased the premises in controversy to the plaintiff company, and as its manager had entered into the possession and control of the leased premises on its behalf; and he had no more right to take possession of the leasehold interest for himself in these circumstances merely because he was the lessor and owner than if he had had no interest in the premises whatever. The leasehold interest was what was involved. That was what his principal was in possession of through him as its manager, and, while he sustained that relation to it, his possession was the possession of his principal. He could not abrogate that relation temporarily, in whole or in part, so as to relieve himself of the duty he owed the company to maintain its possession of its property, of which he was in charge. Further, the law of the case, as determined by our previous decision—42 Colo., 94 Pac., *supra*—is (quoting from the syllabus): "Where the title claimed by plaintiff corporation was purely equitable, being based upon an oral contract between it and defendant, who was one of its directors, it had a right, although out of possession, to maintain an action under Mills' Ann. Code, § 255, to quiet its title."

In 1894 the Denver plant was dismantled and the machinery used in constructing the plant known as the "New Buckhorn Mill," adjacent to the old Buckhorn plant. One of the issues in the case was whether or not this new plant was constructed under an

oral arrangement between the plaintiff company and Mr. Wild, whereby it was to be treated as a lease to the company under the terms and conditions of the lease originally executed by Wild. The trial court found in favor of the plaintiff company on this issue. Counsel for plaintiffs in error contend that this was error for the reason that the evidence was not sufficient to justify such finding, that it was indefinite and uncertain, and invoke the rule that, before an oral agreement relating to transactions which the statute of frauds requires to be in writing can be enforced upon the ground of performance by the party seeking to have it enforced, it must be clearly proved, and be definite and certain. The testimony bearing on this issue brings the case within this rule. In fact, from the testimony the findings of the trial court could not have been otherwise. Wild had a claim against the company owning the Denver plant. He brought suit against that company, levied upon its mill, had the same sold under execution, and eventually secured title by virtue of such sale. Several witnesses on behalf of the plaintiff testified to the effect that the company arranged with Mr. Wild that it would dismantle the Denver plant at its own expense, move it to the immediate vicinity of the Wild mill, use it in constructing a new plant, that the company would construct the mill building and all buildings essential, and also a railroad spur to the new mill, in consideration of which the new plant was to take the place of the old and was to be covered by the terms of the old lease, which, at the time of this arrangement, had between 15 and 16 years to run. The new mill was not constructed on the ground originally leased by Wild upon which the old plant was located, for the reason that it was more advantageous to place it some 1,200 or 1,500 feet distant because water could be more readily secured and the raw material from the quarry more easily handled, and it was also less difficult to construct the spur to that point than to the ground in the immediate vicinity of the old mill. Under this arrangement, Wild was to be the owner of the new mill on the expiration of the new lease. Witnesses for the plaintiff also testified that the company carried out this arrangement, and paid upwards of \$3,000 of the expense of moving the machinery and erecting the new mill. Counsel on behalf of Wild claim that he denied such an arrangement was effected. If he did, he must have been mistaken, when we come to consider other undisputed facts. The old mill—that is, the Wild mill—after the new one was constructed, was released from the original lease, and was thereafter exclusively controlled by Mr. Wild. The machinery from the Denver plant was moved as testified to by witnesses for the plaintiff. The company disbursed over \$3,000 as expense incurred in constructing the new plant.

From the time it was completed until the action of Wild in attempting to assume possession of the property, it was operated exclusively by the company through him as its manager for a period of about seven years. For the first few years the company had a hard struggle financially, and was able to continue operations only by reason of advances made by directors of the plaintiff company upon money borrowed on their personal obligations. Finally, it began to pay dividends, which were distributed among the stockholders of the plaintiff company in proportion to their respective holdings of the capital stock of that concern.

As a preliminary step on the part of Mr. Wild in his attempt to wrest possession and control of the mill from the plaintiff company, he addressed a letter to its secretary and treasurer, a copy of which he forwarded to its president, in which, among other things, he proposed, in effect, that a meeting of the plaintiff company should be called for the purpose of closing up its affairs; that each of its lessors surrender and cancel the contracts and leases executed to it; and that the moneys and assets left after the payment of debts be distributed proportionately and equitably, and the corporation dissolved. If there were no contract or lease which covered the new plant, why was there any necessity for proposing the surrender and cancellation of such instruments? In a subsequent communication, he stated, in effect, that he wished to formally advise the company that he had resumed possession in his own right of the Buckhorn mill, and of the gypsum quarry or mine, together with all the appurtenances belonging to either or both, with the intent to use the property exclusively for his own use and benefit. If the property mentioned had not theretofore been in the possession of the Consolidated Plaster Company, why was it necessary for him to say he had resumed possession?

In a still later communication to the company, he stated, in substance, that he reiterated what was said in his former communication to the effect that it was his purpose and intention to segregate his property from the consolidated arrangement, and operate it for himself exclusively in doing business in his own way and in his own name. If the new plant belonged to Mr. Wild unincumbered by any lease or contract with the plaintiff company, why was it necessary for him to write that "it is my purpose and intention to segregate my property from the consolidated arrangement, and to use it for myself exclusively in doing business in my own way and in my own name"? After he had assumed to take possession of the plant in his own name, he issued the following notice: "Notice is hereby given that the Buckhorn mill, at Loveland, Colo., which has heretofore been operated under a lease by the Consolidated Plaster Company, said lease having been

terminated, will hereafter be operated and controlled by the undersigned, who is the owner of said mill, and the gypsum quarry by which it is supplied." The record does not disclose that there was any other lease of the mill to the Consolidated Plaster Company than the one under which that company claims its leasehold interest in the property in controversy. Consequently Mr. Wild recognized, over his own signature, that the lease under which the plaintiff company claims its rights had been entered into with Mr. Wild as claimed by it. By the lease executed by Wild to the plaintiff company it was provided that the latter should pay him a royalty of 20 cents for each ton of calcined plaster. It appears that during the period Mr. Wild was operating the leased property for the plaintiff company he was paid several thousand dollars in royalties by the company from the proceeds of plaster manufactured and sold. If he was not operating the new mill for the benefit of the company, why should it pay him any royalty? These undisputed facts so clearly demonstrate that the finding of the trial court was right on the issue under consideration that further discussion and comment on that subject is unnecessary.

After the judgment of the trial court which was reversed in 42 Colo., 94 Pac. supra, Wild assumed to sell the property in controversy to James W. Auld, who immediately sold and conveyed to the Buckhorn Plaster Company. The latter entered into the possession of the property, and began to operate the mill. These steps were taken while the former case was pending here. After reversal and issuance of the remittitur, the plaintiff filed a supplemental complaint, making Auld and the Buckhorn Plaster Company defendants. To this supplemental complaint all the defendants demurred. The demurrers were sustained in part; but overruled in so far as the supplemental complaint was based upon an action to quiet title as against the new defendants. Error is assigned upon this action of the court. There is no merit in this contention. A supplemental bill is proper to bring in as a party one who has acquired an interest in the subject-matter of controversy, since the commencement of the suit, as assignee or successor to an original defendant. 21 Enc. Pl. & Pr. 38; Hawes' Parties to Actions, §§ 11, 20; Story's Equity Pleadings, § 156.

Generally speaking, a voluntary assignee pendente lite need not be made a party to a bill or be brought before the court, for every one purchasing pendente lite, except as modified by statute, is treated as a purchaser with notice. Still, however, it is often necessary to bring such assignees before the court as parties by supplemental bill in order to remove a cloud on the title to the property involved which might otherwise exist or where it is necessary to compel the assignee to do some act in order to give the plaintiff full re-

Heff, so that such assignee, although not a necessary party, may be a proper one at the election of the plaintiff. Civ. Code, § 16, provides that, "when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in." This is but a declaration of the general rule that all who are interested in the subject-matter of an action should be made parties thereto, so that complete justice may be done and the rights of all parties in the subject-matter of controversy finally determined. *Denison v. Jerome*, 43 Colo. 453, 96 Pac. 166. In the case at bar the Buckhorn Plaster Company was not only a proper, but possibly a necessary, party. Wild had assumed through Auld to surrender the possession of the plant and other property to that company. If the plaintiff succeeded, it was entitled to a judgment against Wild and a writ for the possession of the property involved. Such a judgment and writ might not have been enforceable as against the Buckhorn Plaster Company unless it had been made a party to the suit. At least, there was an opportunity for it to make this claim, as we shall see later, when we come to consider some of the questions presented by counsel on behalf of the Buckhorn Plaster Company. The court was therefore clearly right in compelling it to answer the supplemental complaint, so that the rights of all parties claiming any interest in the subject-matter of controversy might be settled and determined in one action and by one judgment.

It is next claimed that the court erred in finding that the plaintiff company was organized for a lawful purpose, and was not against public policy. In support of this claim, it is urged on behalf of the plaintiff in error that the findings establish that plaintiff was a combination, or trust agreement, between the parties concerned, to prevent competition and to make and maintain a price agreed upon by all the persons or corporations then engaged in the state of Colorado in the manufacture of plaster of paris, and therefore against public policy, illegal, and void. It is unnecessary to go into a discussion of this question. Whatever may have been the purpose or object of the plaintiff company, the property it acquired belonged to it, and Mr. Wild could not penalize it by appropriating its property.

It is also claimed that under the laws of this state a corporation is forbidden to acquire and hold stock in another corporation. If the plaintiff corporation has violated the law in this respect, that would not confer upon Mr. Wild the right to divest it of its property in the manner attempted. When Auld purchased from Wild, he took a contract to indemnify him against any loss or damage he might sustain on account of any claim or right of the Consolidated Plaster Company. This contract, over the objection of the plaintiffs in error, was admitted in

evidence. The contract was competent for the purpose of showing that Auld was a purchaser with notice of the claims made by the Consolidated Plaster Company to the subject-matter of controversy. At the trial Auld was called as a witness by the plaintiff and examined as if under cross-examination by virtue of the provisions of an act, entitled "Evidence—Admission of," found in *Sess. Laws 1899*, p. 178. At the conclusion of his examination, the court refused to allow counsel for plaintiffs in error to cross-examine. At the time of the second trial Arthur, who had been a witness at the first trial, was dead, and his testimony was read on behalf of the Consolidated Plaster Company. In addition, it appears that entries made in his diary were also admitted in evidence. The latter were objected to by plaintiffs in error. In the circumstances of this case, we do not deem it necessary to determine whether or not the court erred in refusing counsel to cross-examine Auld, or in admitting the diary entries of Mr. Arthur, deceased, for the reason that the testimony on the part of Mr. Wild relating to his actions and what was contained in his communications to the officers of the plaintiff company so clearly and conclusively established every controverted issue of fact made by the pleadings that it is apparent the judgment could not have been otherwise than it was, so that, if the court erred in the particulars contended, it was without prejudice to the rights of either plaintiff in error. Nonprejudicial error will not work a reversal of a case brought here for review.

We shall next consider the questions urged particularly by counsel for the Buckhorn Plaster Company. On its behalf, it is contended that the original written agreement entered into between Wild and the Consolidated Plaster Company did not operate to pass to the latter a leasehold interest in the Wild mill, or to create, so far as that building was concerned, the relationship of landlord and tenant. In support of this contention, it is urged that the usual elements of a lease are missing, because there was no rent or other compensation provided for the use of the mill, nor was there any stipulated rent for the lease upon the gypsum land, and that the company did not agree to work the quarry or remove a single ton of rock. A lease, like every other contract, must be supported by a good and sufficient consideration, but the consideration may be paid in whole at the inception of the term. That was what was done under the contract between Wild and the Consolidated Plaster Company. He received as a consideration for such contract one-fourth of the capital stock of the company. For this consideration he leased the mill and the gypsum land, with the further proviso that he should be paid a royalty for rock taken therefrom and used in the manufacture of plaster. The lease further provided that the plaster company might dis-

continue the use and operation of the mill at any time, and that, when it did cease to operate the mill, Wild might do so on his own account. It is claimed that by this provision the contract was not a lease of the mill, but a contract for its use from time to time at the option of the plaintiff company. The agreement merely provided that Wild might use the plant for certain purposes when the company did not desire to carry on operations, but, when it did, it had the absolute right to operate the mill, and, when it did so, its possession was sole and exclusive. This is the right which Wild, by his action, has attempted to invade. In construing a contract the court will follow the construction placed upon it by the parties themselves. Under the agreement referred to, the plaintiff company entered into the possession of the disputed premises and operated the mill. Wild never questioned its right to do so until he took steps looking towards ousting the company of its rights, and, when he did, he recognized that theretofore the company had been operating the mill under a lease. The Buckhorn Plaster Company purchased and went into the possession of the new Buckhorn mill in May, 1906. About six months later, this mill was destroyed by fire, and counsel for the Buckhorn Plaster Company contend that this terminated the lease between Mr. Wild and the plaintiff company. The Buckhorn Plaster Company, after the destruction of the mill covered by the lease, constructed a new mill practically on the site of the one that was burned. The new structure was erected at an expense of between \$30,000 and \$35,000. Seven thousand dollars insurance on the mill burned was collected. The old machinery was sold for something like \$800, and a crusher from the mill burned was used in the new one. The Buckhorn Plaster Company had the benefit of the money thus realized and the crusher put into the new structure, property upon which the plaintiff company had a lease which would not expire for several years. Most of the cases presenting the question for consideration have arisen where after the destruction of the leased building the lessee has sought to be relieved from his covenant to pay rent. In the case at bar the question is unique in this respect—that it is a lessee that has paid rent in advance to the end of the term, insisting that the destruction of the mill has not terminated its contract with Wild. It seems to have been the doctrine of the common law that rent issued out of the land itself, regardless of the buildings thereon, and hence the destruction of the buildings on the leased premises did not discharge the obligation of the tenant to pay rent for the full term of the lease, unless so stipulated. The reason for holding the tenant liable for rent in such circumstances was that the land was still in existence. The tenant had the exclusive right to occupy it. The

landlord had no right to re-enter for the purpose of rebuilding. The tenant could rebuild if he saw fit; and hence he must be regarded as still holding the land, and therefore liable for rent. *McAdam on Landlord and Tenant*, § 198. From this doctrine there has been formulated the rule that, if by the lease the lessee is demised the land upon which the improvements stand, the destruction of the latter does not terminate the lease unless it is so agreed. *Lanpher v. Glenn*, 37 Minn. 4, 33 N. W. 10; *Graves v. Berdan*, 26 N. Y. 498. The test, then, to apply in the case at bar, is whether the land upon which the new Buckhorn mill was located was demised by Wild to the plaintiff company. Leases must be construed according to the intention of the parties and with reference to the subject-matter. *Kerr v. Merchants' Exchange Co.*, 3 Edw. Ch. (N. Y.) 315. By the original lease executed by Wild, he leased to the plaintiff company his mill "and the land whereon the same is situated, to wit, a tract of land one hundred feet square," located on a specified government subdivision. It did not provide that it was to terminate in the event the mill was destroyed.

From the testimony bearing on the terms and conditions under which the new Buckhorn mill was constructed, it appears without question that the new plant was to take the place of the old, and was to be covered by the terms of the old lease in all respects, which at that time had 13 or 16 years to run; in short, that the new structure was to take the place of the old Buckhorn mill under the written lease thereon. The plaintiff company expended several thousand dollars in erecting the new mill. In consideration of the new lease, Mr. Wild was released from all obligations under the lease which he had executed on the Wild mill, and was re-invested with the full control of that structure. The company had paid Wild in advance the rent agreed upon for the full term of the lease. When the new arrangement was made, the lease had upwards of 15 years to run. From these undisputed facts we think it is clear that by the oral agreement entered into the lease upon the new structure was to be the same as on the old, which included a specified grant of the land upon which the former was located; and hence, under the authorities, the destruction of the mill did not terminate the lease. But, aside from this, the general rule is that the grant of an entire structure carries with it the land upon which it is located. *Whitney v. Olney*, 3 Mason, 280, Fed. Cas. No. 17,595; *Lanpher v. Glenn*, supra; *Rogers v. Snow*, 118 Mass. 118; *Maddox v. Goddard*, 15 Ma. 218, 33 Am. Dec. 604; *Bacon v. Bowdoin*, 22 Pick. (Mass.) 401; *Winchester v. Hees*, 35 N. H. 43; *Sheets v. Selden's Lessee*, 2 Wall. 177, 17 L. Ed. 822. In the case at bar, the Consolidated Plaster Company was the sole lessee. It was granted the exclusive right

to occupy the mill when it so desired. Under this arrangement, the land upon which the structure was located passed by virtue of its agreement with Wild, even though such land was not expressly mentioned. At the time the Buckhorn Plaster Company purchased the premises in controversy the writ of error to the original judgment had been sued out, and the case was pending in this court. It bought with actual knowledge that such proceedings were pending. An appeal had been prayed originally, but was never perfected, nor was the writ of error subsequently sued out made to operate as a supersedeas. In these circumstances counsel for the Buckhorn Plaster Company contend that inasmuch as at the time it purchased Wild was in the possession and enjoyment of his property, and a judgment of record was in existence in his favor, that the company, even though the writ of error had to its knowledge been sued out in good faith, bought the property and acquired a good title irrespective of the final outcome of the proceedings in error. A purchaser of realty with actual notice of the pendency of proceedings involving the title is as conclusively bound by the results of the litigation as if he had from the outset been a party thereto. *Tilton v. Cofield*, 93 U. S. 163, 23 L. Ed. 858. Our Code provision (section 36), even if it should be construed to apply to proceedings pending in this court (a question upon which we express no opinion), does not create the law of *lis pendens*, but imposes limitations upon the common law on the subject. *Empire Land Co. v. Engley*, 18 Colo. 388, 33 Pac. 153. It provides that only from the time of filing the notice of *lis pendens* shall the pendency of an action involving title to realty be constructive notice of such suit to a purchaser or incumbrancer of the property involved. Failing to file such notice, however, does not relieve persons who have actual notice of the pendency of the action. *Bennett on Lis Pendens*, § 320; *Brown v. Cohn*, 95 Wis. 90, 69 N. W. 71, 60 Am. St. Rep. 83; note to *Stout v. Manufacturing Co.*, 56 Am. St. Rep. 843, 856. The Buckhorn Plaster Company may have expended several thousand dollars in erecting the new mill, but, having purchased the premises with actual notice of the claim of the plaintiff company, it made these improvements at its peril, and subject to the rights of the plaintiff company if it prevailed. *Davis v. Farwell Co.* (Tex. Civ. App.) 49 S. W. 656; *Patterson v. Brown*, 32 N. Y. 81; *Haven v. Adams*, 8 Allen (Mass.) 363. The judgment of the district court is affirmed.

Judgment affirmed.

CAMPBELL, J., not participating. HILL, J., though hearing the oral argument, did not participate in the decision.

(12 Cal. A. 604)

SHIELDS v. NATHAN. (Civ. 640.)

(Court of Appeal, Third District, California. Feb. 9, 1910. Rehearing Denied March 8, 1910; Denied by Supreme Court April 7, 1910.)

1. APPEAL AND ERROR (§ 1078*)—REVIEW—MATTERS NOT URGED IN BRIEF.

A defense that plaintiff, in an action to recover real estate conveyed by an insolvent debtor prior to the commencement of the action, conveyed an interest in the property to her attorneys, who are not made parties to the action, which defense is not urged in defendant's brief, will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

2. EXECUTORS AND ADMINISTRATORS (§ 37*)—DISCHARGE OF EXECUTOR — RIGHT TO APPOINT SUCCESSOR.

Code Civ. Proc. § 1698, provides that the final settlement of an estate shall not prevent a subsequent issue of letters "if other property be discovered, or if it become necessary or proper, for any cause, that letters should be again issued." An executor reported that he was unable to discover any property belonging to the estate, and was discharged. *Held*, that after his death the court could appoint an administratrix c. t. a. to take charge of subsequently discovered property.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 37.*]

3. EXECUTORS AND ADMINISTRATORS (§ 449*)—ACTION AGAINST EXECUTOR—PLEADING.

In an action by an administratrix c. t. a. against the administrator of another estate to recover property in the hands of defendant belonging to the estate of plaintiff's decedent, where the due appointment of plaintiff is alleged in the complaint and is not denied in the answer, the jurisdiction of the court to appoint plaintiff cannot be raised.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 449.*]

4. EXECUTORS AND ADMINISTRATORS (§§ 221, 236, 244*)—CLAIM OF EXECUTOR—ALLOWANCE BY JUDGE.

Code Civ. Proc. § 1510, provides that, if an administrator is a creditor of the decedent, his claim must be presented for allowance or rejection to a judge of the superior court, and its allowance is sufficient evidence of its correctness, and must be paid as other claims in due course of administration. Section 1504 provides that a judgment against an administrator upon any claim for money against the estate of decedent only establishes the claim the same as if allowed by the administrator and the judge. *Held*, that the allowance of a claim of an administratrix by the judge is of equal force with a judgment against the administratrix and may be contested by any person interested in the estate the same as other allowed claims might be contested; but, in case of a contest, the burden is on the party contestant to show that the claim was not properly allowed; and the same rule holds good in an action brought by an administratrix to enforce an approved claim belonging to her.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 841, 868, 901; Dec. Dig. §§ 221, 236, 244.*]

5. EXECUTORS AND ADMINISTRATORS (§ 57*)—PROPERTY FRAUDULENTLY CONVEYED BY TESTATOR—RECOVERY BY ADMINISTRATOR.

Under Code Civ. Proc. § 1589, making it the duty of an administrator to prosecute an action to recover for the benefit of the creditors of the estate all real estate fraudulently

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

conveyed by the decedent, the action may be prosecuted by an administratrix who is the sole creditor of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 57.*]

6. EXECUTORS AND ADMINISTRATORS (§ 241*)—RIGHT TO CONTEST ALLOWED CLAIM.

Where probate proceedings have been regularly conducted and the claim of an administratrix has been allowed, all the world are parties to such proceedings and are bound thereby, subject to the right of an interested party to have the claim set aside for cause, although a judgment is an estoppel only as to parties and privies.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 241.*]

7. APPEAL AND ERROR (§ 931*) — REVIEW — PRESUMPTIONS.

It will be presumed on appeal, in an action by an administratrix to recover property fraudulently transferred by decedent, in order to pay her claim against the estate, that the judge, in approving her claim, heard evidence in support of the facts averred in the claim and found them to be true.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 931.*]

8. LIMITATION OF ACTIONS (§ 100*)—ACCRUAL OF RIGHT OF ACTION—DISCOVERY OF FRAUD.

Code Civ. Proc. § 338, subd. 4, provides that a cause of action for relief on the ground of fraud does not accrue until the discovery by the aggrieved party of the facts constituting fraud. Plaintiff and her husband agreed to a separation and to fully account for all community property to two men selected to divide it. Plaintiff's husband did not return a sum of money on deposit which was community property, and plaintiff knew nothing of its existence. After the separation and division of all the property returned, the husband transferred all his property to defendant's intestate, and after the death of the husband, defendant's intestate was made his executor and was subsequently discharged. After the death of defendant's intestate, plaintiff was made administratrix of her husband's estate, and then discovered the fraud as to the bank deposit, and brought an action against defendant to set aside the transfer of real estate of her husband to defendant's intestate within three years after discovery of the fraud. It did not appear that defendant's intestate, while executor, filed any affidavit showing that he published notice to creditors in the matter of the husband's estate, nor that plaintiff had any knowledge that notice to creditors was published. *Held*, that the action was not barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.*]

9. EXECUTORS AND ADMINISTRATORS (§ 437*)—ACTION—LACHES.

Plaintiff and her husband agreed to separate and to return all community property held by them to two men appointed to divide the same between them. The husband did not return a sum of money belonging to the community deposited in a bank, and subsequently transferred all his property to defendant's intestate, who was appointed the husband's executor and was subsequently discharged because he found no property belonging to the estate. Plaintiff did not discover the fraud of her husband in concealing the bank deposit for 13 years after the settlement, and made no effort during that time to ascertain the facts. She discovered the fraud shortly before the death of defendant's intestate, but delayed the presentation of her claim against the estate of her husband until after the death of defendant's intestate. The

deed by which her husband conveyed the property to defendant's intestate was in consideration of love and affection only. It was not shown that defendant's intestate knew anything about the facts existing at the time of the separation. Plaintiff, after defendant's intestate had been discharged as executor, was appointed administratrix c. t. a., and had her claim for a portion of the bank deposit allowed, and within three years after discovering the fraud of her husband in concealing the bank deposit sued to set aside the conveyance by her husband of real estate to defendant's intestate. *Held*, that her action was not barred by laches; there being nothing tending to show that the heirs of defendant's intestate, nor any creditors interested in the estate, had suffered prejudice by delay in presenting the claim.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 437.*]

10. EQUITY (§ 72*)—LACHES—PREJUDICE.

Mere lapse of time less than the statutory period of limitation will not bar an action for equitable relief, unless the delay under the circumstances has been such as to justify the presumption that defendant may have been prejudiced thereby.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 207-220, 225, 226; Dec. Dig. § 72.*]

11. EXECUTORS AND ADMINISTRATORS (§ 431*)—FRAUDULENT CONVEYANCE BY DECEDENT—AVOIDANCE—ACTION—NECESSITY FOR JUDGMENT.

Under Code Civ. Proc. § 1589, providing for the recovery by the personal representative of property fraudulently disposed of by a testator, the requirement that claims of creditors must be evidenced by a judgment, or they must have been allowed by the administrator or executor, the approval by the judge of the claim takes the place of the allowance by the administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 431.*]

12. EXECUTORS AND ADMINISTRATORS (§ 450*)—FRAUDULENT CONVEYANCE BY DECEDENT—AVOIDANCE—ACTION—EVIDENCE OF FRAUDULENT INTENT.

In an action by an administratrix who held an unsatisfied claim against the estate, to set aside a transfer by testator of his real estate as fraudulent, evidence *held* to show the fraudulent intent of the testator in transferring his property.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 450.*]

13. EXECUTORS AND ADMINISTRATORS (§ 450*)—FRAUDULENT CONVEYANCE BY DECEDENT—AVOIDANCE—ACTION—INSOLVENCY—SUFFICIENCY OF EVIDENCE.

In an action by an administratrix to set aside a transfer of property by decedent as being in fraud of creditors, evidence that decedent transferred all of his property shortly before his death *held* to sustain a finding of insolvency.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 450.*]

14. EXECUTORS AND ADMINISTRATORS (§ 453*)—FRAUDULENT CONVEYANCE BY DECEDENT—ACTION TO SET ASIDE—JUDGMENT.

Under Code Civ. Proc. § 1589, authorizing an administratrix to recover for the benefit of creditors all real estate fraudulently conveyed by decedent, and section 1591, providing that all real estate so recovered must be sold for the payment of debts in the same manner as if the decedent had died seized thereof, and the proceeds appropriated in payment of the debts in the same manner as other property in the hands of the administratrix, and the remainder

paid to the person from whom such property was recovered, a judgment in an action by an administratrix to recover property fraudulently conveyed by decedent vested the title in her for the benefit of creditors, and also declared it to be free and clear of all claims of the defendant as administrator of the estate of the grantee, or any other person claiming through or under said estate, the latter provision should be stricken out.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 453.*]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Mary Shiels, as administratrix of the estate of Bernard Shiels, against I. C. Nathan, as administrator of the estate of Michael Shiels. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

W. A. Gett, for appellant. M. S. Wahrhaftig and Hinkson & Elliott, for respondent.

CHIPMAN, P. J. This is an action, brought under section 1589, Code Civ. Proc., to recover from the estate of Michael Shiels, deceased, certain real estate for the benefit of the creditors of the estate of Bernard Shiels, deceased.

It appears from the complaint that Bernard Shiels died December 31, 1902, leaving a will by which he devised all his property to Michael Shiels, naming him as executor; that Michael was duly appointed as executor, and was thereafter, to wit, November 6, 1903, discharged from his said trust; that plaintiff was duly appointed administratrix with the will annexed shortly thereafter, and ever since has been and now is such administratrix; that Michael died intestate, in the state of Nevada, on December 12, 1905, leaving estate in the county of Sacramento, this state; that defendant was duly appointed administrator of his estate, April 5, 1906, by the superior court of said county, and now is such administrator; that before and at his death Bernard was indebted to Mary Shiels in the sum of \$1,691, with lawful interest from November 14, 1890, upon a claim arising out of an agreement of separation (the said Bernard and Mary being husband and wife) and a division of their community property theretofore had between them, "all of which will more fully appear from a copy of the claim of said Mary Shiels, which is hereto annexed (i. e., to the complaint) marked 'Exhibit A,' and is hereby referred to and made part of this complaint"; that on March 7, 1906, said Mary presented to Hon. Peter J. Shields, judge of the superior court of said county, for his approval and allowance, her said claim against the estate of said Bernard Shiels, deceased (amounting then to \$3,505, principal and interest) "accompanied with a statement of the facts out of which said claim arose," which said claim was, on said March 7, 1906, allowed and approved by said judge and duly filed in the office of the coun-

ty clerk. It is then alleged that on December 26, 1902, said Bernard was the owner of certain described real estate referred to in the complaint, situated in said county, and also had on deposit in the Sacramento bank the sum of \$1,800; that he then owned no other property, real or personal; that on said last-named day Mary was a creditor of said Bernard, who, "without any valuable or adequate consideration therefor, transferred and conveyed to the said Michael Shiels all of the above-described real estate and said sum of money so on deposit as aforesaid, and from the time of said conveyance and transfer until his death he had no other property out of which said debt could be paid, and he thereby rendered himself insolvent, and he continued to be insolvent up to the time of his death." It is further alleged that said transfer was "with fraudulent intent and purpose to hinder and defraud the said Mary Shiels, and to prevent her from resorting to said real estate and money whereby to collect and satisfy her said debt, and to avoid the payment of the same"; that said Michael immediately thereafter removed said money without the jurisdiction of this court; that there are no assets in the hands of plaintiff nor in the estate of said Bernard Shiels, deceased, with which to pay said claim of said Mary Shiels, or to pay the costs and expenses of administering said estate, and it is necessary to recover the whole of said real estate for such purposes."

The claim referred to in the complaint and as presented and allowed reads as follows: "In the Matter of the Estate of Bernard Shiels, deceased. The undersigned, a creditor of Bernard Shiels, deceased, presents her claim against the estate of said deceased, with the necessary voucher for approval, as follows, to wit: "Estate of Bernard Shiels, deceased, to Mary Shiels, Dr. March 7, 1906. To money owing, due and unpaid from said Bernard Shiels at the time of his death, to claimant founded upon the facts set forth in the statement hereto annexed, and which is made part hereof, and is explanatory of this claim, \$1,691.00. Interest owing, due and unpaid on said sum of \$1,691.00, from the 14th day of November, 1890, to date, at the rate of 7 per cent. per annum, \$1,814.00. Total, \$3,505.00."

It is set forth in the claim that Bernard and Mary married on November 28, 1872, and were husband and wife until the death of Bernard, December 31, 1902; that during their marriage and up to November 14, 1890, they had, by their joint labor, accumulated "a large amount of money and other property which was then their community property"; that, owing to differences then existing between them, they mutually agreed to make an equal division between them of all their

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said community money and other community property, and to live separate and apart from each other, and that they would select two men to make a true and correct inventory and appraisal of all their said community property, who should divide the same equally between them, and that each of them should furnish to said two men "a full, true, and correct statement and memorandum of all of said community money and other property that each of them had in his or her possession and under his or her control"; that pursuant thereto claimant did on November 14, 1890, furnish to the said Bernard and the said two men a full statement of all said property in her possession or control, and the said Bernard "furnished to claimant and said two men what he represented and stated to be, and what claimant then believed to be, a full, true, and correct statement and memorandum of all said community money and other property that was then in his possession and under his control, and claimant believed, and had full confidence in said Bernard Shields, and in his said statement and memorandum, and his assurance, that he had made to her, that said statement and memorandum contained a full, true, and correct statement of all of said community money and other community property that was then in his possession and under his control, and in making a division of said community, claimant believed, and acted solely upon said representations, statement, and memorandum of the said Bernard Shields"; that said two men acted upon said statement and divided the property accordingly, and, believing said statement to be true, claimant accepted the share set apart to her and consented to the division so made, and thereupon she and said Bernard entered into an agreement in writing to live separate and apart from each other; that from said 14th day of November, 1890, to the day of the death of said Bernard, she remained separate and apart from her said husband, supported herself, and in all respects complied with said agreement of separation; that during all said time she knew nothing of Bernard's business affairs and had no means of knowing or ascertaining anything about his business matters, or of the amount of said community property in his control, and did not know or discover until after his death and until letters of administration were issued to her, on November 25, 1903, that he had money which he had concealed from her and said two men at the time of said division; but that after said letters were issued to her, to wit, on November 28, 1903, she ascertained from the Sacramento Bank, in the city of Sacramento, on presenting to it her authority to act as administratrix of Bernard's estate, that on November 14, 1890, said Bernard had on deposit in said bank the sum of \$3,382, which was community property, and which he had concealed from

claimant and said two men and was not taken into account in said division and no part thereof was ever paid to her; that one-half thereof belonged to her by virtue of said agreement of separation, and she was entitled thereto on said November 14, 1890, and it was due to her at the date of his death. The claim was duly verified and bore the following indorsement: "Allowed and approved for \$3,505.00 this 7th day of March, 1906. Peter J. Shields, Judge. Filed Mar. 7, 1906. Wm. B. Hamilton, Clerk, by S. B. Keller, Deputy."

Defendant demurred to the complaint on several grounds: (1) That the court was without jurisdiction because it does not appear that defendant, as a trustee, has possession of the property; (2) that there is a defect of parties defendant, in this, that Michael Shields died testate, and his heirs are not made parties defendant; (3) that sufficient facts are not alleged to constitute a cause of action; (4) that the complaint is uncertain, unintelligible, and ambiguous, in this, that no copy of the claim, in form or substance, as required by section 1494, Code Civ. Proc., is attached to the complaint; (5) that no facts are set forth in support of the averment that certain real estate was transferred "with the fraudulent purpose to hinder and defraud," etc. The complaint is demurred to also as barred by certain sections of the Code of Civil Procedure. The demurrer was overruled, properly we think, and defendant answered, pleading the statute of limitations in bar of the action. Denials were made to the material averments of the complaint, except the averments in the first and second paragraphs thereof, in the language of the complaint. For example, the averment of the complaint that at his death Bernard was indebted to Mary in the sum of \$1,691, and averments in that connection are simply denied in the language of the complaint. So of the averments as to the presentation and allowance of her claim by Judge Shields. So also of the averments that there are no assets in the hands of plaintiff as administratrix of the estate of Bernard with which to pay said claim or costs and expenses of administration, "and it is necessary to recover the whole of said real estate for such purpose."

A defense is pleaded on the ground that plaintiff, prior to the commencement of the action, conveyed an interest in the property described in the complaint to Messrs. Hinkson & Elliott (who are her attorneys), and that they are necessary parties to the action. This is not urged in appellant's brief and may be dismissed from consideration.

A defense is also pleaded that plaintiff knew, about the time of its execution, of the execution of the deed from Bernard to Michael, mentioned in the complaint, and is guilty of laches, and should therefore not be permitted to maintain the action and is

estopped thereby. The answer also pleads laches, in that the complaint fails to show that plaintiff made any effort to recover said money, or property until October 13, 1906, when the complaint was filed, being more than five years after Bernard bought the land in question. But the statute of limitations began to run from the date of the discovery of the fraud, which was in 1903.

The court found the averments of the complaint to be true, except that the amount of money on deposit in the Sacramento Bank was \$1,727.78 at the time claimed, to wit, December 26, 1902, and except, also, that the evidence did not show that Michael removed the money from this jurisdiction, but that Bernard did, on December 26, 1902, transfer said money to Michael, and he caused the same to be transferred to his credit and on January 3, 1903, he removed the same from said bank and closed his account; that the conveyance to Michael by Bernard was voluntary and without any valuable consideration and was made while he was in debt to Mary "with intent on his part to hinder, delay, and defraud the said Mary Shiels in the collection of her said claim and to defeat the same and deprive her of her rights." The court finds against defendant as to the material averments of his answer. The judgment was that plaintiff recover "for the benefit of the creditors of Bernard Shiels, deceased, and of his estate," and that the title to the lots in question be henceforth, "without further act or proceeding, vested in the plaintiff for the purposes hereinbefore set forth, free and clear of all claims of said defendant as administrator of the estate of Michael Shiels, or any other person, or persons, claiming by, through, or under said estate of Michael Shiels, deceased, or the defendant as administrator."

Defendant gave notice that he would, on April 17, 1908, move to vacate the judgment on the ground that it was rendered through mistake, inadvertence, surprise, and excusable neglect. The motion was denied, and, as the appeal from that order is now pressed, it will not be considered.

Defendant also moved for a new trial on most of the statutory grounds, which motion was denied. He appeals from the judgment, from the order refusing to vacate the judgment, and from the order denying his motion for a new trial.

When the cause was called for trial, the court asked counsel for plaintiff, after he had read the complaint, whether the allegations of plaintiff were denied by defendant. He replied: "We admit that defendant has attempted to deny all the allegations of our complaint, except paragraphs 1 and 2 thereof, which are admitted; but we do not concede that the denials of defendant are sufficient."

Over defendant's objection, plaintiff sub-

mitted evidence showing: That the court had approved and allowed the claim as set forth in the complaint; the will of Bernard by which he devised all his property to his brother Michael, to show an intention, at the time he made the deed, to exclude plaintiff from sharing in his estate; petition of Michael, as executor of Bernard's estate, asking his discharge, and to show that he therein reported to the court that he was unable to discover any property belonging to Bernard, and for that reason asked his discharge; the order of discharge showing that it was made on the ground stated in the petition; inventory in the matter of the estate of Michael showing that it returned the lots in question as part of Michael's estate, of the inventory value of \$5,050. It was shown by witnesses that Bernard, when making his deed to Michael, expressed the intention that his wife should have none of his property, as he had made ample provision for her, and she had property of her own, and that he desired that Michael should have all the property he possessed. It was also proven that on December 26, 1902, Bernard had on deposit in the Sacramento Bank \$1,728.78, and that he transferred the account to Michael on that day, who drew the money out January 3, 1903, and closed his account.

Defendant offered no evidence. He pleaded the deed from Bernard to Michael and the settlement contract between Bernard and his wife, which, not being denied, are deemed admitted.

Appellant urges many points in support of his contentions: That the demurrer should have been sustained; that his motion for nonsuit should have been granted; and that the evidence does not support the findings. The questions in controversy are more or less involved in all these contentions and may be considered without special reference to either one in particular.

1. It is claimed that the appointment of Mrs. Shiels as administratrix of Bernard's estate was without jurisdiction for the reason that the executor (Michael) of that estate was discharged and jurisdiction over the executor and over the property of the estate was terminated. The only ground for asking the discharge or for making the order, so far as appears, was the averment in the petition, found as fact in the order, that the executor was unable to discover any property belonging to the estate. The contention is that by the discharge the court lost jurisdiction which could only be regained by setting aside the order on some sufficient ground made to appear, and, as no such step was taken, the court could not appoint an administratrix with the will annexed. Section 1698, Code Civ. Proc., provides that the final settlement of an estate shall not prevent a subsequent issue of letters, "if other property be discovered, or if it become necessary or proper for any cause

that letters should be again issued." The point is without merit. To have vacated the order discharging Michael as executor would have had the effect to restore him to his office; but he was then dead, and the order would have been futile. The jurisdiction of the court over the estate continued as to subsequently discovered property of deceased. The statute gives the court jurisdiction, even "after the final settlement of an estate," to subject newly discovered property to administration and this without disturbing the settlement. Furthermore, the due appointment of Mrs. Shiels was alleged in the first paragraph of the complaint, and this paragraph is not denied.

2. The other questions are directly or remotely connected with the approved claim of Mrs. Shiels. It therefore becomes of the first importance to determine its status and the extent to which its approval and allowance figure in the case, since it is conceded that it was necessary for plaintiff to show that she was a creditor of the estate of Bernard, which appeared only through her approved claim.

Section 1497, Code Civ. Proc., reads: "Every claim allowed by the executor or administrator, and approved by a judge of the superior court, or a copy thereof, as hereinafter provided, must, within thirty days thereafter, be filed in the court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration."

Section 1510, Code Civ. Proc., provides: "If the executor or administrator is a creditor of the decedent (the case here), his claim, duly authenticated by affidavit, must be presented for allowance or rejection to a judge of the superior court, and its allowance by the judge is sufficient evidence of its correctness, and must be paid as other claims in due course of administration."

It was held in *Estate of More*, 121 Cal. 635, 54 Pac. 148, that the judgment of a court and the approval of a claim by the judge are of equal force. See, also, *Hall v. Cayot*, 141 Cal. 13, 74 Pac. 299. Section 1504, Code Civ. Proc., practically so declares. Speaking of the judgment of the court, the court, in *Estate of More*, supra, said: "It did, however, establish the claim in the same manner as if it had been allowed by the judge, and was prima facie evidence of its correctness. The judgment was, however, subject to be afterward contested by any person interested in the estate, in the same manner and to the same extent as other allowed claims might be contested. But in all such cases the burden is upon the party contesting to show that the claim was not properly allowed"—citing *Estate of Loshe*, 62 Cal. 413; *Estate of Swain*, 67 Cal. 637, 8 Pac. 497. In *Estate of Loshe*, the court said: "It is not necessary to consider how far the allowance and approval of a claim resemble or give the effect of a judg-

ment; it is sufficient to say that such a claim is to 'rank among the acknowledged debts of the estate, to be paid in due course. If it be an acknowledged debt, it is good until cause be shown.'" In these cases the question arose at some stage of the administration; but we see no reason why the same rule should not apply where, as here, the plaintiff, as a creditor, pleads her approved claim in support of her action. To the extent of showing that she is a creditor, the approved claim should be treated "as an acknowledged debt of the estate," and the burden to show otherwise should be, and we think is, upon the party assailing it. Section 1589, Code Civ. Proc., makes it the duty of the executor or administrator to prosecute the action to recover for the benefit of the creditors of the estate all real estate fraudulently conveyed by the decedent, in his lifetime, and the action may be prosecuted by an administrator who is a creditor, even if a sole creditor.

Appellant contends that the allowance of Mrs. Shiels' claim cannot affect him, as he was a stranger to the estate and was not a party or privy thereto, citing *Shay v. McNamara*, 54 Cal. 169. It is true that a judgment is an estoppel only as to parties and privies. But subject, however, to the right of an interested party to have the allowance of a claim set aside for cause, all the world are parties to the probate proceedings relating thereto and are bound thereby, where the probate proceedings have been regularly pursued. Let us, then, consider the attack made upon the claim of Mrs. Shiels.

3. It is claimed that the action is barred in three years by subdivision 4, § 338, Code Civ. Proc., if it is for relief from fraud or mistake; that it is barred in two years by subdivision 1, § 339, Code Civ. Proc., if the claim is upon contract not founded upon an instrument in writing; and is barred in four years by section 343, Code Civ. Proc., if the action is for relief not otherwise provided for.

It seems to us that the claim is based upon the contract entered into between Bernard Shiels and his wife as set forth in the statement of facts therewith made. We must presume that before or at the time the judge approved the claim, he heard evidence in support of the facts averred in the claim and found them to be true. Briefly, that Bernard, at the time the agreement of separation was entered into had a deposit in the Sacramento Bank of \$3,382, belonging to the community, which he purposely and fraudulently concealed from his wife and of which he made no account in returning to her, and to the two men chosen to divide the property, a memorandum of the community property in his possession, to one-half of which, \$1,691.00, she was entitled by the agreement, with interest to March 7, 1906, the date of filing the claim, amounting to \$1,814.00; that by

the agreement each was to make a full, true, and correct statement and memorandum of all the community property in possession or control of each; that claimant had full confidence in her husband and in his statement and his assurance then made to her that it contained a true and correct return of all his said property; that in making said settlement she "believed and acted solely upon said representations and memorandum of the said Bernard Shiels," as also did the said two men chosen to make said division of the property; that she had no means of ascertaining the facts, and did not discover said money so deposited until shortly after letters were issued to her, to wit, November 28, 1903, and then for the first time was informed by the officers of said bank that Bernard had money on deposit (the amount set out in the claim) at the date of the separation. The claim was admitted in evidence as presented to and allowed by the judge. Defendant offered no evidence tending to dispute any of the facts presumably determined by its approval, and the only defense now made to it is the statute of limitation and laches in failing to make due inquiry. The discovery of the fraud was made November 28, 1903, and the action was brought within three years thereafter, to wit, October 13, 1906. While the action is upon the agreement of separation, the relief sought is for fraud—"The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." Subdivision 4, § 338, Code Civ. Proc. The action was not barred by any statute of limitation. It does not appear from the transcript that Michael, while acting as executor, or at all, filed any affidavit showing that he published notice to creditors, in the matter of the estate of Bernard, nor did it appear that Mrs. Shiels had any knowledge that notice to creditors had been published.

4. It is true that many years passed before the discovery was made by Mrs. Shiels, and it is urged that she ought to have shown that she made some effort to ascertain the facts, that available means of knowledge amount to knowledge, and that there is an utter failure to show any sort of diligence in making the discovery from 1890 until 1903. The answer is that the relation of husband and wife is one of the highest degree of confidence and trust, and although in this case they had "differences," not explained, which led to their separation, the claim stated, and the judge presumably found as fact, that the wife had confidence in her husband and trusted him in making return of his property. Differences might have existed without destroying confidence in each other's honesty and integrity. The husband is entitled to the exclusive possession and control of the community property and presumably knows all about it, while no such presumption attaches to the wife. Accepting the settlement upon

the belief that her husband had returned all the community property, she had a right to rest in that belief and was not called upon to pursue an independent search for other property; to have done so would have implied want of confidence in her husband's honesty in making return of the property, whereas her belief in and reliance upon his honesty was the ground on which she accepted the settlement. We do not know, except from the facts stated in the claim, when or how her suspicions were aroused, or when or how she came to make inquiry as to the facts; they were inquired into by the judge who allowed the claim. There is no evidence of any facts or circumstances from which it might be inferred that she knew or had any reason to believe that her husband had deceived her at the settlement, prior to the actual discovery.

5. It is argued, as evidence of her unfairness and laches, that although she learned of the fraud in November, 1903, she delayed the presentation of her claim until after the death of her husband's brother, Michael, to whom the property in question had been conveyed by Bernard; that by his death she could not be confronted with his testimony in explanation of the conveyance. The deed shows that it was without consideration other than love and affection. Besides, it cannot be assumed, and it did not appear, that Michael knew anything about the facts existing at the time of the separation. The defense of laches is sometimes sustained, although the period of delay is less than that provided by the statute of limitation. Mere lapse of time less than the statutory period of limitation will not bar action for equitable relief, unless the delay, under the circumstances, has been such as to justify the presumption that the defendant may have been prejudiced thereby. *Ex-Mission Land Co. v. Flash*, 97 Cal. 610, 32 Pac. 600; *Cahill v. Superior Court*, 145 Cal. 47, 78 Pac. 467; *Cook v. Ceas*, 147 Cal. 614, 82 Pac. 370. There is nothing in the record tending in the slightest degree to show that the heirs of Michael or any creditors interested in his estate have suffered or will suffer prejudice by the delay in presenting the claim.

6. It is urged that there was no evidence of actual fraudulent intent in conveying the property to Michael. The claim presented to and allowed by the judge raised no issue as to the land in question or its transfer to Michael. Only such facts or issues as were then raised are to be deemed adjudged by the allowance. The complaint avers that Mary Shiels was a creditor of Bernard at and before the date of the transfer; that "he, without any valuable or adequate consideration therefor," conveyed to Michael the land and the money on deposit, and thenceforward to the date of his death "he had no other property out of which said debt could be paid, and he thereby rendered himself insolvent," and so continued until he died. It has been

held that under section 1589, Code Civ. Proc., it must appear: "(1) That there are creditors to be paid; (2) that there is an insufficiency of assets in the hands of the administrator to meet their demands; and (3) the claims of creditors must be evidenced by a judgment obtained in this state, or they must have been allowed by the administrator or executor, which is the equivalent of a judgment. *Algeltinger v. Einstein*, 143 Cal. 609, 615, 77 Pac. 669, 101 Am. St. Rep. 131. (Of course, the approval by the judge takes the place of the allowance by the administrator when the latter is the claimant.) Section 1589 authorizes the action "when the decedent, in his lifetime, has conveyed any real estate, * * * with intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or has so conveyed such estate that by the law the deeds or conveyances are void as against creditors."

There was evidence tending to establish the requirements mentioned in the case cited. It was, however, necessary to show further that the conveyance was with fraudulent intent. It was held, in *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 302, that, where the consideration was love and affection alone, it was not insufficient unless made with intent to defraud the creditors; that the intent is a question of fact; and that a voluntary conveyance is not prima facie fraudulent, and fraudulent intent is not to be arrived at as a presumption of law. It was further held in that case: "Pronounced insolvency at the time of the grant would, no doubt, be a strong circumstance tending to show fraudulent intent, and, in the absence of other controlling facts, it would be sufficient to justify a finding of such intent."

It appeared from the evidence that Bernard was mortally ill and in the hospital when he made the conveyance, and died five days thereafter; that he declared that it was his intention to convey all the property he possessed, and, so far as known, he did so; that his brother Michael served for a time as executor of Bernard's estate and could find no property belonging to him and for that reason asked to be and was discharged. We think the evidence was sufficient to justify the finding that by the conveyance he rendered himself insolvent. Strictly, he was not insolvent when he made the conveyance, but, coincidentally with and by that act, he became insolvent, and this, we think, brings the case within the rule in *Emmons v. Barton*, supra, and justifies the finding that the conveyance was with fraudulent intent to defraud his creditors.

Whether section 1589, Code Civ. Proc., is to be given the same effect as section 3442, Civ. Code, need not be decided, for, if so, by the terms of the latter section any transfer made "voluntarily, or without valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors."

In *Gray v. Brunold*, 140 Cal. 615, 74 Pac. 303, it was said that an allegation of intent to defraud is no longer required, under section 3442, where insolvency is alleged; but in *Estate of Vance*, 141 Cal. 624, 75 Pac. 323, the court said that intent to defraud must be alleged, and that the proviso in the section is a rule of evidence and not of pleading. Nevertheless, proof of insolvency establishes the intent. Here there were sufficient allegations and proof. Conceding the rule, appellant says the section does not apply here because there is "but one creditor, and that creditor created by the fraud itself." This rather singular contention is based on the fact that "it was necessary to prove the fraud in the first place, before any advantage can be taken of any special presumption of fraud, in order to establish the status of the plaintiff as a creditor, so that it could be claimed that the transfer was made by an insolvent." We fail to see any force in this point. If she was a creditor, it is immaterial how she became such creditor.

7. It is urged that the judgment is erroneous because it does not conform to the provisions of the Code authorizing it.

Section 1589, Code Civ. Proc., provides that the administrator "may recover for the benefit of the creditors all such real estate so fraudulently conveyed," etc. Section 1591 provides: "All real estate so recovered must be sold for the payment of debts, in the same manner as if the decedent had died seized thereof, upon obtaining an order therefor from the court; and the proceeds * * * must be appropriated in payment of the debts of the decedent in the same manner as other property in the hands of the executor or administrator. The remainder of the proceeds, after all the debts of the decedent have been paid, must be paid to the person from whom such property was recovered."

In *Emmons v. Barton*, 109 Cal. 662, 668, 42 Pac. 302, 304, it was held that, in a case like this, "the judgment should be that the property fraudulently conveyed, or so much thereof as is necessary, be applied to the satisfaction of the debts, and that the residue, if any, go to the grantee. It is not to go into the assets of the estate for any purpose other than the payment of the debts. The residue does not go to the heir; for he stands in the shoes of the fraudulent grantor." See *Tully v. Tully*, 137 Cal. 60, 66, 69 Pac. 700. In *Estate of Page*, 57 Cal. 238, 241, it is said: "But the property, when recovered, must be inventoried as assets of the estate, and sold for the payment of debts, in the same manner as if the decedent had died seized thereof"—citing sections 1589, 1591, Code Civ. Proc.

As the conveyance by Bernard Shields was void, the statute authorized the recovery of the property and its sale for the benefit of the creditors of Bernard, and to make a sale the title would have to be vested in the administratrix. The judgment vested the title

in the administratrix for the benefit of creditors, which was proper; but it also declared it to be "free and clear of all claims of the said defendant as administrator of the estate of Michael Shiels, deceased, or any other person, or persons, claiming by, through, or under said estate of Michael, deceased, or of the defendant as such administrator." This was unauthorized. The heirs of Michael are entitled to the surplus, if any, after the property is sold, and the decree should so provide.

The order denying defendant's motion to vacate the judgment and the order denying his motion for a new trial are affirmed. The judgment is modified by striking out the portion last above quoted and in lieu thereof inserting the following: "And upon the sale of said premises the proceeds thereof shall be applied to the payment of the claims of the creditors of the said Bernard Shiels, which have been or shall be duly allowed, and the residue of such proceeds shall be paid to the administrator of the estate of Michael Shiels, deceased."

And as thus modified, the judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(12 Cal. A. 572)

VAN VALKENBURGH v. OLDHAM et al.
(Civ. 681.)

(Court of Appeal, Third District, California.
Feb. 8, 1910. Rehearing Denied March 9,
1910; Denied by Supreme Court April 7,
1910.)

1. MORTGAGES (§ 76*)—VALIDITY—CONSENT OF PARTIES.

Under Civ. Code, § 1535, providing that the consent of the parties to a contract must be free, mutual, and communicated by each to the other, if the consent of a party to a note and mortgage was not freely or voluntarily given, they were void even though signed by the party.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 174, 175; Dec. Dig. § 76.*]

2. MORTGAGES (§ 86*)—VALIDITY—MISREPRESENTATION—FRAUD—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

In proceedings to foreclose a mortgage, evidence held to show that no misrepresentation was made, no undue influence exerted, nor fraud practiced in procuring the mortgage, and that the execution of the note and mortgage was the voluntary act of the mortgagor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1364; Dec. Dig. § 86.*]

3. WORDS AND PHRASES—"PERSUASION"—"COERCION."

Persuasion is not coercion.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, p. 5367; vol. 2, pp. 1241-1242.]

4. WORDS AND PHRASES—"UNDUE INFLUENCE."

Insistence upon one's legal rights is not undue influence.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172; vol. 8, pp. 7323-7324.]

5. WORDS AND PHRASES—"FRAUD."

Pertinacious zeal to secure the payment of a just debt is not fraudulent.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2943-2954; vol. 3, p. 7663.]

6. MORTGAGES (§ 25*)—VALIDITY—CONSIDERATION—EVIDENCE—SUFFICIENCY.

In proceedings to foreclose a mortgage, evidence held to show a consideration for the note and mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 42, 1364; Dec. Dig. § 25.*]

7. EVIDENCE (§ 320*)—HEARSAY.

Evidence of a witness that he had heard an instrument spoken of and it was dated anywhere from the 9th or 10th up to the 15th of the month was properly stricken out as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1201; Dec. Dig. § 320.*]

8. GUARANTY (§ 36*)—LIABILITY OF GUARANTOR.

A guarantor's liability is limited to the terms of the agreement.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 38; Dec. Dig. § 36.*]

9. PRINCIPAL AND SURETY (§ 59*)—LIABILITY OF SURETIES.

Sureties are entitled to stand on the precise terms of the bond and are not bound beyond its strict letter.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 103; Dec. Dig. § 59.*]

10. MORTGAGES (§ 63*)—VALIDITY—"EXECUTION"—DELIVERY.

Under Code Civ. Proc. § 1933, defining the execution of an instrument, the term "execution," as applied to a mortgage, includes delivery.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 161; Dec. Dig. § 63.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2558-2561.]

11. MORTGAGES (§ 74*)—VALIDITY—DELIVERY—POSSESSION OF INSTRUMENT—PRESUMPTION.

In proceedings to foreclose a mortgage, where it was actually in possession of the mortgagee at the time of trial and was not introduced in evidence by him, the presumption that they came into his possession lawfully is sufficient to support a finding of delivery.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 172; Dec. Dig. § 74.*]

12. JURY (§ 14*)—RIGHT TO TRIAL BY JURY—MORTGAGE FORECLOSURE.

Defendant in proceedings to foreclose a mortgage is not entitled to a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 46; Dec. Dig. § 14.*]

13. EVIDENCE (§ 186*)—SECONDARY EVIDENCE—LOSS OF PRIMARY EVIDENCE—ADMISSIBILITY OF COPY.

Under Code Civ. Proc. § 1855, providing in what cases the contents of a writing may be proved, where the showing was sufficient to justify the conclusion that the original was either lost or destroyed, a copy was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 667; Dec. Dig. § 186.*]

14. WITNESSES (§ 372*)—INTEREST—MOTIVE—CROSS-EXAMINATION TO SHOW.

Under Code Civ. Proc. § 1847, providing how the presumption that a witness speaks the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

truth may be repelled, it is proper to show motive and interest on cross-examination.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1192; Dec. Dig. § 372.*]

15. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The refusal to allow a witness to answer a question as to whether he expected to make a pretty good fee if he made the collection was without prejudice where he had already testified that the matter had been put in the hands of his father and himself for collection, since the court could assume that they were to be compensated for their services.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4201; Dec. Dig. § 1058.*]

16. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR — EXCLUSION OF EVIDENCE.

The rejection of evidence subsequently admitted is harmless error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4200; Dec. Dig. § 1058.*]

17. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR — EXCLUSION OF EVIDENCE.

The rejection of evidence previously admitted is harmless error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4200; Dec. Dig. § 1058.*]

18. APPEAL AND ERROR (§ 1002*)—REVIEW—CONFLICTING EVIDENCE.

Where the evidence is substantially conflicting upon all material points, it will not be reviewed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Appeal from Superior Court, San Joaquin County; O. W. Norton, Judge.

Action by R. W. Van Valkenburgh against D. A. Oldham and Cynthia A. Blackburn. From a judgment foreclosing a mortgage upon certain real estate belonging to Cynthia A. Blackburn, she appeals. Affirmed.

A. H. Carpenter, for appellant. Webster & Webster, for respondent.

BURNETT, J. The appeal is from a judgment foreclosing a mortgage upon certain real estate belonging to appellant. The nature of the defense is shown by the following averment of the answer: "That neither the note nor the mortgage set forth and described in the plaintiff's said complaint herein were executed by her willingly, freely, or voluntarily, and the same are not and never were her obligations; and her signature to each of said documents, if either or both were signed by her, was obtained by fraud, menace, and undue influence in the following manner and way." Then follows a description in detail of the transaction relating to the execution of said note and mortgage in which are set forth sufficient facts, if established by the evidence, to defeat the action. Indeed, appellant's story, as told upon the witness stand, is a pathetic recital of the subjugation of her will and the coercion of her understanding by the importunity, pertinacity, and misstatements of the stronger personalities interested

in obtaining the security, but the case presents a very different aspect when viewed in the light of the testimony of other witnesses. It is true that extreme anxiety was manifested by plaintiff and considerable explanation and persuasion were necessary to induce appellant to execute said note and mortgage, but in contemplation of the rule as to conflicting testimony and of the discretion as to the weight of evidence granted by the law to the trial court, it cannot be said that there was anything in the conduct of plaintiff which is opposed to good morals, legitimate business methods, or any mandate of the statute. This, we think, will appear as we proceed to notice specifically the various contentions of appellant.

1. There can be no controversy as to the principles of law announced by appellant that if the consent of Mrs. Blackburn was not freely or voluntarily given, the note and mortgage were void, even though signed by her. Civ. Code, § 1563; *Loaiza v. Superior Court*, 85 Cal. 80, 24 Pac. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197. And, if executed, fraud, menace, duress, or undue influence would render them void. Civ. Code, § 1567; *Morrill v. Nightingale*, 93 Cal. 455, 28 Pac. 1068, 27 Am. St. Rep. 207. And consent is deemed to have been obtained through one of these causes when it would not have been given had such cause not existed. Civ. Code, § 1568; *Stockton, etc., Works v. Insurance Co.*, 98 Cal. 558, 33 Pac. 633.

But the history of the transaction, as gathered from the testimony of plaintiff's witnesses, shows these facts: On May 29, 1906, appellant guaranteed any indebtedness to accrue after that date from a certain firm of Price & Oldham to the California Electrical Works, a corporation (plaintiff's assignor), to the extent of one thousand dollars. By reason of this guaranty, the said corporation furnished said firm with merchandise to the extent of \$945. In settlement of this sum the defendants Oldham and Blackburn (the latter as surety) gave their promissory note secured by said mortgage of appellant's property. The one thousand dollar guaranty was then canceled and given to the defendant Blackburn.

As to the immediate circumstances attending the execution of the note and mortgage, the witness Percy Webster testified: "The plaintiff told Mrs. Blackburn that he intended to do what was right; he didn't want anything that did not belong to him, but his company could not afford to lose the money; they looked to him as the man who had let the account be carried, and he wanted to see them whole in the matter, he didn't like to make a woman pay it, particularly if she didn't have much money, but as long as the guaranty was signed by her and Price & Oldham were not good for it, he would have to look to her. As I remember it Mrs. Blackburn then

said that she did not think she wanted to pay it; she would want to see somebody; and Mr. Van Valkenburgh said that she could see somebody if she wanted to, but he would not do anything but what was right; all he wanted was his money and no more; and she said that she didn't have any money with which to pay, but she had this property, and it was suggested to her that she could give a mortgage on her property for the payment of it. Mrs. Blackburn asked how that would be done, and then they had some lengthy conversation as I remember it about what to make the terms of the note; they talked it over with Mr. Oldham, and he was told that he really ought to pay it; he said he felt that too, he didn't want to make her pay it; he didn't have any property, but he had an interest in the Commercial Credit Company, and he would be willing to turn over the net profits of that company to the payment of this; and Mr. Van Valkenburgh I believe made the assertion that that was not very good security, but Mrs. Blackburn's property would be, and Mr. J. B. Webster suggested that Oldham give an agreement that he would make the payments, and they figured it out, and he figured that the net proceeds as he made it would be about \$25 a month; he would be willing to apply those in payment of the note, and then they had some talk about what interest was to be paid, and Mr. Van Valkenburgh said he would not make that heavy, make it as light as possible, and called it 5 per cent., and that was agreed upon, and Mrs. Blackburn was asked if that would be satisfactory to her, and she said, 'Yes.' The mortgage was then prepared, but a mistake was made in the description. The mistake was corrected, after the mortgage had been read to Mrs. Blackburn and signed by her. After the correction the instrument was again read to her, and "I asked her if that was her signature to it; she said, 'Yes'; I said, 'You then acknowledge this mortgage with the change?' She said she did; then I made the acknowledgment; I initialed the change on the mortgage; the note and mortgage were signed at that time by Mrs. Blackburn, and then this agreement—there was an agreement made between Mr. Oldham and Mrs. Blackburn; I wrote it myself; that he would hold her harmless from the payment of this account; the agreement also assigned to her the net proceeds of the Commercial Credit Company. After this note and mortgage was signed and executed, Mrs. Blackburn made the remark to Mr. Oldham, 'Now, you don't want to let me pay this, you want to see you keep up the payments.' Oldham said he certainly would, he would apply the \$25 and maybe more, if the business was good, so as to wipe it out as quickly as possible. Mrs. Blackburn said, 'I hope so, because I hate to have the neighbors know I have a plaster on my house.' Before the execution of the three papers by Mrs. Blackburn, the paper (the guaranty) was explained to her, its contents

were explained to her, and after the execution of the three papers, and just before she was leaving, she said she ought to have it, and Mr. Van Valkenburgh said he ought to have it to show his position in the matter, why he was taking the note and mortgage; you said to him she was entitled to it on giving the note and mortgage and she was given the original." It is true the witness stated that appellant was agitated and in tears a part of the time, but it seemed due to her conviction that she had been robbed by one Price who was formerly a member of the firm of Price & Oldham. The only conclusion to be drawn from the testimony of this witness, as we are required to regard it, is that no misrepresentation was made, no undue influence exerted nor fraud practiced in the transaction, but that the execution of said note and mortgage was the voluntary act of said appellant. The same may be asserted of the testimony of plaintiff, although some isolated sentences give color to appellant's contention that advantage was taken of her necessities. Persuasion is not coercion; insistence upon one's legal rights is not undue influence; and pertinacious zeal to secure the payment of a just debt is not fraudulent.

2. It is claimed that another fraud was perpetrated by the insertion in the note and mortgage of \$124.99, an indebtedness of Price & Perkins, which, it is asserted, was not included in the guaranty. Reliance is had upon the testimony of plaintiff that everything that was billed prior to June 9th was shipped to Price & Perkins, which amounted to \$124.99, and the amount shipped to Price & Oldham was \$834.03. Appellant's obligation was expressed as follows: "In consideration of one dollar paid to me by the California Electrical Works and the extension by such company of credit on account from time to time to Price & Oldham which I hereby request, I guarantee the payment of all balances on account and all notes given by them for or on account of such balances up to the sum of one thousand dollars as the same shall become due and payable by them to such company. * * * All bills shall become due the 15th of the month following their dates." The effect of appellant's contention would be to reduce the amount of the principal of the note and mortgage to the extent of said \$124.99, but we are required to reject this view since plaintiff testified that, "During the latter part of May, Price came to my office and asked to open an account with them, which I told him we could not do unless he could give us a guaranty. He asked me to open the account in the name of Price & Perkins, and sent a guaranty some few days later in the name of Price & Oldham. In the meantime before he had sent us a guaranty he had sent us a number of orders covering material which he asked us to ship, and these orders were headed Price & Perkins. He asked us to ship them, but we held them

awaiting this guaranty. When the guaranty came we shipped a certain part of those orders, and our billing department and shipping department headed our shipping tags 'Price & Perkins.' The shipments were made to Price & Perkins and were taken out by Price & Oldham, Price & Perkins having gone out of business in the meantime, and Price & Oldham succeeding them. All of the material, however, that is charged in either one of those accounts was received by Price & Oldham, and none of the material by Price & Perkins, because we have never made a shipment upon open account to Price & Perkins." Turning to the Price & Perkins account, we find that every item on the debit side, which was charged against appellant, became due after May 29th, the date of the execution of said guaranty. There is evidence, also, that the whole matter was explained to appellant before she executed said note and mortgage. There seems, therefore, no question as to the consideration for the said note and mortgage.

3. There is apparently no merit in the contention that the guaranty was fraudulently dated. It is based upon the testimony of one R. B. Green who declared that he was in Stockton when the guaranty was executed and was in Ashland or Grant's Pass, Oregon, on May 29th, the date the instrument bears, and did not return till June 4th, but he further testified: "I didn't witness the document, but I heard it spoken of, and it was anywhere from the 9th or 10th up to the 15th of June, 1906." His testimony in reference to the date of the execution of said instrument was very properly stricken out as hearsay. It is undoubtedly true that the guarantor's liability is limited to the terms of the agreement (*Glassell v. Coleman*, 94 Cal. 260, 29 Pac. 508), and sureties are entitled to stand on the precise terms of the bond and are not bound beyond its strict letter (*Cadenasso v. Antonelle*, 127 Cal. 382, 59 Pac. 765); but these requirements are met by the testimony of the witnesses for the plaintiff and the said amount of \$945 is thereby brought within the operation of said guaranty.

4. Another point made is that the mortgage is void for want of delivery. Appellant asserts that "Mrs. Blackburn testified that she had no recollection of signing the note and mortgage on her home, and she asserted positively under oath that she never delivered either of those two alleged documents to the plaintiff or to any other person for him, and her evidence is undisputed." As to this it may be said that the court was entirely justified in concluding from all the testimony of appellant that she was mistaken in the foregoing declaration. Besides, while no witness stated that the note and mortgage were "delivered," it is impossible to give full credit to the testimony of plaintiff's witnesses without reaching the conclusion that everything was done which is nec-

essary to make said instruments effective. There is, moreover, the positive assertion of the said witness Webster that "this note and mortgage was signed and executed." The term "executed," as applied to such instruments, has a well-defined meaning, and includes delivery. Code Civ. Proc. § 1933; *Clark v. Child*, 68 Cal. 87, 4 Pac. 1058; *Nicholson v. Combs*, 90 Ind. 515, 46 Am. Rep. 229. Again, the same witness testified that he told appellant of having had the mortgage recorded, and the instruments were actually in possession of plaintiff at the time of the trial, and were introduced in evidence by him. The presumption that they came into his possession lawfully would be sufficient to support a finding of delivery.

5. Appellant complains because the court denied her request for a jury trial. A sufficient answer is found in the decision of the Supreme Court in *Downing v. Le Du*, 82 Cal. 473, 23 Pac. 202, wherein is quoted with approval the following from *Carroll v. Deimel*, 95 N. Y. 254: "This is an action for the foreclosure of two mortgages on real estate, and was triable by the court. The defendant was not entitled as matter of right to a trial by jury. Although a sale of the mortgaged premises might result in a deficiency for which a money judgment could be docketed against the defendant liable for such deficiency, such a judgment was not the sole object of the action, but was an incident of the equitable relief sought. It might not even become necessary, as the mortgaged premises might bring a sufficient sum to pay the mortgaged debt and the circumstance, that in the contingency of the premises proving insufficient, a judgment for the deficiency might result, did not entitle the defendant to a jury trial."

6. Certain rulings of the court during the trial of the action are assailed as prejudicially erroneous. Some of them are so manifestly correct that we deem it unnecessary to notice them specifically.

A copy of the said guaranty was received in evidence. Assuming that the circumstance is important, there was a sufficient foundation laid for its introduction, as appears from the testimony of the said Webster and of appellant. The former said that Mrs. Blackburn declared she ought to have the paper, and the plaintiff desired to retain it to show his position in the matter, and "so a copy was made and he indorsed on the original—made a certain indorsement on the original and a copy of it was also made, and she was then given the original; I have an exact copy of it." Mrs. Blackburn testified: "If it was ever given to me, I lost it." She added that she never had it. Be that as it may, the showing was sufficient to justify the conclusion that the original was either lost or destroyed and therefore the copy was admissible. Section 1865, Code Civ. Proc.

The court sustained an objection to the following question asked of the witness Webster: "And you expected to get a pretty good fee, did you not, if you could make this collection against Price & Oldham?" The objection probably should have been overruled, as it is proper to show motive and interest on cross-examination. Section 1847, Code Civ. Proc.; *People v. Thomson*, 92 Cal. 506, 28 Pac. 589. But the ruling was entirely without prejudice, as the witness had already testified that the matter had been placed in the hands of himself and father for collection, and the court had the right to assume that they were to be compensated for their services. Besides, they were attorneys of record for the plaintiff, and they had asked in the complaint for an attorney's fee of \$100. Appellant had the benefit, therefore, of whatever unfavorable inference might be drawn from the fact that the witness was interested in the result of the trial. The plaintiff, in giving his account of the transaction with appellant, was proceeding to state that he said to her, "and that it was not the practice of my company." It was objected to on the ground that it was "incompetent, irrelevant, immaterial, hearsay, and self-serving." The objection was overruled, but whether correctly or not is immaterial, as the witness proceeded no further with the "practice."

The ruling of the court was harmless on the question asked of plaintiff: "Do you remember when you first shipped electrical goods here to Stockton to Price or to any firm of which he was a member?" as it was subsequently answered. The same may be said of some other assignments of error.

As to certain questions asked of appellant after she was recalled and to which an objection was sustained, it may be said that, as far as material, they had all been previously answered by her.

In conclusion, the observation may be indulged that appellant makes the very common mistake of emphasizing the testimony favorable to her theory and assuming that this court will hold that it must be believed in opposition to the testimony sustaining the contention of respondent. It is needless to say that however much we may deplore the misfortunes of appellant, as the evidence is substantially conflicting upon all material points, we cannot enter upon an inquiry as to the relative weight of the evidence and the credibility of the witnesses.

The judgment is affirmed.

We concur: CHIPMAN, P. J., HART, J.

(12 Cal. A. 637)

SAUL v. SAUL (Civ. 746.)

(Court of Appeal, Second District, California.
Feb. 10, 1910.)

DIVORCE (§ 287*)—FRIVOLOUS APPEAL—AFFIRMANCE.

In an action for divorce, which was denied, the court found, as was admitted, that certain land was community property; but in the judgment no order was made with reference thereto, and an order was made under Civ. Code, § 136, for the support of defendant and minor children awarded to her. Held, that her appeal from the judgment, which was criticised only as purporting to declare the status of the property rights of the parties, was frivolous, and the judgment would be affirmed, as there was nothing in it fixing such status, as to which there was no issue.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 287.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by John E. Saul against Emma Saul. There was a judgment in favor of defendant, and she appeals. Affirmed.

Charles Lantz, for appellant. Walter J. Horgan, Frank W. Allender, E. G. Kuster, for respondent.

ALLEN, P. J. This was an action for divorce, which was denied. Plaintiff in his complaint and defendant in her answer admit that a certain tract of land was property of the community and was all the property owned by them or either of them. The court in its findings of fact found that, which was admitted, namely, that the property was community property, but in the judgment no order is made with reference thereto. The custody of some of the children was given to plaintiff and others to defendant, and under section 136 of the Civil Code an order was made requiring plaintiff to pay to defendant for the support of herself and the minor children awarded to her the sum of \$12 per week, lawful money of the United States, each and every week until the further order of the court, and that plaintiff pay the costs of the action.

This appeal is from the judgment; the only criticism thereof being that such judgment purports to declare or establish the status of the property rights of the parties. The appeal seems to us to be frivolous. There is nothing in the judgment appealed from fixing the status of property rights, nor was there an issue in relation thereto. The only thing the court did was to exercise the power conferred by section 136 of the Civil Code, of which no complaint is made.

The judgment is affirmed.

We concur: SHAW, J.; TAGGART, J.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(12 Cal. A. 567)

COFFIN v. KINGSBURY, Surveyor General.
(Civ. 665.)(Court of Appeal, Third District, California.
Feb. 8, 1910. Rehearing Denied by Supreme Court April 7, 1910.)TAXATION (§ 879*)—SALE TO STATE—DELIN-
QUENT TAXES—PAYMENT OF TAXES—SUBSE-
QUENT PURCHASER.

Under Pol. Code, § 3788, providing that the Surveyor General shall not permit an entry or sale of state lands deeded to the state for nonpayment of taxes except upon payment of the delinquent taxes and costs by the person proposing to make the entry or purchase, where property has been sold to the state and the taxes are paid by an applicant whose application is subsequently canceled, no further payment is required of future applicants, since the law contemplates only one payment of the taxes and penalties as a condition precedent to the filing of an application for the purchase of the land and the payment of the purchase price.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 679.*]

Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Proceedings for a writ of mandate by Franky R. Coffin against W. S. Kingsbury, Surveyor General. Judgment for defendant, and plaintiff appeals. Affirmed.

Pardee & Pardee and Wahrhaftig & Shinn, for appellant. U. S. Webb, Atty. Gen., and M. C. Glenn, Asst. Atty. Gen., for respondent.

BURNETT, J. A proceeding was brought in the superior court for a writ of mandate to compel the respondent to file an application presented by appellant for the purchase of certain school lands. It appears, as stated by respondent, that in the year 1889 a similar application was made by one Billington, who paid 20 per cent. of the purchase price and received a certificate of purchase. He assigned his certificate to George R. Fletcher. The latter permitted the taxes to become delinquent, and his interest was sold through a tax sale. Thereafter a deed was made to the state, and, pursuant to the provisions of section 3785 of the Political Code, the deed was forwarded to the Surveyor General. According to said section, the lands thereupon again became subject to entry and sale, subject to the provisions of section 3788 of said Political Code. On June 8, 1908, William R. Mawer applied for the same lands, and, under the provisions of said section 3788, he paid into the treasury a sum equal to the delinquent taxes, etc., which existed at the time of the sale to the state. The application of Mawer was subsequently canceled by the Surveyor General for the reason that Mawer failed to furnish the necessary proof as to the character of the land. Afterward, one M. P. Barnes presented his application for the said lands, and the Surveyor General required him to pay only the purchase price, for the reason that in the

opinion of the Surveyor General the taxes and penalties had been fully satisfied and paid on the application of said Mawer and nothing remained due for the same at the time the said Barnes made his application. Acting upon this theory, respondent declined to file the subsequent application of appellant of the date of April 2, 1908.

It is the contention of appellant that the Legislature, in said section 3788, "prescribes the manner in which and the terms upon which state lands of a certain class, to wit, lands which have been entered, but upon which the full purchase price has not been paid, and which have been sold and deeded to the state for nonpayment of taxes, shall be sold and disposed of. And, by the terms of the section, we find that 'the Surveyor General shall not permit an entry, or make a sale of any lands thus deeded to the state, except upon the previous payment into the state treasury, as other moneys are required to be paid therein, in addition to the price of said lands as compared with the prices fixed for other lands of like character, by the person or persons proposing to make the entry or purchase, of a sum equal to the delinquent taxes, penalties, costs, and accruing costs, by virtue whereof the state became a purchaser of the lands thus sought to be entered or purchased, and also all delinquent taxes, penalties and costs which may have accrued upon such lands from and subsequent to the date of the sale to the state, in pursuance whereof the state received a deed therefor.' It appears clearly from these provisions that the Legislature intended to fix, and did fix, a different price on this class of lands, as compared with the price fixed for other lands of like character. The price thus fixed is the price fixed for other lands of like character, plus a sum equal to the taxes, penalties, costs, and accruing costs by virtue whereof the state became a purchaser of the lands, etc. And this sum equal to the said taxes, penalties, and costs is in terms required to be paid 'by the person or persons proposing to make the entry or purchase.'"

On the other hand, to state respondent's position, we quote quite fully from his brief, as follows: "The state school lands are offered for sale at the rate of \$1.25 per acre. Section 3494, Pol. Code. Title 8, within which the last-named section is found, deals with property of the state, and also within this title are contained the provisions as to the sale of school lands. Section 3788 is primarily a section concerning revenue and the collection thereof, and is not in any sense, except in a secondary way, a statute granting any right to purchasers of state land; and, in this light, the section should be considered. The last-mentioned section is found in title 9 of the Political Code, covering the subject of 'revenue,' and the chapter within

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which section 3788 falls is one dealing with the 'collection of property taxes.' There can be no doubt, therefore, that the main object and purpose of the latter section is to enable the state to collect delinquent taxes, and not for the purpose of fixing the price of school lands. If this be the purpose of the section, it follows that, when the object contemplated thereby has been accomplished, the provisions of the section referring to the delinquent taxes have no further application.

* * * We submit that the section, considered in this entirety, is free from ambiguity or doubt. It cannot be given the construction contended for by appellant, when so considered. It provides that, after the deed referred to in section 3785 shall be filed with the Surveyor General, the lands shall again become subject to entry and sale, in the same manner and subject to the same conditions, as apply to other state lands of like character, but that the Surveyor General shall not permit an entry or make a sale of such lands, except upon the previous payment into the state treasury * * * of a sum equal to the delinquent taxes, penalties, and costs which may have accrued upon such lands prior and subsequent to the date of the sale to the state. The section proceeds: "The money thus paid into the treasury shall be distributed in the manner prescribed in section three thousand eight hundred and sixteen; provided that the moneys received for twenty per cent. of the purchase money, and accruing interest together with the principal in case of full payment on the lands, shall be distributed by the Surveyor General, in the manner now provided by law for such distribution." Turning to section 3816, it will be found that that section provides for the apportionment of taxes, penalties, etc., on redemption; the county, of course, receiving its proper proportion of such amount. With the latter section incorporated within section 3788, the argument that appellant advances must necessarily fall."

In other words, a different disposition is made of the redemption money and the purchase price of the land, and they are thus clearly treated as separate and distinct.

We are entirely satisfied that when the property has been sold to the state, as in the case at bar, the law contemplates only one payment of the taxes and penalties, etc., as a condition precedent to the filing of an application for the purchase of said land and the payment of the purchase price. When Mawer paid into the treasury the sum prescribed, the state was entirely reimbursed, and the land was in exactly the same condition as though no application had ever been made for its purchase. It was, in other words, subject to application as provided in said section 3494 of the Political Code. It

is not contended that Mawer could recover the money thus paid, and it is equally untenable that the status of the land is not entirely restored by the said payment of the "back taxes."

It is true that said section 3788 provides that the Surveyor General shall not permit an entry or make a sale of any lands thus deeded to the state except upon the said payment of the delinquent taxes, etc., "by the person or persons proposing to make the entry or purchase"; but it is clear that the statute has in view the situation after a sale of the land to the state. Thus, before the purchase price can be accepted, the payment of the penalties must be made by the person or persons proposing to make the entry or purchase. There is nothing in the context requiring that this payment of the penalties shall be repeated.

We may add that a perusal of the various sections of the Political Code in reference to the collection of the revenue furnishes additional confirmation of the legislative intent that only one payment of the taxes assessed and accruing penalties is contemplated.

We see no reason to disturb the conclusion of the trial court, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(12 Cal. A. 560)

WATSON v. ALTA INV. CO. et al. (WESTERN FUEL CO., Intervener).
(Civ. 701.)

(Court of Appeal, First District, California.
Feb. 8, 1910. Rehearing Denied by Supreme Court April 7, 1910.)

1. CONTRACTS (§ 295*)—BUILDING CONTRACTS—SUBSTANTIAL PERFORMANCE—DESTRUCTION OF BUILDING—RECOVERY BY CONTRACTOR.

Where a building contract provided that, if before completion the work should be wholly destroyed by fire or earthquake, the owner should sustain the loss to the extent of the installments paid or due, and the contractor should lose the installments not then due, the contractor, on destruction of the building before completion, could not recover on the theory of substantial performance, though the value of the work remaining to be done was only \$48 and the contract price was \$13,000; the owner not having received the benefit of the work and not being able to recoup damages for imperfections or omissions therein.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1353, 1362; Dec. Dig. § 295.*]

2. MECHANICS' LIENS (§ 231*)—EXTINGUISHMENT—DESTRUCTION OF BUILDING.

There can be no mechanic's lien on vacant land, where the uncompleted building, without fault of the owner, has ceased to exist.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 413; Dec. Dig. § 231.*]

3. CONTRACTS (§ 303*)—BUILDING CONTRACTS—DESTRUCTION OF BUILDING BEFORE COMPLETION.

Where a building contract expressly provides how the loss shall be borne in case the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

building is destroyed by fire or earthquake, a covenant that the building must continue in existence, and that a destruction thereof before completion shall excuse further performance by the contractor and entitle him to recover for the value of the work done, will not be implied.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1435; Dec. Dig. § 303.*]

Appeal from Superior Court, City and County of San Francisco; George H. Buck, Judge.

Action by Sage Watson against the Alta Investment Company and others, wherein the Western Fuel Company intervened. From the judgment, plaintiff and intervener appeal. Affirmed.

See, also, 108 Pac. 50.

Olney, Pringle & Mannon, Jas. Alva Watt, and Max Thelen, for appellants. A. G. & H. K. Eells and W. F. Williamson, for respondents.

KERRIGAN, J. This is an action by plaintiff, as assignee of Watson Bros., for the foreclosure of a mechanic's lien as against the Alta Investment Company, and for the recovery of money due on an express contract as against James Crichton.

The Alta Investment Company entered into a contract with James Crichton, by the terms of which Crichton was to do all the granite and brick work on a building being erected by said company. Shortly thereafter Crichton entered into a contract with Watson Bros., a copartnership, according to the terms of which they were to carry out and be bound by the agreement between the Alta Investment Company and Crichton, except that they were to receive a bonus of \$100 from Crichton. Under these contracts the work was to be paid for as it progressed in four equal installments. After the first two payments had been made, the building, through no fault of any of the parties hereto, was entirely destroyed by the calamity of April 18, 1906, which visited San Francisco and vicinity. The third payment was to be made on the completion of the building, and the fourth was to be made 36 days thereafter. If the building was completed prior to its destruction, these two payments became obligatory, and judgment should have gone against the defendants.

The contract between the Alta Investment Company and Crichton contained the following provisions:

"Fifth. The owner agrees to pay \$13,000 at times and in the manner following, to wit: * * * Third payment three thousand two hundred and fifty (\$3,250) dollars when all work is completed and accepted."

"Fourth. Payment, \$3,250 thirty-six days after all work is completed and accepted and notice of completion is filed in the office of the county recorder."

"Provided that when each payment or installment shall become due, and at the final

completion of the work, certificates in writing shall be obtained from said architect stating that the payment or installment is due or work completed, as the case may be. * * *

"Twelfth. In case said work herein provided for should, before completion, be wholly destroyed by fire, defective soil, earthquake or other act of God which the contractor could not have reasonably have foreseen and provided for, then the loss occasioned thereby shall be sustained by the owner to the extent that he has paid installments thereon, or that may be due under the fifth clause of this contract; and the loss occasioned thereby and to be sustained by the contractor, shall be for the uncompleted portion of said work upon which he may be engaged at the time of the loss, and for which no payment is yet due under said fifth clause of this contract. * * *

The court found: "That said work was not completed, nor was the same accepted. * * * That said architect refused to give said certificate for the reason that said work was not done nor completed to his satisfaction nor at all." Also that before completion of either the building or of plaintiff's work, the building was, without fault of defendant or of any of the parties to the action, "wholly and entirely destroyed by fire" in the calamity of April, 1906, and that at no time thereafter "was there said or any building or structure upon said land."

The finding of the court that the contract was uncompleted is based on evidence which shows that the value of the work remaining to be done was \$48. Plaintiff contends that when this amount is compared with the contract price of the granite and brick work, i. e., \$13,000, the conclusion is irresistible that the work left undone is of a trivial nature, and therefore that the finding that the contract was not completed is unsupported by the evidence. To sustain this position he cites us to a number of mechanic's lien cases which hold that when the work has been substantially performed the contractor may recover against the owner, notwithstanding that there may be some trivial imperfection in the work. The theory of those cases seems to be that the owner receives the benefit of the work of the contractor, and can be protected by an allowance of damages for trivial omissions or imperfections. But in this case the owner has not received or accepted the benefit of the work, and he cannot recoup damages for the imperfections in it, for which reasons the doctrine of those cases is inapplicable. Moreover, the parties to the contract, in paragraph fifth thereof, stated what they meant by the word "completion," and in the twelfth paragraph they expressly stipulated precisely as to where the loss should fall in the event of the destruction of the building by fire or earthquake.

Recently, in passing upon this exact ques-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 108 P.—4

tion, in the case of *Seebach v. Kuhn*, 9 Cal. App. 485, 99 Pac. 723, this court said: "Undoubtedly the rule is well established that in ordinary cases the contractor in a building contract may recover against the owner, notwithstanding that he has not strictly complied with his contract because of minor defects and imperfections, and even omissions, not willful or fraudulent. This rule is sometimes spoken of as the modern equitable doctrine of substantial performance. It rests for its justification upon the proposition that in such cases the owner has either accepted the benefit of the work of the contractor, or because of the nature of the transaction he perforce receives such benefit to his property, and may be protected from actual pecuniary loss by a recoupment in damages for deficiencies and imperfections. Oftentimes minor defects and imperfections occur in the construction or repair of buildings without intentional fault of the contractor. For such defects the owner may be readily made whole by an allowance of damages. So, too, under the mechanic's lien law it is provided that for the purpose of filing liens a building shall not be held uncompleted because of trivial imperfections. (Citing cases.) But we do not think that the doctrine of substantial performance has any application to this case. The defendant did not accept the work or enter into the use and possession of the building. He did not and cannot receive any benefit from the work done, and he cannot be made whole by any allowance for damages for incomplete performance. Each and all of the just and equitable principles upon which the doctrine of substantial performance rests are absent from this case. It manifestly is not a case where both parties may be protected from loss. On the contrary, when the parties to the contract framed the fire and earthquake clause, they had in mind a contingency under which one or both parties must suffer a loss. They deliberately undertook to provide how that loss should be borne. The contract that they made is perfectly lawful, and we know of no reason why courts should not give it effect according to its terms."

A further reason why the plaintiff cannot recover against the Alta Investment Company is that there can be no mechanic's lien on vacant land when the uncompleted building, without fault of the owner, has ceased to exist. *Humboldt L. M. Co. v. Crisp*, 148 Cal. 686, 81 Pac. 30, 106 Am. St. Rep. 75.

Plaintiff contends that the law reads into contracts of this character an implied covenant that the building on which the work shall be done must continue in existence, and that a destruction thereof before the completion of the contract excuses further performance by the contractor, and entitles him to recover for the value of the work done up to the time of the destruction. But inasmuch as the contracts in this case expressly provided how the loss should be borne in case the

building should be destroyed by fire or earthquake, there is no room for the application of that principle.

Plaintiff suggests that the Alta Investment Company—Crichton contract was only referred to and attached to the contract between Crichton and Watson Bros. for the purpose of showing what work was to be done, and that the latter contract does not include the fifth and twelfth paragraphs hereinabove quoted, but that, the work having been substantially completed, he is entitled to recover as against defendant Crichton. The contract between Watson Bros. and Crichton stipulated that the work to be done on the building in question by Crichton should be done by Watson Bros. according to the "terms" of the agreement and "specifications," etc., of the contract between the Alta Investment Company and Crichton, and a copy of that contract was attached to and made a part of the subcontract. Plaintiff's position in this regard is without merit. One of the terms of the original contract was that, if the building should be destroyed before completion, the contractor should stand the loss for all payments not due, and this provision by reference became one of the terms of the contract between Watson Bros. and Crichton. The payments under the second contract were to be made at the same time as those under the first contract, and the amounts of the payments were the same, except that the third payment from Crichton to Watson Bros. was to contain the \$100 bonus. The reference clearly imports the incorporation of all the terms of the original contract into the contract between Watson Bros. and Crichton, including those now in question.

Thus it appears that the plaintiff should not recover on the contract as against defendant Crichton, nor has he any right of lien as against the property of the Alta Investment Company.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

(12 Cal. A. 566)

WATSON v. ALTA INV. CO. et al. (WESTERN FUEL CO., Intervener).
(Civ. 773.)

(Court of Appeal, First District, California, Feb. 8, 1910. Rehearing Denied by Supreme Court April 7, 1910.)

Appeal from Superior Court, City and County of San Francisco; George H. Buck, Judge.

Action by Sage Watson against the Alta Investment Company and others, wherein the Western Fuel Company intervened. From a judgment for defendants and from an order denying a motion for new trial, intervener appeals. Affirmed.

Oiney, Pringle & Mannon, James Alva Watt, and Max Thelen, for appellant. A. G. & H. K. Bells and W. F. Williamson, for respondents.

KERRIGAN, J. This is an appeal by the intervener, Western Fuel Company, from the

judgment in favor of the defendants, and from an order denying its motion for a new trial, and is taken on the same transcript as case No. 701 (108 Pac. 48), bearing the same title, which we have this day decided. It grows out of the same transaction, and is argued in and submitted upon the same briefs. The intervenor furnished materials to Watson Bros., the plaintiff's assignors, to be used in the construction of the building giving rise to the controversy in said case No. 701; and long after the destruction of the building it served notice on the owner, the Alta Investment Company, to withhold any moneys that might be due by it to defendant Crichton. But we have this day affirmed the judgment of the lower court in favor of defendants Alta Investment Company and Crichton, by which it was adjudged that there was nothing due from said company.

For the reasons stated in the opinion in said case No. 701 for affirming the judgment and order in that case, the judgment and order in this case should be affirmed, and it is so ordered.

We concur: COOPER, P. J.; HALL, J.

(12 Cal. A. 595)

SCHWARTZ et al. v. ROYAL NEIGHBORS OF AMERICA. (Civ. 597.)

(Court of Appeal, Third District, California.
Feb. 9, 1910.)

1. INSURANCE (§ 819*)—ACTION ON BENEFIT CERTIFICATE—SUFFICIENCY OF EVIDENCE.

In an action on a benefit certificate, evidence held to support a finding that insured was not pregnant when she made application, and did not become so before the certificate was delivered to her.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.*]

2. INSURANCE (§ 819*)—ACTION ON BENEFIT CERTIFICATE—SUFFICIENCY OF EVIDENCE.

In an action on a benefit certificate, evidence held to support a finding that insured, to questions as to whether she had consulted any physician as to personal ailment, whether she had undergone a surgical operation, and as to how many miscarriages she had had, with dates, made correct answers to the insurer's officer who examined her, and was told by such officer that a miscarriage suffered by her was not such as contemplated by the question in the application, and that her answer should be, "None," and that acting on such advice she answered it in the negative.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.*]

3. INSURANCE (§ 818*)—ACTION ON BENEFIT CERTIFICATE—ADMISSIBILITY OF EVIDENCE.

In an action on a benefit certificate, where defendant alleged false answers in the application as to insured's having had a miscarriage, a document signed by persons as Supreme Physicians of the insurer, setting forth certain rules to be observed in passing upon the application of a person "who has had a miscarriage," was inadmissible in evidence, it not appearing to be a by-law of the order, nor that the physician making insured's examination, or insured, knew of its existence.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006-2006; Dec. Dig. § 818.*]

4. INSURANCE (§ 724*)—APPLICATION—UNTRUE ANSWERS BY AGENT OF INSURER.

Where insured orally gave insurer's agent literally true answers, and the agent wrote down answers not literally true, if insured accepted such answers, she will be deemed to have done

so in acceptance of the construction put upon the matter by the agent, and a by-law providing that no officer of the beneficial society is authorized or permitted to waive any of the laws of the society relating to the contract for payment of benefits between any member and the society does not apply.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1866-1868; Dec. Dig. § 724.*]

5. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION OF TESTIMONY.

The excluding of a question asked a witness was harmless where the witness had previously testified to the fact sought to be elicited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4200; Dec. Dig. § 1058.*]

6. INSURANCE (§ 818*)—ACTION ON BENEFIT CERTIFICATE—ADMISSIBILITY OF EVIDENCE.

In an action on a benefit certificate, where the insurer claimed untrue answers to a question as to whether insured had had a miscarriage, testimony of a witness as to whether a miscarriage insured had had, in fact had anything to do with one she suffered after the application, was improperly admitted as immaterial, the warranties running to the answers given in the application.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.*]

7. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of immaterial testimony was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4154; Dec. Dig. § 1050.*]

8. DEPOSITIONS (§ 110*)—OBJECTIONS—SUFFICIENCY.

In objecting to depositions, error must be made to appear, and an objection that they were irregularly taken is insufficient.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 323-328½; Dec. Dig. § 110.*]

9. INSURANCE (§ 818*)—ACTION ON BENEFIT CERTIFICATE—ADMISSIBILITY OF EVIDENCE.

In an action on a benefit certificate, where the insurer claimed untrue answers in the application, evidence was admissible to show what took place when the application was made.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006-2006; Dec. Dig. § 818.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Otto Schwartz and others, minors, by Otto Schwartz, their guardian, against the Royal Neighbors of America. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

Benjamin D. Smith and F. E. Cook, for appellant. J. R. Webb and S. L. Strother, for respondents.

CHIPMAN, P. J. This is an action to recover upon a benefit certificate issued by defendant on the life of Cecelia Schwartz. Plaintiff had judgment, from which, and from the order denying its motion for a new trial, defendant appeals.

The benefit certificate was admitted in evidence, is dated Peoria, Ill., May 9, 1906, and was delivered to Mrs. Schwartz, May 21, 1906; also copy of her application dated February 15, 1906, and proof of death which occurred

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

August 15, 1906. It was admitted that the signatures to the several documents are true and correct, and that all assessments and dues required to be paid under the policy have been paid. The court found all the allegations of the complaint to be true, and all of the defendant's first affirmative defense to be true "except as hereinafter found." This defense is based upon the provisions set forth in the benefit certificate and the conditions thereto affixed, and particularly averring that the insured warranted the answers made by her in her application to be "full, complete, and literally true." Certain specified questions and answers are then set forth as to which it is averred that the answers were false and untrue, "by reason whereof the said benefit certificate herein sued on became, was, and is null and void," to wit: "(18) Have you, within the last seven years, consulted any person, physician or physicians in regard to personal ailment? No. If so, give dates, ailment, length of illness, and person, physician, or physician's name and address. Only confinement." The court found this defense to be untrue. "(19) Have you ever undergone a surgical operation?" To which she answered, "No." This averment is found untrue. "(331) Are you pregnant? * * * If applicant is pregnant, application will not be accepted by Supreme Physician. Examination should be postponed until at least two months after confinement." She answered, "No;" and the answer alleges that at that time, to wit, February 23, 1906, she was pregnant. This averment is found untrue. "(33n) How many miscarriages, and give dates of each?" To which she answered, "None;" it is claimed that prior thereto she had had a miscarriage. As to this the court found that Mrs. Schwartz "made true and correct answer to said question to Mrs. Lulu Case, Deputy Supreme Oracle of defendant, and one of the officers of defendant, and was by said Deputy Supreme Oracle informed that the miscarriage suffered by said applicant was not such a miscarriage as was contemplated by said question by defendant, and that her answer should be, 'None;' that, acting on said advice and information, and believing therefrom that her said answer was literally true as meant by the question asked, said Cecilia Schwartz answered the same in the negative."

A second affirmative defense is based upon the answer given to question 331, and it is particularly averred that if Mrs. Schwartz was not pregnant on February 23, 1906, as warranted by her, the "said condition of nonpregnancy, so certified to and warranted by her said answer, did not continue as so warranted to the completion of the contract applied for in said application; but alleges that on and prior to the 23d day of May, 1906, the said Cecilia Schwartz became and was pregnant and that she failed and neg-

lected to notify the defendant with relation thereto," whereby the said certificate became void. As to this the court found "that said applicant was not pregnant at the time of the delivery to and acceptance by her of defendant's benefit certificate." The findings are challenged as unsupported by the evidence.

It appears that Mrs. Schwartz was born in Germany and did not understand the English language very well, and, when being questioned by Mrs. Case, on several occasions required the questions to be repeated, and seemed "not to understand very well." Her application was solicited at her own home by Mrs. Lulu Case who recommended the application and witnessed it as "D. S. O., Camp Recorder, Deputy Supreme Oracle or Camp Physician." The form of application required the camp physician "to fill in" the answers to questions made part of the application. The answers now claimed to be false were made to and written in the application by Mrs. Case, acting in her official capacity. This examination was had on February 15, 1906, and the applicant was required to verify the answers before a physician. In the record is a verification, dated February 23, 1906, signed by Mrs. Schwartz and by Charles H. Ingram, M. D. In this verification she affirms the truth of her statements made in her answers; agrees that they shall form the basis of her contract with the company and makes them part of her benefit certificate; agrees that if they are "not literally true" the "benefit certificate shall be void"; agrees that any certificate issued to her "while in sound health, shall be in pursuance of the by-laws of the society"; also, that the benefit certificate and the application "shall be construed as one entire contract." Dr. Ingram, who signed this verification with Mrs. Schwartz, did not testify, and it does not appear that he asked her any questions.

There was but little testimony, and, as it bears more or less upon all the answers to questions claimed to be untrue, it may here be given. Dr. McMurtry was called by defendant and testified that he was the attending family physician of deceased; that he was called to attend her in November, 1905, and treated her then for a miscarriage and that "she was up in three or four days." He was again called to treat her about August 10, 1906, and she died August 15. He testified that "the direct cause of her death was her kidney condition." She was then pregnant. "The fetus was about half born. I did not measure the fetus, and it is impossible to say how long she was pregnant. I stated once it was about three months, but I think it was in the neighborhood of four months. I did not measure the fetus and could not say positively." On cross-examination he testified: "If it should appear in

evidence that Mrs. Schwartz was sick in her monthly period the latter part of April, I should then say that the fetus was about three months old. * * * If it should be a fact that in the latter part of April she was sick, it would be impossible for her to know, definitely, her true condition by the 21st of May." (This was the date she received her benefit certificate.) He testified that she died of convulsions, and "the miscarriage was caused by that also." It appeared from the testimony of Mrs. Schwartz' husband that she "had her last monthly sickness at the end of April the same year she died."

The depositions of Mary Teichman and Rosa Teichman were received in evidence. These witnesses were next-door neighbors of Mrs. Schwartz and were present when the Deputy Supreme Oracle and Camp Physician of the society examined Mrs. Schwartz and took her application. Mary Teichman testified: "At that time I and Rosa Teichman were there, and Rosa's mother, who could not talk English, and also Mrs. Case and Miss Bond, representing the company. Mrs. Case wrote the answers to the questions in the application, and I heard everything she asked and the answers given. I heard Mrs. Case ask Mrs. Schwartz whether she had ever been sick or not, and what kind of sickness she had; how many times she was sick, and she said only once and she said she miscarried and got an operation. Mrs. Case says she don't have to tell doctor about it." On cross-examination she testified: "I do not speak English very well. When the people are talking I do not understand everything they say when they speak in English. You know, Mrs. Schwartz she (Mrs. Case) asked her lots of times questions and she could not understand them very well. She asked her lots of times what mean that. Mrs. Schwartz was German and I am German. Mrs. Case spoke to Mrs. Schwartz in English. Sometimes Mrs. Schwartz did not understand what she said. Then Mrs. Case would speak over. Mrs. Case asked Mrs. Schwartz if she was in a family way or not. She never was in family way at that time when Mrs. Case was there. All I know about it was what Mrs. Schwartz said. Mrs. Case told her she had to go to see doctor for it before she could get her final papers. I was in the room all the time Mrs. Case was there. Mrs. Case had a paper and wrote these things down. When she asked Mrs. Schwartz a question and Mrs. Schwartz answered it, Mrs. Case would write it down." Rosa Teichman testified substantially as did Mary Teichman. She testified: "Mrs. Schwartz at that time was not pregnant. She said, 'I ain't in a family way,' and that was all she said about it. She said she was not so very sick on this former occasion when she had the miscarriage, but that she had a doctor and an operation at that time.

I asked Mrs. Case if she should tell Dr. Ingram about the miscarriage, and she said, 'No, you don't have to tell him.' Mrs. Case was there; she had a fountain pen and asked the questions and wrote down the answers. Mrs. Schwartz did not always understand the question when it was first asked her. * * * Mrs. Schwartz did not know how old her grandpa and grandmamma was, and she asked my mamma about it in German and then told Mrs. Case in English. I spoke to Mrs. Schwartz in English. My people came from the same part of Germany that Mrs. Schwartz's people did." This closed the testimony.

1. As to the answer given by Mrs. Schwartz to question 331, that she was not then pregnant and as to the point that she became pregnant before the benefit certificate was delivered to her, the evidence fully warranted the findings of the court. The first symptom of probable pregnancy occurred the last of April, 1906, and Dr. McMurtry testified that "it would be impossible for her to know definitely, her true condition by the 21st of May," when she received the certificate.

2. Questions 18, 19, and 33n all relate to a single instance of previous sickness, pregnancy, and operation. The evidence is that Mrs. Schwartz made no concealment of the fact that in 1905 she had a miscarriage and an operation, which seems not to have been of any seriousness, for Dr. McMurtry testified that he treated her and "she was up and about in three or four days." She did not make any concealment of the fact from Mrs. Case, but told her the truth, and, after explanations, Mrs. Case, not Mrs. Schwartz, wrote down the answers. There is no evidence that Mrs. Schwartz knew what answers were being recorded against her, except the presumption that might follow from having signed the paper. We cannot, from anything disclosed, impute to her any intention to deceive or that she was knowingly a party to any guilty deception. She was asked no questions, so far as appears, by Dr. Ingram, the society's medical officer. Mrs. Case was the authorized agent of the society, and appears to have enjoyed the rather high-sounding title of "Deputy Supreme Oracle and Camp Physician," and with her was Miss Bond, an officer of the society. Neither of these persons was called by defendant to explain their conduct or part in the taking of the application. Nor was Dr. Ingram called to show what occurred when Mrs. Schwartz came to him. We cannot presume that either one of these officers was purposely committing a fraud upon the society which they represented, or was intentionally seeking to mislead it or Mrs. Schwartz. The reasonable, as well as the more charitable view of the transaction, is, that both Mrs. Case and Miss Bond, after hearing the facts about the single previous sickness of any kind which is in

question, concluded that it was of little consequence and on their own initiative and through no wish of the applicant, made out the application. Mrs. Schwartz took this application to Dr. Ingram bearing the recommendation of Lulu Case, who had conducted the examination, and we may well assume that she accepted it without further inquiry, believing that "the Deputy Supreme Oracle and Camp Physician" had sufficiently examined Mrs. Schwartz. Mrs. Schwartz was told that she need not speak of the miscarriage to Dr. Ingram, but whether she did or not we do not know. Presumably she made no verbal misrepresentations to him or defendant would have shown it by Dr. Ingram. The burden was on defendant to establish its defense which we think it failed to do. The findings of the court are supported by the evidence.

3. There was admitted in evidence a document signed by Susan McG. Snyder and three others, "Supreme Physicians, Royal Neighbors of America," setting forth certain rules to be observed by themselves in passing upon the application of a person "who has had a miscarriage." It does not appear to be a by-law of the society, nor does it appear that "Camp Physician" Case or Mrs. Schwartz knew of its existence. It is addressed "To whom it may concern," but we cannot see that it concerns any one of the plaintiffs or has any relevancy to the case.

4. There was also admitted in evidence a section of the by-laws of the society which provides that no officer of the society or local camp officer "is authorized or permitted to waive any of the provisions of the laws of this society which relate to the contract for the payment of benefits between any member and the society." It is contended that the insured warranted her answers to be literally true, and neither Mrs. Case nor any other officer had the authority to waive truthful answers to the questions in her application. The question here seems to us not one of waiver so much as it is the acceptance of the answers as satisfactory by the society's agent. The answer as orally given was literally true, for Mrs. Schwartz said she had had a miscarriage, and, after explanation it was the agent and not Mrs. Schwartz who gave a meaning to the sickness and wrote down what was not strictly true. It was the society's agent and not the insured who did this and if the insured accepted it as her answer we may safely assume that she did so in acceptance of the construction put upon the matter by the agent. In *North American Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 638, 646, Mr. Justice Cooley said: "If the insurer himself, or his agent, drafts an answer to such interrogatory, in which he treats it as immaterial and does not observe strict accuracy in his statement of facts, the assured might well suppose he could be thought captious and hypercritical if he should insist

upon answers exactly correct, when the party seeking the information, and who, alone, was interested in it, was satisfied with statements less accurate, and which, with full knowledge of the facts, he had written out to suit himself."

The assured here was a German woman with an imperfect understanding of the English language. Approached by an officer whose title implies one second in authority to the "Supreme Oracle," accompanied by Miss Bond, also an officer of the society, it was natural for her to be guided by these representatives of the society and place confidence in them. If there was a violation of the society's rules or failure of duty it was not on the part of the assured, and her beneficiaries should not suffer through the zeal or shortcomings of the society's agents. It may be observed that the representation related to a matter which in no wise affected the then present physical condition of the applicant.

5. Error is claimed in sustaining plaintiffs' objection to a question put to Dr. McMurtry by defendant: "Doctor, you have said that when Mrs. Schwartz consulted you some several weeks prior to her death, you knew she was pregnant; state whether she had told you before?" The witness had testified that Mrs. Schwartz went to see him "about two weeks before she was taken sick; that about a week before she had spoken to him about being pregnant." The witness had already testified to the fact sought to be elicited. Conceding that the question was proper the ruling was harmless.

6. The witness was permitted, over defendant's objection, to answer the question: "Did you think the first miscarriage had anything to do with the last one?" and answered, "I do not." We think the question was immaterial, inasmuch as the warranties ran to the answers given in the application. But we do not think the ruling prejudicial.

7. When the depositions of Mary and Rosa Teichman were offered, defendant objected. The record states: "It was admitted that the depositions were irregularly taken, and counsel for defendant objected to same * * * on the ground that same and such evidence is incompetent, irrelevant, and immaterial; that under the by-laws of defendant no agent has any right to waive the rules of defendant, and that defendant is not bound by the acts of any agent in attempting to waive the rules." If there was such irregularity in the taking of the depositions as to have made them inadmissible, defendant should have so shown. They may have been "irregular" and still admissible. Error must be made to appear. We think it was admissible to show what took place at the time the application was made.

The case is not entirely free from difficulty, but regarding the acts of the parties as free from intentional wrong, though not strictly

in conformity with the rules of the society, we feel constrained to uphold the view taken by the learned trial judge.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(12 Cal. A. 558)

PECK v. BERNARD et al. (Civ. 745.)

(Court of Appeal, Second District, California. Feb. 5, 1910. On Petition for Rehearing, March 7, 1910.)

1. MUNICIPAL CORPORATIONS (§ 651½,* New, vol. 9, Key No. Series)—NAME OF STREETS—CHANGE OF NAME.

Where the name of a street became the official name by resolution of the city council, the subsequent recording of a map of a subdivision giving the street a different name was inoperative to change the official name, without reference to the owners of the property on the street.

2. MUNICIPAL CORPORATIONS (§ 651½,* New, vol. 9, Key No. Series)—NAME OF STREETS—CHANGE OF NAME.

Where a street was officially designated as O. street by resolution of the city council, and some persons called it D. street, an attempt of the city council to change D. street to S. street did not affect the official name.

3. MUNICIPAL CORPORATIONS (§ 294*)—STREET IMPROVEMENTS—NOTICE TO PROPERTY OWNERS.

Where the attempt of the city council to change the official name of a street did not affect the name, a street improvement proceeding taken under the changed name was not notice to the abutting property owners, and, where they had no actual knowledge of the improvement until after the commencement of a suit to foreclose an assessment lien, a judgment of foreclosure was erroneous.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 776-788; Dec. Dig. § 294.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by E. O. Peck against Pierre Bernard and others. From a judgment for plaintiff, defendant Jeannette Apion appeals. Reversed.

Charles Lantz, for appellant. A. J. Sherer and Edward Winterer, for respondent.

PER OURIAM. This appeal involves the validity of the same street assessment considered by the Supreme Court in the two cases Nos. 2,300 and 2,301 (108 Pac. 918, 919), and therein held to be void.

For the reasons given in the opinion of department 2 of that court, filed August 24, 1909, in appeal No. 2,300 (108 Pac. 918), the judgment of the trial court directing a foreclosure of the lien based upon that assessment and directing a sale of the premises described is reversed.

On Petition for Rehearing.

Respondent petitions for a rehearing of this appeal on the ground that the decisions of the Supreme Court in Peck v. Stassforth

(Nos. 2,300 and 2,301) 108 Pac. 918, 919, are not applicable to this case because the lot of appellant was identified by being named as lot 12 of Davin & Jullien's subdivision, and the street in question is called Davin on the plat of that subdivision introduced in evidence. We read the decisions mentioned as holding, in effect, that Otto street became the official name of the street in question in 1890 by a resolution of the common council of the city of Los Angeles, and that the recording of the map of the Davin & Jullien subdivision in 1894, giving the same street the name of Davin, did not operate to change the name to Davin. In the application of this rule it was not material who owned the property. There being no such official street as Davin; but the street called by some persons by that name being officially designated Otto street, the attempt of the city council to change Davin to Savannah street did not affect the official name of Otto street at all. Therefore, the property owners on Otto street received no constructive notice that any improvements were being made on that street by any proceeding taken with reference to Savannah street. The appellant, who is not contradicted, testified that she had no actual knowledge of the improvement until after the commencement of the suit, and that no demand was ever made upon her for the payment of any assessment, and that the lot has always been vacant and unoccupied. The claim of estoppel can never be sustained where there is no notice. The further point made by the petition that appellant is bound by any act of E. R. Fox, as her predecessor in title, is repugnant to the express statement in the bill of exceptions: "No evidence was offered by the plaintiff, or by any person, that E. R. Fox ever owned lot 12 of said Davin & Jullien's subdivision, or any property fronting on said Otto street or Savannah street, in said city of Los Angeles."

Petition for rehearing is denied.

(12 Cal. A. 635)

JOHANSON v. JOHANSON. (Civ. 742.)

(Court of Appeal, Second District, California. Feb. 10, 1910.)

1. DIVORCE (§ 109*)—EVIDENCE OF ADULTERY—BURDEN OF PROOF.

If, in a suit for divorce on the ground of adultery, it would be inferred, from evidence that defendant visited a brothel, that he committed adultery, the presumption would only cast upon him the burden of explaining the purpose of his visit.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 354-364; Dec. Dig. § 109.*]

2. DIVORCE (§ 115*)—EVIDENCE OF ADULTERY. Evidence that defendant visited a brothel some two months after the suit for divorce was brought is inadmissible.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 371-378; Dec. Dig. § 115.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In a suit for divorce for adultery, any error in the rejection of evidence that defendant visited a brothel some two months after the suit was brought is not prejudicial, where the finding that the overt acts of adultery charged were not committed is sustained by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4190; Dec. Dig. § 1056.*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Bertha Johanson brought suit for divorce from Charles J. Johanson. Divorce denied, and plaintiff appeals. Affirmed.

Charles F. Carrier and W. P. Butcher, for appellant. W. C. Gammill and H. C. Booth, for respondent.

ALLEN, P. J. This is an appeal from a judgment upon a bill of exceptions to review errors of law in the exclusion of testimony.

The action was one for divorce upon the ground of adultery. The complaint averred that defendant, on the 16th day of December, 1907, in the city of Santa Barbara, at a house numbered 820 Anacapa street, committed adultery with a woman named Violet; that on January 15, 1908, at No. 822 Anacapa street, in said city, defendant committed adultery with some female whose name is unknown to plaintiff; that defendant has committed adultery at various other times with the said female named Violet, at said house No. 820 Anacapa street, and with other females in said house and elsewhere, the particular dates of said acts of adultery being unknown to plaintiff. The complaint was filed on the 16th day of January, 1908. The evidence offered in support of plaintiff's complaint is entirely circumstantial, it being shown that on January 15, 1908, and at about 11 o'clock p. m. of such date, defendant in company with another man visited a brothel in the city of Santa Barbara; that at the time of such visit there was but one female inmate and the only conduct of defendant established in connection with the visit was that he was seen sitting in the reception room, wherein the inmate was playing the piano and the male companion was dancing. Were it even to be assumed that from a visit to a place of this character adultery is to be inferred, nevertheless the presumption attaching would only cast upon defendant the burden of explaining the object and purposes of his visit. This the defendant did to the entire satisfaction of the trial court, who found that no adultery was committed by defendant as charged in the complaint. The court finds, and there is ample evidence in its support, that defendant did not commit adultery with the woman named Violet at any time or place.

Upon the trial, a witness was called who admitted that she had been an inmate of the

brothel during the month of March, 1908, and she was asked by counsel for appellant whether at night after 11 o'clock, on one or more occasions during the month of March, defendant visited that house. The court sustained an objection to this question, and by reason of which error is claimed, and this upon the authority of *Carpenter v. Carpenter*, 56 Hun, 643, 9 N. Y. Supp. 583, wherein it is held that where adultery is charged in particular houses of ill fame evidence is admissible of visits to other houses of ill fame to show the habits and inclinations of the defendant, and as bearing upon the probability of the evidence in support of the specific charges. It will be observed that the evidence sought to be elicited by this question related to conduct long after the commencement of the action, and in no degree can the same be said, to establish the commission of the offenses alleged to have been committed before the filing of the complaint. Assuming, however, such question to be admissible as tending to show the intent with which the visit to the brothel was made at the time specified in the complaint, we do not regard the error in its rejection, if conceded to be such, as sufficiently prejudicial to warrant a reversal of the judgment. The court having found that the overt act was not committed, and the record not disclosing any circumstance or fact from which the court could have found otherwise, it is of little importance as to the intent of the visit. Had there been some evidence from which it might be reasonably inferred that his relations with the female inmate on that occasion had been of an adulterous character, the effect of the exclusion of the evidence might have been different; but in the absence of any testimony or circumstance other than the bare matter of a visit, and it being clearly shown that no offense was committed upon the occasion of such visit, it can scarcely be said that the error was prejudicial.

Judgment affirmed.

We concur: SHAW, J.; TAGGART, J.

(12 Cal. A. 582)

MODERN LOAN CO. v. POLICE COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 613.)

(Court of Appeal, First District, California. Feb. 9, 1910.)

1. CONSTITUTIONAL LAW (§ 309*)—PERSONAL PROPERTY—POSSESSION—DUE PROCESS OF LAW.

One in possession of personal property under claim of right cannot be deprived thereof without due process of law, to satisfy which there must be notice of the time and place of hearing and opportunity to be heard.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

2. CONSTITUTIONAL LAW (§ 309*)—DUE PROCESS OF LAW—OWNERSHIP OF PROPERTY—DETERMINATION—SEARCHES AND SEIZURES.

Pen. Code, § 1524, subd. 1, authorizes the seizure of stolen or embezzled property on a search warrant, and section 1536 provides that when the property is delivered to the magistrate, he must dispose of it as provided in sections 1408-1413. Sections 1408 and 1409 provide that on satisfactory proof of ownership the magistrate must order the property to be delivered to the owner. *Held*, that sections 1408 and 1409, in so far as they are applicable to search warrant proceedings, are unconstitutional for failure to provide for notice of time of hearing to the person from whose possession the property is taken under a search warrant, and an opportunity to be heard, as depriving such person of his property without due process of law, nor was it any answer to such objection that the magistrate would probably see to it that notice and an opportunity to be heard were given.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.*]

3. CONSTITUTIONAL LAW (§ 309*)—DUE PROCESS OF LAW—NOTICE.

The right to take jewelry, alleged to have been stolen or embezzled from the person in possession, by means of a search warrant issued out of a police court, and for such court to determine the ownership thereof in summary proceedings, without notice or opportunity to the possessor to be heard, as authorized by Pen. Code, §§ 1408, 1409, cannot be sustained by the rule authorizing the taking or destruction of property without notice when the public welfare demands summary action.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Prohibition on petition of the Modern Loan Company against the Police Court of the City and County of San Francisco and E. P. Shortall, judge thereof. From a judgment making the writ permanent, respondents appeal. Affirmed.

Charles F. Hanlon, for appellants. Robt. W. Harrison, amicus curiæ. Chas. N. Douglass, for respondent. Campbell, Metson, Drew, Oatman & Mackenzie and W. H. Orrick, amici curiæ.

KERRIGAN, J. This is an appeal from a judgment of the superior court making permanent a writ of prohibition. In August, 1908, one Bessie Seaman, presented to Hon. E. P. Shortall, judge of the police court of the city and county of San Francisco, an affidavit, properly subscribed and sworn to by her, in which she averred that in February, 1908, one E. R. Burke had willfully, unlawfully, and feloniously taken and carried away a certain diamond breastpin of the value of \$250, the property of said Bessie Seaman, and that there was probable and reasonable cause to believe that said breastpin was concealed at the place of business of the Modern Loan Company, the above-named respondent, in San Francisco. Upon said affidavit the po-

lice judge issued a search warrant, pursuant to which the said breastpin was taken from the possession of the respondent. Thereafter, it appearing that said police judge was about to proceed and determine the ownership of said pin, the respondent, claiming a lien upon the same, and asserting that he was entitled as such lienholder to possession thereof, instituted these proceedings in the superior court for a writ of prohibition. That court held that the provisions of the Penal Code, which purport to authorize the police judge to hear and determine "the ownership of" and "title to" personal property, were unconstitutional, and that therefore such police judge was without jurisdiction to proceed in the matter, and a peremptory writ of prohibition issued as prayed for in the petition. From the judgment in favor of the Modern Loan Company appellants prosecute this appeal.

Respondent claims that when personal property has been stolen or embezzled, and that fact is made to appear by affidavit, nevertheless a search warrant should not issue unless a complaint is filed charging the guilty person with the larceny or embezzlement of the property in question. See *contra* *Haworth v. Newell*, 102 Iowa, 541, 546, 547, 71 N. W. 404. He also claims that under section 1527 of the Penal Code the evidentiary, and not the ultimate, facts should be stated. Here the affidavit set forth the commission of the larceny, not upon information, but in positive terms; and, in view of the decisions in *Ex parte Dimmig*, 74 Cal. 164, 15 Pac. 619, and *People v. Staples*, 91 Cal. 23, 27 Pac. 523, this last contention would seem to have as little merit as the first one. However, the conclusion we have reached on the chief point in the case will render any discussion of these, or any other minor exceptions to the regularity of the proceedings, unnecessary.

The sections of the Penal Code which authorize the disposition and award of personal property seized under search warrants fail to provide for the giving of notice to interested parties, or to afford them an opportunity to be heard on such proceedings, and for this reason respondent contends that those sections are unconstitutional. When personal property has been stolen or embezzled, and, as the result of proceedings under a search warrant, has been seized and delivered to a magistrate, he must dispose of it as provided in sections 1408 and 1409 of the Penal Code. Subdivision 1, § 1524, of the same Code provides that a search warrant may issue "When the property was stolen or embezzled, in which case it may be taken on the warrant from any place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be." Section 1536 provides: "When the property is delivered to the magistrate he must, if it was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

stolen or embezzled, dispose of it as provided in sections 1408 and 1413 inclusive. * * *

Sections 1408 and 1409 of the Penal Code read as follows:

"Sec. 1408. On satisfactory proof of the ownership of the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or embezzling it, must order it to be delivered to the owner, on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitles the owner to demand and receive the property.

"Sec. 1409. If property stolen or embezzled comes into the custody of the magistrate, it must be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate."

We agree with the contention of the respondent that these two sections, so far as they are applicable to search warrant proceedings, are void. One who is in possession of property under a claim of right cannot be deprived of its possession without due process of law; and, in order to constitute due process of law, there must be notice of the time and place of hearing, and an opportunity to be heard. *Murray v. Hoboken Land, etc., Co.*, 18 How. 280, 15 L. Ed. 372; 22 Cyc., pp. 72, 73; *People v. Granice*, 50 Cal. 447. The statute should give the parties interested in the property an opportunity of presenting, in a deliberate, regular, and orderly method, issues of fact and of law to the court or to a court and jury unless a jury is waived. Under these two sections, irrespective of the value of the property, and without any right of appeal, and without the slightest notice—indeed immediately upon the return of the warrant—the magistrate may proceed to the "proof of the ownership or of title" to the property and make an award. A proceeding permitting this contravenes the provisions of the state and federal Constitutions that a person cannot be deprived of his property without due process of law. It is no answer to the objection urged that the magistrate quite probably will see to it in each case that notice and an opportunity to be heard are given, for the right of a person to his day in court must rest on something more substantial than favor or discretion. It is essential to the validity of a statute that it furnish the means whereby one may enforce his constitutional right.

As said by the Supreme Court of this state in *Re Lambert*, 134 Cal. 626, 634, 66 Pac. 851, 854 (55 L. R. A. 856, 86 Am. St. Rep. 296): "In the absence from the statute of any requirement of notice to the person, any notice that might be given would be without legal force and authority, and consequently, whether acted upon by him or disregarded, the proceeding would be equally ineffective. 'It is not enough that he may by chance have notice, or that he may as a matter of favor have

a hearing. The law must require notice to him, and give him the right to a hearing and opportunity to be heard. The constitutional validity of a law is to be tested, not by what has been done under it, but what may by its authority be done.' *Stuart v. Palmer*, 74 N. Y. 188 [30 Am. Rep. 289]. It is not what has been done, or ordinarily would be done, under a statute, but what might be done under it, that determines whether it infringes upon the constitutional right of the citizen. The Constitution guards against the chances of infringement. *Bennett v. Davis*, 90 Me. 105 [37 Atl. 865]."

In the language of Mr. Justice Rich, speaking for the Supreme Court of the state of New York in *Re Grout*, 105 App. Div. 98, 93 N. Y. Supp. 711: "It is not enough that a person may by chance have notice, or that he may, as a matter of favor or courtesy, have a hearing. The law itself, to be constitutional, must require notice, and give a right to a hearing. It matters not, upon the question of the constitutionality of such law, that the questions involved have been fairly decided. The essential validity of the law is to be tested, not by what has been done under it, but what may by its authority be done." *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520; *Bennett v. Davis*, 90 Me. 102, 37 Atl. 864; *Dewell v. Commissioners*, 232 Ill. 215, 83 N. E. 811; *Fisher v. McGirr*, 1 Gray (Mass.) 1, 61 Am. Dec. 381.

It will be unnecessary in this case to consider whether or not the magistrate sitting in search warrant proceedings may, as the language of the statute (sections 1408, 1409, Pen. Code) imports, adjudicate the title to the property. It may be conceded that if he passes upon the title he does so only incidentally (*Est. of Rathgeb*, 125 Cal. 302, 57 Pac. 1010), and that the person from whom the property was taken in search warrant proceedings may maintain an action in claim and delivery against the person to whom it was delivered, and that the award or action of the magistrate would not be res adjudicata (*Moore v. Ewbanks*, 68 S. C. 374, 44 S. E. 971; *Houghton v. Bachman*, 47 Barb. [N. Y.] 388, 393). This statute, however, does at least purport to authorize the magistrate to determine the right of actual possession of the property, and actual possession is a most valued right, and is an essential part of property, and no one, consistent with constitutional safeguards, can be deprived of the possession or title to property, or of any other substantial right, without reasonable notice and an opportunity to be heard. As said by the Supreme Court in *Meacham v. Bear Valley Irrigation Co.*, 145 Cal. 606, 79 Pac. 281, 68 L. R. A. 600: "The guaranty of the Constitution that he shall not be deprived of his property without due process of law gives him the right to be heard in its defense against any claim that may be made against him for its possession." In the case of *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac.

121, 10 L. R. A. 627, 18 Am. St. Rep. 192, the Supreme Court expressed the same idea, saying, per Mr. Chief Justice Beatty: "A court cannot take property from his (the party in possession) possession without a hearing, and compel him to prove title in order to regain it." See, also, *Boca, etc., Ry. Co. v. Superior Court*, 150 Cal. 147, 88 Pac. 715; *Lowry v. Rainwater*, 70 Mo. 152, 35 Am. Rep. 420; *Hornsby v. U. S.*, 10 Wall. 242, 19 L. Ed. 900; *Ex parte Koser*, 60 Cal. 210; *White v. Ward*, 157 Ala. 345, 47 South. 169, 18 L. R. A. (N. S.) 568; *Bennett v. Davis*, 90 Me. 102, 37 Atl. 864; *Eustis v. City of Henrietta*, 90 Tex. 468, 39 S. W. 567.

Turning from these observations to a consideration of cases which tend more directly to support respondent's position, that the sections in question are void in failing to provide for the giving of notice to the claimant and an opportunity to be heard, in the case of *State v. Snow*, 3 R. L. 64, liquors of specified kinds kept for sale in violation of the provisions of a certain act were liable to be seized upon search warrant and adjudged forfeited. The court held that the section providing for the mode of condemnation of the liquors was unwarranted, in that the parties interested in the subject of the adjudication were afforded under the act no opportunity to answer and defend. The court said: "In order to the validity of a judicial trial, the parties interested in the subject of the adjudication should be informed of the nature and cause of the charge upon which the adjudication is to be made—they must have an opportunity to answer and defend. Can it be said in this case that there is any such opportunity given to any person who has an interest in the things seized upon the search warrant, that he has any notice of any allegation of the facts necessary to exist in order to warrant a forfeiture, or of any proceeding against the liquors themselves? We think not. No such allegation is anywhere made or to be made. No complaint of that kind is provided for, and the property is to be divested from the owner without any charge or trial of the facts upon which alone he could be legally divested, and without any notice of any such intended trial or inquiry."

In the case of *Fisher v. McGirr*, supra, the court considered the constitutionality of a statute which made it unlawful for unauthorized persons to keep or to have on deposit spirituous or intoxicating liquors for sale, and directed, upon a complaint being filed showing a violation of the act, the issuance of a search warrant and the confiscation of such liquors. The act however, provided that, before the liquors should be forfeited or destroyed, if the keeper or owner thereof should be known to the officer executing the warrant, such owner or keeper should be summoned forthwith before the officer who issued the warrant to show, if he could, that the liquors were lawfully kept, and if the

officer did not know the owner, keeper, or possessor of the seized liquors, notice for the same purpose was to be given by posting for two weeks. That act, it will be observed, as to notice and a hearing, better conserved the rights of parties interested in the property than does the one now under consideration; nevertheless in a very elaborate opinion the court held the act unconstitutional on the ground, among others, that it fixed no time or place at which a claimant might appear with his evidence, and have a trial and meet opposing witnesses face to face. The court said: "If the officer returns the name of some person as owner or keeper, and such person does not appear forthwith, then the liquor may be adjudged forfeited, without further notice or proof. The officer, who, of course, must act upon hearsay and the best information he can obtain, however honestly he may endeavor to obtain the truth, may be mistaken in his return of the name of a person as owner or keeper; then the property may be confiscated and destroyed without any opportunity given the true owner to appear and defend. But suppose the officer happens to be right, and the owner has notice, the notice is to appear forthwith. No day in court is given, no allowance made for the contingency of the owner's absence or sickness or engagements. No provision is made that personal notice shall be given, or that proceedings shall be postponed until personal notice be given. Probably it was not the intention of the Legislature to direct a proceeding subversive of the rights of the subject; and it is quite probable that magistrates and courts, acting in conformity with the more familiar and established maxims governing the administration of justice, have required proofs on the part of the prosecutor, and given to respondents some of the privileges of a defendant, before proceeding to a judgment. But * * * the statute itself must, on its face, be conformable to the Constitution."

In *Ieck v. Anderson*, 57 Cal. 251, 40 Am. Rep. 115, section 636 of the Penal Code as it then read, providing for the seizure, sale, and forfeiture of apparatus employed in illegal fishing without the formality of a judicial hearing, was declared void and unconstitutional. In that case it was said: "The statute under consideration contained no provisions whatever for determining whether the property was liable for condemnation for the forfeiture denounced against it for the criminal acts of those who had it in their possession. It merely authorizes a peace officer to seize the property without warrant or process, to condemn it without proof, or the observance of any judicial forms, and to destroy it without notice of any kind, or sell it upon notice posted anywhere in the county for five days. Such an enactment cannot be harmonized with those constitutional guarantees which are supposed to secure every one within the state his rights of liberty and

property. * * * The law of the land in judicial proceedings requires a hearing before condemnation, and judgment before dispossession."

And in *Loesch v. Koehler*, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129, 35 L. R. A. 682, a statute authorized certain peace officers, or every agent of any society for the prevention of cruelty to animals, to kill any animal found neglected or abandoned, and which is injured or diseased past recovery, or from age has become useless. The court said that the act could not be maintained as an exercise of police power, as its destruction was not made to depend upon the existence of infectious or contagious disease, or other condition affecting the public health or comfort. And, after citing and quoting from a number of cases, the court held it unconstitutional because it allowed the owner to be deprived of his property without due process of law—without notice. The court said: "It is fundamental that no person can be deprived of any article which is recognized as property without a judicial hearing, after due notice. No degree of misconduct or wrong can justify the forfeiture of the property of a citizen except in pursuance of some judicial procedure, of which the owner shall have notice, and in which he shall have an opportunity to contest the ground upon which the forfeiture is claimed."

Hibbard v. People, 4 Mich. 125, invokes a like principle. There the part of a certain act commonly called the "search and seizures clause" was held repugnant to the Constitution and void, in that the act provides no notice to the owner of the property when, where, or before whom the search warrant is to be returned.

Donovan v. Mayor of Vicksburg, 29 Miss. 247, 64 Am. Dec. 143, was a proceeding to prohibit the sale of two hogs found running at large, contrary to the provisions of an estray ordinance. The court said: "The petition shows that the ordinance complained of was of a summary nature, itself directing the city marshal to seize and sell all hogs found running at large in the city, and to pay over the proceeds of the sales, one half to the use of the hospital, and the other half to retain for his services in executing the ordinance. No process is required to be issued for the seizure or the sale, nor notice given to the owner, either actual or constructive, nor is there any opportunity given to him to appear and show cause, under any circumstances, why the ordinance should not be enforced against his property. The entire proceeding is summary, and calculated to deprive the party of his property in all cases without notice or trial, and however clearly he might be able to show that property seized was not within the operation of the ordinance. It is manifest that it [the ordinance] falls within the condemnation of these provisions of the Constitution. It de-

prives the citizen of his property without notice or trial, and without the opportunity to protect his rights, and of course without 'due course of law.'" See, also, *Poppen v. Holmes*, 44 Ill. 362, 92 Am. Dec. 186; *Jenks v. Stump*, 41 Colo. 281, 93 Pac. 17, 124 Am. St. Rep. 137; *Varden v. Mount*, 78 Ky. 86, 39 Am. Rep. 208.

Cooley, in his work on Constitutional Limitations, speaking of search warrants, and after referring to a number of objections that would be fatal to such a warrant, says: "The warrant must also command that the goods or other articles to be searched for, if found, together with the party in whose custody they are found, be brought before the magistrate, to the end that, upon further examination into the facts, the goods and the party in whose custody they were may be disposed of according to law. And it is a fatal objection to such a warrant that it leaves the disposition of the goods searched for to the ministerial officer, instead of requiring them to be brought before the magistrate, that he may pass his judgment upon the truth of the complaint made; and it would also be a fatal objection to a statute authorizing such a warrant if it permitted a condemnation or other final disposition of the goods without notice to the claimant, and without an opportunity for a hearing afforded him."

Black on Intoxicating Liquors, at section 351, says: "The statute [i. e., one providing for the confiscation or forfeiture of liquors kept in violation of law] must provide for notice to the party interested in the property, and for a trial and judicial ascertainment of the facts requisite by the statute to warrant a forfeiture, and an opportunity must be given for such party to appear and defend. If the statute fails in these particulars, it is not valid."

McConnell v. McKillip, 71 Neb. 712, 99 N. W. 505, 65 L. R. A. 610, 115 Am. St. Rep. 614, was an action in replevin against a deputy game warden for the possession of three shotguns, held by him under a statute authorizing game wardens to seize and forfeit to the state all guns, ammunition, dogs, blinds, and decoys, and all fishing tackle, in actual use by persons hunting or fishing in violation of the game law. There, in passing upon the contention that the statute was a valid exercise of the police power of the state, the court said there was a wide distinction between personal property, which can only be put to an illegal use, and firearms, which may be used for many other purposes innocent and lawful in their nature, that in the former case the Legislature might declare such property to be a public nuisance, and provide for its summary abatement or destruction by a public officer, but on the other hand, if property susceptible of a beneficial use has been perverted to an unlawful use, and therefore is subject to for-

feiture to the state, that such forfeiture can only be declared after the owner of the property has had his day in court. The court said: "We know of no principle of law which justifies the seizure of property, innocent in itself, its forfeiture, and the transfer of the right of property in the same from one person to another as punishment for crime, without the right of a hearing upon the guilt or innocence of the person charged before the forfeiture takes effect." See, also, *State v. Robbins*, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 433; *Wagner v. Upshur*, 95 Md. 519, 52 Atl. 509, 93 Am. St. Rep. 412; *Berry v. De Maris*, 76 N. J. Law, 301, 70 Atl. 337; *Beavers v. Goodwin* (Tex. Civ. App.) 90 S. W. 930; *Darst v. People*, 51 Ill. 286, 2 Am. Rep. 301; *In re Gannon*, 16 R. I. 537, 18 Atl. 159, 5 L. R. A. 359, 27 Am. St. Rep. 759; *In re Lance*, 55 Misc. Rep. 13, 106 N. Y. Supp. 211; *Louisville, etc., Board v. King*, 127 Ky. 824, 107 S. W. 247, 15 L. R. A. (N. S.) 379; *State v. Chittenden*, 127 Wis. 468, 107 N. W. 500; *Craig v. Board of Improvement*, 84 Ark. 390, 105 S. W. 867; *Chauvin v. Valiton*, 8 Mont. 451, 20 Pac. 658, 3 L. R. A. 194; *East Kingston v. Toule*, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174; *Central, etc., Ry. Co. v. Wright*, 207 U. S. 127, 28 Sup. Ct. 47, 52 L. Ed. 134; *Canon City v. Manning*, 43 Colo. 144, 95 Pac. 537, 17 L. R. A. (N. S.) 272; *Clement v. Rabbach*, 62 Misc. Rep. 27, 115 N. Y. Supp. 162; *In re Rosser*, 101 Fed. 562, 41 C. C. A. 497; *Ulman v. Baltimore*, 72 Md. 587, 20 Atl. 141, 21 Atl. 709, 11 L. R. A. 224, and note; *Kuntz v. Sumpston*, 117 Ind. 1, 19 N. E. 474, 2 L. R. A. 655, and note.

The case of *Collins v. Lean*, 68 Cal. 284, 9 Pac. 173, lends no support to the position of appellants. There, from an affidavit filed with a justice of the peace, it appeared that Collins had in his possession certain lottery tickets, and that he intended to use them as a means of committing a public offense. A search warrant was issued, under the authority of which the place of business of Collins was searched, and 100 lottery tickets were found and taken by the police officer for the purpose of being used as evidence against Collins in a future prosecution. After the tickets were no longer required as evidence, their return to Collins was refused on the ground that they should be retained to prevent him from committing the public offense of selling them. The court said that, while as a general rule one could not be deprived of property without due process of law, nevertheless it was firmly settled that all property must be kept and used in consonance with the welfare of the general public; that when property is held or used so as to be injurious to the general welfare of the public, it may be seized and destroyed. It was apparent that Collins would put the lottery tickets to an unlawful use, and the refusal therefore to return them was held au-

thorized. In that case the property was seized under subdivision 3 of section 1524, Pol. Code, as property held "with the intent to use it as a means of committing a public offense," and under section 1536, unlike the case at bar, the magistrate was under no duty of delivering the property to its owner "upon a satisfactory proof of title," but was required to retain it in his possession subject to the order of the court to which he was required to return the proceedings before him.

There is a line of cases holding that it is a proper exercise of legislative power to provide for the destruction of property without notice when the public welfare demands summary action. Instances of this kind are the power to destroy diseased meat or decayed fruit, to kill diseased cattle, to destroy obscene pictures and books, to pull down houses in the path of a devastating fire, to destroy property used or kept in violation of the law which is incapable of lawful use (*Mullen v. Mosley*, 13 Idaho, 457, 90 Pac. 986, 12 L. R. A. [N. S.] 394, 121 Am. St. Rep. 277). The property involved in this case is what is sometimes termed in the books to be "innocent property." It threatens no danger in any way to the public health or morals, and there is no reason why the claimant of the property should not be accorded by statute an ample opportunity to make his defense. It is plain that the present case does not fall within the rule of the cases just cited.

If it be conceded that in a criminal prosecution a court, judge, or magistrate would be authorized and warranted incidentally to pass upon and award the possession of personal property as provided in said sections 1408 and 1409, yet in the case at bar no one has been arrested; no one has been charged with an offense; no one has been brought to trial; nor is the article seized to be used in evidence in any case. Thus it clearly appears that the search warrant proceedings were resorted to for the sole purpose of having the magistrate pass upon the right of possession of property under a law which gives no notice to the person from whom the property is summarily taken. We think that it was never intended, under the circumstances of this case, that the right of possession of property should be adjudicated by a magistrate, especially when the law has provided the means for settling such question by the ordinary action of claim and delivery. In our opinions sections 1408 and 1409, in so far as they purport to authorize a magistrate to pass upon and adjudicate the right to the possession of personal property without notice to the person from whose possession it was taken, or who claims title to it, are null and void.

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

(12 Cal. A. 240)

PEOPLE v. DRIGGS. (Cr. 141.)

(Court of Appeal, Second District, California.
Dec. 17, 1909. Rehearing denied by
Supreme Court Feb. 14, 1910.)

1. INDICTMENT AND INFORMATION (§ 125*)—ALLEGATIONS—CHARGING SEVERAL OFFENSES—"FORGERY."

Pen. Code, § 470, makes any person guilty of "forgery" who, with intent to defraud, signs another's name to a lease, etc., knowing he has no authority to do so, or utters, publishes, or passes such forged instrument as true with intent to injure another, and section 116 makes every person guilty of felony who knowingly procures or offers any forged instrument to be recorded. An information alleged that accused willfully, fraudulently, etc., made and forged a lease, which was set out, and afterwards, knowing the instrument to be forged, and with intent to defraud, willfully and fraudulently uttered, published, and passed such instrument as true by offering it for record by the county recorder and having it recorded. *Held*, that the information only charged an offense under section 470, and not under section 116, the allegations as to the manner in which the lease was published being of evidential facts which may be disregarded as surplusage.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 125.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2900-2910; vol. 8, p. 7665.]

2. INDICTMENT AND INFORMATION (§ 154*)—DUPLICITY—OBJECTIONS—WAIVER—FAILURE TO DEMUR.

Failure to demur to the information on the ground that it charges more than one offense, as permitted by Pen. Code, § 1004, subd. 3, waives that objection to the information.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 501; Dec. Dig. § 154.*]

3. CRIMINAL LAW (§ 1036*)—TRIAL—RECEPTION OF EVIDENCE—NECESSITY OF REPEATING OBJECTIONS.

While as a rule objections to testimony are waived by failing to object to its admission, where one has once objected and excepted to the admission of a certain line or character of testimony, he need not make repeated objections to the reception of such testimony in order to have the ruling admitting it reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2639-2641; Dec. Dig. § 1036.*]

4. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY.

The information charged accused with forging a lease which recited a consideration of past kindness to the purported lessor by accused. The executor of such lessor testified that he had a conversation with the latter during his lifetime, in which he told decedent that accused was apt to have forged papers against his estate, and advised him to convey his property to those he wanted to give it to, which he (decedent) did, saying that that would balk accused in anything she did. Another witness testified to conversations with decedent relative to accused, in which the former said that accused wanted him to sign a lease, but he did not do it, and ridiculed the idea of doing so, and said that accused was an adventuress, and that he was fixing things to head off the old woman in case he died, and another witness testified that decedent told him he expected to have trouble with accused and was deeding his property away, and that he called her a reprobate, etc., and said she was working

him as she worked another man. *Held*, that the evidence was hearsay and improperly admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

5. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE—PREJUDICIAL EFFECT.

The admission of the evidence was highly prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

Gertrude Driggs was convicted of forgery, and she appeals. Reversed.

For opinion of Supreme Court denying rehearing, see 106 Pac. 64.

See, also, 10 Cal. App. 445, 102 Pac. 542.

Paul W. Schenck, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Appeal from judgment of conviction and an order denying defendant's motion for a new trial.

By information filed by the district attorney the defendant was charged with the crime of forgery, it being averred that she forged the name of one John J. Charnock to an instrument, which purported, in consideration of "past kindness and tender care bestowed upon him by the said Gertrude Driggs," to lease to her for a term of years certain real estate therein described. Appellant attacks the information, claiming that it is defective in that it charges her with the commission of two offenses, namely, that of forgery as defined in section 470, Pen. Code, and also that defined in section 116, Pen. Code, which provides that: "Every person who knowingly procures or offers any false or forged instrument to be filed, registered or recorded in any public office within this state, which instrument, if genuine, might be filed, or registered, or recorded under any law of this state, or of the United States, is guilty of felony."

The information, in appropriate language, charges the defendant with forging the instrument; it being averred therein that: "Gertrude Driggs is accused * * * of the crime of forgery, committed as follows: That the said Gertrude Driggs * * * did willfully, unlawfully, falsely, fraudulently, and feloniously make, alter, forge, and counterfeit a certain lease, indenture, writing obligatory, conveyance, and contract, which instrument is and was in the following words and figures, to wit," which instrument is set out in *hæc verba*. This is followed by the averment which it is claimed states an offense under said section 116, Pen. Code, and is as follows: "That afterwards, to wit, on or about the 25th day of March, 1909, Gertrude Driggs, well knowing that the said instrument was false, altered, forged, and counterfeited as aforesaid, and with intent to de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fraud * * * did willfully, unlawfully, falsely, fraudulently, and feloniously, at and in the county and state aforesaid, utter, publish, and pass as true and genuine the instrument aforesaid, by offering the said instrument for record at the office of the recorder of the county of Los Angeles, state of California, and did then and there cause the same to be recorded as a record in said office."

The information in form is identical with that considered in the case of *People v. Harrold*, 84 Cal. 567, 24 Pac. 106, and it is upon the authority of that case that appellant bases her claim that the information states more than one offense. An examination of the opinion in the Harrold Case discloses the only point there decided was that the instrument which was the subject of forgery, even if genuine, was not one entitled to be recorded, and hence it was not a felony to offer it for record, or to cause or procure it to be recorded; and, for this reason, says the court, the instrument leaves but one offense charged—that of forgery. This was a sufficient ground for so deciding, and we cannot accept the opinion as an authority for holding the information defective upon the grounds claimed in the case at bar. Indeed, it was not so held. All that the allegation purports to aver is that defendant uttered, published, and passed as true and genuine the alleged forged instrument, and that she did this, not by assigning or transferring it, but in a certain specified manner, namely, by offering it for record, etc. The utterance, publishing, and passing of the instrument as true and genuine are acts constituting the offense under section 470. The manner of such utterance and publishing is evidentiary, and should be disregarded as mere surplusage. The averment does not purport to charge the substantive offense defined by said section 115. In the absence of such averment proof that the instrument was offered for record would constitute evidence of its utterance and publication. *People v. Baker*, 100 Cal. 190, 34 Pac. 649, 38 Am. St. Rep. 323. In our judgment, there is no merit in appellant's contention upon this ground. Moreover, such objection to an information is made the ground for demurrer by subdivision 3, § 1004, of the Penal Code, and when demurrer to the information upon such ground is not interposed, the defendant must be deemed to have waived such objection. Section 1012, Pen. Code. No demurrer was interposed by defendant upon the ground stated; and, even conceding the information to be objectionable for the reasons now urged by appellant, she must nevertheless be deemed to have waived the point.

The lease and attached certificate of acknowledgment bear date March 3, 1909, and John J. Charnock, whose signature thereto was the subject of the alleged forgery, died about March 23, 1909. The court, over defendant's objections, admitted the testimony of several witnesses as to declarations and statements made without the presence of de-

fendant by the deceased in his lifetime. Appellant justly contends that the testimony so received under such ruling was of a character prejudicial in the highest degree to her substantial rights. Against appellant's contention respondent insists that, while some of the testimony so received was objectionable, defendant neglected to interpose objections to its reception, and that by reason of such failure defendant waived any objection thereto. While this is the general rule, nevertheless the law is well settled that, where a party has once excepted to the admission of a certain line or character of testimony his right to a review of such alleged error does not require him to interpose repeated objections to the reception thereof. *Green v. Southern Pac. Co.*, 122 Cal. 563, 55 Pac. 577; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131. The numerous objections made by defendant to the admission of testimony as to statements made in his lifetime by deceased of and concerning defendant, her efforts to obtain a lease from him, his refusal, etc., all made without her presence, and the rulings of the court thereon and exceptions thereto by defendant, entitle her beyond question to a review of each and all of such rulings.

It is unnecessary to refer to the evidence so received other than in part. Witness Smead, the executor of the will of deceased and in his lifetime his confidential adviser, testified in substance that prior to February 27th he had a conversation with Charnock relative to his sentiments towards Mrs. Driggs; that from his actions and what he said he knew what his sentiments were towards her; that about the 1st of February he told Mr. Charnock that Mrs. Driggs was apt to have forged papers of some kind against his estate, and that he advised him to protect his heirs by getting out deeds to the people he wanted his property to go to, and that Charnock told him to prepare the deeds, which the witness did; that Charnock signed the deeds and stated: "Well, this will balk her, the old woman, in anything that she does." Witness Haas testified in substance that in the latter part of February or 1st of March he had conversations with Charnock in his lifetime relative to defendant, in which Charnock said that Mrs. Driggs and some attorney wanted him to sign a lease, and he says, "I wouldn't sign any lease to any one and didn't sign any papers." George Charnock, a brother of the deceased, testified that his brother John told him Mrs. Driggs had been there and was trying to get a lease, and so on. He just made sport of it. He said: "To think that I would give a lease on land that was already leased and ready to put crops and a man that had been cultivating it for years, and she has no horses or tools of any kind to put a crop in with." He says: "I must be a fool, any one would think of giving a lease to a person under such conditions." "Q. What did he say? A. Well, he didn't sign anything, he told me. I under-

stood him. He didn't tell me right out, but I understood that he did not, had not given any lease." He said Mrs. Driggs was an adventuress; that she was nothing more than an adventuress, and was not really reliable. He said something more, but I don't feel like saying. He told us then that he had made out a will, and he was fixing things so as to head off the old lady, the old woman, as he called her, in case he passed in his checks; he just spoke that way." Witness Stackus testified that deceased said to him that he expected to have some trouble with Mrs. Driggs, and he was deeding most of his property, most of his land, away. "I had talked with him about Mrs. Driggs before, and he had always spoken of her lowly; he called her, and spoke of her as 'that old thing of a woman, I think is going to get—they are trying to get, some of my property.' He called her a reprobate. I was there the Sunday before his death, and had a conversation with him, in which he mentioned Mrs. Driggs. He said that he expected there would be trouble with her, but he thought he had things—business affairs—arranged so that he didn't anticipate any trouble." Witness Reinhart testified: "He told me, he says, 'She is working a good deal as she worked in the Hill case.' He read about the Hill case, and he said to me: 'She is working me about the same as she worked old man Hill; I think that is her game of coming to me with soup.'" Much other testimony of a like character was introduced.

Respondent justifies the rulings of the court in receiving the evidence upon the ground that Charnock and his friends were suspicious of Mrs. Driggs, and believed that she had designs on him; that owing to this fact, and for the purpose of "heading off" Mrs. Driggs in any attempt she might make to forge an instrument affecting his property, he deeded the property described in the lease to his daughter. The suspicion and belief of Charnock and his friends might have been wholly groundless. In no event, however, could it constitute evidence tending to show defendant's guilt. Respondent also insists that, inasmuch as the expressed consideration in the lease was "past kindness and tender care bestowed" upon the deceased by the defendant, the evidence was competent for the purpose of showing no such consideration existed, or, if it existed, no value was placed thereon by Charnock. The forgery, however, did not depend upon the sufficiency or insufficiency of the consideration. Testimony on behalf of defendant to the effect that she had bestowed the tender care and performed the kindly acts specified in the lease, and that it constituted full consideration therefor, could in no wise affect her status under the charge of forging the instrument. If improper in the one case, it must likewise be improper in the other.

Respondent also contends "that sufficient testimony of the acts and declarations of deceased concerning defendant appears in the

record, without objection having been made thereto, to cure any possible error in the admission of other similar evidence to which proper objection was made," and for which reason the errors were without prejudice to the substantial rights of defendant. We cannot assent to this; indeed, the circumstances and facts connected with the alleged forgery are of such a nature that it would be difficult to conceive of evidence more prejudicial in its effect upon the jury. Moreover, as we have seen, the record bristles with objections repeated over and over again to the same line of questions.

The mental state of the deceased toward defendant was wholly irrelevant so far as it affected her guilt or innocence. We are aware of no rule of evidence which would warrant the reception in evidence in this case of the statements and declarations of John J. Charnock, deceased, as they are disclosed by the record. They form no part of the *res gestæ* (section 1850, Code Civ. Proc.), were not authenticated under the solemnity of an oath, nor made in the presence or hearing of defendant, and constituted hearsay pure and simple, if not "vicious and venomous." These views are fully sustained by *People v. Landis*, 139 Cal. 426, 73 Pac. 153, the facts of which are identical with those in the case at bar, and *People v. Irwin*, 77 Cal. 499, 20 Pac. 56; *People v. Carlton*, 57 Cal. 83, 40 Am. Rep. 112; *People v. Powell*, 87 Cal. 363, 25 Pac. 481, 11 L. R. A. 75; *Roosa v. Boston Loan Co.*, 132 Mass. 439; *Bacon v. Charlton*, 7 Cush. (Mass.) 581; *Meeker v. Boylan*, 28 N. J. Law, 274; *In re Calkins*, 112 Cal. 300, 44 Pac. 577. We have carefully examined the authorities cited by the people, but the points involved therein bear no analogy to the case at bar.

While our attention has been directed to other alleged errors appearing in the record, the improbability of a recurrence of the same upon a new trial renders it unnecessary that we pass upon them.

The judgment and order denying appellant's motion for a new trial are reversed.

We concur: ALLEN, P. J.; TAGGART, J.

(12 Cal. A. 240)

PEOPLE v. DRIGGS. (Cr. 1,585.)

(Supreme Court of California. Feb. 14, 1910.)

Gertrude Driggs was convicted of forgery, and a judgment of conviction and order denying new trial was reversed by the District Court of Appeal (108 Pac. 62), and the state applies for a rehearing in the Supreme Court. Application denied.

See, also, 10 Cal. App. 445, 102 Pac. 542.

PER CURIAM. Application for a hearing in this court is denied. In denying this application we deem it proper to say that we are not to be understood as approving that portion of the opinion which is as follows: "The mental state of the deceased toward defendant was wholly irrelevant so far as it affected her guilt or innocence."

(157 Cal. 371)

STUM v. HADRICH et al. (L. A. 2,419.)
(Supreme Court of California. March 18, 1910.
Rehearing Denied April 15, 1910.)

PARTNERSHIP (§ 53*)—CREATION OF RELATION—EVIDENCE.

On an issue as to whether plaintiff had sold to defendant a half interest in his business, evidence held insufficient to show a sale.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 53.*]

Department 2. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by John A. Stum against L. F. Hadrich and others. Appeal by plaintiff from a judgment for defendants. Affirmed.

Frank G. Bryant, for appellant. Wallace W. Wideman, Frank Herald, and Welch & Thompson, for respondents.

MELVIN, J. Appeal from a judgment in favor of defendants. In November, 1904, respondent Hadrich was the proprietor of a confectionery and catering business in Los Angeles. The stock, fixtures, and good will were worth \$8,000. Certain negotiations were had between Hadrich and Stum looking to a sale of a half interest in the business to the latter for \$500. Stum was an expert caterer, and it was understood in the discussions between him and Hadrich that, if he purchased a half interest in the business at the sum named, he was to devote his entire time to the management of the establishment. Conversations were held at Hadrich's place of business and at that of one Sparks, in which it was arranged that Stum should pay \$50 at once, \$100 within a day or two thereafter, and that he and Hadrich should obtain the remaining \$350 of the purchase price from Sparks upon their joint note. This amount was to be repaid out of Stum's share of the profits of the business. Stum paid the \$50 and received from Hadrich the keys of the store and of the cash register, and, at the latter's request, wrote one letter, signing the name "Stum & Hadrich." This, and ordering the porter to clean up the store on one occasion, seem to have been the only services rendered by appellant. When he tendered \$100, two days after his payment of \$50, Hadrich refused to accept it and repudiated the sale. Subsequently, through his attorney, Hadrich offered to return the \$50, but, as the tender was refused, he paid that sum into court for the use of plaintiff. Stum testified at the trial: "It was agreed between Hadrich and me that the sale should be evidenced by an agreement or contract in writing. This was never done. When we went up to see Wideman (the attorney who prepared the bill of sale) about the contract, I would not sign it as prepared, and left them. Thereafter, on the same day, I tendered the \$100 as hereinabove stated."

About half a year following the transactions between Stum and Hadrich, the latter exchanged his business for the property in San Bernardino county in which appellant claims an interest. It was alleged in the complaint that appellant, by reason of ownership of a half interest in the business formerly conducted by Hadrich, was entitled to an undivided half interest in the real property obtained by Hadrich in exchange for the stock, fixtures, and good will of his store in Los Angeles. The other defendants are sued as trustees, alleged to be holders of the title to a portion of this land who had taken their respective parcels of the property fraudulently and with full knowledge of Stum's equities.

Although the contract of copartnership was to be the final agreement within which all of the oral negotiations were to be gathered and expressed, plaintiff did not, so far as the evidence shows, offer to defendant any such agreement for execution, nor did he tender a note to Hadrich for signature, nor in lieu thereof offer defendant \$350, the amount agreed upon according to his testimony as the final payment of the purchase price of the half interest in the business. He seems to have done nothing to consummate the proposed sale after Hadrich declined to proceed further with the matter. The testimony in his behalf failed utterly to show a completed sale of a half interest in the business, and consequently there is nothing on which to base a claim to a like interest in the property obtained in exchange for the store, fixtures, and good will.

The judgment is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(157 Cal. 363)

CITY OF LOS ANGELES v. SOUTHERN PAC. R. CO. et al. (L. A. 2,246.)

(Supreme Court of California. March 14, 1910.
Rehearing Denied April 13, 1910.)

1. RAILROADS (§ 76*)—RIGHTS IN STREETS—CONSTRUCTION OF TRACKS.

Where a city ordinance purported to grant the unreserved and unrestricted use of a street to defendant for railroad purposes, defendant was not compelled at the outset to construct all the tracks it had a right to lay in the street under its grant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 195; Dec. Dig. § 76.*]

2. RAILROADS (§ 75*)—STREETS—USE—EXTENT—DETERMINATION OF CITY COUNCIL.

Where a city council was authorized to grant a railroad certain rights in a street, the council was not required to determine what use of the street was absolutely necessary for the grantee, but might simply determine what street or streets it would devote to the grantee's use, leaving to the railroad company the right to determine what use would be necessary and within the council's jurisdiction to grant, as time and experience should determine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 185; Dec. Dig. § 75.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
108 P.—5

3. RAILROADS (§ 75*)—USE OF STREETS—MUNICIPAL GRANT—AUTHORITY OF CITY COUNCIL.

Where a city council had jurisdiction to grant a railroad company certain rights in a street, an ordinance exceeding the council's jurisdiction was nevertheless valid to the extent of the council's power to grant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 187; Dec. Dig. § 75.*]

4. MUNICIPAL CORPORATIONS (§§ 680, 681*)—GRANTS OF RIGHTS IN STREET—MUNICIPAL AUTHORITY—STATUTES—REPEAL.

Act May 20, 1861 (St. 1861, c. 532) § 21, authorizing any county, city, or town to grant to any railroad company the use of any of its streets or highways absolutely necessary to enable the railroad company to reach an accessible point for a depot therein or to pass through the same on as a direct a route as possible, conferred no greater authority on a city council than Civ. Code, §§ 465, 470, relating to the same subject, by which the act was superseded.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1464; Dec. Dig. §§ 680, 681.*]

5. MUNICIPAL CORPORATIONS (§§ 680, 681*)—GRANTS OF RIGHTS IN STREETS—STATUTES.

Civ. Code, § 465, subd. 5, authorizes cities to grant to a railroad corporation the right to construct its road along any street on its route, provided the corporation shall restore the street to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise. Section 470 declares that no railroad corporation shall use any street within a city unless the right to use it is granted by a two-thirds vote of the city authorities, from which the right must emanate. *Held*, that section 470 merely makes the municipal grant a condition precedent to the exercise of power given by the Legislature so far as city streets are concerned, and cannot be construed to confer on the city power to authorize a greater use of the street than that declared by section 465, subd. 5, which limited a city's power so to grant.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1464; Dec. Dig. §§ 680, 681.*]

6. MUNICIPAL CORPORATIONS (§§ 680, 681*)—GRANTS OF RIGHTS IN STREETS—POWER OF CITY—"ROAD."

Civ. Code, § 465, subd. 4, provides that a railroad should have power to lay out its road not exceeding nine rods wide, and to construct and maintain the same with a single track and with such appendages and adjuncts as might be necessary for its convenient use, and subdivision 5 authorized the construction of the "road" along any street so as not to unnecessarily impair its usefulness or injure its franchise, etc. *Held*, that the word "road" was not used in subdivision 5 in connection with "appendages and adjuncts" as in subdivision 4, and therefore should be construed only to include the railroad's single or double track, as the case might be, and hence the city had no power to grant a railroad company the right to lay a third track in a street for any purpose.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1464; Dec. Dig. §§ 680, 681.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6250-6254.]

In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action in the nature of ejectment by the City of Los Angeles against the Southern Pacific Railroad Company and the Southern

Pacific Company. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Leslie R. Hewitt, City Atty., John W. Shenk, Asst. City Atty., Lewis R. Works, and Howard Robertson, Deputy City Atty., for appellant. J. W. McKinley, for respondents.

ANGELLOTTI, J. This is an appeal from a judgment in favor of defendants. The action was one in the nature of ejectment to oust defendants of possession of a portion of Alhambra avenue in the city of Los Angeles, occupied by them with a railroad track.

Defendant Southern Pacific Company is in possession of all the railroad tracks of the other defendant, holding and operating trains thereover under a lease from such defendant. In the year 1874 the Southern Pacific Railroad Company constructed a single steam railroad track along the center line of the entire length of what is now known as Alhambra avenue, and in the year 1895 it constructed a second track along the entire length of said avenue parallel to and about eleven feet south of the center line thereof, and has ever since maintained and used the said tracks as part of its railroad system. In the year 1902, it laid a third track along a portion of said avenue, south of the other two tracks, which it has ever since maintained and used for railroad purposes. It is this third track that is in question here. It appears that this track is not a part of the main traveled road of defendant, but is one running to the grounds occupied by the railroad repair shops, and that it is also used for siding and switching purposes. It further appears that the effect of the maintenance of this track in its present condition is to prevent the use of the southerly half of the avenue by wagons or vehicles, but we do not deem this consideration material to a disposition of this appeal.

Defendants base their alleged right to such use of Alhambra avenue upon an ordinance adopted by the city council of the city of Los Angeles on July 24, 1873, and approved by the mayor thereof on July 28, 1873. So far as is material here, that ordinance purported to "set apart" from the public highways of the city of Los Angeles all of San Fernando and Mission streets (the latter being now Alhambra avenue) "to the unreserved and unrestricted use of the Southern Pacific Railroad Company," and to grant to said company "the right of way over and along the same * * * for the building, maintaining, and operating of its railroads by and through the track or tracks which said company shall deem it necessary to build along and over the same and with the privilege to said company to make such embankments and excavations upon said streets as shall be found necessary by the company's engineer to the proper construction of said railroad and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

its connections with said city." The only reservations or conditions therein were as to the right of the city to maintain zanjias, water courses, sewers, water pipes, and gas pipes, and a provision as to the reversion in the event of nonuse by the grantee. There can be no room for doubt that such use of the street as is being made by the defendants is warranted by the terms of this ordinance. As said by the learned judge of the trial court: "This ordinance purports to grant * * * the 'unreserved and unrestricted use' of the street in question * * * 'for the building, maintaining and operating of its railroads by and through the track or tracks which said company shall deem it necessary to build along and over the same,' * * * excepting or reserving only certain rights as to ditches, street crossings," etc. The language of the ordinance is so plain and unambiguous in this regard as to leave no room for doubt as to the construction that must be placed upon it, and counsel for the city make no claim to the contrary.

It is established by the decision in *Workman v. Southern Pacific R. R. Co.*, 129 Cal. 536, 62 Pac. 185, 318, that the grantee was not compelled to construct at the outset all the tracks it had a right to lay in the street under its grant, but that, constructing a single track at first, it might construct any additional track or tracks authorized by the ordinance at any time in the future and "whenever it should become desirable from the necessities or convenience of operating its road." It was further determined by that case that the city council was not required to determine what use of the street was "absolutely necessary," for the grantee, but that it might simply determine what street or streets it would give to the use of the railroad company, leaving to the railroad company the right to determine what use will be necessary, "as time and experience shall demonstrate." We are speaking, of course, of such "use" as might legally be granted by the council.

It is contended by appellants that the ordinance is absolutely void, for the reason that it granted rights beyond the power of the council to give. It is not claimed that the council did not have the right to authorize a limited use of Alhambra avenue by the grantee for railroad purposes, but it is insisted that it had no right to give the railroad company the practically absolute control of the whole street, or any such right therein as would authorize it to maintain the third track under the existing conditions. It is clear, in view of the concession that the city council had the legal right to authorize a limited use by the railroad company of Alhambra avenue, that the ordinance cannot be held to be absolutely void. As said by counsel for respondents, it is undoubtedly valid "to the extent of the right which was within the power of the council to grant," and as said by this court of another ordinance in

Workman v. Southern Pacific R. R. Co., supra, it gives "to the company the right to make such use of the street as the city could authorize." Admittedly, the city council at that time had only such power in this regard as had been conferred on them by the Legislature of the state. Their authority to grant such a use of the street by the railroad company as includes the maintenance of this third track must be found, so far as we have been able to ascertain, in sections 465, 470, Civ. Code, as the same stood at the time of the adoption of this ordinance, for no other provision of law bearing on the matter has been called or has come to our attention. Learned counsel for respondents cites certain sections of the act providing "for the incorporation of railroad companies," etc., approved May 20, 1861 (St. 1861, p. 607), under which the Southern Pacific Railroad Company was organized. The particular section of this act relied on is section 21, authorizing any county, city, or town, by a certain vote of its legislative body, to grant to any railroad company the use of any of the streets or highways which may be absolutely necessary "to enable any such company to reach an accessible point for a depot" therein, "or to pass through the same on as direct a route as possible and accommodate the traveling and commercial interests thereof." Read in connection with the other provisions of the act, this section conferred no greater authority on a city council than the provisions of the Civil Code above cited, and by which, we have no doubt, it was superseded upon the going into effect of the Civil Code, January 1, 1873. At the time of the adoption of this ordinance, the only legislative authorization of the use of a public street for railroad purposes was in subdivision 5, § 465, Civ. Code, the section enumerating the powers of railroad corporations. That subdivision purported to empower any such corporation to "construct their roads across, along, or upon any * * * street, avenue or highway * * * which the route of its road intersects, crosses or runs along, * * *" with the proviso that "the corporation shall restore the street, avenue, highway * * * to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise." This subdivision was a part of the original Code, and has never been amended. It is to be observed that this provision is limited to the "road" of a railroad corporation; in other words, that it grants to a railroad corporation the right to use a street, avenue, or highway only as a place for its "road." Nothing is said therein, as in the next preceding subdivision, to which we will refer later, about "such appendages and adjuncts as may be necessary for the convenient use of the same." This, as we have said, was the only purported legislative authorization of the use of any street for railroad purposes. Section 470, Civ. Code, as it then and

has ever since stood, providing that "no railroad corporation must use any street, alley or highway, or any of the land or water, within any incorporated city or town, unless the right to so use the same is granted by a two-thirds vote of the town or city authority from which the right must emanate," is simply a limitation upon such authorization, making such a grant by the town or city authority a condition precedent to the exercise of the power given by the Legislature so far as streets in incorporated cities or towns were concerned. See *Arcata v. Arcata, etc.*, R. R. Co., 92 Cal. 645, 28 Pac. 676. In other words, section 470, Civ. Code, cannot be construed as conferring on the "town or city authority" the power to authorize any use of a street greater than that declared by subdivision 5, § 465, Civ. Code. The city council of Los Angeles was limited therefore to a grant of the right described in said subdivision 5, § 465, Civ. Code, and, in so far as the ordinance exceeded this, it was without legislative authority and ineffectual to give the railroad company any rights. The power given by that subdivision was simply "to construct their roads across, along, or upon" a street or highway.

What was meant by the term "roads" as therein used? We think it must be held to have meant the single or double-track road referred to in subdivision 4 of the same section as it stood at that time, and until amended after the judgment in this case (St. 1907, p. 99), and which provided that every railroad corporation has power "to lay out its road not exceeding nine rods wide, and to construct and maintain the same, with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same." Doubtless the words "and with such appendages and adjuncts," etc., as used in this subdivision, include necessary sidetracks, but this subdivision is not the one dealing with the right to use a street or highway. When we come to that subdivision (subdivision 5), we find that right limited to the "road." The words "such appendages and adjuncts," etc., as used in subdivision 4, are words of broad import, including perhaps, as practically decided in *Southern Pacific R. R. Co. v. Raymond*, 53 Cal. 223, even workshops for repairing the cars and locomotives of the railroad company. In the absence of very clear language to that effect, we are not inclined to construe subdivision 5 as intending or authorizing any such use of a public highway by a railroad corporation as would include the occupation thereof for all such purposes as would be included in the term "such appendages and adjuncts," etc. While such appendages and adjuncts may be a part of the "road" in one sense of the word, they are not a part of the road as the same is described in subdivision 4. As there described, the append-

ages and adjuncts are things additional to the road proper, things necessary to the convenient use of the road, which the railroad corporation has the general power to construct and maintain in such places as it may lawfully acquire and occupy for the purpose. The omission of any reference thereto in the subdivision relative to the use of public highways shows the intention to confine such use to the road itself, consisting of not exceeding two tracks. In our opinion the subdivision did not authorize the city council to allow a third track to be placed on the street. The amendment of 1907, heretofore referred to, allowing "one or more tracks" instead of a "single or double track," can, of course, have no effect in this case, which must be determined upon the law as it stood at the time of the adoption of this ordinance. The case of *Workman v. Southern Pacific R. R. Co.*, supra, relied on by learned counsel for respondents, is in point here only so far as already indicated. The question there was the right of the railroad company to lay a second track after it had constructed and operated for many years only a single track, under an ordinance giving it the right of way for its "track or tracks." This court said that under the law the railroad company was authorized to construct and maintain "a single or double track," and that the grant contained in the ordinance gave to the company "the right to make such use of the street as the city could authorize, and as circumstances may at any time thereafter require." (The italics are ours.) The case of *Arcata v. Arcata, etc.*, R. R. Co., 92 Cal. 639, 28 Pac. 676, involved the question of the right of a board of trustees of an incorporated town to allow a second track, where it had previously given permission for a single track. The second track was called a "slide track" it is true, but we do not think this affects the question. What was said in the opinion in that case must be construed with reference to the precise question presented. We are satisfied that the opinion should not be construed as intimating either that the trustees had the right to permit a use not warranted by subdivision 5, § 465, Civ. Code, or that said subdivision authorizes the maintenance of a third track for any purpose. We have examined the cases cited from other states, and find none that affect the question here discussed.

No question is raised as to the right of the city of Los Angeles to maintain this action, if the occupancy by the defendants of the portion of the street occupied by the third track is unauthorized.

The judgment is reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; SHAW, J.; LORIGAN, J.; MELVIN, J.

(157 Cal. 373)

McNEIL v. MORGAN (McNEIL, Intervener).
(S. F. 5,021.)(Supreme Court of California. March 18, 1910.
Rehearing Denied April 15, 1910.)**1. QUIETING TITLE (§ 35*)—SUFFICIENCY OF COMPLAINT.**

A complaint which alleged that plaintiff was the "owner and in possession of the land, and that defendant claimed some right, title, or interest in the premises, but neither in law nor in equity had any claim, right, title, or interest," was sufficient as against the objection that it did not in terms proclaim the adverse nature of the claim respecting which plaintiff sought to have his title quieted.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 73, 74; Dec. Dig. § 35.*]

2. JURY (§ 14*)—RIGHT TO TRIAL BY JURY—EQUITABLE ACTION.

An action to quiet title to land, instituted by a plaintiff in possession, is in equity, and remains so notwithstanding a petition by the intervener asserting exclusive ownership and right to possession, as such intervener is merely in the position of an original defendant out of possession, and he is not entitled to trial by jury as a matter of right.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 75; Dec. Dig. § 14.*]

3. EXECUTORS AND ADMINISTRATORS (§ 22*)—APPOINTMENT OF SPECIAL ADMINISTRATOR.

Code Civ. Proc. § 1412, providing that appointment of a special administrator may be made at any time and must be made by entry upon the minutes of the court specifying the powers to be exercised by him, was not mandatory as to the entry of a minute order, and the appointment was complete when the order was signed, and failure of the clerk to enter it on the minutes would not invalidate it.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 22.*]

4. EXECUTORS AND ADMINISTRATORS (§ 420*)—ACTIONS—SPECIAL ADMINISTRATORS.

Code Civ. Proc. § 1582, permitting actions to quiet title against administrators, includes special as well as general administrators.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 420.*]

Beatty, C. J., dissenting.

Department 2. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Louise R. McNeil against Frank E. Morgan, in which James McNeil intervenes. From an order denying the motion of the intervener for a new trial, he appeals. Affirmed.

Sullivan & Sullivan, Theo. J. Roche, and Cassin & Lucas, for appellant. D. M. Delmas, W. T. Jeter, and Benjamin K. Knight (Wm. T. Jeter and Henry C. McPike, of counsel), for respondent Morgan.

MELVIN, J. This is an appeal by James McNeil, intervener, from a judgment in favor of the plaintiff, Louise R. McNeil, and from an order denying the motion of said intervener for a new trial.

Plaintiff, Louise R. McNeil, brought suit against Frank McLaughlin as administrator of the estate of James McNeil, deceased, seeking a judgment against the estate of said

deceased quieting her asserted title to certain real property in the city of Santa Cruz. On the day after it was filed, the defendant answered, and, pursuant to a stipulation of the parties, the cause was transferred to the county of Santa Clara and to a department of the superior court in which the Hon. A. L. Rhodes presided. Both parties to the action also by stipulation in writing waived a trial by jury.

After the cause was set for trial in Santa Clara county, Margaret McNeil and James McNeil, who alleged that they were respectively the surviving wife and son of the deceased, filed their complaint in intervention. In the first cause of action pleaded it was alleged that the land in suit was community property of Margaret McNeil and the deceased; that, after the death of James McNeil, the plaintiff took possession of the said property, claiming to be the owner thereof, and that she was still holding it adversely to the estate and the heirs of James McNeil, deceased. The second cause of action was based upon the theory that James McNeil, deceased, and Margaret McNeil had been tenants in common, each owning an undivided one-half interest in the land. The interveners prayed judgment that the plaintiff had no interest in the real property, that the respective interests of the various claimants be ascertained, and that the said interveners should recover possession of the land.

The plaintiff and Frank McLaughlin, as administrator, answered, denying all of the essential allegations of the complaint in intervention, except that James McNeil was an heir of James McNeil, deceased. After the cause was at issue, the interveners demanded a trial by jury upon all matters of fact involved, but their request was denied by the court. Thereafter Margaret McNeil dismissed her complaint in intervention. This left James McNeil, appellant here, the only intervener.

At the trial it appeared that an appeal had been taken from the order appointing Frank McLaughlin administrator of the estate. The court therefore substituted F. E. Morgan, special administrator, as defendant in the action in the place and stead of said McLaughlin. The special administrator was permitted to file an answer to the complaint. None was filed by him, however, to the complaint in intervention. After the trial and this appeal the special administrator accounted and was discharged. F. J. Hoffman was appointed administrator of the estate of James McNeil, deceased, and the said Hoffman, as administrator, has been substituted as a party in the place and stead of the said Morgan, special administrator.

Appellant questions the sufficiency of the complaint on the ground that it does not in terms proclaim the adverse nature of the claim respecting which plaintiff seeks to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

have her title quieted. Section 738 of the Code of Civil Procedure authorizes an action to quiet title to real property adverse to that of the person seeking the remedy, and appellant contends that such an action is not available against one whose interest in or claim to the land involved in the action is not opposed to that of plaintiff, but "consistent with and subordinate to plaintiff's assertion of title." It is not necessary to decide this precise question because the complaint in substance does seek repose of title against adverse claimants. The complaint alleges that plaintiff is "the owner and in possession" of the land, and, further, that defendant "claims some right, title or interest in the premises, * * * but neither in law nor in equity has he any claim, right, title, or interest therein or thereto or in or to any part thereof." It seems to us that, if one is the owner and in the possession of property and another asserts a claim to that property which is founded neither in law nor in equity, the asserted claim is necessarily adverse to that of the owner or possessor of the land.

Respondent seeks to justify the refusal of the lower court to accede to the intervenor's demand for a jury upon two grounds: (1) That he "is bound by the record of the case at the time of intervention," and was therefore subject to the terms of the stipulation of the original parties to the action in which a jury trial was expressly waived. (2) That an action to quiet title to land, instituted by a plaintiff in possession, remains in equity, and cannot be removed to the domain of law where trial by jury may be demanded as of right by the mere averment of an intervenor that he is the owner entitled to the possession of the property. It is true, generally speaking, that one who intervenes in an action is bound by the record of the action at the time of intervention. For example, it has been held that such a party is bound by depositions taken prior to his intervention (*Rainbolt v. March*, 52 Tex. 246), but, the right of trial by jury being a very important privilege preserved by our Constitution, we would be loath to extend the rule in such manner as to deprive an intervenor of a trial upon matters of fact by a jury in an action where he would enjoy the right to such manner of trial in an action commenced by him originally. "An intervention merely adds new parties for the purpose of determining all conflicting claims to the matter in controversy, and does not affect the nature of the action so that plaintiff in an action at law is not deprived of his right to a jury trial by an intervention praying for equitable relief"—citing *Reay v. Butler*, 7 Pac. 669. "While, on the other hand, if the case is properly triable by jury, a jury may be demanded by the intervenor, although it has not been demanded by either of the original parties"—citing *Lacroix v. Menard*, 3 Mart. N. S. (La.) 339, 15 Am. Dec.

161; 24 Oyc. 114. It is not necessary for us to decide this interesting question, however, because the court was justified in refusing a jury trial upon the second ground stated by respondent, namely, because the intervenor was not entitled to a jury trial as matter of right, even if there had been no stipulation of the other parties waiving a jury. In *Angus v. Craven*, 132 Cal. 696, 64 Pac. 1091, in discussing section 738 of the Code of Civil Procedure, the following language was employed: "The purpose of the section is evidently to afford a remedy similar in character to that of the old bill of peace, but extending it to cases which the latter remedy did not reach. See *Curtis v. Sutter*, 15 Cal. 259. Courts, however, in guarding the constitutional rights to a jury trial, have repeatedly held that where the suit should have been, and in substance is, an action for the recovery of the possession of land, the right of a defendant to a jury cannot be defeated by the mere device of bringing the action in an equitable form. And so it has been held that the right to a jury is not defeated, where, at the commencement of the action, the defendant, and not the plaintiff, was in the actual possession of the premises involved; and it has also been held that where the defendant had been for a long time in the actual possession, and the plaintiff had ousted him, the plaintiff, by first bringing his action to quiet title, could not, by such inversion of parties, avoid the defendant's right to a jury, but that the action should be treated as substantially an action to recover possession. But this is as far as this court has gone in *Donahue v. Meister*, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283; *Newman v. Duane*, 89 Cal. 597, 27 Pac. 66; *Gillespie v. Gouly*, 120 Cal. 515, 52 Pac. 816; *Moore v. Copp*, 119 Cal. 434, 51 Pac. 630, and kindred cases. As was substantially said in *Donahue v. Meister*, supra, the decision of the question whether in an action brought under section 738 either party is entitled to a jury must depend greatly upon the facts in that particular case. It has never been held by this court that an action to quiet title under the Code cannot be maintained as an equitable action, where the plaintiff was, and for a considerable period of time had been, in actual possession, and defendant had never been in possession, or that in such case a defendant can overthrow the equitable character of the action by simply answering that he had title, and praying that he, for the first time, be let into possession. A complaint showing that plaintiff is the owner of the land, and in actual possession of it, and that defendant asserts some right or title thereto which is unfounded, followed by an answer admitting plaintiff's possession, and not showing a prior possession in defendant, seems to present the very action contemplated by the Code provision; and, under these conditions, its continued equitable character is not affected by the

particular kind of right which the defendant sets up."

Intervening in a case in which the possession of the property had been alleged by the original plaintiff who also asserted exclusive ownership, James McNeil is in exactly the position of an original defendant out of possession who asserts title and the right of possession as against the person in actual possession. As such a defendant he would not have a right to a trial of the matters of fact by jury unless he had been recently dispossessed by the nominal plaintiff. In such a case he would be treated as really a plaintiff in possession entitled to demand a trial by jury of the issues of fact involved. *Donahue v. Meister*, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283. The rule announced in *Angus v. Craven*, supra, has been followed in *Johnson v. Peterson*, 90 Minn. 503, 97 N. W. 384, where the court, speaking through Mr. Justice Collins, said: "This action was brought to determine an adverse claim made by defendant to 80 acres of land in Chicago county in the possession of plaintiff. By an amendment to the original complaint the latter's right to the land and the extent of her possession were set forth in detail, but the nature of the action was not thereby changed. It was still an action to determine an adverse claim. In his answer the defendant denied the alleged ownership of the plaintiff, admitted, however, that she was in possession, and then alleged that this possession was wrongful, unlawful, and without any right. Defendant further alleged that he was the owner in fee simple, setting out that his title was derived from the United States government through certain conveyances. He demanded that he be declared the owner in fee simple, and entitled to possession. In her reply, plaintiff alleged title by adverse possession, under the statute. When the case came on for trial, defendant moved that a jury be impaneled to try the issues. The motion was denied, and the case was thereupon tried by the court without a jury.

"(1) The character of this action has been heretofore stated. It was brought to determine an adverse claim to real property; the plaintiff being in possession, and the answer setting up a counterclaim in ejectment. Except as otherwise provided by statute, all the ordinary rules governing suits in equity to quiet title apply to this action, and it was triable by the court and not by a jury. *Rousain v. Patten*, 46 Minn. 308, 48 N. W. 1122. See, also, *Larkin v. Wilson*, 28 Kan. 513; *Angus v. Craven*, 132 Cal. 691, 64 Pac. 1091, in which the same rule is announced. Under the complaint, the case was for trial by the court without a jury, and the fact that the answer contained a counterclaim in the nature of ejectment did not change the procedure." The rule announced above has long been established in California, and we are convinced it was properly applied in this case by the learned judge of the superior court who refused the intervenor's demand for a jury.

Appellant objects to the substitution of the special for the general administrator. He insists that there was no warrant in law or in fact for such substitution. We cannot agree with this contention. The special administrator was appointed by an order duly signed by the judge of the court in which the probate proceeding was pending. In his petition for appointment as special administrator the defendant Morgan asked that he be given power, among other things, to "commence or maintain suits." The order recited that the court on reading his petition appointed him special administrator "with the powers of said estate enumerated," and directed that a minute order "to that effect" be entered "specifying the powers to be exercised by said special administrator." Objection was made to the introduction in evidence of this order upon the ground that it did not appear that a minute order had been entered in accordance with the court's direction. We do not think that the entry of such an order is "mandatory" as appellant contends, under the provisions of section 1412 of the Code of Civil Procedure. *Estate of Sackett*, 78 Cal. 300, 20 Pac. 863, cited in that behalf, does not sustain that view, for it was there merely held that, the order appointing the special administrator not being before this court, it could not be determined whether any error was committed by the court below in disallowing a certain item in the special administrator's account. The appointment of Morgan was complete when the order was signed, and the failure of the clerk to enter it upon the minutes was a mere neglect of a ministerial duty. It was entirely within the power of the probate court to appoint a special administrator with authority to commence and maintain or defend suits and other legal proceedings (Section 1415, Code Civ. Proc.), and it was also within the scope of the authority of the court to try this case and make the order substituting the special for the general administrator as a party (section 385, Code Civ. Proc.). The language of section 1582 of the Code of Civil Procedure is general, providing that actions to quiet title may be maintained against administrators. Obviously, special, as well as general, administrators, are included within this term. If this section were held to apply only to general administrators, as distinguished from those specially appointed, it would be necessary to postpone the trial of the action to quiet title until after the determination of the appeal from the order appointing the administrator. Such a rule would be obviously unjust. The substitution of the special for the general administrator was properly ordered by the court on suggestion of the general administrator's disability.

It follows that the judgment and order should be affirmed, and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

I dissent: BEATTY, C. J.

(18 Wyo. 402)

SHEDD DITCH CO. et al. v. PETERSON.
(Supreme Court of Wyoming. April 12, 1910.)

1. NEW TRIAL (§ 112*)—MOTION—JOINT MOTION.

Motion for new trial being a joint one by defendants, and some of them not being entitled to new trial, refusal thereof was not error.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 233; Dec. Dig. § 112.*]

2. APPEAL AND ERROR (§ 281*)—REVIEW—NEW TRIAL.

Errors, if any, being such that they cannot be reviewed unless first presented to the trial court by motion for new trial, the appellate court can grant no relief, the motion for new trial having been properly refused because made by defendants jointly, when part of them were not entitled to new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 281.*]

Error to District Court, Fremont County;
Charles E. Carpenter, Judge.

Action by Joseph Peterson against the Shedd Ditch Company and others. Judgment for plaintiff. Defendants bring error. Affirmed.

W. E. Hardin, P. B. Coolidge, and Clark, Riner & Clark, for plaintiffs in error. Stone, Winslow & Gudmundsen and Klukead & Mentzer, for defendant in error.

BEARD, J. This action was brought by the defendant in error, Joseph Peterson, as plaintiff, against the Shedd Ditch Company, a corporation, Elijah H. Pitts, Lincoln Young, Edson A. Earle, Myra Earle, Robert H. Hall, Amelia S. Hall, Allie R. Hall, F. J. Forbes, and James Gillis, as defendants, to quiet the title in said plaintiff to a certain irrigation ditch known as the "Shedd ditch." The defendants Lincoln Young and Elijah H. Pitts defaulted, and the other defendants filed a joint answer, denying that plaintiff was the sole owner of said ditch, and alleging that each of said answering defendants owned an interest therein, to which answer plaintiff filed a reply, denying that either of said defendants had any interest in or title to said ditch. The cause was tried to the court, without a jury, resulting in a judgment in favor of plaintiff and against each and all of the defendants. A joint motion for a new trial was made by said answering defendants, which motion was denied, and they bring the case here on error.

It is contended by counsel for defendant in error that as the motion for a new trial is a joint motion by all of said answering defendants, plaintiffs in error, and as the petition in error is also joint, and it clearly appearing that the motion for a new trial was properly denied as to some of said defendants, and as to them the judgment was right, the judgment must be affirmed. The motion for a new trial is clearly joint, not joint and several. The statement is: "Come now Shedd Ditch Company, Edson A. Earle, Myra Earle, Robert H. Hall, Amelia S. Hall, Allie R. Hall, F. J.

Forbes, and James Gillis, the above-named defendants, and move the court to set aside the judgment, decree, findings, and orders of the court herein, and grant a new trial in said cause upon the following grounds affecting substantially the rights of said parties." The motion is signed by all of said parties by their attorneys, and the rulings and decisions complained of as grounds for a new trial are stated by the parties jointly, and not severally. The trial court evidently regarded the motion as a joint one, there being nothing in the record to indicate the contrary, and is referred to in the order denying it as "the motion of defendants," and the exception to the ruling is by "the defendants." It clearly appearing on its face to be joint must be so considered here. It is clear upon the evidence, and was practically conceded upon the trial, that the Shedd Ditch Company had no title to or interest in the ditch in controversy. As to it the motion for a new trial was therefore properly denied. It is also doubtful whether two other of the defendants were shown to have any right in the ditch, even if the correctness of the theory upon which the case was defended should be conceded. Under the settled rule in this state, the motion for a new trial, being a joint one of all the plaintiffs in error, and being properly denied as to one, must be held to have been properly denied as to all. It was said by this court in *North Platte Milling & Elevator Co. et al. v. Price et al.*, 4 Wyo. 293-306, 33 Pac. 664, 666: "The motion for a new trial is a joint motion of both plaintiffs in error. It is clear that the overruling of the motion was right as to the North Platte Milling & Elevator Company. * * * Whatever the law might be as to the Wyoming National Bank on a separate motion for a new trial, the joint motion was properly overruled." And for that reason the judgment was affirmed. And in *Hogan et al. v. Peterson*, 8 Wyo. 549-564, 59 Pac. 162, 167, the court said: "It is difficult, however, to comprehend upon what theory any verdict was rendered against Hogan and Chandler. * * * Had they presented a separate motion for a new trial, they would have been entitled to the vacation of the judgment against them. * * * For the reasons above set forth, Mr. Fourt was not entitled to a new trial. The motion for a new trial being properly overruled as to him, and the motion being a joint one of all the plaintiffs in error, it must be held to have been properly overruled as to the others also. *No. Platte Milling Co. v. Price*, 4 Wyo. 293, 33 Pac. 664. The judgment will be affirmed."

The questions presented by the record in the case at bar being only such as by the statutes of the state and the rules of this court must have been presented to the trial court by a motion for a new trial in order to have them reviewed here, the case comes

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

clearly within the rule announced in the above-cited cases. The rule is especially applicable to the case at bar, for the reason that the defendants claim separate rights in the ditch in controversy. Following the rule established by those decisions, the judgment of the district court is affirmed.

Affirmed.

POTTER, C. J., and SCOTT, J., concur.

(82 Kan. 291)

SELLARDS v. KIRBY.

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

1. WILLS (§ 712*)—DEVISE TO WITNESSES—VALIDITY.

The statute (Gen. St. 1909, § 9786) making void a devise or bequest to a witness to a will which cannot be proved without his testimony applies only to attesting witnesses, not to other persons called upon to testify when the will is offered for probate.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 712.*]

2. WILLS (§ 97*)—EXECUTION—FAILURE TO FASTEN SEPARATE SHEETS.

Where a will offered for probate consists of several separate sheets not permanently fastened together, only the last one bearing the signature of the testator, the connection of the subject-matter may be sufficient to establish prima facie the identity of the other sheets.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 233; Dec. Dig. § 97.*]

3. WILLS (§ 163*)—UNDUE INFLUENCE—EVIDENCE.

The fact that a will is written by the daughter of the testator, who is named as the executrix, but is not otherwise favored over the other children, does not raise a presumption of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 396; Dec. Dig. § 163.*]

4. WILLS (§ 163*)—PREPARATION BY CONFIDENTIAL AGENT—EFFECT.

The fact that a will is written by a daughter of the testator, who shares its benefits equally with the other children, does not make a case for the application of the statutory provision (Gen. St. 1909, § 9787) that a will written by the principal beneficiary, who was the confidential agent or legal adviser of the testator, or who occupied any other position of confidence or trust to him, shall not be held valid unless it shall be affirmatively shown that the testator knew the contents and had independent advice with reference thereto.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 396; Dec. Dig. § 163.*]

5. WILLS (§ 302*)—EVIDENCE—EXECUTION AND GENUINENESS.

No error appears in the admission to probate of a will, where there was evidence that the testator had duly signed it in ink, below the attestation clause, in the presence of the subscribing witnesses, and a few weeks later had delivered it to the executrix, who retained possession of it until his death, although when it was produced in court the testator's signature had been partially erased by knife scratches, and his name had been written in pencil above the attestation clause, apparently by himself, and no further showing was made as to

when, by whom, or with what purpose the changes had been made.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 302.*]

Appeal from District Court, Osage County; Robert C. Helzer, Judge.

Action by Cora Kirby Sellards against Mary H. Kirby, guardian. Judgment for plaintiff, and defendant appeals. Affirmed.

J. H. Stavelly, for appellant. Robert Stone, James A. Troutman, and Geo. T. McDermott, for appellee.

MASON, J. Probate of the will of Peter Kirby was refused by the probate court, but granted by the district court on appeal, and this proceeding is brought to review that order. The will was written by his oldest child, Mary Kirby Sellards, who was the executrix and a principal beneficiary, on five sheets of paper, which were separate at the time of its execution, but fastened together with a pin when offered for probate; the second and fourth pages being interchanged. The signature of the testator and the witnesses appeared only on the last sheet, and the only direct testimony as to the identity of the others was that of Mrs. Sellards. The opponent of the will contends that the proof in this respect failed by reason of the incompetence of the witness, and also that a presumption of undue influence arose from the relation of the draughtsman to the testator.

The statute (Gen. St. 1909, § 9786) provides that: "If a devise or bequest be given to a person who is a witness to the will, and the will cannot otherwise be proved than by the testimony of such witness, the devise or bequest shall be void, and the witness shall be competent to give testimony of the execution of the will in like manner as if such devise or bequest had not been made." Clearly, however, the words "witness to the will" refer to an attesting witness. This accords with the purpose and history of the legislation. That the statute distinguishes between a witness to the will and one who testifies in its support when it is offered for probate is made apparent by the original language of the succeeding section (Gen. St. 1901, § 9787), providing that "the court shall cause the witnesses to such will, and such other witnesses or any person interested in having the same admitted to probate as may desire, to come before such court." Mrs. Sellards was not a witness to the will in such a sense that her competency was affected by her interest. Moreover, her testimony was not necessary to identify the unsigned sheets. As the first four pages happened to end with incomplete sentences, the connection of the subject-matter made as effective a union of the several parts as could have been accomplished by their physical attachment. "It is a rudimentary principle that a will may be made on dis-

tinct papers. * * * It is sufficient that they are connected by their internal sense, by coherence, or adaptation of parts." *Wilkoff's Appeal*, 15 Pa. 281, 53 Am. Dec. 597; 30 Am. & Eng. Encycl. of L. 580. The sequence of the pages was indicated by figures placed at the top of each, as well as by the connection of the language, and the fact that they were fastened together in other than the proper order is not important.

A further contention is that the fact that the will was written by the testator's daughter, who was one of the principal beneficiaries, created a presumption of undue influence which was not rebutted by any evidence. There is some apparent conflict in the authorities as to the effect to be given to the circumstances that a will is drafted by a legatee. In *Underhill on the Law of Wills*, it is said (§ 137): "Many cases seem to hold that the circumstance that a party draws a will, * * * under which he takes a legacy, * * * raises a presumption of undue influence exerted by him which must be rebutted by clear and satisfactory evidence. * * * But the safer and more correct statement of the rule is that such a condition of affairs creates no presumption, but merely raises a suspicion which ought to appeal to the vigilance of the court. * * * It is a fact to be considered with other facts. It is undoubtedly a suspicious fact, but its weight depends, not solely upon its character, but upon the facts and circumstances with which it is connected. In some cases it would have no weight at all. Thus, if it appear that the testator had testamentary capacity, that he dictated his will and knew its contents at the date of its execution, and that it was executed in the statutory manner, the mere fact that the will was written by the sole beneficiary would not be enough, unless coupled with other extremely suspicious facts, to overthrow it, or, taken alone, to cast the slightest suspicion upon it." What justly creates suspicion is not that the draughtsman is a legatee, or even a sole legatee, but that he receives an unreasonable or unnatural benefit. This idea is thus expressed in *Schouler on Wills*, § 245: "The circumstance that a party who derives under the will a disproportionate benefit or a benefit to which he had no natural claim is the party who drew it lends disfavor to the instrument, and may turn the scale against its admission to probate. * * * Our later cases appear to rule that, wherever the testator's draughtsman or manager of the execution may be thought worthy of some generous token, undue influence and fraud are not to be presumed from the fact that the will gives him a legacy or executorship accordingly. The extent of his benefit as compared with that of natural objects of one's bounty is a matter of some consequence."

So, also, the suspicion that attaches to a will written by a beneficiary is heightened

where he sustains a confidential relation toward the testator. That condition is sometimes said to create an actual presumption against the will. Thus Mr. Underhill says: "Where it appears from the evidence that the testator and the beneficiary stood in confidential relations towards one another, and it also appears that the legatee * * * was the draughtsman of the will, * * * circumstances are shown from which a presumption of undue influence or fraud arises, which the proponent of the will has the burden of proof to overthrow, and to show that the will was the free and voluntary act of the testator." 1 *Underhill on Wills*, § 145. On the other hand, a portion of a note in the same work reads: "The fact that the draughtsman of a will, who is a legatee at the same time, stands in a confidential relation to the testator, does not, in the absence of affirmative proof of fraud or coercion, raise a presumption against the voluntary character of the will." 1 *Underhill on the Law of Wills*, note 3, p. 195, § 137. And the rule is thus stated in 29 Am. & Eng. Encycl. of L. 124: "Undue influence is not generally presumed in the case of a legacy or devise made by a client in favor of his attorney from the mere relation itself, or from the circumstance that the will was drawn by the attorney—at least where the legacy or devise is not disproportionately large."

Perhaps an unnecessary difficulty is created by an effort to say at just what point the union of a number of suspicious circumstances, no one of which is enough in itself to defeat probate, shall be deemed to give rise to an actual presumption that a will was the result of undue influence. The real question in each case is whether all the circumstances so far as shown are such as to lead the court to believe that in fact the will does not actually express the voluntary purpose of the testator. The substance of *Kirby's will* was that his property was to go to his wife for her life, and then, except for a specific legacy to each of two granddaughters, to his three children. There is nothing in this disposition to suggest any overreaching on the part of Mrs. Sellards. Nor was she shown to have occupied a position of confidence and trust toward her father beyond that arising from their relationship. If it had appeared that she had been intrusted with the general management of his business, or that he was in the habit of deferring to her judgment in his affairs, a different question would be presented. We think that her writing the will created no presumption of undue influence. No question of incapacity or restraint appears to have been raised at the hearing. The controversy turned chiefly upon whether there had been a revocation. But in seeking to counteract evidence in support of the will its opponent introduced affidavits of the attesting witnesses which had been read in the probate court, stating, among oth-

er things, that when Kirby signed the will he was of sound mind and memory and not under any restraint.

A recent statute (Gen. St. 1909, § 9787) makes this provision: "In all actions to contest a will, if it shall appear that such will was written or prepared by the sole or principal beneficiary in such will, who, at the time of writing or preparing the same, was the confidential agent or legal adviser of the testator, or who occupied at the time any other position of confidence or trust to such testator, such will shall not be held to be valid unless it shall be affirmatively shown that the testator had read or knew the contents of such will, and had independent advice with reference thereto." This rule by its terms relates to actions to contest a will; but, even if extended by interpretation to cover proceedings for its admission to probate, the present case would not be affected. The requirement that the testator must be shown to have had independent advice clearly implies that in order to be deemed to occupy a position of confidence or trust to the testator the draughtsman must be some one to whom he naturally looks for counsel. That situation does not follow from the mere relationship of daughter and father.

The fact being established that the will had been duly executed, a more difficult question is whether the evidence showed that it had been revoked. The testator in the presence of the subscribing witnesses signed it with pen and ink below the attestation clause, and not elsewhere. He kept it in his own possession for a few weeks, and then delivered it to the executrix, who retained it until after his death. When she offered it for probate, his ink signature had been partly obliterated by means of knife scratches, and his name had been written in pencil just above the attestation clause, either by himself or by some one who closely imitated his handwriting—a matter concerning which the opinions of witnesses differed somewhat. The law permits a will to be revoked "by the testator tearing, canceling, obliterating or destroying the same with the intention of revoking it, by the testator himself, or by some person in his presence or by his direction." Gen. St. 1909, § 9814. In order to accomplish revocation under this provision, it is necessary that the testator, with an intention to revoke, cause some physical defacement of the will, adapted to give expression to that purpose. If the other conditions were proved, there would be no difficulty in saying that here a sufficient actual defacement was shown, for, while the signature was not rendered wholly illegible, the partial erasure was of such a character as to suggest a purpose to discredit it. Under the English act, requiring "burning, tearing or otherwise destroying," a mere crossing out of the signature, leaving it still legible, is held not to be enough (Williams on Executors, 101, 102; 1 Jarman on Wills,

§ 116); but the rule is otherwise where the statute includes the word "canceling." In re Olmsted's Estate, 122 Cal. 224, 54 Pac. 745; In re Hopkins, 172 N. Y. 360, 65 N. E. 173, 65 L. R. A. 95, 92 Am. St. Rep. 746. See, also, Woodfill et al. v. Patton et al., 76 Ind. 575, 40 Am. Rep. 269.

Except as already stated, the evidence in this case affords no light as to when, with what purpose, or by whom the changes were made. The general rule is that, where a mutilated will is found among the testator's effects, the presumption arises that the mutilation was his own act, done with a revoking purpose. 1 Underhill on the Law of Wills, §§ 281, 282; 1 Redfield on the Law of Wills, § 25, par. 8, p. 307; 30 Am. & Eng. Encycl. of L. 635; 28 Am. St. Rep. 351, 352, note. Here the will had been out of the possession of the testator for about a year at the time of his death; but, as the proponent must be deemed to assert that it was not changed while in her custody, the situation is doubtless the same as though it had never left the testator's hands. The partial erasure of the signature is not so unequivocally a cancellation as the running of a pen through it, but would doubtless be sufficient to warrant the application of the rule referred to, if it were not for the penciled addition. We must regard this as a genuine signature, for the trial court evidently so treated it, and the evidence supports that view. Doubtless, if the testator erased his first signature intending an unconditional revocation thereby, a subsequent unattested signing could not revive the will. 30 Am. & Eng. Encycl. of L. 637. But the condition of the instrument affords no presumption that such was the case. In The Goods of King, 2 Robertson's Ecclesiastical Reports, 408, a will was admitted to probate under these circumstances: "After the death of the testator, the will was found with his signature, as at first written, opposite to the center of the attestation clause, erased; but subsequently to that erasure the testator's signature was written a short distance beneath the place where the original signature stood." The only evidence regarding the change was that it was made after the will was executed and witnessed and before it was found after the testator's death. The opinion reads: "The original signature of the deceased has been erased, but by whom and with what motive it is not easy to determine. It is manifest, however, from the facts and circumstances deposed to, that the erasure was not made by the testator *animo revocandi* as required by the wills act. On that ground, therefore, I decide this case: In the probate the original signature must be restored, and the second signature omitted." Citing that case in Schouler on Wills, § 892, the author says: "If a will should show the testator's signature struck through with a pen and another signature written and left, the natural presumption would be

that the original erasure was not made with the intention to revoke at all, but was connected in some way with the final execution by the signature substituted."

In *Re Wood's Will*, 11 N. Y. Supp. 157, a will was admitted to probate which had been found in the testatrix's safe, with the signature erased first by drawing lines over it, and then by nearly erasing such lines and the original signature, but with her name rewritten by her over the erasure. It was not shown when or why the change was made. In the opinion it was said: "The proponents having proved the due execution of the will, it is entitled to probate, unless the contestants prove its revocation by some one of the modes pointed out by the statute. * * * If the will had been found in her safe, carefully preserved among the valuable papers of the testatrix, with her signature erased, it would have been a fair and reasonable presumption that she erased the signature *animo revocandi*; and it would then be lacking in one of the statutory requirements of a valid will—the signature of the decedent at the end thereof. But when found with the signature carefully restored, no such presumption arises. In the absence of all proof, how can I find that it was made with the intent to revoke, when the instrument was preserved by her with her signature carefully restored? An intention to revoke a will not fully consummated is not revocation. * * * It may be that Mrs. Wood drew the lines through her name with the intention of revoking the will, but immediately, and before the act was completed, changed her mind, erased the marks, and restored her signature. To sustain the theory of the learned counsel for the contestants, I must find that the erasure was made by the testatrix herself, understandingly, freely, and voluntarily, with no other purpose than to destroy her will, and that it was done at some time previous to the act of rewriting her name, and this finding is asked for in the absence of proof and with the burden resting upon the contestants to establish the fact of revocation."

In the present case the one fact concerning the testator's intention that is definitely established is that at one time he wished to dispose of his property according to the terms of the will and complied with every requirement of the law to give effect to that desire. What his subsequent purposes were is a matter of speculation. That a few weeks later he delivered the will to the testatrix has some tendency to show that he then regarded it as a valid instrument, although he must already have made the change if he made it at all. In that event as reasonable a supposition as any is that when he executed the will he failed to notice the space left for his signature above the attestation clause, and therefore inad-

vertently signed below; that afterwards he discovered the inadvertence, and, in order to correct it, attempted to erase the original signature and affixed the other in the more natural place, intending, not revocation, but ratification. Of course, a signing below the attestation clause was sufficient (17 L. R. A. [N. S.] 354, note); but the testator, on the matter being drawn to his attention, may easily have supposed otherwise. Upon this hypothesis it is not necessary to resort to the principle of "dependent relative revocation" to save the will, for the mutilation was without effect unless accompanied by a purpose to revoke. Another way of accounting for the condition of the will seems not unreasonable. The testator may have started to erase his signature, changed his mind before completing the erasure, and then rewritten his name, not as a new execution, but as evidence that he did not intend revocation.

The judgment is affirmed. All the Justices concurring.

(82 Kan. 248)

SMITH v. MISSOURI PAC. RY. CO.

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 180*)—INJURIES TO SERVANT—FELLOW-SERVANT ACT.

A sectionman engaged in track repairing, who is injured by the negligence of a fellow laborer, is within the protection of the fellow-servant act (Gen. St. 1909, § 6999).

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 359-368; Dec. Dig. § 180.*]

2. MASTER AND SERVANT (§ 252*)—INJURY TO SERVANT—NOTICE TO MASTER.

A notice of such an injury and claim for damages, required by that act, mailed to an assistant claim agent of the railway company whose duty it is to examine and act upon such claims, and who receives the notice and makes such examination in pursuance thereto, is notice to the company.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 252.*]

Appeal from District Court, Anderson County; C. A. Smart, Judge.

Action by Benjamin Smith against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The plaintiff, a sectionman, engaged in track repairing, was tamping stone under a cross-tie when a fellow laborer, who was tamping stone under another cross-tie behind him, negligently struck the plaintiff's hand with a tamping pick, inflicting the injury for which the action was brought. A notice, as required by section 1 of chapter 341 of the Laws of 1905, was served by mail addressed to the assistant claim agent of the defendant at Kansas City, Mo. The injury occurred in this state. Demurrers to the pe-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion and to the evidence were overruled. Special findings were returned by the jury, with a verdict for the plaintiff.

B. P. Waggener and J. M. Challis, for appellant.

BENSON, J. The defendant contends that sectionmen in doing the ordinary work of repairing track are not within the purview of the statute imposing liability upon a railroad company for injuries to an employé caused by the negligence of its agents or the mismanagement of its engineer or other employes. Gen. St. 1909, § 6999. The defendant relies upon the opinion in *Railway Co. v. Medaris*, 60 Kan. 151, 154, 55 Pac. 875, 876. In that case it was held that an employé of a railway company, engaged in setting a curb around a depot and office building, who was injured by a falling curbstone which had been negligently left in an insecure position by a fellow laborer, was not within the protection of the statute. It was said in the opinion that: "No train was passing or near the place where Medaris was at work at the time the injury was inflicted. It is true, also, that he was at work for a railroad company, and upon the land of a railroad company; but this does not entitle him to the benefits of the act. He can only recover by showing that the service in which he was engaged exposed him to the peculiar perils incident to the operation of a railroad."

In *Union Trust Co. v. Thomason*, 25 Kan. 1, a trackman riding upon a hand car from his work at the close of the day's service was hurt by a collision with another hand car, caused by the negligence of his fellow workmen in propelling the other car. It was held that he was injured while in the line of duty, and that the case was within the provisions of the statute. Chief Justice Horton, in delivering the opinion, quoted with approval from several Iowa cases where it had been held that trackmen, switchmen, and others, whose duties require them to be upon the track, are more or less exposed to the hazards of the business of operating a railroad. In *U. P. Ry. Co. v. Harris*, 33 Kan. 416, 6 Pac. 571, it was held that the statute applied to a sectionman engaged in repairing a track. The injury had occurred by the negligence of a fellow employé in removing a rail from the push car. His duties did not require him to ride upon cars, nor was he exposed to the perils caused by the operation of trains, other than such as were incidental to his work upon the track. In the opinion the fact that a different rule had been applied in Iowa in recent cases, apparently departing from earlier decisions, was ascribed to the fact that the Iowa Code had been changed so as to restrict the application of the statute to wrongs connected with the use and operation of the railroad. The decisions under the amended statute in Iowa appear to have limited its operation as stat-

ed in *Dunn v. Railway Co.*, 130 Iowa, 580, 107 N. W. 616, 6 L. R. A. (N. S.) 452, so that a section hand in his ordinary work, wholly disconnected from the use and operation of the road, is excluded from its purview; but, as indicated in the majority opinion in that case, and more fully stated in a vigorous dissent, the decisions in that state have not uniformly sustained this view.

In the *Koehler Case*, 37 Kan. 463, 15 Pac. 567, a laborer engaged in loading rails upon a car; in the *Brassfield Case*, 51 Kan. 167, 32 Pac. 814, a sectionman unloading ties to be used in repairing track; and in the *Pontius Case*, 52 Kan. 264, 34 Pac. 739, a bridge carpenter engaged in loading timbers on a car—were held to be within the operation of the statute, and in the cases named recoveries for injuries sustained through the negligence of a co-employé were sustained. In the case last cited, it was argued that the statute when so construed was obnoxious to the federal Constitution; but, upon review in the Supreme Court of the United States, its constitutionality was sustained. *Chicago, etc., R. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675. In *A. T. & S. F. R. Co. v. Vincent*, 56 Kan. 344, 347, 43 Pac. 251, 252, it appeared that two sectionmen with a foreman were carrying a rail to place it in the track. By the negligence of the foreman one of the men was injured. In the opinion it was said: "The service in which Vincent (the injured man) was engaged was performed on the company's road, and, being necessary to its use and operation, places him within the provisions of the act which makes railroad companies liable to their employes for damages resulting from the negligence of a co-employé."

It will be observed that there was no car or engine at or about the place of injury. In the *Harris Case* a hand car only was being used, while in the other cases referred to standing cars were being loaded or unloaded, and there was no movement of trains, cars, or engines upon the track at the time or place of the injuries.

The Missouri Supreme Court, in *Callahan v. Mer. Bridge Terminal Ry. Co.*, 170 Mo. 473, 495, 71 S. W. 208, 214 (60 L. R. A. 249, 94 Am. St. Rep. 746), held that a sectionman, while stationed underneath a portion of the track elevated over a street to give signals to fellow laborers above when to throw down discarded ties, in order that passers-by might not be hurt, was, while attempting to remove a child from danger, within the protection of a statute making railroad companies liable for injuries sustained by any servant of such railroad, by reason of the negligence of any other servant or agent thereof. The Missouri statute construed in the opinion provides that: "Every railroad corporation * * * shall be liable for all damages sustained by any agent or servant thereof, while engaged in the work of operating

such railroad, by reason of the negligence of any other agent or servant thereof. * * * In an elaborate review of the authorities in Missouri, and other states, including our own, the court said: "It is not essential that the injury should have been inflicted by reason of the negligence of a fellow servant while actually engaged in running a car, but that the injured employé may recover if injured by the negligence of a fellow servant while they are engaged in doing any work for the railroad which was directly necessary for the operation of the railroad."

In Georgia a recovery against a railroad company for the death of an employé working upon one of its bridges, caused by the negligence of a fellow employé, was sustained. *Georgia Railroad v. Ivey*, 73 Ga. 499. The court said that an earlier decision declaring that principle had been powerfully assailed but had been long recognized as law; that it was firmly established in the jurisprudence of the state; and that both the employé and the railroad corporation had contracted with each other in the light of the law as thus construed.

A statute of Minnesota makes railway companies liable to their servants for damages caused by the negligence of a fellow servant. Construing this statute, it was held that a railroad company was liable to a sectionman who, while engaged with the rest of the crew in performing his ordinary duties in lifting and carrying a rail to repair the track, was injured by the negligence of a fellow servant in releasing his hold and dropping the rail. It is stated in the opinion that the work was being done in great haste so as to accomplish it before the arrival of a coming train. The court said: "We have held that the test is not whether the conditions are in some respects parallel to those to be found in some other kinds of business, or whether the appliances are in some respects similar to those used in some other kinds of business, but that if there is any substantial element of hazard or condition of danger which contributed to the injury, and which is peculiar to the railroad business, the statute applies." *Blomquist v. Great Northern Ry. Co.*, 65 Minn. 69, 67 N. W. 804.

Mr. Justice Brewer, in an opinion in the Circuit Court of Appeals, reviewed the Kansas statute and the Kansas cases referred to in this opinion, except the *Medaris* Case, which had not been decided, and held that they authorized a recovery by an employé in a roundhouse for an injury caused by the negligence of a fellow employé while handling a driving rod in putting an engine in order for use. *Chicago, R. I. & P. Ry. Co. v. Stahley*, 62 Fed. 363, 365, 11 O. C. A. 88, 91. In the opinion, referring to the *Harris* Case, it was said: "It will be seen that this injury in no way resulted from the actual movement of trains, but occurred while the

party injured and the negligent co-employé were engaged in the work of putting the track in condition for use. * * * Then, after quoting from the *Koehler* Case, it was said: "A roundhouse is as much a necessity for railroading as a stable for the livery business. He was not engaged in repairing an old engine or constructing a new one, but in putting that engine which had recently arrived in condition for immediate use. He was, as in those cases, not engaged in any outside work remotely related to the business of the company; he was not cutting ties on some distant tract to be used by the company in preparing its roadbed, nor in mining coal for consumption by the engines, nor even in the machine shops of the company, constructing or repairing its rolling stock; but the work which he was doing was work directly related to the movement of trains, as much so as that of repairing the track."

The opinion last cited suggests the grounds upon which the *Medaris* Case is easily distinguishable from the *Harris* and other cases where recoveries have been sustained although the service did not include any participation in the movement of trains. In those cases, and in the one now under consideration, the work was upon the track; but this exposed the laborers to the hazards of passing trains, requiring vigilance and attention in proportion to the frequency of their passage.

The constitutionality of the statute was upheld by this court in *C. & W. R. Co. v. Pontius*, supra, and in *Missouri Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107. Similar statutes have been upheld in other decisions, state and federal, cited in *Callahan v. Mer. Bridge Terminal Ry. Co.*, supra. Such legislation applying to particular bodies or associations imposing upon them additional liabilities is not open to the objection that it denies to them the equal protection of the laws if all persons brought under its influence are treated alike under the same conditions. *Missouri Railway Co. v. Mackey*, supra. The same opinion holds that such statutes are not obnoxious to the fourteenth amendment. Nor are they unreasonable (*Thompson v. Central Railroad & Banking Company*, 54 Ga. 509), violative of the principle of equality, or otherwise unconstitutional (*Labatt on Master & Servant*, § 643 et seq.).

It is contended that the language of the statute, "negligence of its agents, * * * mismanagement of its engineers or other employés," excludes employés whose negligence caused the injury except those of the same class, i. e., agents in charge of stations, and engineers and others operating or participating in the movement of trains. The decisions of this court already referred to have determined adversely to this contention. The negligence of a fellow servant in the same service with the injured party is held to bind the company. It would overturn a rule long fol-

lowed and firmly fixed in our jurisprudence to hold otherwise, and would be contrary to the trend of judicial decisions.

Error is alleged in the admission of a copy of a notice served under that clause of the statute imported into it by amendment requiring notice to the company within a specified time. A carbon copy of such a notice was produced by the plaintiff, and testimony given that a duplicate had been mailed to the defendant's assistant claim agent at Kansas City, and that it was not in the possession of the plaintiff. Notice to produce it had not been given, and an objection was made to the copy. It was shown, however, that the person to whom the notice was addressed had appeared within the time given by the statute for giving it, and examined the plaintiff concerning the claim, promised to report to the general claim agent thereon, and requested that no further action be taken for 60 days, which request was acceded to. It was also shown that this claim agent, when thus making the examination, had in his possession the notice so mailed to him. Receipt of the notice was shown by the fact that it was seen in that officer's hands. Evidence was given tending to show that it was his duty to examine such claims, and he did in fact examine this one. The provision of the statute that service may be made upon certain agents does not exclude a proper notice given to the company in some other manner (*Central Branch R. Co. v. Ingram*, 20 Kan. 66), especially when acted upon by its officers charged with such duties. A failure to show the service of the statutory notice, however, would not have been fatal, for the record shows that the section foreman took and forwarded to the company a written statement, signed by the plaintiff, stating the injuries and giving time and place, within a few days after the occurrence. The company procured and placed this written statement in evidence. It had sufficient notice. *Smith v. Ry. Co.* (Just decided) 107 Pac. 635.

The fact that the opinion in the *Medaris Case* was relied upon by the defendant as a departure from former decisions in the interpretation of the statute is believed to justify this review of the subject. The present case does not fall within the class to which the *Medaris Case* belongs, but is within the principles announced in former decisions.

The judgment is affirmed. All the Justices concurring.

(32 Kan. 357)

**ATINA BUILDING & LOAN ASS'N v.
HOBSON et al.**

(Supreme Court of Kansas. April 9, 1910.)

**COURTS (§ 200½*) — JURISDICTION — ISSUES —
TITLE TO LAND.**

An action which involves title to land is properly brought in the district court, and not

in the probate court; the subject being outside the jurisdiction of the latter court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 479; Dec. Dig. § 200½.*]

Appeal from District Court, Kingman County; P. B. Gillett, Judge.

Action by the *Atina Building & Loan Association*, against one *Hobson* and another. From a judgment for defendants, plaintiff appeals. Affirmed.

J. H. Connaughton and A. B. Quinton, for appellant. S. D. La Fuze and George L. Hay, for appellees.

PER CURIAM. The action was properly instituted in the district court, because the title to land was in controversy, a subject which falls outside the scope of probate jurisdiction; but the petition was demurrable, because the deed pleaded shows title was taken by *Ira E. Hobson*, as trustee for *Pauline* and *Helen Hobson*. *Loan Co. v. Essex*, 68 Kan. 100, 71 Pac. 268, and cases cited in the opinion. There is no difficulty in harmonizing the various parts of the deed.

Judgment affirmed.

(32 Kan. 355)

McAFEE v. WALKER.

(Supreme Court of Kansas. March 29, 1910.)

**1. COSTS (§ 264*)—ON APPEAL—TAXATION—
"STATEMENT."**

The stenographer's receipt attached to the transcript is a sufficient statement, within rule 21 (104 Pac. ix), providing that the amount paid for the stenographer's transcript shall be taxed as costs only when a statement thereof is filed with the clerk not later than 10 days after the cause is decided.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 1005; Dec. Dig. § 264.*]

For other definitions, see *Words and Phrases*, vol. 7, p. 6643.]

**2. COSTS (§ 264*)—ON APPEAL—TAXATION—
DELAY IN FILING STATEMENT.**

A day's delay, beyond the prescribed time, in filing statement is fatal under rule 21 (104 Pac. ix), providing that the amount paid for printing the abstract shall be taxed as costs only when a statement thereof shall be filed with the clerk not later than 10 days after the cause is decided.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 1005; Dec. Dig. § 264.*]

On motion to retax costs. Motion granted. For former opinion, see 107 Pac. 637.

PER CURIAM. The clerk has taxed as costs \$65.50, the amount paid the stenographer of the trial court for the transcript, and \$23.40, the expense of printing the abstract. The appellee moves to strike out these items on the ground that no statement of either was filed with the clerk within 10 days after the case was decided, as required by rule 21 (104 Pac. ix), which reads: "The amount paid for the transcript of the record or case-made, for the stenographer's transcript of the evidence, or for the printing of the ab-

abstract, shall be taxed as costs only when a statement thereof shall be filed with the clerk not later than ten days after a cause is decided. The opposite party may file an objection thereto not later than twenty days after such decision." The stenographer's receipt for the \$65.50 was attached to the transcript, and this was a sufficient statement so far as that item is concerned. No statement of the amount paid for the appellant's abstract was filed until March 23d, the decision having been made March 12th. The prescribed limit was exceeded by only one day, but the bar had fallen and the extent of further delay is immaterial. The very purpose of the rule was to draw at some point a hard and fast line, "in order that a definite limit shall be fixed within which the right must be asserted if it is not to be deemed abandoned." *Railway Co. v. Jenkins*, 79 Kan. 698, 701, 101 Pac. 630. The appellant's abstract was deposited in the clerk's office January 8th, and the statement could have been filed then or at any time thereafter until and including March 22d. By the terms of the rule a later filing was ineffective. The charge of \$23.40 will be stricken from the cost bill.

(82 Kan. 338)

**GARRETT BIBLICAL INSTITUTE v.
MINARD.**

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

1. JUDGMENT (§ 652*)—DEFAULT—RES JUDICATA.

A judgment by default, based on actual notice to the defendant, is as conclusive against him upon every matter admitted by the default as if he had personally appeared and contested the plaintiff's right of recovery.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1164; Dec. Dig. § 652.*]

2. JUDGMENT (§ 138*)—VACATING—FRAUD.

While a judgment may be vacated and a new trial had "for fraud practiced by the successful party in obtaining it," it is such fraud as is collateral and extrinsic to the issues involved in the action and on which the judgment was founded, and hence a party against whom a judgment by default was rendered is not entitled to have the judgment set aside and the issues retried because the allegations in plaintiff's petition, which constitute the merits of the case, are alleged to be untrue.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 250; Dec. Dig. § 138.*]

(Additional Syllabus by Editorial Staff.)

3. JUDGMENT (§ 441*)—EQUITABLE RELIEF—"EXTRINSIC OR COLLATERAL FRAUD."

By "extrinsic or collateral fraud" for which a court of equity will set aside a judgment rendered by a court of competent jurisdiction is meant some act or conduct of the prevailing party which has prevented a fair submission of the controversy.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 836; Dec. Dig. § 441.*]

Appeal from District Court, Bourbon County; W. L. Simons, Judge.

Action by the Garrett Biblical Institute against Henry C. Minard. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 79 Kan. 470, 100 Pac. 55.

A. M. Keene and E. C. Gates, for appellant. W. P. Dillard and W. W. Padgett, for appellee.

JOHNSTON, C. J. On March 3, 1906, Henry C. Minard instituted an action against Robert Fowler and the Garrett Biblical Institute to recover a tract of land. Personal service was obtained on Fowler and constructive service upon the Institute. No answer was filed by either defendant, and on June 6, 1906, judgment by default was entered deciding that Minard was the owner of the land and awarding him possession of the same. On September 7, 1906, the Institute applied to the court to open up the judgment and allow it to make a defense, alleging that it never had actual notice of the case nor opportunity to defend against it. A hearing was had upon the application, wherein it was shown and found that the Institute really had actual notice of the pendency of the action, and upon appeal this finding was affirmed. *Garrett v. Minard*, 79 Kan. 470, 100 Pac. 55. After the refusal to reopen the judgment the Institute brought the present action, alleging again that it had not been duly summoned in the ejectment action, and had no actual notice or knowledge of its pendency. It also alleged that Minard had no ownership or interest in the land when that action was begun or decided, and that the allegations in his petition as to ownership upon which judgment was founded were wholly false, and known by him to be false when they were made, and that the court was thereby misled, and the judgment in favor of Minard fraudulently obtained. Issues were joined on these averments of the petition, and upon a trial were rightly decided in favor of Minard. The judgment by default, based as it was on legal notice, was as conclusive against the Institute upon every matter admitted by the default as any other kind of judgment could have been. *Johnson v. Jones*, 58 Kan. 745, 51 Pac. 224. The claim that the Institute did not have actual notice of the pendency of the ejectment action was adjudicated against it upon the application to reopen the judgment. On that hearing it had full opportunity to prove this claim, but there was a finding, based on sufficient testimony, that it had actual notice of the action and a fair chance to defend against it. The question was foreclosed by the decision in *Garrett v. Minard*, supra.

There is a further contention by appellant that the judgment in ejectment should be annulled because the allegations of Minard in his petition were untrue. The truth of these averments were directly involved in

the ejectment action, and were determined by the judgment in that case. The Code permits the setting aside of a judgment for fraud in obtaining it—that is, fraud extrinsic or collateral to the issues tried and decided—but the falsity of the things alleged or proven which constitute the merits of the case and the basis of the judgment affords no reason for reopening and retrying the case. This was directly adjudged in a case where a party attempted to escape the binding force of a default judgment. *Loan Co. v. Marks*, 59 Kan. 230, 52 Pac. 449, 68 Am. St. Rep. 349. In that case, as in this, the judgment was attacked on the ground that the averments in plaintiff's petition as to the title of land were false. After stating that the effect of a default is to admit the truth of the averments of the petition it was said: "The contention in this case has been, and now is, that the averments in the petition of Caroline Mathews with reference to title were false. Marks now denies that which by his default Dolloff admitted. The very object and purpose of judicial proceedings is to determine the truth or falsity of the allegations of fact of the parties to controversies in the courts, as well as their rights under the law applicable to the facts as finally found. When summoned in an action, the defendant is called on to challenge the truth of any statement of fact which he denies, and the correctness of any claim of right under the law applicable to the facts alleged. If it should be held that a judgment by default is binding only when based on a truthful pleading, there would be very little advantage in making any appearance in actions relating to land, unless some present right to use the property should be threatened; for nothing would be lost by the default, and the same defense could be made at any time thereafter." The same question was considered at length and supporting authorities cited in *Plaster Co. v. Blue Rapids Township*, 81 Kan. 730, 106 Pac. 1079. The view adopted there was that when a party has been summoned into court, and has had an opportunity to contest an issue which goes into judgment whether he avails himself of the opportunity or not he is not entitled to have the judgment set aside and be granted another trial of the same issues merely because the facts alleged in his petition, or the testimony offered and upon which the judgment is founded, are untrue. There would be no finality in a judgment, and no end of litigation, if the contrary view were taken. It was stated as a general rule "that an act for which a court of equity will set aside or annul a judgment between the same parties, rendered by a court of competent jurisdiction, has relation to fraud extrinsic or collateral to the matter tried by the first court, not to fraud in the matter on which the judgment was rendered. * * * By the expression 'extrinsic or collateral fraud' is meant some

act or conduct of the prevailing party which has prevented a fair submission of the controversy." *McCormick v. McCormick*, 82 Kan. —, 107 Pac. 548.

The judgment of the district court will be affirmed. All the Justices concurring.

(82 Kan. 285)

JAMES v. LOGAN.

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

1. AFFIDAVITS (§ 12*)—FORM OF JURAT.

The statutory certificate for the authentication of depositions cannot be used on the ordinary affidavit, and the Code of Civil Procedure prescribes no form of jurat to be appended to affidavits.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. §§ 46-57; Dec. Dig. § 12.*]

2. AFFIDAVITS (§ 12*)—ABSENCE OF JURAT.

If a declaration has in fact been made under oath, it is an affidavit although no jurat be attached. The jurat is merely evidence that an oath was duly administered, and in the absence of a jurat the fact may be proved by evidence aliunde.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. § 47; Dec. Dig. § 12.*]

3. OATH (§ 6*)—EVIDENCE OF TAKING—ABSENCE OF JURAT.

The evidence in this case examined, and held sufficient to show that a written declaration used as an attachment affidavit was in fact made under oath, although no jurat appears.

[Ed. Note.—For other cases, see Oath, Cent. Dig. § 14; Dec. Dig. § 6.*]

4. AFFIDAVITS (§ 12*)—OMISSION OF JURAT—EFFECT.

When a paper purporting to be an affidavit has been approved by the court as such, and has been made the basis of judicial action as if it were duly authenticated, the omission of a jurat is a mere irregularity which will not expose the proceeding to collateral attack.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. § 47; Dec. Dig. § 12.*]

5. LIMITATION OF ACTIONS (§ 19*)—RECOVERY OF LAND—EXECUTION SALE—ACTION BY DEBTOR.

The five-year statute of limitations against actions for the recovery of real property sold on execution brought by the execution debtor, his heirs, or any person claiming under him by title acquired after the date of the judgment, applies to all sales, void and voidable alike.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 81; Dec. Dig. § 18.*]

Appeal from District Court, Shawnee County; A. W. Dana, Judge.

Action by V. W. James against Effie Logan. Judgment for defendant, and plaintiff appeals. Affirmed.

W. A. S. Bird and Thomas J. White, for appellant. James Troutman, Robert Stone, and George T. McDermott, for appellee.

BURCH, J. Sarah A. James undertook to recover the land in controversy from the defendant, Effie Logan, by an action of ejectment. While the action was pending the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff died, and a revivor was had in the name of her administrator. Judgment was rendered for the defendant, and the administrator appeals.

The property formerly belonged to the Enterprise Land, Loan & Investment Company, a foreign corporation. W. E. Fagan sued the investment company, attached the land, and made service by publication. The action proceeded to judgment, and the land was ordered sold for its satisfaction. Fagan purchased at a sheriff's sale made under the order, the sale was confirmed, and a sheriff's deed was issued to him, which was duly recorded. Afterward Fagan conveyed to the defendant. After the sheriff's deed was recorded the investment company conveyed to Sarah A. James. Her suit was commenced more than five years after the recording of the sheriff's deed. It is said the proceedings in the attachment case are void for want of jurisdiction, and they must be so, or the sheriff's deed is beyond collateral attack. The only defect pointed out is that Fagan's affidavit for attachment bears no jurat. Therefore it is claimed the paper was not sworn to, and there was no affidavit.

The provision of the Code of Civil Procedure that affidavits are to be authenticated in the same way as depositions, except as provided for the verification of pleadings (Old Code, § 345; New Code, § 336 [Gen. St. 1909, § 5930]), means, of course, so far as the requirements concerning depositions are applicable. The certificate of the officer need not show that an affidavit was taken at the time and place specified in a notice, as in the case of a deposition (Old Code, § 359; New Code, § 357 [Gen. St. 1909, § 5952]), because an affidavit is a written declaration made under oath without notice (Old Code, § 341; New Code, § 347 [Gen. St. 1909, § 5942]). There is no requirement that an affidavit shall be written in the presence of the officer and shall be written by the officer, the witness, or a disinterested person, as in the case of a deposition (Old Code, § 354; New Code, § 352 [Gen. St. 1909, § 5947]), and the certificate to an affidavit need not show these facts. In the case of a deposition the witness is first sworn, and after the deposition is written it is subscribed. In the case of an affidavit the oath is administered after the declaration is formulated. The result is that the certificate prescribed for a deposition cannot be used on the ordinary affidavit, and no other form is ordained. The remaining section of the statute relating to the authentication of depositions (Old Code, § 358; New Code, § 356 [Gen. St. 1909, § 5951]) simply provides that the signature and seal of the officer, if he have a seal, are sufficient, without additional proof of official character, that signature alone is sufficient if the affidavit be taken in this state and the officer have no seal, but that further proof, the nature of which is indicated, is required if the

affidavit be taken in another state and the officer have no seal. This section, of course, applies to affidavits, but, since no special form of jurat is required, the statutory definition of an affidavit is satisfied whenever a written declaration is made under oath.

In the case of *Cunningham v. Barr*, 45 Kan. 153, 25 Pac. 583, a mechanic's lien statement was held to be properly verified to which the following jurat was appended: "Subscribed and sworn to before me, this September 12, 1887. O. A. Harding, Clerk District Court. [Seal.]" In the case of *Simon v. Stetter*, 25 Kan. 155, a jurat in the same form, but designating the officer simply as "clerk," and bearing no seal at all, was held to be sufficient to authenticate an attachment affidavit even against a direct attack by motion to discharge the attachment. In the case of *Buckland v. Goit*, 23 Kan. 327, it was held that the entire omission of a jurat did not render an affidavit void. The court said the jurat might be supplied afterward.

In the case of *City of Kingman v. Berry*, 40 Kan. 625, 628, 20 Pac. 527, 529, it was said: "The important consideration is whether the complaint was actually sworn to before a proper officer. The mere fact that an officer fails to couple his official title with his name in signing a jurat, or to attach a jurat at all, to the affidavit at the time the oath is administered, will not invalidate it."

These rulings necessarily imply that the certificate of the officer under his signature and seal is merely evidence that the affidavit was duly sworn to, and in *Foreman v. Carter*, 9 Kan. 674, 682, it was said that a challenge of a jurat is not an attack upon what was done, but an objection that the proof of what was done is defective. If therefore the jurat be missing from an affidavit, if there be no proof on the face of the paper that an oath was duly administered, the fact may be established by evidence aliunde. This rule is clearly just, because after a party has in fact made or procured to be made the necessary declaration under oath he ought not to be prejudiced, and the proceeding ought not to fail in consequence of the officer's neglect to affix a jurat. In view of the foregoing the question here is, Was Fagan's written declaration made under oath? This question is to be answered from the evidence like any other question of fact. What does the record show?

The affidavit was signed by Fagan, and purports to be an affidavit. It opens with the following statement: "W. E. Fagan, being duly sworn, says: The document is indorsed on the bank 'Attachment affidavit. Filed Nov. 7, 1899, A. M. Callahan, Clerk District Court.'" The appearance docket, which the law requires the clerk to keep, contains the following entry: "Nov. 7, 1899, ——— Affidavit for attachment sworn to and filed, 35c." The clerk's statutory fees for administering an oath were 25 cents, and for

filing and docketing a paper were 10 cents. The clerk issued a writ of attachment under his signature and the seal of the court which contains the following recital: "To the sheriff of said county, Greeting: Whereas, W. E. Fagan, plaintiff, has this day, on the necessary affidavit being filed," etc. From all this it clearly appears that an affidavit was in fact sworn to according to law.

If the evidence that an oath was duly administered were less conclusive, the plaintiff is met by another principle founded upon justice and wise policy. The journal entry of judgment contains the following recitals: "And the court further finds that an attachment has been duly issued in said action upon the affidavit of plaintiff and levied upon the following described real estate. * * * And the court further finds that all the allegations in said affidavit for attachment are true; that the defendant is a nonresident of the state of Kansas, and that said attachment ought to be sustained. It is therefore considered by the court that the plaintiff have judgment in rem against defendant for said sum of two hundred and thirty-eight and 60/100 dollars (\$238.60), and the costs of this action, taxed in the sum of \$—; that said attachment be sustained; by virtue of the real estate levied upon under and by virtue of the said order of attachment * * * be sold." Collateral attacks upon judicial proceedings made long after they have been closed are not favored, and whenever a paper purporting to be an affidavit has been approved as such by the court, and has been made the basis of judicial action as if it were duly authenticated, the omission of the jurat is a mere irregularity which will not vitiate the proceedings. Numerous cases sustaining the foregoing views are collated in *Turner v. St. John*, 8 N. D. 245, 78 N. W. 340. See, also, 2 Enc. L. & P. 671; 2 Cyc. 26.

The judgment of the district court must be sustained for another all-sufficient reason. The defendant pleaded the five-year statute of limitations which reads as follows:

"Actions for the recovery of real property, or for the determination of any adverse claim or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter.

"First. An action for the recovery of real property sold on execution brought by the execution debtor, his heirs or any person claiming under him, by title acquired, after the date of the judgment, within five years after the date of the recording of the deed made in pursuance of the sale.

"Second. An action for the recovery of real property sold by executors, administrators or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased per-

son, or the ward or his guardian, or any person claiming under any or either of them, by title acquired after the date of the judgment or order, within five years after the date of the recording of the deed made in pursuance of the sale." Gen. St. 1900, § 5608 (Code Civ. Proc. § 15).

The property was sold by order of the court under a special execution conforming to the judgment. The plaintiff claims under the execution debtor by title acquired after the date of the judgment. The action was not commenced within five years after the date of the recording of the sheriff's deed. Therefore every condition of the statute is satisfied. The plaintiff argues that the statute does not apply to deeds executed pursuant to avoid judgments. As shown in the case of *O'Keefe v. Behrens*, 73 Kan. 469, 85 Pac. 555, 8 L. R. A. (N. S.) 354, wherein the second subdivision of the statute was considered, it has particular reference to such deeds because, if the proceedings were merely irregular, and consequently not void, they could not be attacked collaterally at all.

The judgment of the district court is affirmed. All the Justices concurring.

(82 Kan. 240)

BALDRIDGE v. CENTGRAF.

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE (§ 41*)—ORAL CONTRACT—PART PERFORMANCE—ENFORCEMENT.

The ground upon which a court, notwithstanding the statute of frauds, may compel the complete performance of an oral contract for the sale of real estate which has been partly performed is that such a decree may be necessary in order to avoid injustice toward one who, in reliance upon the agreement, has so altered his position that he cannot otherwise be afforded adequate relief.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 120-123; Dec. Dig. § 41.*]

2. SPECIFIC PERFORMANCE (§ 46*) — ORAL AGREEMENT—STATUTE OF FRAUDS.

The mere fact that a proposed buyer has taken possession of real estate with the consent of the owner upon the faith of an oral agreement for its purchase does not in and of itself avoid the effect of the statute and justify a decree for the specific performance of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 123; Dec. Dig. § 46.*]

3. SPECIFIC PERFORMANCE (§ 41*)—ORAL CONTRACT—PART PERFORMANCE—PAYMENT BY CHECK.

In the absence of any further showing as to the injury that would result to the plaintiff by a denial of that relief, a decree for the specific performance of an oral contract for the sale to him of a dwelling house is not justified by evidence that, having deposited a valid check for the purchase price with a third person mutually agreed upon, to be delivered upon the execution of a deed, he took possession of the premises by the owner's permission, but was on the same day served with a notice to vacate.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 120-123; Dec. Dig. § 41.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. EJECTMENT (§ 82*) — EVIDENCE — TITLE OF PLAINTIFF.

In ejectment, where the defendant claims a right of possession only under a contract with the plaintiff for the purchase of the property, evidence of title on the plaintiff's part becomes immaterial.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 222-228; Dec. Dig. § 82.*]

Appeal from District Court, Sumner County; O. L. Swarts, Judge.

Action by D. M. Baldrige against Leopold Centgraf. Judgment for defendant, and plaintiff appeals. Reversed.

F. A. Dinsmoor, for appellant. Lawrence & Ferguson, for appellee.

MASON, J. D. M. Baldrige brought ejectment against Leopold Centgraf, who defended on the ground of an oral contract for the purchase of the property, rendered enforceable by having been partly performed. The court found in favor of the defendant, and rendered a judgment for the specific performance of the contract, from which the plaintiff appeals.

The evidence showed an oral agreement between the parties for the sale of the property, which included an unoccupied dwelling house. The buyer deposited his check for the purchase price with a third person mutually agreed upon, to be delivered in exchange for a deed. According to his testimony (which, although contradicted, must be accepted as true in view of the finding of the trial court), he then said that he wanted to move in, and the owner told him either that he would or that he could. He did move in, but on the same day received from the owner a writing notifying him to vacate the premises and asserting that he was merely a trespasser thereon. The owner followed up the notice with a proceeding under the forcible entry and detainer article, but, upon the defendant's claiming title, abandoned that for the present action. Although by putting up his check the defendant did all that was incumbent upon him in that regard, the deposit did not amount to a payment. No money changed hands; the plaintiff received none, the defendant parted with none, and there was therefore none to be repaid in order to restore the parties to their original position. No showing was made that the defendant had improved the property or otherwise incurred expenses or placed himself at a disadvantage in any respect in reliance upon the contract. The case therefore presents the question, which this court has not heretofore been required to decide, whether in and of itself the fact that a proposed buyer has taken possession of real estate with the consent of the owner upon the faith of an oral agreement for its purchase so far avoids the effect of the statute of frauds as to justify a decree for the specific performance of the contract. The opinion in *Edwards v.*

Fry, 9 Kan. 417, 423, includes the statement that delivery of possession will take a case out of the statute of frauds, but there the possession was in fact accompanied by the making of permanent improvements, and that circumstance was treated as a determining factor. In *Baldwin v. Baldwin*, 73 Kan. 39, 45, 84 Pac. 568, 4 L. R. A. (N. S.) 957, it was said that while the statement referred to is supported by the weight of authority, if the question were a new one the court would incline to hold that bare possession is not sufficient. The precise question involved is considered in an exhaustive note in 3 L. R. A. (N. S.) 790, which is supplemented by further citations in 8 L. R. A. (N. S.) 870. In the introductory portion of the note it is said: "Whether possession, standing by itself, is enough to do away with the plain words of the act, is a troublesome question upon which there is considerable conflict of opinion, and apparently some confusion. * * * The rule that possession alone is sufficient to remove the bar of the statute appears to have sprung largely from obiter statements to that effect. In many cases in which the rule is announced other acts in part performance besides possession appear, although the courts seem to uphold the oral contract on the ground of possession alone. * * * The idea that one who has gone upon land under an oral contract might be driven off as a trespasser if he could not take refuge behind his agreement is the main support of the English doctrine of part performance, and of the rule that possession alone is sufficient to answer for the writing required by the statute. That it was necessary to break the statute to such an extent to shield the party in possession from the pains and penalties which might follow a trespass has been doubted. * * * In this country the courts have been swayed for the most part by the idea that it would be a shock to the conscience to allow one who had put another in a hard position to throw up his contract and get off under cover of the statute. The statute would thus be aiding and abetting fraud which it was its design and purpose to prevent. Under the fraud theory, pure and simple, possession alone would not necessarily be a sufficient act of part performance to take an oral contract relating to real estate out of the statute, since the party to whom possession had been delivered might be put back where he was before the contract, and no real loss be suffered by him as a result of the transaction." Pages 790, 791, 792 of 3 L. R. A.

The argument in favor of what has been regarded as the general rule is thus outlined in 2 Story's *Equity Jurisprudence*, § 761: "Nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed. Thus, for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser, if there be no agreement valid in law or equity. Now, for the purpose of defending himself against a charge as a trespasser, and a suit to account for the profits in such a case, the evidence of a parol agreement would seem to be admissible for his protection; and if admissible for such a purpose there seems no reason why it should not be admissible throughout."

We do not think it follows that if proof of the existence of an oral agreement is admissible, the contract itself must be capable of enforcement. The statute does not make an oral contract for the sale of real estate illegal or void, nor does it forbid evidence thereof to be given for any purpose consistent with the statute. *Ann Berta Lodge No. 42, I. O. O. F., v. Leverton*, 42 Tex. 18; *Glass v. Hulbert*, 102 Mass. 24, 33, 34, 3 Am. Rep. 418. The law in letter and in spirit is that no one shall be charged upon such a contract; that is, he shall not be compelled to perform it, or to answer in damages for his refusal to do so. One party can recover nothing of the other on account of the loss of the fruits of his bargain, but no reason is apparent why if in reliance upon the agreement he has incurred expense he may not assert a claim for reimbursement, not under the contract, but upon all the facts of the case. Such a practice was recognized in *Delsher v. Stein*, 34 Kan. 39, 42, 7 Pac. 608, 610, where it was said: "Of course the case should not be taken out of the statute of frauds any further than is necessary to do justice and to prevent fraud; and to pay the plaintiff a fair compensation for what he has lost by reason of the parol agreement between the parties is probably sufficient for that purpose."

The mere payment of money is not such part performance as upon this principle to take a contract out of the statute of frauds, because the recipient can be compelled to restore it. 26 Am. & Eng. Encycl. of L. 54; 29 Same 838; 20 Cyc. 297, 298; *Baldwin v. Squier*, 31 Kan. 283, 284, 1 Pac. 591. The verbal agreement is not the basis of an action for that purpose, but evidence of its terms is often necessary to establish the implied contract upon which recovery is sought. "In an action to recover upon an implied promise to pay for partial performance of a contract within the statute of frauds, the contract is admissible in evidence, not as being binding and conclusive as to the amount of recovery, but merely as a circumstance to be considered in estimating the value of what has been done." 29 Am. & Eng. Encycl. of L. 842.

The ground upon which a court, notwithstanding the statute of frauds, may compel the complete performance of an oral con-

tract for the sale of real estate which has been partly performed is that such a decree may be necessary in order to avoid injustice toward one who in reliance upon the agreement has so altered his position that he cannot otherwise be afforded adequate relief. His mere entry into possession with the consent of the owner does not in and of itself meet this condition. It does not make him a trespasser in fact, and a decree of specific performance is not necessary to protect him from liability as such. Nor does it in and of itself place him at any disadvantage or involve him in any loss. True, whenever he has made permanent improvements upon the property the courts are ready to order a conveyance, even although it might be possible to provide compensation in damages. A sufficient reason for this is that alterations in the artificial features of real estate are so largely a matter of individual taste that the loss to their designer in being deprived of their benefit might not be adequately measured either by the increased value of the property, or by his expenditures in making them. And whenever possession is taken under such circumstances that its relinquishment involves a disadvantage apart from the mere loss of the benefits of the bargain, a case may be presented for equitable relief, dependent upon the special circumstances. Nothing having been shown here beyond the bare fact of possession, we think the court erred in finding for the defendant.

A question is raised regarding the proof of title, but it is rendered immaterial by the fact that the defendant admitted deriving his possession from the plaintiff and justified it under the contract for the purchase of the property. *O'Brien v. Wetherell*, 14 Kan. 618; 10 Am. & Eng. Encycl. of L. 501.

The judgment is reversed and a new trial ordered. All the Justices concurring.

(82 Kan. 311)

COON v. ATCHISON, T. & S. F. RY. CO.
(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 333*)—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—PASSING BETWEEN TRAIN AND STATION.

Persons carried on a freight train on which their live stock is in transit, in going to and fro between the caboose and a depot, are not absolved from the duty of looking and listening when about to cross an intervening track, their obligation in that respect being greater than that of persons passing back and forth between a station platform and a passenger train that has stopped to receive and discharge passengers.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1396, 1397; Dec. Dig. § 333.*]

2. CARRIERS (§ 347*)—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In a personal injury action against a railway company there was evidence tending to show these facts: The plaintiff accompanied

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

live stock in shipment; he was told to wait at a depot until a train arrived to which his cars were to be attached, and to be ready to take it there at any time; he saw it approaching on a track 60 feet away, and started towards it; in crossing an intervening track he was struck by a switch engine which was running three or four miles an hour, receiving the injury on account of which he sued; a shadow prevented the engine being visible to him until it had reached a point within 45 feet of the place of the accident, after which he could have seen it if he had looked, but he failed to do so. *Held*, that whether under the circumstances his failure to look constituted contributory negligence was a question of fact for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1396, 1397; Dec. Dig. § 347.*]

Appeal from District Court, Elk County; G. P. Alkman, Judge.

Action by S. A. Coon against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Wm. R. Smith, O. J. Wood, and A. A. Scott, for appellant. Jackson & Darby, for appellee.

MASON, J. The Atchison, Topeka & Santa Fé Railway Company appeals from a judgment in a personal injury action brought against it by S. A. Coon. So far as material to the questions of law presented the facts according to his testimony and the findings of the jury were as follows: He accompanied two cars of stock which he shipped from Howard to Kansas City, riding on a drover's pass. At about 8 o'clock in the evening he reached Emporia, where his cars were to be attached to a train from the west which had not yet arrived. The conductor told him to wait at the depot, and he did so for more than an hour. He asked the train dispatcher when the train would be along, and was told to look for it at any time and to be there and ready to take it, as it would only wait about a minute. Presently he saw his train approaching and started for the track on which it was running, so as to take the caboose when it should be opposite the depot. This track was 60 feet from the door of the waiting room, and to reach it he had to cross another track which was about 20 feet nearer. As he was crossing this nearer track he was struck by the tender of a switch engine backing in from the east and received the injuries on account of which he sued. By the light of an arc lamp he could have seen the tender if he had looked toward it after it had reached a point 45 feet from the place of the accident. Beyond that limit the track was obscured by a shadow. The speed of the engine was not found, and estimates of witnesses varied from three or four miles an hour to as fast as a man could run.

The questions presented relate to contributory negligence. The principal objection to the judgment is based upon a portion of an instruction reading as follows: "A passenger in necessarily traveling from a depot to

reach his train, and who is compelled to cross an intervening railway track belonging to the company over the road of which he is traveling as a passenger, if going the direct route and at the proper time and to take the proper train for him, is not compelled to look or listen before going over the track." In so charging the jury the trial court applied to the facts of this case the rule declared in *Railway Co. v. McElroy*, 78 Kan. 271, 91 Pac. 785, 13 L. R. A. (N. S.) 620, 123 Am. St. Rep. 134, the substance of which is that persons passing back and forth between a depot platform and a passenger train which has stopped to receive and discharge passengers are relieved from the obligation to look for an approaching train before crossing an intervening track. Many courts reject the rule in this form, holding that while a failure to look under such circumstances is not negligence as a matter of law, the jury may decide it to be negligence as a matter of fact. See notes to the *McElroy* Case, in 13 L. R. A. (N. S.) 620, and 123 Am. St. Rep. 137; also *Birmingham Ry., etc., Co. v. Landrum*, 153 Ala. 192, 45 South. 198, 127 Am. St. Rep. 25, and *Dieckmann v. Chicago & N. W. Ry. Co.* (Iowa) 121 N. W. 676. We are aware of no instance of the application of the rule to passengers on a freight train, and do not think it can properly be so applied. A freight train carries passengers only incidentally. Irregularity is to be expected in the time of its arrival at a station, the duration of its stay, and its location during the interval. A person riding upon it for the purpose of caring for stock in transit may justly be required to take precautions for his own safety while going to and from the caboose that are not exacted of one passing between a depot platform and a passenger train. "It is obvious * * * that the precautions required of railway companies carrying passengers on freight trains, in affording them safe and convenient means to get on and off such trains, are not the same as those which are demanded in the case of passenger trains." *Thomp. Com. on L. of Neg.* § 2904.

If the engine which caused the injury was running at the rate of only three or four miles an hour, there was a considerable interval after it had emerged from the shadow in which by looking in that direction the plaintiff could have seen it before attempting to cross the track. Whether his failure to look at that time constituted negligence was the vital question in the case. By instructing the jury that one in his situation was absolved from the duty of looking, the trial court took this question from them and answered it in the negative. The remainder of the instruction did not in this respect modify the effect of the part already quoted. It read: "But nevertheless it is his duty upon arriving at the track to cross over it if there is no apparent danger, and he has no right

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

when knowingly upon such track to linger thereon and neglect to use his judgment and faculties and close his mind and reason to all sense of danger, and if he does carelessly and negligently linger on the track, or carelessly and negligently walk along between the rails, and an injury follows to him by reason of such carelessness and negligence, when if he had used reasonable care he would not have been injured, then in such case he cannot recover." This allowed the jury to find that the plaintiff was chargeable with contributory negligence in having lingered on the track or in having walked between its rails, but not in having failed to look before attempting to cross it.

The railway company also contends that the court should have instructed, in substance, that, if by looking up the track just before attempting to cross it the plaintiff could have seen the approaching engine, his failure to do so would bar a recovery. A case might arise in which a passenger on his way to the caboose of a freight train would be held to the same requirements that are imposed upon a traveler seeking to cross a railroad at a highway, but we do not think the situation here presented justifies so rigid a rule. The plaintiff's shipping contract contained these provisions, among others, regarding his conduct: "Will not be upon or attempt to cross any track while switching is being or is about to be done thereon, but will first use every effort to ascertain whether it is safe to go upon or cross such track or tracks. Will be advised that freight trains do not stop at stations or other places where it is usually made safe to alight from trains, * * * and will therefore not attempt to alight from the caboose or car * * * without first making careful examination * * * and first determine * * * that it is safe to step down." These agreements serve to illustrate how the attitude of the passenger is affected by the character of the train on which he rides, but we do not perceive that they have a direct bearing upon the plaintiff's obligations under the facts already stated.

The judgment is reversed and a new trial ordered. All the Justices concurring.

(89 Kan. 268)

HOLT v. WILSON.

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

1. WILLS (§ 601*) — CONSTRUCTION — ESTATES CREATED—FEE SIMPLE.

Where one part of a will clearly indicates a disposition in the testator to create an estate in fee, it will not be restricted or cut down to any less estate by subsequent, vague, or doubtful expressions.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1341; Dec. Dig. § 601.*]

2. WILLS (§ 601*) — CONSTRUCTION — ESTATES CREATED—FEE SIMPLE.

A will contained a provision in these words: "The residue of my estate I hereby give and bequeath to my husband, S. E. G. Holt, during the term of his natural life, and at his decease the residue that may be left after his death, I hereby give and bequeath to my adopted son, William N. Holt, if he be living at the time, but if he dies before that time and leaves a child or children living, then the said residue of my estate is bequeathed to said child or children." Held, that this clear devise of the absolute fee of the estate to the adopted son was not cut down to a mere life estate with a vested remainder by the following subsequent language: "But if the said William N. Holt shall die without issue either before or after the first legatee's estate expires, then and in that case, I direct that the whole of said estate be and the same is bequeathed and given to Martha M. Wilson or her heirs."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1340, 1341; Dec. Dig. § 601.*]

3. WILLS (§ 465*) — CONSTRUCTION — PUNCTUATION.

A rule of construction, as applied to wills, is that punctuation is not to be regarded if any change therein will render the meaning of the instrument more obvious.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 984; Dec. Dig. § 465.*]

Appeal from District Court, Lyon County; F. A. Meckel, Judge.

Action by Josephine L. Holt against Martha M. Wilson. Judgment for plaintiff. Defendant appeals. Affirmed.

E. N. Evans, for appellant. L. B. Kellogg and C. M. Kellogg, for appellee.

PORTER, J. The plaintiff brought this action to quiet title to certain lands in Lyon county, and the sole question involved is the construction of the last will of Eliza Holt, who died on the 15th day of September, 1891. It is only necessary to quote the second paragraph of the will, which reads as follows: "Second. I direct that all my just debts and funeral expenses be paid as soon as convenient after my decease, and the residue of my estate I hereby give and bequeath to my husband, S. E. G. Holt, during the term of his natural life, and at his decease the residue that may be left after his death, I hereby give and bequeath to my adopted son, William N. Holt, if he be living at the time, but if he dies before that time and leaves a child or children living, then the said residue of my estate is bequeathed to said child or children, but if the said William N. Holt shall die without issue either before or after the first legatee's estate expires, then and in that case, I direct that the whole of said estate be and the same is bequeathed and given to Martha M. Wilson or her heirs. (The intention of this will is to bequeath to William N. Holt, after the first legatee's tenure expires, the whole of my said estate, and to his children after his death, but if he should die childless, then the same to go to the said Martha M. Wilson or her heirs.)" S. E. G.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Holt, the husband of Eliza Holt, died on the 22d day of June, 1902, and at the time of his death W. N. Holt, the adopted son named in the will, was living, was married, and had one child, a son 18 years of age. The only question to be determined is: What estate did W. N. Holt take under the will? The trial court held that a fee-simple estate of inheritance passed to him by the terms of the will.

The defendant claims: First, that under the will W. N. Holt upon the death of S. E. G. Holt took a life estate only, with remainder to his child or children who survived him, and, in default of child or children surviving him, to the defendant, Martha M. Wilson, or her heirs; second, that if for any reason the foregoing construction be found untenable then, whatever fee W. N. Holt took, the same was conditional, restricted, and limited, without power of appointment, and not a fee-simple estate of inheritance, but subject to limitation over by executory devise in the alternative, that is, to his child or children if any survived him, otherwise to Martha M. Wilson.

In the construction of wills, the rule of paramount importance is that the intention of the testator must be gathered from all parts of the will considered and construed together (*Ernst v. Foster*, 58 Kan. 438, 443, 49 Pac. 527), and, when ascertained, that intention must govern if not in contravention of law or public policy (*Williams v. McKinney*, 34 Kan. 514, 9 Pac. 265). Aside from this general principle, it is difficult to lay down any hard and fast rule which shall govern in all cases, because it is evident that each will must be construed by its own language. There are, however, certain well-established principles which must control in determining the question here. One is that, where property is devised in fee simple with absolute power of disposal to the first taker, the remainder over is void as a remainder because repugnant to the existence of the preceding fee, and equally void by way of executory devise because the limitation is inconsistent with the express disposition. 4 Kent's Comm. 270; *McNutt v. McComb*, 61 Kan. 25, 58 Pac. 965; *Jones v. Bacon*, 68 Me. 34, 28 Am. Rep. 1; *Campbell v. Beaumont*, 91 N. Y. 464, 468; *Banzer v. Banzer*, 156 N. Y. 429, 51 N. E. 291; 80 Am. & Eng. Enc. of Law, 742. In *Jones v. Bacon*, supra, it was said that, if property has been devised absolutely with no restrictions on the gift, the courts will be slow in giving such a construction to subsequent words as will defeat the absolute estate just devised. The rule is also well established that the absolute power of disposition need not be expressly given if it be necessarily implied by the terms of the will. 4 Kent's Comm. 270. The present case differs but slightly from that of *McNutt v. McComb*, supra. There the will contained two items. The first was held to create an uncontrolled power of disposition and to vest

an estate in fee simple; the second, which contained a direction inconsistent with the absolute interest vested, was held to be void. In this case the two clauses or provisions are not so clearly separated, and for that reason the intention of the testatrix is not so easily gathered from the language of the will as in the case of *McNutt v. McComb*; but we think the intention of the testatrix was to vest an estate in fee simple in W. N. Holt if he was living at the time of her husband's death. He was living at that time, and took an estate of inheritance in fee simple, and not a life estate.

The word "heirs" being unnecessary under our statute (Gen. St. 1909, § 1651) to create a fee, other words, such as "all my property," "the rest," or "the residue of my estate" will carry an estate of inheritance if not limited by other portions of the will. 30 Am. & Eng. Enc. of Law, 745. It will be observed that there are no qualifying words following the devise to W. N. Holt which can be said to limit his right to dispose of the property absolutely. In this respect the will differs from that in *Williams v. McKinney*, 34 Kan. 514, 9 Pac. 265, upon which the defendant relies. There the bequest to the wife was "for her sole use and benefit, and for the rearing, nurture and education of my minor children." An examination of the will in the present case discloses that the testatrix, after bequeathing to her husband a life estate, bequeathed to her adopted son, W. N. Holt, the residue of her estate if he should be living at the time of her husband's death, and provided that in case he died childless without the estate having vested in him the same was to go to Martha M. Wilson or her heirs. The language of the will following the devise of the life estate to her husband reads: "And at his decease the residue that may be left after his death, I hereby give and bequeath to my adopted son, William N. Holt, if he be living at the time, but if he dies before that time and leaves a child or children living, then the said residue of my estate is bequeathed to said child or children." If the sentence ended with a period at the word "children," no one would question the application of the rule declared in the case of *McNutt v. McComb*. But no importance can be attached to the fact that the clause devising the estate to him is separated from what follows by a comma instead of a period. The rule of construction as applied to wills is that the punctuation is not to be regarded if any change in the same will render the meaning of the instrument more obvious. *Johnson v. First Nat. Bank*, 192 Ill. 541, 61 N. E. 379; 1 *Redfield on the Law of Wills*, §§ 433, 434; *Reynolds v. Reynolds*, 65 S. C. 390, 43 S. E. 878; 30 Am. & Eng. Enc. of Law, 672.

There is another rule which applies to this case, which is that: "Where property is given in clear language sufficient to convey an absolute fee, the interest thus given

shall not be taken away, cut down, or diminished by any subsequent, vague, and general expressions." 2 Underhill on the Law of Wills, § 689. To the same effect are McNutt v. McComb, supra; Safe Deposit Co. v. Stitch, 61 Kan. 475, 59 Pac. 1082; Lohmuller v. Mosher, 74 Kan. 751, 87 Pac. 1140. Mr. Redfield, in the following language, states the rule as a qualification of the general rule that the intention of the testator must prevail: "A clearly expressed intention, in one portion of the will, is not to yield to a doubtful construction, in any other portion of the instrument." 1 Redfield on the Law of Wills, c. 9, § 30c4.

A rule slightly more rigid has been adopted by some of the courts. It is thus stated in Byrnes et al. v. Stillwell et al., 103 N. Y. 453, 460, 9 N. E. 241, 243 (57 Am. Rep. 760): "An estate in fee created by a will cannot be cut down or limited by a subsequent claim, unless it is as clear and decisive as the language of the clause which devises the estate"—citing Thornhill v. Hall, 2 Clark & Fin. 22; Campbell v. Beaumont, supra; Freeman v. Coit, 96 N. Y. 63, 68. The same rule is declared in Goodwin v. Coddington, 154 N. Y. 283, 286, 48 N. E. 729. Perhaps the rule as stated by Mr. Redfield, supra, is the better one. It is the one adopted by the court in Banzer v. Banzer, supra, and in Clarke v. Leupp, 88 N. Y. 228, 231, where it is said: "It is well settled, by a long succession of well-considered cases, that when the words of the will in the first instance clearly indicate a disposition in the testator to give the entire interest, use, and benefit of the estate absolutely to the donee, it will not be restricted or cut down to any less estate by subsequent or ambiguous words, inferential in their intent." The same principle was held in Washbon et al. v. Cope et al., 144 N. Y. 287, 39 N. E. 388, and in Benson et al. v. Corbin et al., 145 N. Y. 351, 40 N. E. 11.

The particular clause of the will under which the defendant claims reads as follows: "But if the said William N. Holt shall die without issue either before or after the first legatee's estate expires, then and in that case, I direct that the whole of said estate be and the same is bequeathed and given to Martha M. Wilson or her heirs." The direction that in case W. N. Holt died without issue before the death of S. E. G. Holt the estate should pass to Martha M. Wilson or her heirs is in no respect inconsistent with the preceding clause. The repugnancy arises over the use of the words "or after," because under the preceding clause upon the death of S. E. G. Holt the fee title passed to W. N. Holt; and that portion of the latter clause which directs that the estate shall pass to Martha M. Wilson or her heirs in case of his death after the estate had already vested in him is, of course, inconsistent with the absolute interest which he took under the first

clause, and is therefore void. Jackson v. Bull, 10 Johns. 18; Ide v. Ide et al., 5 Mass. 500; Bowen v. Dean, 110 Mass. 438. McNutt v. McComb, supra, and cases cited in the opinion.

As the judgment must be affirmed for the reasons stated, it is not deemed necessary to consider the contention that the clause under which Martha M. Wilson claims is in violation of the law in respect to perpetuities.

The judgment is affirmed. All the Justices concurring.

(83 Kan. 222)

TUCKER v. MISSOURI PAC. RY. CO.

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

1. STATUTES (§ 113*)—SUBJECTS AND TITLES OF ACT.

Chapter 353, Laws 1905, establishing maximum rates for the transportation of oil, contains but one subject, which is clearly expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 144; Dec. Dig. § 113.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 17*)—SCHOOL FUNDS—WHAT CONSTITUTE.

The damages recoverable by an aggrieved shipper under the act referred to do not constitute a fine for the breach of a penal law, which must go to the school fund under section 6 of article 6 of the Constitution.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 23, 24; Dec. Dig. § 17.*]

3. CARRIERS (§ 12*)—REGULATION OF CHARGES—"SINGLE-LINE RATES"—"DOUBLE-LINE RATES."

The distinction between "single-line rates" and "double-line rates" in the act mentioned is between rates for shipment over a single line and rates for shipment over more than one line.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 7; Dec. Dig. § 12.*]

4. CARRIERS (§ 2*)—REGULATION OF CHARGES—POWER OF LEGISLATURE.

The Legislature was justified in segregating the transportation of oil from the transportation of other commodities, in making it the subject of special regulation, and in securing observance of such regulations by the imposition of special penalties.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5; Dec. Dig. § 2.*]

5. CONSTITUTIONAL LAW (§ 298*)—DUE PROCESS OF LAW—REGULATION OF FREIGHT RATES.

The act referred to does not either in express terms or by implication forbid a judicial investigation of the reasonableness of the rates fixed by the Legislature, and the question is open for determination by any court in which the carrier may be called to account.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 847; Dec. Dig. § 298.*]

6. CONSTITUTIONAL LAW (§ 298*)—DUE PROCESS OF LAW—REASONABLENESS OF FREIGHT RATES.

An opportunity to test once for all, in a single suit against some officer or board, the reasonableness of legislative rates, is not essential to the protection of a carrier asserting that such rates are unreasonable. It is sufficient that the carrier cannot be made to suffer the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

penalties prescribed until the question of reasonableness has been passed upon by a competent court.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 847; Dec. Dig. § 298.*]

7. CONSTITUTIONAL LAW (§ 298*)—DUE PROCESS OF LAW — REGULATION OF FREIGHT RATES.

The penalties prescribed by the act in question are not so oppressive that their natural effect would be to intimidate carriers from resorting to the courts to test its validity.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 847; Dec. Dig. § 298.*]

8. CARRIERS (§ 12*)—REGULATION OF RATES—REASONABLENESS.

Acts of the Legislature fixing rates for transportation by common carriers will not be held to be unconstitutional on the ground that the rates established are unreasonable without the fullest disclosure of all material facts affecting the question.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 11, 19; Dec. Dig. § 12.*]

9. CARRIERS (§ 12*)—REGULATION OF RATES—REASONABLENESS—EVIDENCE.

The evidence in this case is not sufficient to show that the oil rates fixed by the act of 1905 are unreasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 11, 19; Dec. Dig. § 12.*]

Appeal from District Court, Osborne County; R. M. Pickler, Judge.

Action by J. W. Tucker against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

B. P. Waggener and C. H. Nicholas, for appellant. R. H. Towne and J. W. Tucker, for appellee.

BURCH, J. The plaintiff recovered a judgment of \$500 against the defendant for a violation of chapter 353, Laws 1905, establishing maximum rates for the transportation of oil. The defendant appeals and contends the statute violates the Constitution of the state of Kansas and the Constitution of the United States.

The title of the act reads as follows: "An act to establish maximum rates for the transportation of crude oil and the products thereof, to forbid rebates, and provide penalties for the violation thereof." Section 1 fixes maximum rates for the transportation of oil within the state of Kansas by single and by double line shipments. Section 2 contains the following provisions: "Every common carrier which shall fail or refuse to accept for shipment or to properly ship or deliver the products named in section 1 hereof, or which shall demand, exact or receive for such transportation or delivery any sum in excess of the rates herein made lawful, shall be liable to any person injured thereby in the sum of five hundred dollars as liquidated damages, to be recovered by action in any court of competent jurisdiction, together with a reasonable attorney's fee, to be fixed by the court." Section 3 makes the giving of rebates

a misdemeanor punishable by fine and forfeiture of the right to do business.

The defendant claims the title and the body of the act are multifarious. It is plain, however, that a single subject is embraced, the regulation of rates for the transportation of oil and its products, and the statute extends no further than is necessary for efficient regulation. It would be a lame statute if it contained no penalty for its violation. Both civil and criminal remedies may be employed to that end. The remedy by way of damages to the aggrieved shipper is not a fine for a breach of a penal law in the sense of article 6, § 6, of the Constitution, which provides that moneys derived from that source shall go to the school fund.

It is said the statute denies the defendant the equal protection of the laws guaranteed by the federal Constitution because shipments over more than two lines of road are not regulated. This is an unwarranted interpretation of the terms "single-line rates" and "double-line rates" used in the statute. The distinction is between rates for shipment over a single line and rates for shipment over more than one line.

It is said that the act in question discriminates between classes of shippers and favors oil shippers with liquidated damages and attorney fees which are denied to farmers, stockmen, and many other persons engaged in reputable pursuits. The carrier in this case is not a shipper and has no legal right to question the classification of members of a group to which it does not belong. It is also said that the statute discriminates between the defendant and other litigants in the matter of attorney fees. There is nothing in the abstract to show that the plaintiff recovered attorney fees, so that the defendant has nothing to complain about in that respect. In view of the defendant's argument, however, it may be observed that for many well-understood reasons, which need not be rehearsed here, the Legislature was clearly justified in segregating the transportation of oil from the transportation of other commodities, in making it the subject of special regulation and in securing observance of such regulations by the imposition of special penalties. All common carriers of oil, including pipe lines (chapter 315, Laws 1905), are placed under the liabilities complained of, which satisfies the constitutional provisions which the defendant invokes.

The statute referred to relating to the transportation of oil by pipe lines establishes maximum rates for the service. It then gives the board of railroad commissioners authority to fix rates not to exceed those prescribed by the Legislature, and provides that the reasonableness of rates fixed by the board may be tested by proceedings in any court of competent jurisdiction. Until the board acts, the legislative rates are to stand. The act fur-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

nishing the basis of the proceedings under consideration contains no provision for a court review of the rates which it promulgates. From these facts the defendant argues that no right of review exists, and that consequently it is deprived of the equal protection of the laws and of property without due process of law. The pipe-line act merely expresses a condition which attaches to all statutes fixing rates or charges for public services unless the Legislature has by specific declaration, or by implication equally clear, forbidden an inquiry into the matter of reasonableness. The act, in question merely proceeds upon the basis that in the judgment of the Legislature the maximum rates established are reasonable. *Prima facie*, this conclusion is correct; but there is no intimation that a judicial investigation of the fact of reasonableness is foreclosed, and such an investigation may be made in any proceeding in which a carrier is called to account under the act. It is true that under the pipe-line act the reasonableness of rates fixed by the board of railroad commissioners may be tested once for all in an appropriate action against the board. The right to a judicial determination of the question of reasonableness, however, is the matter of essence and substance, and not the matter of procedure; and, so long as the defendant cannot be made to suffer until a competent court has passed upon the justice of the legislative rates, the guarantees of the federal Constitution are not infringed.

Finally, it is said that the legislative rates are in effect made conclusive because the penalties for violating the law are great enough to terrorize carriers into submitting, rather than to take the chances of succeeding in a test case. This argument is based on the decision in the case of *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932. The tenor of that decision is shown by the following extracts from the opinion: "For disobedience to the freight act, the officers, directors, agents, and employes of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding 90 days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of 90 days each for each offense. Disobedience to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding \$5,000 or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible, for the company to obtain officers, agents, or employes willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the

immense fines provided for in violating orders of the commission. The company, in order to test the validity of the acts, must find some agent or employé to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or federal) for the purpose of testing its validity. The officers and employes could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. * * * If the law be such as to make the decision of the Legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago, etc., Railway Co. v. Minnesota*, 134 U. S. 418 [10 Sup. Ct. 462, 702, 33 L. Ed. 970]. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right, rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may therefore be said that, when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."

Compared with the drastic penalties prescribed by the Legislature of the state of Minnesota, those of the Kansas statute are mild indeed. The latter are not imposed upon officers, agents, or employes; they affect the corporation only, are merely pecuniary, and are neither extravagant nor unreasonable. Therefore the court holds they are not so enormous that their natural effect would be to deter carriers from resorting to the courts to test the validity of the act.

At the trial in the district court the defendant was given an opportunity to show that the statutory rates are unreasonable. It introduced evidence to prove its contention to that effect. The court found otherwise, and the finding is assigned as error. The evidence consisted largely of tables of figures compiled by the defendant's statisticians, supplemented by the testimony of two witnesses. It is claimed that the evidence establishes the following facts: "First. The rate fixed by the statute is not compensatory, and that the actual cost of the service, not including fixed charges, or taxes, is greatly in excess of the maximum revenue allowed by the statute. Second. That all the earnings combined of the company in the state, from domestic business, shows an annual loss or deficit of over \$200,000. Third. That all of the earnings in the state, from every source, interstate and intrastate, do not show sufficient net revenue

to pay to exceed 2 per cent. on one-half of the value of the property, as assessed for taxation."

It is not necessary to analyze this evidence. Some of it is open to the suspicion of want of good faith. Thus, the only showing with reference to revenue from intrastate oil shipments consists of receipts for two months of a single year, and those months are July and August. Indeed, there is nothing in the evidence showing what a reasonable rate for the transportation of oil would be, or that the legislative rates are too low. The figures to the effect that the Missouri Pacific Railway Company loses money every year on its Kansas business do not tend to show either of these facts. Further suspicion is cast on this evidence by proof presented by the plaintiff showing the defendant voluntarily made double-line shipments of oil in less than car load lots to a noncompetitive point beyond the one where this controversy arose at less than the statutory rates. In the case of Chicago, etc., Company v. Wellman, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176, Mr. Justice Brewer pointed out how easily courts might be misled into doing grievous wrong to the public by striking down legislative rate acts on general statements and without the fullest disclosure of all material facts. In delivering the opinion of the court, he said: "A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were \$2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries—\$50,000 to \$100,000 to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the Legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for, if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this: That the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'"

The trial court was correct in holding that the defendant's evidence was not sufficient to prove that the statutory rate is unjustifiably low.

The judgment of the district court is affirmed. All the Justices concurring.

(82 Kan. 266)

MARTIN v. GARLOCK.

(Supreme Court of Kansas. April 9, 1910.)

*(Syllabus by the Court.)***1. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS.**

In an action based on the frightening of a horse on the highway by an automobile, in the absence of a request for more definite instructions, a charge to the jury that a recovery could be had if the injury was caused by the negligence of the defendant, without contributory negligence on the part of the plaintiff, is not rendered materially erroneous by the omission to state that the negligence complained of must have been the proximate cause, and that the injury must have been one reasonably to have been anticipated as a result thereof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 637; Dec. Dig. § 256.*]

2. DAMAGES (§ 179*)—PUNITIVE DAMAGES—EVIDENCE OF MALICE.

In such an action, evidence that the defendant used language showing a disregard of the plaintiff's rights may be sufficient to show such malice as to warrant the recovery of punitive damages, although the words were spoken after the accident had taken place.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 476, 477; Dec. Dig. § 179.*]

Appeal from District Court, Doniphan County; William I. Stuart, Judge.

Action by William Martin against Ben Garlock. Judgment for plaintiff, and defendant appeals. Affirmed.

S. M. Brewster, for appellant. J. J. Baker, for appellee.

MASON, J. A horse ridden by William Martin was frightened by an approaching automobile, driven by Ben Garlock, and ran away, killing itself and injuring its rider. Martin sued Garlock, claiming that the accident was caused by the failure of the latter to stop when signaled to do so. Garlock claimed that the automobile advanced only 10 feet after the signal was given, and that it was not practicable to stop sooner on account of the condition of the road. A jury found for the plaintiff, and the defendant appeals from the judgment.

The verdict was not without support in the evidence, and must be deemed to have settled the questions of fact. The jury were instructed, in effect, that a recovery could be had if the injury was caused by the negligence of the defendant, without contributory negligence on the part of the plaintiff. This instruction is complained of because it omitted to state that the negligence must have been the proximate cause, and that the injury must have been one reasonably to have been anticipated as a result thereof. No request was made for any more definite instruction. In 29 Cyc. 651, it is said: "Failure to instruct that, in order for negligence to create liability, it must be the proximate cause of the injury is reversible error." On the other hand, it is said in Thompson's Commentaries on the Law of Negligence, § 7916: "The ques-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion whether the negligence complained of was the proximate cause of the injury is solely for the jury. It is not required, however, that the attention of the jury should be called to this element in direct terms. Thus, an instruction that, to warrant a recovery by the plaintiff, the jury must find the defendant negligent, and that the plaintiff's injury was caused by such negligence, without contributory negligence on the part of the plaintiff, will cover the ground." Doubtless, where attention is called to the matter, the court should refer to the requirement that negligence to be actionable must have been the proximate cause of an injury that was to have been foreseen as a result thereof; but, in the absence of a specific request, the omission cannot ordinarily be regarded as material error. 11 Encyc. P. & P. 217. Possibly the rule might be different where the circumstances naturally suggest the intervention of an independent cause or a difficulty in anticipating the injury. *Maitland v. Gilbert Paper Co.*, 97 Wis. 476, 72 N. W. 1124, 65 Am. St. Rep. 137, relied upon by the appellant, appears to have been a case of that character; but we think the present one is not.

Complaint is also made of the allowance of punitive damages. There was evidence that after the accident the defendant said to the plaintiff: "I don't give a damn for you, or your horse either." This had some tendency to show malice. When such feeling originated, if it existed, was a question for the jury. "Where an emotion of hostility at a specific time is to be shown, the existence in the same person of the same emotion at another time is in general plainly admissible. * * * Subsequent hostility is equally receivable; that it arose only subsequently is matter for explanation by the opponent." 1 Wigmore on Evidence, § 396.

The judgment is affirmed. All the Justices concurring.

(32 Kan. 280)

LEMASTER v. FISHER et al.

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

CHATTEL MORTGAGES (§ 161*)—STIPULATIONS IN MORTGAGE—LOCATION OF PROPERTY.

A stipulation in a chattel mortgage that the property shall be kept by the mortgagor at a certain place gives to him no right to continue in its possession at another place, to which it was removed without the knowledge or consent of the mortgagee and contrary to his direction.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 282-285; Dec. Dig. § 161.*]

Appeal from District Court, Franklin County; C. A. Smart, Judge.

Action by C. A. Lemaster against John Fisher and others. Judgment for plaintiff, and defendants appeal. Affirmed.

F. A. Waddle, for appellants. W. S. Jenks, for appellee.

BENSON, J. This is an action in replevin to recover possession of a piano mortgaged by the defendants Tawney and wife to the plaintiff, Lemaster, to secure a note given for purchase money. The answer was a general denial. The mortgage provided that the piano should be kept by the mortgagors at a certain number on a designated street, and that, if "the indebtedness shall be deemed insecure," the property might be taken and sold to pay the plaintiff. The building where the piano was kept was owned by the plaintiff's wife, and rented to Tawney. For default in the payment of rent a notice to leave was served, in compliance with which Tawney vacated the premises. At the time of serving the notice to leave, the attorney for the owner of the premises, who was also acting for the mortgagee, notified the mortgagors to leave the piano in the building, and that he considered the indebtedness insecure. With the assistance of Fisher the piano was removed to Fisher's home. A demand was then made upon Tawney for the property, which was refused. No demand was made upon Fisher, but he testified that he claimed no interest in the property. Errors are assigned upon the orders overruling an objection to evidence under the petition, and a demurrer to the evidence.

The petition was informal, and contained unnecessary matter. It did, however, allege that the plaintiff was the special owner of the property under a mortgage, a copy of which was attached; that the defendants, without the knowledge of the plaintiff, removed the property from the place designated in the mortgage; that the defendant Fisher "is wrongfully and unjustly detaining in his possession the said goods and chattels from the plaintiff, who is justly entitled to the same, * * * and did so wrongfully detain the same for the space of 30 days before the commencement of this action." It was also alleged that "the defendants H. W. Tawney and N. Tawney are aiding, counseling, and abetting the said John Fisher * * * in wrongfully * * * detaining said goods and chattels." This stated a cause of action, and there was no error in overruling the objection to evidence. *Cobbeys on Replevin*, § 453; *Farmers' Bank v. Bank of Glen Elder*, 46 Kan. 376, 28 Pac. 680; *Bartlett v. Bank*, 70 Kan. 126, 78 Pac. 414; *Laithe v. McDonald*, 7 Kan. 254; *Civ. Code*, §§ 140, 531 (*Gen. St.* 1909, §§ 5733, 6176).

In the absence of a stipulation to the contrary, the mortgagee of personal property has the legal title thereto and the right of possession. *Gen. St.* 1901, § 4250. The only stipulation to the contrary in this mortgage is that it shall be kept by the mortgagors at a place described. This implies the right

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of possession at that place, but gives no right of possession elsewhere, unless consent be given for the removal. The plaintiff was therefore entitled to possession of the property when it was removed without his consent. Whether a demand upon the mortgagor was necessary need not be considered, for there was evidence that a demand had been made. It is argued that a demand upon Fisher was also necessary as a condition to the maintenance of an action against him. This contention cannot be sustained. He claimed no interest in the property, and was only a custodian for Tawney. He had no better right than Tawney, for whom he held the property. The requirements of the statute relating to registry do not apply, for he was not a purchaser. Gen. St. 1901, § 4244. He might have been relieved from costs by filing a disclaimer (Id. § 5073), or by offering to surrender possession (Cobbey on Replevin, § 451).

The debt secured by the mortgage was not due when the action was commenced, and the defendants insist that the plaintiff was not entitled to possession under the insecurity clause, so called; that the condition is unlike that under consideration in *Werner v. Bergman*, 28 Kan. 60, 42 Am. Rep. 152. In that case the condition was that "the mortgagee shall deem himself insecure." The condition in the mortgage in this case is the same in effect, and no reason is perceived why the rule in the *Werner* case should not be followed, if it were necessary to uphold the judgment.

The judgment is affirmed. All the Justices concurring.

(32 Kan. 233)

FIRST NAT. BANK OF HORTON v. ABMEYER.

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

PLEADING (§ 412*)—REPLY—INSUFFICIENCY—WAIVER.

In an action to recover upon a promissory note by an indorsee against the maker, the answer of the maker was that there was fraud in the inception of the note. The plaintiff replied, denying "each and all of the allegations in said answer contained which are in any way inconsistent or which deny the allegations in plaintiff's petition." *Held*, that the reply was defective; but, as the parties proceeded through two trials as if the reply was sufficient, and the fraud alleged in the answer was in issue, the defendant is not in a position to insist that the averments of fraud were admitted.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1387; Dec. Dig. § 412.*]

Appeal from District Court, Jackson County; Marshal Gephart, Judge.

Action by the First National Bank of Horton against B. F. Abmeyer. Judgment for plaintiff, and defendant appeals. Affirmed.

Whitcomb & Hamilton, for appellant. Crane & Woodburn Bros., for appellee.

JOHNSTON, C. J. This action was here for a review on a former appeal (76 Kan. 877, 92 Pac. 1109). At the second trial the bank assumed the burden of showing that it was the owner of the note in suit. Proof of that kind was offered, and the note itself was introduced in evidence. The bank then rested, and, appellant's demurrer to the evidence having been overruled, he declined to produce any testimony, but submitted the case on the evidence introduced on behalf of the bank. An instruction was asked to the effect that, when a note has its inception in fraud, the burden is upon the indorsee to show that he acquired it for a valuable consideration and without notice of the fraud; but this was refused, and instead the court directed the jury that, if they found that the bank was the owner of the note, their verdict must be in favor of the bank. A verdict in favor of the bank was returned.

The contention is that, as the pleadings stood, it devolved on the bank to prove that it acquired the note in good faith and without notice of the fraud by which it was alleged to have been obtained. It is argued that the averment in the answer that there was fraud in the inception of the note was admitted by the reply, and hence that no right of recovery was shown. In its petition appellee alleged the execution of the note to the payees, a copy of which was set forth, their transfer of the same to Dunn, and his sale and delivery of it before maturity to appellee. There was an allegation that appellant was indebted for the full face value of the paper, and for that amount judgment was asked. The answer, aside from a general denial, pleaded facts indicating that there was fraud in the inception of the note. The reply denied "each and all of the allegations in said answer contained which are in any way inconsistent or which deny the allegations in plaintiff's petition." The reply cannot be regarded as a model method of denying averments of a pleading; but, in view of the way the case was tried, the character of the reply was not very important. The answer set up the fraudulent acts which, if supported by testimony, would show no liability to appellee, and this in a sense is inconsistent with the averment in the petition that appellant was indebted to appellee for the full face value of the note; but in any view the reply was faulty, and vulnerable to any proper attack. In neither trial had there been a motion for judgment on the pleadings, and the sufficiency of the reply had never been questioned. On the first trial appellant offered evidence to prove fraud, and proceeded as if it was an issue in the case, and the sufficiency of the reply was not challenged in the second trial. Under the circumstances the appellant is not in a position to insist that the fraud was admitted by the reply. *Bashor v. Nordyke & Marmon*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Co., 25 Kan. 222; St. L. & S. F. Ry. Co. v. Dudgeon, 28 Kan. 283; Cooper v. Machine Co., 37 Kan. 231, 15 Pac. 235.

It is contended that the action of appellee in assuming the burden of proof in the case was a recognition that the burden was upon it to also show that the note was acquired for a valuable consideration and without notice of the fraud. As the petition did not allege that the transfer of the note to appellee was in writing, it devolved on it to show that it was the owner of the note. The burden of proof rested on it to that extent; but when it produced the note, and offered testimony of ownership, it had shown a prima facie right to recover. In the absence of proof of fraud, that question was no longer in the case, and hence an instruction on the subject was not warranted.

Judgment affirmed. All the Justices concurring.

(82 Kan. 351)

LEWIS v. MISSOURI, K. & T. RY. CO.

(Supreme Court of Kansas. April 9, 1910.)

1. DOMICILE (§ 11*)—QUESTION FOR JURY.

Where the question of whether plaintiff is a resident of the state in which he brings his action involves his intention, and whether his mother, by her actions, had emancipated him, the question is for the jury.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 40; Dec. Dig. § 11.*]

2. PARENT AND CHILD (§ 16*)—EMANCIPATION OF CHILD.

The emancipation of a minor by his parent may be inferred from the conduct of the parties or other circumstances.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 165-175; Dec. Dig. § 16.*]

3. APPEAL AND ERROR (§ 1001*)—REVIEW—QUESTIONS OF FACT.

The finding of the jury on a question of fact is conclusive on appeal, where supported by evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3934; Dec. Dig. § 1001.*]

Appeal from District Court, Montgomery County; Thomas J. Flannely, Judge.

Action by Robert R. Lewis against the Missouri, Kansas & Texas Railway Company. Plaintiff had judgment, and defendant appeals. Affirmed.

John Madden and W. W. Brown, for appellant. A. L. Billings, for appellee.

PER CURIAM. The plea in abatement raised the single question whether the plaintiff was a resident of Kansas at the time the action was commenced. From the evidence it was for the jury to determine this fact, which involved his intention, and whether his mother by her actions had emancipated him. The emancipation of a minor by his parent may be inferred from the conduct of the parties or other circumstances. Halliday v. Miller, 29 W. Va. 424, 1 S. E. 821, 6 Am.

St. Rep. 653; Flynn v. Baisley, 35 Or. 268, 57 Pac. 908, 45 L. R. A. 645, 76 Am. St. Rep. 496; Dierker, to the Use of Shoemaker, v. Hess et al., 54 Mo. 246.

The jury, in substance, have found that the mother in this instance relinquished all claim to the plaintiff's earnings and all right to control him. He testified that it was his intention to make his domicile in Kansas, so that there was evidence to sustain the jury's findings. The case of *Modern Woodmen v. Hester*, 68 Kan. 129, 71 Pac. 279, is not controlling because there was no question in that case of emancipation.

Here the whole case turned upon that question, and, there being evidence in our opinion to support the finding of the jury, the judgment must be affirmed.

(82 Kan. 354)

KING v. NILSON.

(Supreme Court of Kansas. April 9, 1910.)

TAXATION (§ 788*)—TAX DEEDS—PRESUMPTION.

A tax deed over five years old is entitled to every presumption in its favor.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1559; Dec. Dig. § 788.*]

Appeal from District Court, Haskell County; Wm. H. Thompson, Judge.

Action between Albert E. King and Eusebius Nilson. From the judgment, King appeals. Affirmed.

Scates & Watkins, for appellant. William Easton Hutchison and C. E. Vance, for appellee.

PER CURIAM. The tax deed in this case being valid, the judgment must be affirmed, without reference to the other questions raised. There is no similarity between this case and that of *Lanning v. Brown*, 79 Kan. 108, 98 Pac. 771, which is relied upon by the plaintiff. There the deed recited on its face that the order of the board authorizing the assignment required the payment of taxes which were not at the time a lien upon the land. This deed, on the contrary, shows that the taxes of 1900 were not included in the order of compromise, although they were paid on June 27, 1901, when the certificate was actually assigned; but in the meantime they had become a lien upon the land, and their payment, together with the amount for which the certificate was assigned, properly made up the entire consideration. The only reference to the taxes of 1900 is in the granting clause, and, since it was proper for the purchaser to pay those taxes when the assignment was actually made, the recital of the fact is not sufficient to avoid the deed.

Another objection to the deed is that the compromise resolution had lost its force and had become dormant at the time the money was paid and the assignment executed. The

deed, being more than five years old, is entitled to every presumption in its favor. There is nothing showing that the board had revoked its authority, and the presumption is that the order was made without any condition requiring it to be accepted within a certain time. The original owner could not have been prejudiced by the order remaining open from October to the following June. He had that much more time within which to compromise the tax himself, if he desired. The judgment is affirmed.

(32 Kan. 204)

REESE et al. v. KAPP.

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

CHattel Mortgages (§ 219*)—SALE OF MORTGAGED PROPERTY—ORAL CONSENT OF MORTGAGEE.

A mortgagor of chattels may, with the oral consent of the mortgagee, make a valid sale of the mortgaged property, and convey a good title thereto to a purchaser in good faith, notwithstanding the provisions of chapter 105, Laws 1901, making it a misdemeanor to sell or dispose of mortgaged property without the written consent of the mortgagee.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 473-475; Dec. Dig. § 219.*]

Appeal from District Court, Leavenworth County; Eli Nirdlinger, Judge pro tem.

Action by John B. Reese and another against Samuel Kapp. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

W. B. Brownell and Arthur M. Jackson, for appellants. W. W. Hooper, for appellee.

BENSON, J. This action was to recover the purchase money due on the sale of cattle. A counterclaim for damages was interposed by reason of a mortgage on the property. Judgment was given for the defendant, and the plaintiffs, Reese & Son, appealed.

At the time of the sale there was a mortgage outstanding on the cattle held by a commission firm at Kansas City. When the purchase was made, a check for \$1,000 was given by the purchaser, and two days later, when the cattle were shipped, a check for the balance, \$5,450, was given. Both checks were drawn on the Linwood State Bank. The cattle were shipped from Fall Leaf, Kan., and were consigned to a firm in St. Louis, Mo., for feed at Kansas City, on account of Cole & Ott, under an arrangement by which the cattle might be sold at Kansas City by Cole & Ott with the permission of the defendant. On arrival at Kansas City, the cattle were placed in the pens of Cole & Ott at the stockyards to be fed and watered. About the same time a member of the plaintiffs' firm presented the \$1,000 check at the bank in Linwood. Previous to shipping the

cattle the defendant had drawn a sight draft in favor of the bank on Cole & Ott for \$1,000 with which to meet this check, and it appears that he intended to provide for the payment of the other check out of the proceeds of the sale of the cattle, but, when the first check was presented, he did not have sufficient funds in the bank, and the cashier telephoned to Cole & Ott, inquiring whether the sight draft would be paid. At the request of Cole & Ott, the defendant, who was then in their office, answered, directing the bank to refuse payment of the checks. The reason given by the defendant at the trial, for this order was that he had just been informed of the existence of the mortgage, and that he had then stated that he would have nothing more to do with the cattle. The plaintiff, however, testified that the defendant told him that his reason was that parties who were going in with him would not pay up their share of the money. The mortgagee was immediately notified of the refusal of the bank to pay the \$1,000 check, and, calling up the cashier, learned that the \$5,450 check, which the plaintiffs were about to use to satisfy the mortgage, would not be paid. Thereupon the mortgagee notified Cole & Ott of its mortgage. The defendant then refused to have anything more to do with the cattle, and they were sold by Cole & Ott upon the market with the consent of the mortgagee; the defendant saying that he was done with them. An account of the sale was made by Cole & Ott reciting that the sale was for account of Sam Kapp. The proceeds were paid over to the mortgagee, and, after deducting the mortgage indebtedness, the balance was paid to the plaintiffs, who gave the defendant credit for the net proceeds, leaving a balance due to them on the cattle, for which amount this suit was brought.

The plaintiffs' evidence tended to show that the defendant had been informed of the mortgage before the cattle were shipped, and that one of the plaintiffs would take the larger check to Kansas City to use in paying it off. The evidence showed that the mortgagee had given oral permission for the sale of the cattle, but the case was submitted to the jury upon the theory that such oral consent was ineffectual, and upon the request of the defendant, and over the objections of the plaintiffs, the jury were instructed that, if the cattle were sold by the plaintiffs to the defendant without the written consent of the mortgagee, the defendant had the right to stop the payment of the checks; and that, if the mortgagee, after satisfying the mortgage, paid over the balance of the money remaining from the proceeds of the sale by Cole & Ott, without reference to the rights of Sam Kapp, the plaintiffs should be held to have accepted the abandonment of the purchase by the defendant. This instruction was equivalent to a direction to find for the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant, as there was no claim that any consent in writing had been given, and it was not denied that the plaintiffs had received the proceeds. Just what was meant by the expression "without reference to the rights of Sam Kapp" is not clear, but the statement of the effect of a sale without the written consent of the mortgagee is explicit. The defendant contends that he had the right to rescind the purchase and abandon the cattle at once upon being notified of the mortgage notwithstanding any oral permission for the sale that may have been given by the mortgagee, and that the instruction was therefore correct. This is contrary to the views of this court in *Frick Co. v. Milling Co.*, 51 Kan. 370, 32 Pac. 1103. It is insisted, however, that chapter 105 of the Laws of 1901 makes the consent in writing indispensable. This statute provides that it shall be unlawful to sell mortgaged property without the written consent of the mortgagee and provides a penalty for its violation, but does not affect the question here presented. A sale of mortgaged property by the mortgagor with the oral consent of the mortgagee will convey the title as against the latter, notwithstanding the statute. *Randol v. Buchanan*, 61 Mo. App. 445; *Chase v. Willard*, 67 N. H. 369, 39 Atl. 901; *Anderson v. Brewing Co.*, 173 Ill. 213, 50 N. E. 655; *Bank v. West et al.*, 46 Me. 15; *Jones on Chattel Mortgages*, §§ 456, 457; *Cobbe on Chattel Mortgages*, § 637. If the plaintiffs had the oral permission of the mortgagee to sell the cattle, as the evidence shows, the defendant obtained a good title by his purchase; and, if he stopped the payment of the check which would otherwise have been used to satisfy the mortgage, he cannot justly complain of its existence.

The evidence shows that the cattle were sold in Kansas City upon a falling market. The defendant alleged that a higher price could have been obtained in St. Louis, and was allowed under his counterclaim to give evidence of the state of the market in that city, and upon this evidence damages were awarded in favor of the defendant. It is insisted that evidence of market values in St. Louis is immaterial, as the defendant claims to have rescinded the purchase. This question is not fully discussed in the briefs, and may not arise on another trial.

The judgment is reversed, and the cause remanded, with directions to grant a new trial. All the Justices concurring.

(82 Kan. 241)

BRESSLER v. McVEY.

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

NEW TRIAL (§ 75*)—GROUNDS—INSUFFICIENT VERDICT.

Where the sole question submitted to a jury is whether the plaintiff is entitled to re-

cover upon a contract, and there is no dispute concerning the amount, nor any basis for a finding that the defendant owes a less sum than that claimed, a verdict for half the amount should not be received, and, if received, should be set aside as contrary to the evidence at the instance of either party.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 151, 152; Dec. Dig. § 75.*]

Appeal from District Court, Norton County; W. H. Pratt, Judge.

Action by G. W. Bressler against George McVey. Judgment for plaintiff. Defendant appeals. Reversed.

J. R. Hamilton, for appellant. L. H. Thompson, for appellee.

MASON, J. G. W. Bressler sued George McVey for a real estate broker's commission. He asserted that a contract had been made by which, if he found a purchaser, he was to receive whatever the property brought in excess of \$7,000; that he had procured a customer ready and able to take it at \$7,500, but that the defendant without just cause refused to convey. While the answer was a general denial, the defense developed at the trial was that the plaintiff's agency was not exclusive, and that before his negotiations culminated a sale had been made to another buyer. There was no dispute as to the amount of the commission. The only controversy was whether it had been earned. The jury, however, returned a verdict for the plaintiff for \$250, upon which judgment was rendered, from which the defendant appeals.

The appellant claims that the judgment should not stand, because it is contrary to the evidence, inasmuch as, whatever view may have been taken of the conflicting testimony, the plaintiff was entitled to \$500, or to nothing at all. The appellee seeks to answer this contention by saying that a party cannot complain that a judgment against him is too small. That, however, is not the ground of the appellant's complaint. He finds fault with the judgment, not because it is not large enough, but because it rests upon a verdict utterly without support in the evidence. If the verdict could be construed as a finding in favor of the plaintiff, it would support a judgment, not merely for \$250, but for \$500. But it is no more for him than against him. If the jury believed his story, they were bound to render a verdict for the full amount. In deciding that he was not entitled to \$500, they in effect refused to accept his version of the matter. The case was not one where, by discrediting a portion of his testimony, his claim could be allowed in part; nor was there room for error in computation, or for misapprehension in estimating the amount of recovery. The only question submitted to the jury was: Did the plaintiff earn his commission? The process by which the verdict was arrived at is perfectly obvious. If

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the plaintiff testified truly, the defendant owed him \$500; if not, there was no indebtedness. The jury were called upon to determine which condition existed; but, instead of doing so, they assumed to settle the controversy by allowing one half of the claim and disallowing the other half, no doubt with the idea that "splitting the difference" was a fair method of compromising the dispute. But in this they mistook their function. Each litigant, the defendant no less than the plaintiff, was entitled to an answer to the question the jury were impaneled to determine. "Where the verdict which the jury return cannot be justified upon any hypothesis presented by the evidence, it ought obviously to be set aside. Thus, if a suit were brought upon a promissory note, which purported to be given for \$100, and the only defense was that the defendant did not execute the note, and the jury should return a verdict for \$50 only, it would not be allowed to stand; for it would neither conform to the plaintiff's evidence nor to that of the defendant. It would be a verdict without evidence to support it; and it is not to be tolerated that the jury should thus assume, in disregard of the law and evidence, to arbitrate the differences of parties, or to decide according to some supposed natural equity, which in reality is merely their own whim." 2 Thompson on Trials, § 2606.

The court has undoubted power to refuse to accept a verdict rendered under such circumstances. *Hines v. Royce*, 127 Mo. App. 718, 106 S. W. 1091; *Chandler v. Hinds*, 135 Wis. 43, 115 N. W. 339. If it is received, it should be set aside at the instance of either party, as contrary to the evidence. The plaintiff's right to demand this is recognized in recent decisions of this court. *Thompson v. Burtis*, 65 Kan. 674, 70 Pac. 603; *Miller v. Miller*, 81 Kan. 397, 105 Pac. 544. The defendant's right is equally clear in reason, and is supported by decisions in other jurisdictions. A typical case is *Metz v. Campbell Printing-Press & Mfg. Co.*, 11 Misc. Rep. 284, 285, 32 N. Y. Supp. 155, 156, where it is

said: "The only issue created by the pleadings was with regard to the making of the alleged agreement. * * * No other issue was litigated upon the trial, * * * and the only question submitted by the learned trial judge to the jury was whether or not the alleged agreement was made. * * * Upon the pleadings and the evidence, the verdict should have been either for the plaintiff in the amount claimed, or for the defendant. The jury might well, upon the conflict of evidence which ensued upon the trial, have found either way; but they could not with consistency find both ways. A verdict which repudiated the alleged agreement, and yet awarded any recovery to the plaintiff, was manifestly unjust to the defendant." Of precisely the same character are *Fuld v. Kahn*, 4 Misc. Rep. 600, 24 N. Y. Supp. 553, and *Pionier v. Alexander*, 7 Misc. Rep. 709, 28 N. Y. Supp. 157. In *Benedict v. Beef & Provision Co.*, 115 Mich. 527, 529, 530, 73 N. W. 802, 803, the Chief Justice said: "The jury were * * * bound * * * to give plaintiff the entire amount of this claim, or to reject it entirely. It is, however, urged that, since the jury have found that the contract was as claimed by plaintiff, and have fixed the amount at less than that to which he testified, the defendant is not prejudiced. Every litigant is entitled to have the verdict against him based upon the evidence. * * * A litigant is always prejudiced when he can point to the record and say there is no tangible evidence to support the verdict." The other members of the court took a different view of the evidence, but said that "there is no doubt that, where the record is such as to make it clear that the jury have reached the result by 'splitting differences,' neither party has had the benefit of their judgment, and such verdict ought not to be permitted to stand."

Other objections are made to the judgment, but they are not regarded as substantial.

The judgment is reversed, and a new trial ordered. All the Justices concurring.

(82 Kan. 323)

YOUNG v. MISSOURI, K. & T. RY. CO.
(Supreme Court of Kansas. April 9, 1910.)*(Syllabus by the Court.)***1. PLEADING (§ 35*)—SURPLUSAGE.**

An allegation in a petition that notice of an injury had been given as required by the fellow servant act (Gen. St. 1909, § 6999) will be treated as surplusage, where the negligence claimed is that of the master in failing to exercise proper care in furnishing to the servant a safe place in which to work.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 76-80; Dec. Dig. § 35.*]

2. MASTER AND SERVANT (§ 258*)—INJURY TO SERVANT—PETITION.

The allegations of negligence, by which it is claimed that a laborer in a coal mine was injured, are examined, and found to be sufficiently definite.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 823, 830; Dec. Dig. § 258.*]

3. MASTER AND SERVANT (§§ 288, 289*)—INJURY TO SERVANT—DANGEROUS PREMISES—QUESTION FOR JURY.

Where the evidence tends to prove that a laborer in a coal mine had become aware of the presence of gas in the room in a mine where he had been directed to work, and made complaint about it, and was then directed to proceed with his work in the same room, and was there injured by an explosion of gas, an instruction following the rule given in *Wurtenberger v. Railway Co.*, 68 Kan. 642, syl. 2, 75 Pac. 1049, is not erroneous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1086, 1129; Dec. Dig. §§ 288, 289.*]

4. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether in such a situation the servant, in the exercise of reasonable care for his own safety, knew, or ought to have known, of the impending danger, and whether it was so obvious that a person of ordinary prudence would not have incurred the risk, were questions for the jury, and there was no error in overruling a demurrer to the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1129; Dec. Dig. § 289.*]

Appeal from District Court, Cherokee County; C. A. McNeill, Judge.

Action by W. T. Young against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John Madden, W. W. Brown, and L. B. Kellogg, for appellant. J. N. Dunbar and W. H. Lucas, for appellees.

BENSON, J. This action was brought to recover damages for personal injuries suffered by the plaintiff, Young, while at work mining coal for the defendant company. The negligence charged was the failure to provide proper airways, break-throughs, or other necessary means of ventilation whereby gas was suffered to accumulate in the mine, causing an explosion by which the plaintiff was injured. The plaintiff had worked for

the defendant three weeks before the injury, had three months' previous experience as a coal miner, and was 19 years of age. A main entry in the defendant's mine extends north from the shaft. Entries extend to the east from this main entry. From the sixth east entry other entries extend to the north; three rooms are to the east of the third north entry. No. 1 of these rooms is the one next to the sixth east entry, No. 2 is next north of No. 1, and No. 8 is next north of No. 2. The plaintiff's room was No. 2, and was turned off from No. 8. It did not open into the entry. A track to carry out the coal was laid from the entry into room No. 3, and thence into room No. 2. About two weeks before the explosion the plaintiff told the pit boss that he must have air; that there was no air, and it was a bad place to work. The pit boss directed him to "Go ahead and break it through to Sawyer's," and said, "That place has got to go, and I haven't any other place for you." Sawyer's room was No. 1. The plaintiff had noticed gas in the room, which caused him to make the complaint. He continued his work, and the night before he was injured had put in a shot behind a horseback in his room. The next morning he found that the shot had let down the coal, filling up the hole through the horseback. He proceeded to load the coal into cars upon the track. His uncle, who had been mining in room No. 3, came in and assisted him. Both of them put down their lights from 11 to 15 feet from the place where they were working because of gas in the room. While the plaintiff was resting, his uncle in loading coal thrust his shovel through the coal in the opening in the horseback, and thereupon the explosion followed by which the plaintiff was injured.

Four days before the accident the foreman had stopped work in room No. 3 because of lack of air, and requested the plaintiff's uncle, who had been working there, to take the plaintiff's place, which he declined to do. The boss then told him "to gouge around for a day or two," when there would be a place for him. While thus waiting he went in to help the plaintiff as stated. Unprotected oil lamps were used. The place of the explosion was about 45 to 50 feet from the entry. There was no other way to supply air, except through room No. 3, the break-through not having been made.

The petition contained an allegation that notice had been given to the company as required by the fellow servant act (Gen. St. 1909, § 6999). A motion to make the petition more definite was overruled, and upon this ruling error is assigned. The allegation with respect to notice, which the defendant argued was indefinite, must be treated as surplusage. The negligence alleged is that of the company. The duty to exercise proper care to furnish a safe place in which to work is one

that can only be satisfied with performance. One of the dangers to be guarded against in mining coal is the accumulation of noxious and explosive gases, and the mine owner is required to provide and maintain ample means of ventilation. *Schmalstieg v. Coal Co.*, 65 Kan. 753, 70 Pac. 888, 59 L. R. A. 707. The defendant contends that the petition was also indefinite because the specific acts of negligence were not stated. In addition to the general averment of neglect to provide proper ventilation, airways, and break-throughs, it is alleged that the mine was not kept free from noxious standing gas, but that it was continually allowed to accumulate therein, that it was not diluted or made harmless, and that no examination had been made by an examiner or fire boss. The petition was sufficient to show the nature of the plaintiff's claim and the cause and manner of his injury. Civ. Code, § 122. The argument that the name of the officer or agent who had directed the plaintiff to work in the particular place should have been stated is without merit. It was a matter especially within its knowledge, and the company could not have been surprised by evidence that the pit boss or mining boss was the person who had given such directions, for it was within the scope of his duties. He was in the immediate charge of the place.

Complaint is made of an instruction given to the jury that: "Where a master instructs or orders a servant into a situation of danger, and while obeying such order he receives an injury, he will not be held to contributory negligence, or with having assumed the risk incident to such work, unless the danger was so glaring that a prudent person would not have entered upon it, even though ordered by one having authority to order him, and the question as to whether the danger in such an instance was glaring, and so glaring that no prudent man would have encountered it, is a fact to be determined by you by the evidence in this case, the same as any other question of fact." It is insisted that the facts did not warrant this instruction because there was no promise to correct the defective conditions. The plaintiff was, however, directed to go ahead and break through to the adjoining room, and was working to this end when he was hurt. It must be presumed that the pit boss could estimate the time necessary to comply with his orders, and the failure to give any other directions was equivalent to continuing the order for a reasonable time, or until the object should be accomplished in the usual progress of the work. The instruction is supported by the opinion in *Wurtenberger v. Railway Co.*, 68 Kan. 642, 75 Pac. 1049, followed in *Railroad Co. v. Morris*, 76 Kan. 836, 93 Pac. 153, 13 L. R. A. (N. S.) 1100, and was applicable to a phase of the case presented by the evidence.

It is contended that by continuing at work with knowledge of the presence of noxious gases the plaintiff assumed the risk, notwithstanding the order to proceed, and that a demurrer to the evidence should have been sustained for that reason. A servant does not assume latent or obscure dangers, such as he would not discover by the exercise of ordinary care, having reference to his situation, and which the master ought to discover by proper inspection. *Thompson on Neg.* § 4641. In order to devolve upon the servant the assumption of risk he must not only know the defect, but must also know and appreciate the danger arising therefrom. *Id.*, § 4652; Case note, 87 Am. St. Rep. 557, 583, V, e; *King v. King*, 79 Kan. 584, 100 Pac. 503; *Choctaw, Oklahoma & Gulf R. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837, and case note. It has been held, however, that if the danger is so obvious as to be apparent to a person of ordinary intelligence, the law will charge the servant with knowledge of the danger. *Christiansen v. Graver Tank Works*, 223 Ill. 142, 79 N. E. 97. Whether the plaintiff, in the exercise of proper care for his own safety, knew, or ought to have known, of the impending danger, and whether it was so obvious that a person of ordinary prudence would not have incurred the risk, were questions properly submitted to the jury. Case note, 48 L. R. A. 753, 758. "It would be a very unjust rule which would allow a master to shield himself from responsibility for the consequences of his own negligence by alleging those acts, not inevitably or imminently dangerous, to have been negligent which his servant performed by his express orders." *Hawley v. Northern Central Railway Co.*, 82 N. Y. 370.

It is also argued that the plaintiff was guilty of contributory negligence, but this too was a question for the jury. It is true he knew that there was gas in his room, but it was for the jury to determine whether he apprehended, or ought to have apprehended, disaster therefrom, and whether he exercised due care in the circumstances in which he was placed. The evidence was sufficient to sustain the finding that the company had failed to exercise proper care to make the place safe, and had neglected to provide for ventilation, and to make inspection as required by the statute. Gen. St. 1909, c. 79; 28 Cyc. 1203; Case note, 87 Am. St. Rep. 557. The beneficial objects which the statute was designed to secure are stated in *Schmalstieg v. Coal Co.*, supra, where it was held that the act provides additional safeguards for the laborer, and does not take away from him any protection given by the common law.

The case was fairly submitted to the jury, and the verdict is supported by competent evidence. No error is shown, and the judgment is affirmed. All the Justices concurring.

(82 Kan. 230)

DUNCAN v. CHICAGO, R. I. & P. RY. CO.
(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

1. EVIDENCE (§ 53*)—PRESUMPTIONS.

To find a fact by presumption or inference, the inference should be a logical deduction and reasonably certain in the light of all other proper presumptions and of all collateral facts.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 53.*]

2. APPEAL AND ERROR (§ 1001*)—FINDINGS OF FACT—EVIDENCE TO SUSTAIN.

Where there is no substantial evidence, direct or circumstantial, tending to prove a material fact in issue, a finding that it exists cannot be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

Appeal from District Court, Clark County; Gordon L. Finley, Judge.

Action by M. L. Duncan against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

M. A. Low and Paul E. Walker, for appellant. Francis C. Price, D. W. Harrington, and Wallace & Lumpkin, for appellee.

BENSON, J. This action is for damages for the death of the plaintiff's husband, who was a brakeman in the service of the defendant railway company. In order to set out a freight car at a switch while the train was moving, Mr. Duncan stood on the stirrup near a corner of the car next behind the one that was to be set out, grasping the handhold with one hand and reached down to or toward the lever of the coupling appliance at the end of the car with the other hand. This was the usual way of uncoupling and setting out a car from a moving train, the brakeman thus standing upon the stirrup raising the lever which would lift the pin. He would then go upon the top of the car and set the brakes to hold the detached part of the train in place, while the forward part, on signal from the brakeman to the engineer, would move past the switch, and then back, pushing the car to be set out upon the side track. The conductor saw Duncan in the position described, apparently ready to raise the lever, and then stepped into the depot. Coming out a minute afterwards, he saw him rolling out from under a car in the rear on the opposite side of the train. The uncoupling had been made, and the train had parted, but both parts were moving forward. Duncan had not been upon the top of the car, and the brakes had not been set. Blood was found upon the ties outside the rail on the opposite side of the track from where Duncan had last been seen and also upon one of the cars. He was mortally hurt, and died from the injury. The engineer testified that he saw him upon the stirrup and said that he was lean-

ing over in the car, and that he gave the signal to go forward. The jury found, however, that the signal was not given. When asked what he meant by "leaning over in the car," the engineer said that he meant "leaning over against the car, and he would have one hand down pulling." The brake beam of the car was found to be defective. It hung upon brake hangers and chains. In stepping upon it, for some reason not shown, it would sink down.

The claim of the plaintiff is that the lever of the coupling device was disconnected and failed to work, and for that reason the deceased was compelled to stoop or lean between the cars to lift the coupling pin with his hand, and in doing so placed his foot on the defective brake beam, which, sinking down, caused him to fall. Evidence was given that, where the lever fails to lift the pin, it becomes the duty of the brakeman to proceed in that manner when uncoupling moving cars. The jury found that the ladder, handhold, and stirrup were in good order, but that the brake beam and coupling appliance were not in proper condition. They stated that the defect in the latter was that the pin could not be raised by use of the lever. The finding with respect to the brake beam is supported by direct evidence. The finding that the coupling appliance was defective rests entirely upon the circumstances shown in evidence. The conductor testified that it was in good condition and worked properly immediately after the accident. The argument of the plaintiff to support the finding to the contrary is that the physical facts show that it was necessary to stoop between the cars to lift the pin, which necessity could only arise by reason of a defect in the coupling appliance; that the deceased being an experienced brakeman, as the evidence proved, it must be assumed that he was performing his duties properly; that, if the uncoupling could have been made without going between the cars, he would have so done it; and that it therefore follows that the injury occurred by reason of the defective coupling, the brake beam giving way when he set his foot upon it, causing him to fall.

The finding that the coupling appliance was out of order rests upon the assumption that the deceased would not otherwise have placed his foot upon the defective brake beam, but there is no evidence that he did place his foot upon the defective brake beam except the inference or presumption that the coupling appliance was defective, making it necessary to do so to pull the pin with his hand. That facts may be found by presumption or reasonable inference from other facts is elementary; but the contention of the plaintiff goes far beyond this. It is first presumed that the brakeman was doing his duties properly, which is a fair presumption. It is next presumed that he could not lift the pin by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

use of the lever. It is presumed from this that the appliance was out of order, and because of this defect it is presumed that he stepped upon the defective brake beam thereby losing his life.

It is argued that the presumption that he could not use the lever is supported by the testimony of the engineer that he saw Duncan leaning in or against the cars, but this is a slight circumstance, and is not necessarily inconsistent with the use of the lever. It does not show, as claimed, that he went between the cars or was upon the brake beam. It has been said that one presumption of fact cannot in law become the basis of another presumption of fact. *Railway Co. v. Rhoades*, 64 Kan. 553, 68 Pac. 58; *Railway Co. v. Baumgartner*, 74 Kan. 148, 85 Pac. 822. This doctrine is assailed by a distinguished writer (1 Wigmore on Ev. § 41), and it has been held that it is subject to exceptions (*Hinshaw v. State*, 147 Ind. 334, 363, 47 N. E. 157; *Burrill on Circumstantial Ev.* p. 138). An examination of the discussions upon this subject leads to the query whether there has not been much strife about words concerning it. The real question must always be whether there is substantial evidence, direct or circumstantial, fairly tending to prove the fact in issue. Presumptions as understood in the law of evidence must have substantial probative force as distinguished from surmise. If a fact may be established by inference from the presumption of another fact, it should at least be a logical deduction and reasonably certain in the light of all other proper presumptions, and of all collateral facts. The chain of presumptions ought not to be extended into the region of conjecture. *Diel v. Railway Co.*, 37 Mo. App. 454. A fact is not proven by circumstances which are merely consistent with its existence. *Carruthers v. C., R. I. & P. Ry. Co.*, 55 Kan. 600, 40 Pac. 915. The lamentable death of this man may have been caused by some mischance after the uncoupling was effected. It may have been caused in the manner claimed by the plaintiff. Possibly one conjecture is as reasonable as another, but the evidence does not reveal the cause of his fall. In the absence of such evidence, there can be no recovery. *Hart v. Railroad Co.*, 80 Kan. 699, 102 Pac. 1101. It has been said recently by this court: "It is not sufficient to show circumstances which would indicate that the other party might have been guilty of negligence, especially when the evidence furnished suggests with equal force that the injury might have resulted without fault on the part of the other party." *Brown v. Railroad Co.*, 81 Kan. 701, 106 Pac. 1001. While it is presumed that this employé was properly performing his duty, the same presumption applies to the company.

Governed by principles of law well settled in this state, and in other jurisdictions, the

judgment must be reversed, and the cause remanded for a new trial. All the Justices concurring.

(32 Kan. 345)

GARDEN CITY, G. & N. R. CO. v. NATION, State Auditor.

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 859*)—RAILROAD AID BONDS—CONSTITUTIONAL LAW.

Section 7049 of the General Statutes of 1909 is not repugnant to section 8, art. 11, Const.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 859.*]

2. MUNICIPAL CORPORATIONS (§ 936*)—RAILROAD AID BONDS—REGISTRATION.

It is the duty of the Auditor of State, upon presentation for that purpose, to register and certify bonds issued under the above act if he is satisfied that such bonds have been issued in accordance with the provisions of the act, and that the signatures thereto of the officers signing the same are genuine.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 936.*]

3. MUNICIPAL CORPORATIONS (§ 936*)—RAILROAD AID BONDS—REGISTRATION.

As a prerequisite to registering such bonds, the Auditor of State is not authorized to require a showing that the holder of the bonds has expended a sum of money equal in amount to the face value of the bonds for land to be used for right of way, depot grounds, and terminal facilities in the city which issued the bonds.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 936.*]

Action by the Garden City, Gulf & Northern Railroad Company against James M. Nation, State Auditor. Peremptory writ of mandamus allowed.

Albert Hoskinson, Edgar Roberts, and A. M. Harvey, for plaintiff. F. S. Jackson, Atty. Gen., and Charles D. Shukers, for defendant.

SMITH, J. This is an original action in mandamus to require the State Auditor to record in his office certain bonds of the city of Garden City in aid of the railroad company. The bonds purport to have been issued under authority of chapter 286 of the Laws of 1907. The bonds, apparently issued in due form, were presented for registration to the State Auditor, who refused the registry for the following reasons: (1) That chapter 286 of the Laws of 1907 and the acts supplemental thereto are unconstitutional. (2) That there is no statute making it the duty of the Auditor to register such bonds. (3) That plaintiff has made no showing to the Auditor that it has expended a sum of money equal to the face value of the bonds for land, which is to be used for right of way, depot grounds, and terminal facilities in Garden City. It is contended on the one side that each of these objections

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is good, and upon the other that none is good.

1. The defendant asks to reopen the question of the constitutionality of the statute authorizing cities and municipalities to issue bonds in aid of railroads. It is said that such cities and municipalities are but subordinate branches of the state government, and the state cannot authorize such branches to do what the state itself cannot do, viz., "to be a party in carrying on any works of internal improvements." Const. § 8, art. 11. The whole question, it is practically conceded, was threshed out in the opinion by Mr. Justice Valentine in *Leavenworth Co. v. Miller*, 7 Kan. 479, 12 Am. Rep. 425, on one side thereof, and in the dissenting opinion of Mr. Justice Brewer in *State v. Nemaha Co.*, 7 Kan. 542, on the other side. In the same volume is another decision (*Morris v. Morris Co.*, 7 Kan. 576), which reaffirms the two former decisions adversely to the very impressive argument of Justice Brewer.

The statute under which these decisions were made is chapter 12, Laws 1865, which provides in part: "That the board of county commissioners of any county, to, into, through, from, or near which, whether in this or any other state any railroad is or may be located, may subscribe to the capital stocks of any such railroad corporation, in the name and for the benefit of such county, not exceeding in amount the sum of three hundred thousand dollars in any one corporation, and may issue the bonds of such county, in such amounts as they may deem best, in payment for said stocks: * * * But no such bonds shall be issued until the question shall be first submitted to a vote of the qualified electors of the county at some general election, or at some special election to be called by the board of county commissioners."

Omitting the provisions relating to the conditions under which aid may be extended under the statute in question in this case, section 7049, Gen. St. 1909, provides: "When a petition in writing, signed by at least two-fifths of the resident taxpayers of any incorporated city of the first or second class, shall be presented to the mayor and council of such city, asking that a vote be taken and an election held upon the question of aiding any railroad company, whether operated by steam, electricity, or other motive power, constructing or proposing to construct its line of railroad in or through said city, in securing or paying for land for right of way, depot grounds, and terminal facilities, the mayor and council of such city shall cause an election to be held to determine whether such city shall aid such railroad company in securing and paying for lands for the right of way, depot grounds, and terminal facilities: Provided, that * * * no city of the second class shall extend aid under

this act to any railroad company to a greater amount than twenty thousand dollars: Provided, that aid shall not be extended to any railroad under this act which has received aid from the same city under any former act."

Section 7053 provides in part: "If a majority of the qualified electors voting at such election shall vote for extending such aid, the mayor and council, for and in behalf of such city, shall cause the bonds of such city, to the amount specified in such petition, to be issued and delivered to such railroad company. * * * Provided, that no such bonds shall be issued until the railroad to which it is proposed to extend aid for the purposes hereinbefore indicated shall be completed and in operation through the city voting in favor of such and the issuance of such bonds, or to, from or between such points in such city as may be specified in the proposition set forth in the petition required by this act."

It is virtually conceded in the argument that, if the Legislature of the state may authorize a county to aid in the construction of a railroad, the Legislature may also authorize a city to extend such aid. Neither is it contended that the statute authorizing a county to subscribe for bonds of a railroad company to aid it differs in principle from the statute authorizing cities to donate aid to the railroad company, probably because in effect the former resulted in a donation as effectually as does the latter provision. The question involved is in this case the same as the question involved in those cases. In the dissenting opinion of Mr. Justice Brewer in *State v. Nemaha Co.*, supra, he says: "While I concede that the great weight of authorities, looking at it simply in the light of majorities, is with my Brethren, yet there has ever been a vigorous and earnest dissenting. The question will not remain settled. Like Banquo's ghost, 'it will not down.' While the earlier cases do not discuss the question in the light of the principles upon which such legislative action must be based, there has been, ever since, great sheltering behind the accumulating authorities. 'Whatever is, is right,' is practically the idea upon which the late decisions rest. Because so many Legislatures, so many executives, and so many courts have recognized this species of legislation, it must be valid. If that be the rule universally adopted, accumulating wrong will never be disturbed in its illegally acquired power. But it is said that this question has already been settled in this court, and the maxim *stare decisis* is invoked in its behalf. I recognize the binding obligation of that maxim, and, if the question had once been fully considered and determined in this court, I should have no desire to re-examine it." Nothing new has been added to the argument made by Judge Brewer in that decision, if, indeed, anything new

can be added thereto, and, after fully considering that learned protest, this court decided that the statute was not in violation of section 8, art. 11, of the Constitution of the state. The bar, the courts, and the people of the state with practical unanimity have accepted the construction of the constitutional provision thus made nearly 40 years ago. Even in such cases as *C. & N. Ry. Co. v. City of Manhattan*, 45 Kan. 419, 25 Pac. 879, where a reversed construction would have been a complete defense, the question is not even suggested.

The defendant cites *State v. Kelly*, 71 Kan. 811, 81 Pac. 450, 70 L. R. A. 450, and *City of Geneseo v. Gas Co.*, 55 Kan. 358, 40 Pac. 655, as authority for his contention that the statute is unconstitutional. There is so little analogy, however, in principle between these cases and the case at bar that it seems hardly necessary to distinguish them. In the case of *State v. Kelly* the statute clearly authorized the state "to be a party in carrying on a work of internal improvement." In *City of Geneseo v. Gas Co.* the statute involved was entitled "an act authorizing counties and unincorporated cities of the second and third class to encourage the development of their localities by subscribing to the stock of companies organized for such purposes." In the opinion Mr. Justice Allen, after recognizing the validity of statutes authorizing cities to provide for lighting the streets and other public purposes, says: "This corporation, however, seems to be formed for the purpose of carrying on the business of mining gas, coal, oil, salt, and other minerals. It is not formed merely to supply a public need of the city, but contemplates carrying on a private business for profit. The main purpose of the corporation would seem to be to produce minerals for sale on the market at a profit. Cities are organized for public purposes, not to enter into private business ventures." Paraphrasing the language of Justice Brewer, we recognize the binding obligation of the maxim *stare decisis*, and, since the question here involved has once been fully considered and determined in this court, we have no desire to re-examine it, but in accord with the former decisions of this court hold that section 7049 of the General Statutes of 1909 is not repugnant to section 8, art. 11, Const. In his brief the At-

torney General indicates that millions of dollars have been paid or assumed in this state by reason of the decisions in 7 Kan. If so, presumably a large per cent. of the bonds voted are still outstanding and unpaid. They were issued and negotiated in reliance upon the rule of property promulgated in these decisions, and this fact, if it be a fact, is a pertinent reason for maintaining the validity of the statute rather than the reverse.

2. As said by the defendant, the provisions of the statute relating to the recording of bonds by the Auditor of State are somewhat vague and indefinite, but we think may be fairly held to include bonds of the class in question, especially in view of the evident wisdom of the policy in vogue for many years, to have such record in the Auditor's office of all bonds issued and when paid by the municipalities of the state.

3. The Auditor declined to register the bonds because the plaintiff tendered him no proof that it had expended an amount of money equal to the face value of the bonds in securing and paying for lands for right of way, depot grounds, and terminal facilities. It is urged that it is the plain meaning of the language employed in the statute that bonds are to be issued only to aid in securing and paying for land to be used for the three specified purposes, to wit, "right of way," "depot grounds," and "terminal facilities." If this should be conceded, it does not follow that, as demanded, the purposes of the aid should all have been accomplished before the aid is extended. It is time to aid a drowning man when he is struggling in the water, not after he has gotten out on the bank. The only investigation the Auditor is required or authorized to make before registering or refusing to register the bonds when presented for that purpose is whether the bonds were issued according to the provisions of section 7049 of the General Statutes of 1909 (chapter 286, Laws 1907), and whether the signatures thereto of the officers signing the same are genuine (Gen. St. 1909, § 581, chapter 68, Laws 1872). That the railroad company has secured or paid "for lands for right of way, depot grounds, and terminal facilities" is not made a prerequisite to the voting, issuance, or registration of bonds by the terms of the act.

The peremptory writ is allowed. All the Justices concurring.

(82 Kan. 275)

SHERTZER et al. v. MYERS.

(Supreme Court of Kansas. April 9, 1910.)

*(Syllabus by the Court.)***1. MINES AND MINERALS (§ 79*)—OIL LEASE—CONSTRUCTION.**

Where an oil and gas lease provides (1) that the lessee may terminate the lease at any time "by notice in writing or by surrendering the same and discharging it of record" and (2) that the lessee shall pay a stipulated rental each year until the royalties derived from the sale of oil and gas shall equal or exceed the rental stipulated, the lessor will be entitled to receive the amount of rent agreed upon as long as the lease remains in force, and the royalties received do not equal that amount.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 79.*]

2. MINES AND MINERALS (§ 79*)—OIL LEASE—RECOVERY OF RENT.

In such a case the lessee completed eight producing wells, and then sold all the pipes, machinery, and appliances by which the plant was operated, and the purchaser proceeded to remove such appliances from the premises. The lessor commenced an action to enjoin such removal and to cancel the lease, but was defeated in the action. The action was pending over a year, during which time the removal was restrained by a temporary order of injunction granted at the commencement of the action. After this litigation ended, the lessor brought an action for rent accruing during the pendency of the injunction proceedings and recovered. *Held*, that the mere fact that the lessor did not succeed in his action for a perpetual injunction, and to cancel the lease, is not sufficient to defeat his action for rent.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 79.*]

Appeal from District Court, Neosho County; Oscar Foust, Judge.

Action by John Shertzter and others against E. S. Myers. Judgment for defendant. Plaintiffs appeal. Affirmed.

John J. Jones and James W. Reid, for appellants. Farrelly & Evans, for appellee.

GRAVES, J. This action was commenced March 11, 1907, in the district court of Neosho county by E. S. Myers, to recover rent claimed to be due under an oil and gas lease. The lease was executed June 20, 1903, and by its provisions was to continue for the term of 10 years unless sooner terminated by the parties under the stipulations provided in the lease for that purpose. One of the provisions of said lease concerning its termination reads: "Second party shall have the right at any time to terminate this lease by notice in writing or by surrendering the same and discharging the same of record, and shall thereafter be released from all obligations and liabilities under the same. In case said party of the second part shall fail to make the payment or perform the covenants hereinbefore set out then this contract, oil and gas lease shall be null and void." The lease was transferred successively by assignment until

the appellants became the owners and holders thereof. The lessees and their successors drilled, cased, and completed eight oil wells upon the leased premises, all of which produced oil. The appellants while in possession of the leased premises which were located in Wilson county sold the machinery, pipes, pipe lines, tanks, casing, and other appliances of the plant to one J. F. McCandlass, who began to remove them and intended to take all the appliances away from the premises. On May 11, 1906, the lessor commenced an action in the district court of Wilson county perpetually to enjoin such removal and to cancel the lease. The petition for the perpetual injunction contained among other allegations the following: "That said defendant the New Holland Oil & Gas Company, under said lease, drilled, completed, cased, and equipped eight oil wells on plaintiff's said land described in this petition, which said wells are producing oil wells, and, under reasonably fair conditions and under reasonably fair management, oil may be produced from said wells at a profit. * * * That on or about October 1, 1905, the defendant the New Holland Oil & Gas Company and all of said defendants abandoned said lease and property, and have ever since said time abandoned the same. Pursuant to said abandonment, the other said defendants sold to the defendant J. F. McCandlass the power house, pipe, pipe lines, casing, and other property and fixtures on said lease, and said McCandlass has been engaged in removing said power plant and surface pipe lines and pipes from said lease for several days, and threatens and intends to pull the casing from said wells, which act, if done, will ruin and destroy said wells and will render them valueless, to the great and irreparable injury and damage to this plaintiff, and to the said land, for which said damages the plaintiff has no adequate remedy at law. * * * That said defendant J. F. McCandlass is threatening to remove the casing from said wells at once, and will do so unless restrained and enjoined by order of this court from so doing."

To this petition the defendants filed an answer, which consisted of a general denial. The court granted a temporary injunction, but on final trial refused to make the order perpetual. The lease contained a provision which reads: "Said second party shall have the right to erect, lay, maintain, and remove all pipe, pipe lines, machinery, and structures necessary for the production, transportation, and preservation of oil and gas produced on said premises, provided that said first parties shall have the right to purchase any of said pipes, when said second party desires to remove the same, at the cost of new pipe at such time, and in that event said pipe shall not be removed." Under this clause of the lease, the court ascertained the value of new casing, and granted a perpetual injunction against

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

its removal, provided the lessor would pay the ascertained value therefor. Further than this the relief prayed for by the plaintiff was denied, and judgment for costs was entered against him.

The judgment in the action for injunction was entered February 6, 1907, and the action for rent in Neosho county was commenced the 11th of the following March. There is a provision in the lease which reads: "Said party of the second part agrees to pay said parties of the first part a rental of two dollars per acre each six months from this date by depositing the same to the credit of the said E. S. Myers at the National Bank of Chanute, Kansas, on or before the 20th day of June and December, 1903, and on or before the 20th day of June and December of each year thereafter until the royalties derived from the sale of oil or gas from said premises shall equal or exceed said rentals." There is no controversy about the amount of rent claimed. The contention of the appellants is that no rent whatever should be allowed. The reason for this contention is that at the time the action in Wilson county was commenced no rent was due; that during the pendency of that litigation appellant was compelled as a matter of self-preservation to contest it or be defeated in the action. This may be true, but, if it is, it will hardly justify the conclusion contended for by the appellant. The lessee had the right to terminate the lease at any time which would have ended the duties and liabilities of each party thereunder. By the terms of the lease the lessor had a right to expect the stipulated rent as long as the lease was in force. The lessee failing to terminate the lease as he might have done, the appellee attempted to accomplish this end by the action in Wilson county which attempt was defeated by the resistance of the appellant. When the lessor saw that the plant of eight producing oil wells was about to be rendered worthless by the removal of the machinery, piping, casing, and other appliances by which it was operated, he very naturally took legal steps to protect his rights under the lease, which he had an undoubted right to do. In exercising this right, however, he sought a remedy which the court after protracted litigation refused. A man is not bound at his peril to succeed in every legal action he commences. If he acts in good faith and makes a mistake as to his legal rights, he satisfies the full legal penalty therefor when

he pays the costs adjudged against him. The good faith of the lessor is not disputed.

The real justification for the resistance of the appellant to the Wilson county action and the refusal to pay rent during the time such litigation was pending is stated in the brief as follows: "It is contended by the defendant in error that because plaintiffs in error insisted that the lease had not been abandoned, and did not surrender the same of record prior to the decision of that case, that they are estopped from saying that they should not pay the rental. For the plaintiffs in error to have surrendered the lease of record at any time to the trial of said cause in Wilson county would have put them in the position of attempting to defend in court in that case the title to property which they had relinquished. For them to have admitted its abandonment in October, 1905, without removing the material, would have carried with it the material itself, and they would have been liable in damages to the purchaser of the same, and would have lost the said material and its value. The only thing, then, plaintiffs in error could have done, in view of the allegations of defendant in error's petition in that case, was to contest the suit for abandonment in October, 1905, and go to the expense of seeking to have the restraining order, which was wrongfully issued, set aside." This statement of the disastrous consequences which would have resulted to appellants we think somewhat overdrawn. The action in Wilson county was of an equitable nature, being for injunction and to cancel a written contract. The court had complete jurisdiction of the parties and of the subject-matter. If the appellants had instead of a general denial filed an answer stating fully all the facts involved in the controversy, they could have safely relied upon the court as chancellor to have adjusted the differences involved so as to have done exact and even-handed justice to all parties concerned. Under the circumstances, we cannot say that the conduct of the lessor was so far wrongful that he ought to be deprived of the rent due under the lease. Doubtless either party might have prevented this long and expensive litigation by a little business diplomacy at the commencement of their difficulties, but they chose to abide by the results of a lawsuit.

We see no error in the judgment of the district court, and it is affirmed. All the Justices concurring.

(32 Kan. 245)

O'NEIL et al. v. EPTING et al.

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

TRUSTS (§ 348*)—ENFORCEMENT AGAINST ESTATE OF TRUSTEE—NATURE OF ACTION—ACTION BY BENEFICIARY.

Where, by the terms of the contract which created the trust, a cestui que trust is forced to rely upon his trustee's personal liability, he occupies a position toward the estate of the trustee which is identical with that of a contract creditor, and in such case he may maintain an action at law against the trustee, or the administrator of the trustee's estate, to recover a debt matured by the terms of the contract.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 513; Dec. Dig. § 848.*]

Appeal from District Court, Coffey County; F. A. Meckel, Judge.

Action by Maggie O'Neil and others against Fred L. Epting, administrator, and others. Judgment for defendants. Plaintiffs appeal. Reversed and remanded.

E. N. Connal, J. M. Pleasant, and Joe Ralston, for appellants. Ganse & Hannen, for appellees.

SMITH, J. The appellants filed in the probate court of Coffey county a claim against the estate of David O. Owens, deceased, as follows:

Burlington, Kansas, January 11, 1908.

In the Probate Court of Coffey County, Kansas.

Estate of David O. Owens, to Maggie O'Neil and Hugh Hughes, Dr.

1905, March 1.

To money and property turned over to said Owens by Hannah Owens (formerly Hannah Hughes, and the mother of Maggie O'Neil and Hugh Hughes), in about 1868, in consideration of which the said David O. Owens then orally agreed to hold the same in trust for the use thereof, and at his death to pay the principal to the said Maggie O'Neil, formerly Maggie Hughes, and Hugh Hughes, and which money and property was of the value and valued by the said Hannah and David O. Owens at the sum of.....	\$ 900 00
To interest on same from David O. Owens' death to date.....	157 00

Total \$1,057 00

The claim was properly verified, and was set for hearing, at which all parties appeared. The executor demurred to the evidence introduced in support of the claim, which the court overruled; but, upon the declination of the executor to offer any evidence on his part, the court disallowed the claim. Appellants thereupon appealed to the district court. Upon the trial in the latter court the appellants introduced evidence which showed, prima facie, that about the year 1868 their mother, then the wife of David O. Owens, delivered to said Owens money and securities of the

agreed value of \$900, upon an oral agreement that he should hold and have the use thereof during his lifetime, and at his death should pay said sum to the appellants, her children by a former marriage; that Owens accepted the money and securities, and agreed to repay the \$900 to appellants at his death; that Owens at the time of his death February 27, 1905, was a resident of Coffey county; that on March 27, 1905, Epting was appointed and qualified as executor of the estate, and gave due notice of his appointment as such April 6, 1905; that on January 11, 1908, the claim was exhibited to the executor, and was filed in the probate court January 23, 1908; and that no part of said sum of money had been paid to appellants, or to either of them, by Owens, or by his executor. Thereupon the executor renewed his motion to dismiss the case. The motion was sustained, for the following reason, as expressed by the court: "I regard it as a trust fund that can't be established against an estate in that way. * * *"

In this the court erred. The evidence produced entitled the appellants, prima facie, to judgment. It should be observed that the relief sought was not to have property, which ostensibly belonged to the estate of Owens, decreed to belong to the beneficiaries of the trust and to be no part of the estate; neither was it sought to establish that funds had come into Owens' hands as a trust, and had been so used by him that they could not be traced; nor was it sought to carve the amount out of the estate for the beneficiaries in preference to all creditors or legatees. The claim is that by the terms of the contract the trustee was to have the use of the funds during his lifetime, and at his death he was to pay, and pledged his personal responsibility to pay, the sum of \$900 to the beneficiaries. Neither law nor equity implies any new contract for the parties. The appellants accepted the arrangement, as they were compelled to; otherwise, they had no claim in law or equity. Accepting the contract made for their benefit by their mother, they became at Owens' death his creditors, and he became their debtor. In section 690, vol. 2, of Beach on Trusts and Trustees, it is said: "Cestui que trust, when forced to rely upon his trustee's personal liability, occupies a position toward the estate of the trustee which is no better than, but is identical with, that of a simple contract creditor." This excerpt is quoted with approval in *Holderman v. Hood*, 70 Kan. 267, 285, 78 Pac. 838. See, also, *Ryan v. Phillips*, 3 Kan. App. 704, 44 Pac. 909, and cases there cited; *Metcalf v. Union Trust Co.*, 181 N. Y. 89, 78 N. E. 498; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909; 28 Am. & Eng. Encyc. of Law, 905. It follows that the probate court and the district court, each in succession, had jurisdiction to adjudicate the claim.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The judgment is reversed, and the case is remanded for further proceedings in accordance herewith. All the Justices concurring.

(82 Kan. 315)

FUQUA v. ST. LOUIS & S. F. R. CO.
(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

1. DAMAGES (§ 145*) — PERSONAL INJURIES — PLEADING—FUTURE DISABILITY.

In an action to recover damages for injury to his person, the plaintiff, after sufficiently alleging the negligence of the defendant as the cause of the accident, alleged in his petition that he fell and struck his right side against the edge of the platform of a coach, broke two ribs, and bruised the flesh, and lacerated and strained the muscles of his right side; and as a result of said injuries has suffered intense pain and mental anguish, and still suffers pain and mental anguish; and as a result of such injuries he received a severe shock to his nervous system and ever since has been able to sleep but little; and ever since has been unable to perform his usual avocation of a traveling salesman and has been unable to walk or move about without pain and suffering. *Held*, that such allegations are sufficient to present to the jury the question of future disability.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 410; Dec. Dig. § 145.*]

2. CARRIERS (§ 318*) — INJURIES TO PASSENGERS—ACTIONS—EVIDENCE.

The evidence in this case is sufficient to sustain the verdict and the judgment.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1307; Dec. Dig. § 318.*]

Appeal from District Court, Bourbon County; John C. Cannon, Judge.

Action by Edgar Fuqua against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Evans and R. R. Vermillion, for appellant. Keene & Gates, for appellee.

SMITH, J. The appellee began this action by filing a petition, in which he alleged, in substance, that he went as a passenger aboard appellant's passenger train in the nighttime, and in going from one coach thereof to another to find a seat he fell between the two coaches and was injured by receiving two broken ribs and other injuries. The petition sufficiently alleged that the accident occurred through the negligence of the company and its employes in having the coaches separated by a space of about three feet and by failing to light the platforms. The petition alleged damages in the sum of \$2,000 by reason of expenses incurred for doctors' bills and medicine and for loss of time and injuries. The company filed a motion to require the plaintiff "to state how much damages the plaintiff claims by reason of doctors' bills and medicine, and to whom the doctor bill was incurred, and to state what amount of time the plaintiff claims to have lost by reason of said in-

juries and the value thereof, and to state how much damage the plaintiff claims for injury to his person and for pain and mental anguish." The motion was sustained, and on the order of the court the appellee filed the following amendment to his petition: "Comes now the said plaintiff, and as an amendment to his petition heretofore filed in said action, and in addition thereto, alleges that the amount of damages said plaintiff claims by reason of doctors' bills and medicine is \$100. Plaintiff further alleges that the doctors' bills were incurred to Dr. O. D. Baird, Dr. W. S. Miller, Dr. E. B. Payne, and Dr. R. Alkman. Plaintiff further states that the amount of time the plaintiff claims to have been lost by reason thereof was about six weeks, and the value thereof was about \$19 per week. Plaintiff further alleges that plaintiff claims damages for injury to his person in the sum of \$1,200, and for pain and mental anguish in the sum of \$500. Wherefore plaintiff prays judgment as originally asked in his petition." The company in its answer alleged that if the plaintiff was injured, as alleged, the injury occurred through no fault or neglect of the defendant, but solely by the carelessness and negligence of the plaintiff. The reply was a general denial. On the trial the jury returned a general verdict in favor of the plaintiff for \$652.50 and answered special questions of fact, among which are the following: "(1) If you find a verdict in favor of the plaintiff, how much do you allow him for loss of time? Answer: \$50. (2) How much do you include in your verdict for injury to the person of the plaintiff? Answer: \$500. * * * (6) How much do you allow the plaintiff for pain and mental anguish? Answer: \$75. (7) How much do you allow the plaintiff for doctors' bills and medicine? Answer: \$27.50."

The principal contention of the appellant is that "injury to the person of the plaintiff" is not a proper element of damages unless the injury is alleged and proven to be permanent. If not, the company is not in very good position to complain. It asked and received from the court an order requiring the plaintiff to amend his petition to state what damages he claimed on this identical ground. It also on the trial asked and received an instruction to the jury that "this suit was commenced on the 1st day of April, 1908, and under the allegations of the petition, and amendment thereto, filed, you cannot allow the plaintiff any sum for pain and suffering experienced by him after the 1st day of April, 1908." It does not appear that the appellee has served upon the appellant any notice stating in what respect he asks a consideration and review of any part of the judgment or of any order of the trial court. Code 1909, § 578 (Gen. St. 1909, § 6173). Hence this instruction is not before us for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

review and must be accepted as the law in this case. We remark, however, that it does not seem to be in accord with the law as declared by this court. *Townsend v. City of Paola*, 41 Kan. 591, 21 Pac. 596; *Edgerton v. O'Neil*, 4 Kan. App. 88, 46 Pac. 206. See, also, *Richmond & Danville R. Co. v. Alison*, 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 45, and note.

The company contends that neither the petition nor the evidence justifies the second finding of fact. The plaintiff in his petition alleges that " * * * he fell and struck his right side against the edge of the said platform of the south coach, breaking two ribs of plaintiff on the right side of said plaintiff's body, and, so far as plaintiff is able to ascertain, it was what is known as the eighth and tenth ribs on plaintiff's right side." Further that " * * * he bruised the flesh and lacerated and strained the muscles of his right side. Plaintiff further alleges that, as a result of said injuries, ever since receiving same he has been unable to perform his usual avocation of traveling salesman, and, as a result of said injuries, has suffered intense pain and mental anguish, and still suffers pain and anguish as a result of said injuries. Plaintiff further alleges that, as a result of said injuries, he received a severe shock to his nervous system, and ever since receiving said injuries has been unable to sleep but little as a result therefrom. Plaintiff further alleges that, as a result of said injuries, ever since receiving the same he has been unable to walk or move about without pain and suffering to himself."

In *Railroad Co. v. Willey*, 57 Kan. 766, 48 Pac. 25, Mr. Chief Justice Doster, speaking for the court, said: "A party is entitled to recover for all consequences which are the natural and probable result of injuries negligently inflicted upon him by another—that is, for those consequences which the common experience of men justify us in believing will result from an injury, the extent and character of which are known—without specially alleging them as grounds of recovery. Any result following an in-

jury, but beyond the usual and natural consequences flowing therefrom, must be specially alleged, so as to apprise the opposing party of an intention to claim damages therefor."

In 13 Cyc. 186, it is said: "The future effect of an injury, and the pain and suffering which it will presumably cause in the future, need not, if they are the legal result of the injury, be specially averred; but proof thereof is admissible under the general allegation of damages, and an allegation that the plaintiff has not yet recovered from his injuries is sufficient to present to the jury the question of future disability."

Let us review the evidence from the standpoint the jury was required to view it as limited to April 1, 1908, 26 days after the accident. The plaintiff testified: "Q. How long were you at home after you came, after your side was hurt? A. About six weeks. Q. Why were you home at that time, six weeks? A. Why, I was suffering. I could not do any work. Q. Why? A. On account of my injuries. I was laid up. I was in bed most of the time. Q. How long was it before you got out of the house after you got home? A. About three or four weeks. Q. What are the facts with reference to your side hurting you at the time you were laid up here at home? A. Why, my side hurt me all the time. I could not rest, but was very nervous." Two doctors also testified that they examined plaintiff several days after the accident; that one rib was broken, one injured, the side was swollen, bruised, and inflamed, and the plaintiff was nervous. The jury had a right, also, to take into consideration the usual and natural result of the injury. Both the petition and the evidence justified the allowance of \$500 as damages "for injury to the person of the plaintiff" in addition to the other items allowed.

We have examined all the other assignments of error and find nothing to justify a reversal of the judgment nor to call for special discussion.

The judgment is affirmed. All the Justices concurring.

(82 Kan. 327)

TROWER et al. v. BEEKMAN.

(Supreme Court of Kansas. April 9, 1910.)

*(Syllabus by the Court.)***NEW TRIAL (§ 186*)—AFTER TERM—PETITION—DEMURRER.**

In an action to foreclose a first mortgage upon real estate, the mortgagor and owner of the mortgaged premises and the holder of a junior lien were made parties defendant. The owner of the real estate filed as his answer to the petition a general denial unverified. Neither the petition nor the answer stated facts which in any manner challenged or affected the interests of the other lienholder, and he did not plead in the action, but made default. Afterward, the court permitted the owner of the mortgaged premises to amend his answer by alleging that their codefendant held a warranty deed of the property, but it was merely intended as a mortgage, and the debt which it secured had been fully paid and discharged; and they prayed the court to adjudge such deed to be a mortgage and cancel the same. Within six days after the amended answer was filed, and the judgment taken, the defendant filing such answer well knew that the debt secured by the deed had not been paid. The holder of the deed then filed a petition stating fully the facts, and asked for a new trial. A demurrer to the petition was overruled. *Held* not error.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 248; Dec. Dig. § 163.*]

Appeal from Court of Common Pleas, Wyandotte County; H. J. Smith, Judge.

Action by O. B. Trower and Lillie A. Trower against T. H. Beekman. Judgment for plaintiffs. Action by defendant Beekman to set aside the judgment. Demurrer to his petition sustained, and he appeals. Affirmed.

Wm. L. Wood, for appellant. Keplinger & Trickett, for appellees.

GRAVES, J. The court of common pleas of Wyandotte county, in an action wherein the Wyandotte State Bank was plaintiff and O. B. Trower, Lillie A. Trower, and T. H. Beekman were defendants, rendered judgment in favor of the plaintiff against O. B. and Lillie Trower for the sum of \$2,000, and foreclosed a mortgage given by them to secure said sum. The defendant Beekman held a warranty deed to the same property, which was executed subsequently to the plaintiff's mortgage, and which was given as a mortgage to secure the sum of \$5,000. Beekman was a nonresident of the county, and was not served with a summons. O. B. and Lillie Trower filed an answer consisting of a general denial unverified. No mention was made in the petition or answer of the deed held by Beekman. On November 29, 1907, Beekman, by stipulation, entered his voluntary appearance in the case. As neither the petition nor the answer and cross-petition of his codefendant contained any facts which he wished to contest, and as he did not wish to foreclose his warranty deed, he did not file

any pleading whatever. On April 22, 1908, O. B. Trower and Lillie A. Trower, by leave of the court, but without the knowledge or consent of their codefendant, T. H. Beekman, filed an amended answer and cross-petition in which they averred in substance that the defendant Beekman held a warranty deed to the mortgaged premises which was intended to operate as a mortgage to secure a debt of \$5,000; that the debt had been fully paid and discharged, and the deed should be canceled. Six days thereafter a judgment of foreclosure was entered in favor of the plaintiff as prayed for, and also a judgment that the deed held by the defendant T. H. Beekman was a mortgage, and the debt secured thereby had been fully paid and discharged. On January 25, 1909, Beekman filed this action under section 810 of the Code to vacate and set aside the judgment so far as it affected him. A demurrer was filed to his petition which was overruled, and from that ruling the Trowers appeal to this court.

The petition contained in substance the facts herein stated, and also that the Trowers well knew at the time they filed their amended answer and cross-petition, and when the judgment was entered thereon, that the debt secured by the deed held by the defendant T. H. Beekman was not paid and satisfied, and that the statement made by them to the contrary was false, and known by them to be false. A judgment obtained under such circumstances does not seem to be in accord with that honesty and fairness which courts of justice are expected to observe in their proceedings. Under the ordinary rules of pleading as prescribed by sections 104 and 105 of the Code the defendant was entitled to 10 days after the filing of the amended answer and cross-petition within which to plead thereto, and judgment should not have been entered within that time. It was taken, however, in 6 days. This was, to say the least, erroneous.

It is claimed that the voluntary appearance of defendant Beekman gave the court jurisdiction of him as fully as if he had been served with a summons, and a defendant served with a summons is bound to take notice of every step taken in the action; and under this rule Beekman must be held to have known of the filing of the amended answer and cross-petition. In support of this view, several decisions are cited among which are the following: *Kimball v. Connor*, 8 Kan. 414; *Curry v. Janicke*, 48 Kan. 168, 29 Pac. 319; *Clay v. Hildebrand*, 44 Kan. 481, 24 Pac. 962; *Jones v. Standiferd*, 69 Kan. 513, 77 Pac. 271; *Shellabarger v. Sexsmith*, 80 Kan. 530, 103 Pac. 992. There are other cases cited, but these are the strongest in the list, and they do not seem to sustain the point. The case of *Kimball v. Connor*, 8 Kan. 414, was limited and distinguished in the case of *Beecher v. Ireland*, 46 Kan. 97, 26 Pac. 448,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

so that it does not apply to these facts. The general idea running through this line of cases seems to be that while every party is entitled to his day in court and to have an opportunity to defend and vindicate his rights, he must, when notified that an action is pending against him, exercise due diligence to present his claims and wishes in the premises to the court so that they may be adjudicated. Should he fail to do this when the opportunity is presented, he will be thereafter barred from the privilege. It has been found necessary in the administration of justice to require the exercise of a degree of diligence upon the part of defendants in this respect, which in some cases seems harsh and arbitrary, but it is not intended by the application of this rule to deprive any person of a full opportunity to have his rights fully investigated and adjudicated; and every case must be interpreted with this purpose in view. Where an action is commenced to foreclose a lien, and several lienholders are made parties defendant, but one or more are omitted as in the case of *Jones v. Standifer*, 69 Kan. 513, 77 Pac. 271, the defendant owner is chargeable with notice that the omitted lienholders may voluntarily come in or be brought in to assert their liens, and he must therefore anticipate the possibility of such action and be prepared to make such defense thereto as he may desire. Under such circumstances the language used in the case of *Kimball v. Connor*, 8 Kan. 414, where it is said, "When the original summons is served in such a case the defendants are in court for every purpose connected with the action and the defendants served are bound to take notice of every step," would be proper and just. This rule has been modified however, in several cases where it has been held that a judgment cannot be properly entered upon a pleading which has been amended in a material manner where the adverse party is in default or absent. *Haight v. Schuck*, 6 Kan. 192; *Alvey v. Wilson*, 9 Kan. 401; *R. R. v. Van Ripper*, 19 Kan. 317; *R. R. v. McReynolds*, 24 Kan. 368.

In the case being considered, the cross-petition was amended in a material matter while the adverse party was absent, in default, and without notice or knowledge of the amendment. Before the amendment was made, there was nothing in the pleadings to indicate that the action would affect this defendant's rights in any manner. The ef-

fect of the amendment was to deprive him surreptitiously and fraudulently of a secured debt for \$5,000. The petition does not characterize the conduct of the defendant Trower as fraudulent, but uses the milder term of "misconduct." The act, however, speaks for itself, and constitutes a flagrant violation of justice and fairness. The claim that such conduct is justifiable under the rules of law administered in courts of justice cannot be admitted. Laws intended to facilitate and promote the administration of justice may not be used as instrumentalities of fraud and oppression, and no interpretation of the law which leads to that end can be sanctioned.

When Beekman entered his voluntary appearance, he was bound to use due diligence to protect whatever interests he might have in the action. Neither the petition nor the answer, however, suggested any facts which he was called upon to notice. He might have filed a cross-petition and had his warranty deed foreclosed as a second mortgage, but he was under no obligations to do so, and he chose to let the opportunity pass. The other parties had filed such pleadings as were presumably satisfactory to them. It was not a case where other lienholders might come in and assert rights inconsistent with this defendant's interest. There was no occasion for him to anticipate the possibility that a contingency might arise in which it would be necessary for him to be present in order to protect his rights, and therefore it cannot be said to be a want of due diligence for him to let the action go without further attention. A very different rule would be applied to the Trowers. They were the owners of the lands. They knew what liens were upon it, and that all holders of liens might assert their rights in that action, and due diligence would require them to anticipate such a contingency and be prepared to meet whatever might arise during the progress of the trial. It will be seen, therefore, as illustrated in this action, that the rule of law contended for by the appellee would be fair and just if applied to the owner of the land, but grossly unjust when applied to a party in the situation of Beekman. Misconduct of the party is a very mild term to apply to such a situation, but it is sufficient. The demurrer was properly overruled.

The judgment of the court of common pleas is affirmed. All the Justices concurring.

(82 Kan. 234)

REMINGTON v. WALTHALL et al.

(Supreme Court of Kansas. April 9, 1910.)

*(Syllabus by the Court.)***1. MUNICIPAL CORPORATIONS (§ 744*)—CONTROL OF STREETS—CUTTING DOWN SHADE TREES—LIABILITY OF OFFICERS.**

In the exercise of their delegated powers to grade and improve streets, municipal authorities are vested with discretion to determine whether growing trees are nuisances and what obstructions shall be removed; and, when their decision is made, every reasonable intentment of good faith should be indulged, but an arbitrary decision by an officer, not made in good faith, that shade trees of an abutting owner are a nuisance, when in fact they are not, and where there is no reason or public necessity for cutting them down, is no protection or defense to the officer who cuts them down, when an action is brought against him to recover for the injury and loss.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1565; Dec. Dig. § 744.*]

2. MUNICIPAL CORPORATIONS (§ 678*)—CONTROL OF STREETS—CUTTING DOWN SHADE TREES.

It is competent for the city council to pass a resolution, directing the officers in charge of the grading of a street not to cut down certain shade trees, until such action has been authorized by the council.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1458; Dec. Dig. § 678.*]

Appeal from District Court, Miami County; W. H. Sheldon, Judge.

Action by J. B. Remington against J. T. Walthall and W. H. Hickman. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Frank M. Sheridan, for appellant. S. J. Shively and E. J. Sheldon, for appellees.

JOHNSTON, C. J. This action was brought by J. B. Remington against the city of Osawatimie, J. T. Walthall, as mayor, and W. H. Hickman, as street commissioner of the city, and also against Walthall and Hickman as individuals. The city, as well as the mayor and street commissioner, went out of the case upon a ruling sustaining a demurrer as to them, and the case thereafter proceeded against Walthall and Hickman alone. Remington alleged, and the proof tended to show, that he owned a home in Osawatimie which fronted on Main street, and on this street he had built a sidewalk and had planted 14 shade trees, which had been growing there for over 20 years. The city authorities had notified Remington that he must build a new sidewalk on a lower grade, and Remington had learned of an intention by the mayor and street commissioner to cut down his shade trees growing in the street in front of his home. He appeared before the council and protested against the cutting of the shade trees, and that body passed a resolution to the effect that there-

after no shade trees should be cut until the same should be specifically authorized by the city council. Testimony was offered that, in defiance of this order and without submitting the question to the council, Walthall, the mayor, and Hickman, the street commissioner, acting together cut down the shade trees, lifted the sidewalk, and tumbled it over upon the lawn while Remington was absent from the city, and proceeded with the grading of the street. In their answer they alleged that the work was done in pursuance of an ordinance, but no copy of such an ordinance was pleaded, and none was produced in evidence. It was also averred that the cutting of the trees was necessary in order to bring the street in front of Remington's property to grade, but Remington met these averments of the answer with general denials. In addition to the evidence mentioned Remington produced testimony that there was a city ordinance regulating the parking of streets and the planting and protecting of shade trees, which provided for the punishment of those who injured or destroyed such trees. There was testimony that Walthall, the mayor, resented the action of Remington in appearing before the council and obtaining the order to stop the cutting of shade trees, and then remarked that Remington "thought that he had his auger in me, but I have mine in him, and I will keep it there." One of the excuses he made for cutting the trees was that he had a street force organized and employed, and that he did not have any other work for them to do. There was testimony to the effect that when Remington asked the mayor to defer action until a dispute as to a survey of the street could be settled, stating to him that, if the old survey was adopted, he would put in a new sidewalk at once, Walthall responded in an angry and offensive manner "that, if Remington undertook to do any work except right where he told him, he would have him arrested." The trees were cut, it appears, after the resolution was passed by the council, and without the concurrence of that body. No testimony in behalf of Walthall or Hickman was offered, as the court sustained their demurrer to Remington's evidence and gave judgment against him.

An abutting lot owner has an interest and ownership in the shade trees planted and growing in the parking in front of his lots. An assessment may even be made against his lots to pay for the charge of planting and maintaining shade trees in the street in front of his premises. *Heller v. City of Garden City*, 58 Kan. 263, 48 Pac. 841. An owner holds his right to the trees planted to adorn and improve his lots subject to the paramount right of the public to the use of the streets, but it is an ownership which gives him a standing in court to prevent an unau-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thorized and unjustified destruction of the trees by officers or others. *Paola v. Wentz*, 79 Kan. 148, 98 Pac. 775. The city authorities are, of course, not to be hampered in the improvement or control of the streets, and when they decide that a tree or other obstruction is a nuisance, and that the public good requires that it should be abated or removed, every reasonable intendment of good faith and honesty of the officers will be indulged. But a tree, however, does not become a nuisance merely because a city officer has declared it to be such. A decision, arbitrarily made, that a tree maintained by an abutting owner is a nuisance and should be cut down, when in fact it is not an obstruction, and there is no reason or public necessity for removing it, is no defense for the official or individual who arbitrarily and unnecessarily destroys it. In *Frostburg v. Wineland*, 98 Md. 239, 56 Atl. 811, 64 L. R. A. 627, it was decided that shade trees growing on a street are not a nuisance per se, and only become so when they interfere with the use of the street, and it was there said: "It is clear, we think, both upon reason and authority, that when a municipality undertakes to destroy private property which is not a nuisance per se, it then transcends its powers, and its acts are reviewable by a court of equity." In this case there was no proof of an ordinance authorizing the mayor or street commissioner to change the grade of the street, or to cut down the trees and remove obstructions from streets; and, so far as the abstract shows, their action in this respect was without authority. If they had reached the defense and offered testimony, they possibly might have produced an ordinance giving them general authority to grade and improve streets. If it be assumed that such authority existed, it is one which must be exercised in good faith by the officers. Indeed there is testimony that the officers were actuated by malice in the action taken; and, if they were vested with any discretion to decide upon the removal of the trees, such discretion was in fact abused. In such a case the owner is entitled to recover damages from the one who destroys his property. In this instance the trees appear to have been destroyed against the will of the city council and in spite of its order.

It is claimed, however, that the order of the council was without force because it was in the form of a resolution instead of an ordinance. It is true, as appellees contend, that the statute provides that the powers of the council to open and improve streets and the like is to be exercised through ordinances adopted in a certain manner, which is prescribed. A statutory direction that certain steps shall be taken by ordinances leaves no discretion in the council as to methods, and in a general way it may be said that every step that is legislative in character must be accomplished by an ordinance.

There are many things, however, of a ministerial and administrative character that may be accomplished by a resolution. In *McQuillin on Municipal Ordinances*, § 2, it is said: "Whether the particular thing should be done by ordinance or resolution depends upon the proper construction of the charter and the forms observed in doing the act. An ordinance prescribes a permanent rule of conduct or government, while a resolution is of a temporary character only. It may be stated as a general rule that matters upon which the municipal corporation desires to legislate must be put in the form of an ordinance, while all acts that are done in its ministerial capacity, and for a temporary purpose, may be put in the form of resolutions." It would seem that a ministerial act or a mere detail in the execution of a power or provision for some temporary matter, applicable alone to a single and individual case, might be accomplished by means of a resolution. So it has been decided that a resolution for the purchase of apparatus for a fire department would bind the municipality. *Green v. City of Cape May*, 41 N. J. Law, 45. A resolution has been held to be sufficient to fix the amount of a license fee previously authorized. *City of Burlington v. Putman Insurance Company*, 31 Iowa, 102; *Arkadelphia Lumber Company v. Arkadelphia*, 56 Ark. 370, 19 S. W. 1053. It has been held to be sufficient to direct municipal agents to make proper contracts, as well as to appoint municipal agents. *City of Alton v. Mulledy et al.*, 21 Ill. 76; *Egan v. City of Chicago*, 5 Ill. App. 70. It has been treated as a proper method of directing a conveyance of certain property (*Morgan v. Johnson*, 106 Fed. 452, 45 C. O. A. 421), and also for waiving the time of performance of a contract (*Hubbard et al. v. Morton et al.*, 28 Ohio St. 116). See, also, 1 *Beach on Public Corporations*, § 485; *Dillon on Municipal Corporations*, § 307. These cases illustrate the trend of authorities, but of course they depend to quite an extent upon the charter acts under which the municipalities were acting. Some of them may be inconsistent with our general laws providing for the government of cities. In case of an ordinance providing for the planting of trees in a park, for instance, without specifying how many or what kinds of trees or shrubs should be planted, it would seem that a resolution might be adopted prescribing how many of each kind of trees should be planted in that park. It would appear, too, that there is no impropriety in providing by resolution that the officers in charge of grading streets should consult the council or a committee of the council, as to whether it was necessary that particular shade trees should be cut down. It is not uncommon for administrative officers to confer with a committee of the council having the special matter in charge; and, so far as anything is shown in the record, the ac-

tion of the council in passing the resolution was a just and proper exercise of its powers. The fact that the officers ignored the resolution tends at least to establish the charge that they acted arbitrarily and oppressively in destroying the shade trees in question.

The judgment must therefore be reversed, and the case remanded for further proceedings. All the Justices concurring.

(82 Kan. 856)

MAYNARD v. WALTHALL et al.

(Supreme Court of Kansas. April 9, 1910.)

Appeal from District Court, Miami County; W. H. Sheldon, Judge.

Action by L. B. Maynard against J. T. Walthall and W. H. Hickman. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Frank M. Sheriden, for appellant. S. J. Shively and E. J. Sheldon, for appellees.

PER CURIAM. The facts in this case and the points for decision are substantially similar to those in *J. B. Remington v. J. T. Walthall* and *W. H. Hickman* (just decided) 108 Pac. 112; and, following the ruling in that case, the judgment in this case will be reversed, and the cause remanded for further proceedings.

(82 Kan. 320)

JERRILS v. GERMAN-AMERICAN INS. CO.

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

1. INSURANCE (§ 575*)—PROVISIONS OF POLICY—APPOINTMENT OF APPRAISERS—RIGHT OF ACTION.

Under a fire insurance policy, providing that in the event of a disagreement as to the amount of the loss each party shall appoint an appraiser, and the two appraisers shall select an umpire and appraise the loss, and that no action shall be maintained on the policy until such appraisal has been made, the insured discharges his obligation in that respect when he appoints an appraiser in good faith; and, where the two appraisers fail to agree upon an umpire, and the appraisal fails without the fault of the insured, he is not required to propose the selection of other appraisers, but may maintain an action upon the policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 575.*]

2. INSURANCE (§ 645*)—CONDITIONS OF POLICY—APPRAISEMENT.

In an action upon a fire insurance policy, the petition, after alleging the issuance of the policy, the payment of the premium, and loss by fire, alleged due performance of the conditions of the policy on the part of the insured. The answer alleged that, after the fire occurred, a disagreement arose as to the amount of the loss, and that the same had never been ascertained by appraisers, as provided by the policy. The reply was a general denial. *Held*, that under the pleadings it was proper for the plaintiff to show that he appointed an appraiser in good faith, and that the two appraisers were unable to

agree upon an umpire, for which reason no appraisal was made.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1632-1644; Dec. Dig. § 645.*]

Appeal from District Court, Chautauqua County; G. P. Aikman, Judge.

Action by E. W. Jerrils against the German-American Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fyke & Snider, for appellant. S. H. Piper, for appellee.

PORTER, J. This was an action on a fire insurance policy. Plaintiff recovered judgment, and the defendant appeals.

The policy covered a stock of merchandise in the town of Elgin. The petition alleged that the stock was destroyed by fire July 31, 1907, that plaintiff had performed all the requirements and conditions of the policy on his part, and that the defendant refused to pay. The answer set up as a defense that, after the fire occurred, a disagreement arose between the insured and the company as to the amount of the loss, and that the amount had never been determined by appraisers, as provided by the policy. The reply was a general denial. On the trial the plaintiff was permitted, over the objections of the defendant, to offer evidence showing that, following the disagreement as to the amount of the loss, appraisers were appointed, the company and the insured each selecting one appraiser as provided by the terms of the policy, and that the two appraisers were unable to agree upon an umpire, for which reason no appraisal was ever made. The errors complained of are the admission of this testimony and the giving of an instruction to the effect that, if appraisers were appointed as the policy provided, and they were unable to agree upon an umpire, the plaintiff had complied with the terms and conditions of the policy respecting appraisal, and could recover without showing an award by appraisers. The policy was of the ordinary, standard form, and the provision with respect to appraisal reads as follows: "In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

appraisal and umpire, and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

The plaintiff's evidence, which was admitted over the objections of the defendant, was in substance that after the fire occurred an adjuster of the company visited him, and a disagreement arose respecting the amount of the loss; that appraisers were then appointed, the company selecting Mr. Warren, and the insured selecting Mr. Meeker. When the two appraisers met for the purpose of agreeing upon an umpire Mr. Warren suggested a Mr. Potts, who had been the first choice of the adjuster for appraiser, and also handed to Mr. Meeker a list of persons, one of whom resided at Kansas City, another at Newton, and another at Wagoner, Okl. Mr. Meeker stated to him that on account of the expense it would be better to take some one nearer home, and suggested the names of half a dozen merchants living in towns in the same county. The appraiser for the company objected to any one who lived in the vicinity, on account of local influence. On three separate days the appraisers met and attempted to agree upon an umpire, but, being unable to do so, the matter was dropped. On the trial the plaintiff introduced in evidence two letters received from the adjuster of the company after the failure of the appraisers to agree, which stated that the company was ready to select another appraiser in place of Mr. Warren, and suggested that the plaintiff appoint some one else to take the place of Mr. Meeker. In these letters the insured was informed that the company would not waive its right to an appraisement.

There are cases holding that, where there is a failure of appraisers acting in good faith to agree, it is incumbent on the parties to appoint other appraisers. *Vernon Ins. Co. v. Maitlen*, 158 Ind. 893, 63 N. E. 755; *Westenhaver v. Ger.-Am. Ins. Co.*, 113 Iowa, 728, 84 N. W. 717. On the other hand, it has been held, on what seems to be the better reasoning, that where the insured has appointed an appraiser, and without his fault the appraisers fail to agree, he may maintain an action. *In Western Assur. Co. v. Decker*, 98 Fed. 381, 39 C. C. A. 383, Judge Caldwell said in the opinion: "The contention of the company is that, when the arbitrators failed to agree, it was the duty of the insured to propose a new selection of arbitrators, and that, not having done so, and not having appointed an arbitrator the second time, he cannot maintain this action. The terms of the policy are satisfied when the insured, acting in good faith, appoints an appraiser. If the appraisement

falls through by disagreement of the appraisers, without any fault of the insured, he has discharged his covenant, and satisfied the requirements of the policy, and may then resort to the courts to have his damages assessed." In the opinion in *Niagara Fire Ins. Co. v. Bishop*, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep. 105, the court, after referring to cases holding that, upon the failure of the appraisers to agree upon an umpire, it is the duty of the insured at least to propose the selection of new appraisers, said: "We are unable to subscribe to this doctrine, so far as the policy, upon which the present suit has been brought, is concerned. The contract here only requires the parties to choose appraisers once, and not twice." In that case it appeared that the appraiser nominated by the company insisted upon the appointment of an umpire living at a great distance from the scene of the loss, and refused without excuse to agree to any umpire named by the other appraiser, and it was said that his conduct amounted to a refusal to proceed with the appraisement, and the insured was not required to wait longer before bringing his action. The same doctrine is declared in the following cases: *Hickerson & Co. v. Insurance Companies*, 98 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172; *Bishop v. A. Ins. Co.*, 130 N. Y. 488, 29 N. E. 844; *Chapman v. Rockford Ins. Co. et al.*, 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405; *Uhrig v. Williamson City Fire Ins. Co.*, 101 N. Y. 362, 4 N. E. 745; *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606, 21 S. W. 207; *Conn. Fire Ins. Co. v. Cohen*, 97 Md. 294, 55 Atl. 675, 99 Am. St. Rep. 445; *Brock v. Insurance Co.*, 102 Mich. 583, 61 N. W. 67, 26 L. R. A. 623, 47 Am. St. Rep. 562.

These are the principal authorities relied upon by the plaintiff in support of the judgment. It will be observed that none of them touch the precise question involved here, since we are not called upon to determine merely whether the conduct of the company or its appraiser in failing to agree upon an umpire rendered it unnecessary that any further steps be taken towards procuring an appraisement. Conceding, for the purpose of the argument, that since the appraisers had failed to agree the plaintiff could maintain the action without showing an award, the defendant contends that the pleadings should have set up the facts which avoided the necessity of an award. The whole claim of error concerns the pleadings. The contention is that, having alleged full performance of all the conditions and requirements of the policy on his part, he offered proof showing facts which rendered performance unnecessary, in other words, a waiver on the part of the defendant of certain conditions and requirements, that, under the pleadings it was error to admit the testi-

mony, and that, for the same reason, the instruction referred to was erroneous. In support of this contention the defendant relies upon the doctrine of *Insurance Co. v. Johnson*, 47 Kan. 1, 27 Pac. 100. There the petition set forth the contract of insurance, payment of premium, destruction of the property by fire, and that the company had refused to pay the loss, although the plaintiffs had performed all the conditions of the policy incumbent upon them. The defendant answered, alleging a breach of the condition of the policy in regard to incumbrances. The reply was a general denial. On the trial the plaintiffs were permitted to offer proof tending to establish a waiver of the condition of the policy respecting incumbrances and facts in the nature of an estoppel against the company urging the forfeiture. A judgment against the company was reversed. It was held that there was sufficient testimony produced by plaintiffs to warrant the instructions given by the court if the acts of waiver and estoppel had been pleaded, but it was also held that: "Neither the evidence introduced nor the instructions based thereon are warranted under the pleadings as they exist, and before they can be properly received, the reply must be amended." To the same effect is *Insurance Co. v. Thorp*, 48 Kan. 239, 28 Pac. 991; *Gillett v. Insurance Co.*, 53 Kan. 108, 36 Pac. 52; *Insurance Co. v. Coverdale*, 9 Kan. App. 651, 58 Pac. 1029.

The question resolves itself in its final analysis to this: What were the conditions of the policy which the insured was required to perform in order to entitle him to maintain the action? True, the terms of the policy contemplated that, in case a difference arose respecting the amount of the loss, it should be determined by an award of appraisers, but all the policy required the insured to do in case such a disagreement arose was to join with the company in the selection of appraisers. Of course, the insured cannot avoid the conditions of the policy by naming an appraiser who acts in bad faith, and who refuses without excuse to agree with the other appraiser. Nor, on the other hand, can the company gain any advantage where the failure to agree upon an umpire is occasioned by bad faith or misconduct of its appraiser. We agree with the plaintiff that there was and is no question of waiver in the case. While it would not be inaccurate to say that, where the failure of the appraisers to agree upon an award is caused by the bad faith of the appraiser appointed by the company, the latter would be estopped from setting up the lack of an award as a ground of forfeiture of the right to maintain the action, still the plaintiff does not rely upon either waiver or estoppel. On the contrary, he relies upon due performance of all the terms

and conditions of the policy on his part. Since the policy only required him to appoint an appraiser in case a difference arose as to the amount of the loss, it follows that he has shown due performance when he shows that he has appointed an appraiser. There was no error in the admission of testimony or in giving the instruction.

The judgment will be affirmed. All the Justices concurring.

(33 Kan. 308)

L. A. WATKINS MERCHANDISE CO. v. MISSOURI, K. & T. RY. CO.

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 108*)—LOSS OF GOODS—EXTENT OF LIABILITY.

Except as limited by the terms of the bill of lading, the liability of a railway company is for all losses of goods intrusted to it for shipment, except those occasioned by the act of God, the public enemy, or the contributing negligence of the shipper.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 471-495, 520-522; Dec. Dig. § 108.*]

2. CARRIERS (§ 125½*)—LOSS OF FREIGHT—NECESSITY OF DEMAND.

The failure to instruct the jury as to a stipulation in the bill of lading providing that a shipper shall present any claim for loss or damages to the railway company within thirty days after it has been sustained is not a ground for reversal where it appears that the railway company had acquired full knowledge of the loss within a few minutes after it occurred, and, upon learning the cause of the loss, had instituted negotiations to provide for the payment of the same, and where it denied liability for the loss upon other grounds than a lack of demand.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 544; Dec. Dig. § 125½.*]

Appeal from District Court, Lyons County; F. A. Meckel, Judge.

Action by the L. A. Watkins Merchandise Company against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

John Madden, W. W. Brown, and L. B. Kellogg, for appellant. Hamer & Harris, for appellee.

JOHNSTON, C. J. This was an action by the L. A. Watkins Merchandise Company to recover damages from the Missouri, Kansas & Texas Railway Company for the loss of coal tar which the railway company undertook to transport from Emporia, Kan., to Denver, Colo. The tar was lost after it had been loaded in a car and intrusted to the railway company for shipment. On the first trial of the case the district court directed a verdict in favor of the plaintiff, but upon an appeal to this court it was held that there was testimony to be weighed and disputes to be settled which required the submission of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the case to the jury. The ruling, therefore, taking the case from the jury compelled a reversal of the judgment. *Railway Co. v. Watkins*, 76 Kan. 813, 92 Pac. 1102. On the second trial and upon testimony substantially similar to that received on the first trial, the jury returned a verdict for the plaintiff. Some of the questions reargued on this appeal were determined by the decision on the first review, and are not open to further consideration. There was testimony that the tar was loaded on a car provided by appellee, and was placed on a connecting track of the Missouri, Kansas & Texas Railway Company when it was in good condition. After the delivery of the car and before the loss, the railway company issued a bill of lading, which, among other things, provided that the company should not "be liable for leakage or fermenting of any kinds of liquids, arising from expansion, bursting of packages, or other unavoidable causes." On the first review it was held that in the testimony there was ground for an inference that the loss might have been caused by the defective condition of the tank car furnished by appellee, but whether this was the cause of the loss was a proper question for a jury. In the second trial the inferences were drawn and the deductions were made by the jury, and they made special findings that the car was not an old one, and was not in bad condition when it was loaded, or when it was accepted for shipment by the railway company. This was a practical determination of the principal question of fact left for disposition in the second trial. On the first trial, the railway company filed a demurrer to plaintiff's evidence which was overruled, and this ruling was approved in the first review. The liability of the railway company, except as limited by the terms of the bill of lading, is for all losses except those occasioned by the act of God, the public enemy, or the contributing negligence of the shipper. So far as the appellee is concerned, it is immaterial what the relations were between the appellant and the Atchison, Topeka & Santa Fé Railway Company which carried the car from the gas works and placed it on appellant's line, and for which the appellant paid that company \$2, nor is it important to inquire at this time whether that company is responsible to appellant for the loss. Appellant is a common carrier and is responsible for the loss of the goods intrusted to it unless the loss appears to have resulted from one or more of the excepted causes. There is nothing in the testimony which brings the appellant within any of the exceptions to the common-law liability of a common carrier.

There is nothing new or substantial in the objections to testimony, nor is there any good cause to complain of the instructions.

There was a stipulation in the bill of lading that any claim which the shipper might have against the railway company on account of loss or damage occurring on its line should be presented within thirty days after the loss or damage was sustained. This provision was evidently intended for the benefit of the railway company in order that it might inquire into the cause of the loss and its liability therefor. The stipulation is not a material consideration in this case. The railway company had notice of the injury to the tank car and of the resulting leakage within a few minutes after it occurred. The agent of the company inspected the break, and had ample opportunity to gain full information as to the condition of the car and the cause of the leakage, and also to use any available means to prevent further loss. The appellee could not have given the railway company any more information than it already possessed. Negotiations were promptly begun by appellant with reference to the claim and with a view of fixing the responsibility for the loss upon the Santa Fé Railway Company. The officers of appellant seemed to think that it could not shoulder the responsibility upon the Santa Fé Railway Company until a judgment against appellant had been rendered. Appellant did not resist payment because of a lack of demand or notice, but did insist that the loss resulted from the defective car which appellee furnished. This claim was negated by the jury. The failure to instruct on the matter of a demand is not a ground of reversal.

Judgment affirmed. All the Justices concurring except GRAVES, J., who did not sit.

(83 Kan. 301)

KING v. BELLAMY et al.

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 524*)—INDORSEMENTS—PRESUMPTION OF OWNERSHIP.

The holder of negotiable paper indorsed in blank is prima facie the owner thereof, and the mere erasure of previous indorsements does not destroy this presumption.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1826-1831; Dec. Dig. § 524.*]

2. ALTERATION OF INSTRUMENTS (§ 24*)—EXPLANATION—NECESSITY.

In an action to recover judgment upon a promissory note, and to foreclose a mortgage given to secure the payment of such note, the mortgage, when offered in evidence, was indorsed in blank by the payee, but there had been a previous assignment thereon by the payee, which was erased by red lines drawn through it. The court excluded the mortgage, unless the plaintiff would first explain the erasure, which he was unable to do, and for want of such evidence his case was dismissed. *Held* error.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 208-214; Dec. Dig. § 24.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from District Court, Haskell County; William H. Thompson, Judge.

Action by Albert E. King against Emma E. Bellamy and others. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

Thomas A. Scates and Albert H. Watkins, for appellant. O. H. Foster, Fred J. Evans, and Edgar Foster, for appellees.

GRAVES, J. This action was commenced by the appellant in the district court of Haskell county, to recover judgment on a note, and to foreclose a mortgage given to secure payment of the note. The Central Loan & Investment Company was the original mortgagee. The appellees now own the land mortgaged. The appellant claims to be the owner and holder of the note and mortgage. The note was assigned in blank. The mortgage appears to have been assigned to Aretta M. Johnson, in writing, indorsed upon the back of the mortgage, and executed by the payee. This assignment was erased by lines drawn with red ink through it. The assignment, however, clearly appears, and can be easily read. Afterward it was indorsed in blank by the original payee. The appellant upon the trial offered the note and mortgage in evidence. The mortgage was excluded for the reason that the plaintiff was unable to explain the erasure of the assignment on the back thereof and show that he was the owner. The plaintiff having no further evidence to offer, the case was dismissed at his cost, and he comes here by appeal.

The plaintiff claims that the note and mortgage were admissible in evidence without preliminary proof, and possession established prima facie his right to recover. We agree with the plaintiff. It is a well-established general rule that the possession of negotiable paper proves prima facie the ownership of the holder. *Eggen v. Briggs*, 23 Kan. 711; *Challiss v. Wylie*, 85 Kan. 506, 11 Pac. 458; *O'Keeffe v. Bank*, 49 Kan. 847, 80 Pac. 473, 33 Am. St. Rep. 370; *Hutchison v. Myers*, 52 Kan. 292, 84 Pac. 742; *Anthony v. Brennan*, 74 Kan. 707, 87 Pac. 1136; 8 Cyc. 227; 2 Cyc. 239; *Kells v. N. W. Live Stock Ins. Co.*, 64 Minn. 390, 67 N. W. 215, 71 N. W. 5, 53 Am. St. Rep. 541. In the case of *Pinney v. Turner*, 10 Mo. 207, it is said: "The first point in this case is the one presented by the instructions of the court. Allowing the first proposition of the instruction to be correct, in the abstract, yet the latter part, in relation to the burthen of proof, in case of an erased indorsement, is erroneous, and under the circumstances compelled the plaintiff to take a nonsuit. The mere fact of an erased indorsement appearing on the back of the note does not per se prove an actual assignment. There may

have been no delivery, or the writing may have been the act of a stranger. * * * The only proof offered of an assignment was the production of the note, with an erased indorsement. No circumstances or facts calculated to throw any suspicion upon the instrument appeared, but upon this alone the court gave the instructions complained of. The rule of law is that everything is presumed to be done rightly until the contrary be proved, and therefore this erasure of itself should not have raised a presumption unfavorable to the holder of the note." The case of *Jones v. Berryhill*, 25 Iowa, 293, is to the same effect. In that opinion it is said: "On the trial defendant objected to the introduction of the note in evidence, and also of the notarial certificate of protest. It seems that the payee indorsed the note in blank, and that plaintiff, in sending it to New York for collection, wrote over this indorsement the words, 'Pay cashier Chemical National Bank or order,' which latter words were erased when the note was offered in evidence. The objection is that this erasure was not explained. And we ask why should it be? So far as defendant was concerned, plaintiff, being the holder, and all the time the real owner, had a right to erase these words and insert his own name, even at the time of trial. *Goddard v. Cunningham*, 6 Iowa, 400; *Pilmer v. Branch State Bank of Des Moines*, 19 Iowa, 112."

The judgment of the district court is reversed, with direction to proceed in accordance with the view herein expressed. All the Justices concurring.

(83 Kan. 220)

ROWLAND v. HOME INS. CO. OF NEW YORK.

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

1. INSURANCE (§ 330*)—PROVISIONS OF POLICY—STIPULATION AGAINST INDEMNITIES.

A policy of fire insurance containing a provision which reads, "It is stipulated and agreed if the property, or any part thereof shall hereafter become mortgaged or incumbered * * * without written consent hereon, then this policy shall be null and void," will not be rendered invalid by a mortgage upon the insured premises unless it is a valid and subsisting lien upon the property.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 829-839; Dec. Dig. § 330.*]

2. INSURANCE (§ 330*)—"INCUMBRANCE"—PROVISIONS OF POLICY.

In such a case, where the insured executed a mortgage for the purpose of securing a promissory note payable more than a year after date, for rent expected to become due under a lease where the term does not commence for five months in the future, and the insured property is destroyed by fire before the commencement of the term under the lease, such mortgage will not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

be an incumbrance within such provision of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 829-839; Dec. Dig. § 830.*

For other definitions, see Words and Phrases, vol. 4, pp. 3519-3527.]

Appeal from District Court, Miami County; W. H. Sheldon, Judge.

Action by Louis N. Rowland against the Home Insurance Company of New York. Judgment for defendant, and plaintiff appeals. Reversed.

Lane & Lane, for appellant. Fyke & Snider, for appellee.

GRAVES, J. This action was commenced by Louis N. Rowland as plaintiff in the district court of Miami county against the Home Insurance Company of New York as defendant, to recover upon an insurance policy for loss occasioned by fire. Upon a trial in the district court the defendant recovered judgment for costs, and the plaintiff brings the case here by appeal.

The policy contained a provision which reads: "It is stipulated and agreed if the property or any part thereof shall hereafter become mortgaged or incumbered * * * without written consent hereon, then this policy shall be null and void." The company claimed that this provision was violated by the insured, and the policy thereby rendered void, and for this reason refused payment. No other question is presented. The policy took effect February 25, 1904. The fire occurred November 4, 1904. The insured had executed a mortgage upon the premises insured after the insurance policy was in force and before the fire, but claims that it was not in force, and had no legal effect at the time of the fire. The facts are that the insured had rented 200 acres of land for one year from and after March 1, 1905, and was to pay the sum of \$450 rent in cash on January 1, 1906. The lease, note, and mortgage were executed, but were not intended to become effective until March 1, 1905, when the insured took possession of the lands under the lease. Under these circumstances they were merely preliminary steps taken toward the consummation of an anticipated contract and until such contract was completed and in force, these papers were without present force. A mortgage to be an incumbrance within the meaning of an insurance policy must be a valid and subsisting lien upon the property. 13 A. & E. Encycl. of Law (2d Ed.) 259; 19 Cyc. 757; Weigen v. Council Bluffs Ins. Co., 104 Iowa, 410-413, 73 N. W. 982; Smith v. Niagara Fire Ins. Co., 60 Vt. 682, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. Rep. 144; Fitchner v. Fidelity Mutual Fire Association, 108 Iowa, 276, 72 N. W. 530. One of the purposes of the provision to prohibit incumbrances from being placed upon insured property is to prevent the ownership of the

insured from being diminished in value, and his interest in the preservation of the property thereby decreased. A lien which has not taken effect or one which has been extinguished or one which for any reason is not effective and subsisting does not fall in this category and is not an incumbrance.

We conclude that the district court erred in holding that the appellant's mortgage was an incumbrance, and the judgment is reversed, with direction to set aside the judgment in favor of the appellee, and enter a judgment in favor of the appellant for the amount due on the policy when ascertained. All the Justices concurring.

(82 Kan. 858)

STATE v. WILSON.

(Supreme Court of Kansas. April 9, 1910.)

Appeal from District Court, Johnson County; J. O. Rankin, Judge.

S. B. S. Wilson was convicted of an offense, and appeals. Affirmed.

S. J. Shively, for appellant. F. S. Jackson, Atty. Gen., O. B. Little, and H. L. Burgess (C. W. Gorsuch, of counsel), for the State.

PER OURIAM. This case might properly be dismissed, for the reason that the alleged transcript of the record is not so certified as to show that it is a true copy of the record. Assuming, however, that it is a true transcript, we have examined it as to all the errors assigned, and do not find any substantial or prejudicial error in the proceedings of the court.

The judgment is therefore affirmed.

(56 Or. 538)

OLAY v. OLAY.

(Supreme Court of Oregon. April 12, 1910.)

DIVORCE (§ 280*)—APPEALABLE ORDERS—ALIMONY—DISSOLUTION OF MARRIAGE.

Under B. & C. Comp. § 547, providing that an order affecting a substantial right, and which in effect determines the suit, so as to prevent a decree therein, is final, and may be reviewed on appeal, an order in a suit by a husband to dissolve the marriage, awarding the wife alimony to enable her to make a defense, pursuant to B. & C. Comp. § 512, is not final, where the suit remains undetermined, and hence was not reviewable on direct appeal, though it would be reviewable on appeal from the final decree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 764; Dec. Dig. § 280.*]

Appeal from Circuit Court, Jackson County; H. K. Hanna, Judge.

Suit by W. S. Clay against Alzire Clay to dissolve the marriage contract. From an order granting alimony, complainant appeals. On motion to dismiss appeal. Motion granted.

W. H. Phipps, for appellant. Robert G. Smith, for respondent.

MOORE, C. J. This is a motion to dismiss an appeal. The facts are that this suit was begun by the husband to have his marriage

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

contract dissolved. The defendant answered the complaint, and interposed a motion, supplemented by affidavits, for an allowance of money to enable her properly to make a defense. Based on her application, the judge, pursuant to the provisions of the statute (B. & C. Comp. § 512), ordered the plaintiff to pay the sum of \$500, and he appeals.

It is argued by defendant's counsel that the order complained of is not final, and therefore unappealable. An order affecting a substantial right, and which in effect determines the suit, so as to prevent a decree therein, is final, and may be reviewed on appeal. B. & C. Comp. § 547. So far as disclosed by the transcript, no decree granting or denying the divorce has been rendered. The order herein is not void, and, having been made prior to any final decree, it is merely interlocutory, and for that reason no appeal lies. *Sterling v. Sterling*, 43 Or. 200, 204, 72 Pac. 741; *Kesler v. Nice*, 104 Pac. 2. The plaintiff is not remediless, however; for, when the cause is finally determined, any intermediate order affecting a substantial right may be reviewed on appeal. *Van Voorhies v. Taylor*, 24 Or. 247, 33 Pac. 380; *Farmers' Bank v. Key*, 33 Or. 443, 54 Pac. 206.

It follows that the appeal should be dismissed, and it is so ordered.

(56 Or. 144)

PECK v. VOGET.

(Supreme Court of Oregon. April 12, 1910.)

CONTRACTS (§ 346*)—BUILDING CONTRACTS—ACTION FOR BREACH—ADMISSIBILITY OF EVIDENCE.

In an action for breach of a contract to build a house of a certain quality, where plaintiff alleged that the house was so negligently built as to be almost worthless, and defendant, answering, admitted the contract and payment of the price, but denied any default in the work, and did not raise the question that the title to the lot on which the house was built was in plaintiff's wife, evidence that plaintiff, though apparently acting in his own name, was really the agent of an undisclosed principal, was properly excluded.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 346.*]

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

Action by S. E. Peck against Julius G. Voget. Judgment for plaintiff, and defendant appeals. Affirmed.

The complaint alleges that defendant entered into a written contract with plaintiff to build a dwelling house on lot 16, block 2, in the city of Salem, according to certain plans and specifications, which are made a part of the complaint, from which it appears that defendant was to build for plaintiff a house of certain dimensions and quality and was to be paid therefor the sum of \$700. Plaintiff alleges that he has paid de-

fendant the \$700 stipulated, but that defendant has so negligently built the house that it is almost useless and worthless, and claims damages in the sum of \$400. Defendant answered, admitting the contract and payment of the price, but denying any negligence or default in the work or any damages to plaintiff. On the trial defendant offered proof tending to show that the title to the lot on which the house was built was in plaintiff's wife; but the court sustained an objection to such testimony, and, the jury having found for plaintiff in the sum of \$350, defendant appeals.

Geo. G. Bingham and Carey F. Martin, for appellant. John A. Carson and Thomas Brown, for respondent.

McBRIDE, J. (after stating the facts as above). The objection to the evidence offered by defendant was properly sustained. The contract for breach of which the action was brought is set forth fully as an exhibit to the complaint, and shows an absolute agreement to build a house for plaintiff. If defendant wished to insist upon the proposition that plaintiff, though apparently acting in his own name, was really the agent of an undisclosed principal, he should have raised that question by suitable denials in the answer, so that plaintiff would be put upon notice and prepared to defend. *Goetz v. Ambs*, 27 Mo. 28; *Prall v. Peters*, 32 Neb. 832, 49 N. W. 767.

The contract showed an absolute written agreement by defendant to build plaintiff a house. Plaintiff contracted and paid for a house to be worth \$700, and got one worth \$350. Now, whether he built it for himself or another, he was entitled to have built just what he contracted for. One contracting with another for the erection of a building ought not to be required to litigate his title to the land on which it is erected in an action for damages for nonperformance of the contract, and especially where no issue of that nature is tendered by the answer.

The judgment is affirmed.

(56 Or. 146)

MUCKLE et al. v. COLUMBIA COUNTY et al.

(Supreme Court of Oregon. April 12, 1910.)

1. APPEAL AND ERROR (§ 423*)—NOTICE OF APPEAL—NECESSITY FOR INDORSEMENT OF SERVICE ON NOTICE.

Compliance with B. & C. Comp. § 549, providing that, when notice has not been given in open court, appellant must, within six months from entry of the judgment, file with the clerk of the court in which the judgment is rendered the notice of appeal, with the proof of service indorsed thereon, is jurisdictional.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2163, 2177; Dec. Dig. § 423.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

2. APPEAL AND ERROR (§ 426*)—NOTICE OF APPEAL—SERVICE BY OFFICER WHO IS APPELLANT.

A sheriff cannot serve the notice of appeal in a case in which he is an appellant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2151; Dec. Dig. § 426.*]

Appeal from Circuit Court, Columbia County; J. U. Campbell, Judge.

Action by James Muckle and another against Columbia County and another. Judgment for plaintiffs, and defendants appeal. Dismissed.

E. B. Tongue and M. E. Miller, for appellants. L. R. Webster and Dillard & Day, for respondents.

EAKIN, J. Judgment was rendered in this cause on July 21, 1909. The notice of appeal therefrom was filed January 21, 1910, but no proof of service was indorsed therein. One of the appellants, Martin White, sheriff, on February 18, 1910, obtained ex parte leave from the lower court permitting him to attach to the notice of appeal the certificate of said Martin White, as sheriff, that he had served the notice on January 21, 1910.

By statute (section 549, B. & O. Comp.) it is provided that, when notice has not been given in open court, appellant must, within six months from the entry of the judgment, file with the clerk of the court in which the judgment is rendered the notice of appeal, with the proof of service indorsed thereon. Compliance with this requirement is jurisdictional. *Briney v. Starr*, 6 Or. 207; *Hennessy v. Wells*, 16 Or. 268, 19 Pac. 121; *Dowell v. Bolt*, 45 Or. 89, 75 Pac. 714; *Rodman v. Manning*, 50 Or. 507, 93 Pac. 366. Neither can the sheriff serve the notice of appeal in a case in which he is a party appellant. *Williams v. Schmidt*, 14 Or. 470, 13 Pac. 305; section 539, B. & C. Comp. Each of these defects is fatal to the appeal.

The appeal is dismissed.

(56 Or. 383)

MEYER v. LIVESLEY et al.

(Supreme Court of Oregon. April 12, 1910.)

1. CONTRACTS (§ 67*)—CONSIDERATION—PRE-EXISTING OBLIGATION.

The doing or promising to do what one is already bound to do is not a consideration sufficient to support a contract, and such existing obligation may be imposed by law independent of contract, or result from a subsisting contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 240; Dec. Dig. § 67.*]

2. MONEY PAID (§ 1*)—PROMISE TO PAY.

Where expenditure was made for the benefit of the person making it, but proved of no benefit to him, but benefited others, who promised to pay for it, the person making the expenditure could recover on the promise.

[Ed. Note.—For other cases, see Money Paid, Cent. Dig. §§ 1-16; Dec. Dig. § 1.*]

On motion for rehearing. Motion denied. For former opinion, see 107 Pac. 476.

EAKIN, J. The motion for a rehearing is urged upon the contention that the expenditure by plaintiff in harvesting, curing, bailing, and storing the hops was the legal duty of plaintiff, and, therefore, cannot constitute a consideration for defendants' promise to pay. It is the general rule, that doing or promising to do what one is already bound to do is not a consideration sufficient to support a contract. This existing obligation may be imposed by law, independent of contract, or result from a subsisting contract. 9 Cyc. 347; Page on Cont. §§ 311, 312.

In this case plaintiff's obligation was not one imposed by law. If it existed at all, it must have arisen out of contract; but it has been adjudicated that there was no contract between plaintiff and defendants, and, therefore, plaintiff owed them no contractual duty. He was held to be a trespasser. Defendants were not seeking to enforce the terms of the lease with Huston, under which they were to receive one-fourth of the crop when harvested, but to secure the whole crop, not under a contract, but against a trespasser. Plaintiff may have been liable to defendants on an undertaking given in the injunction suit; but, if so liable, it was not conditioned for the care and harvesting of the crop, or retaining it subject to the final decree in the suit, but to respond in damages if the injunction was wrongful. And even though much of the expenditure was made in expectation of winning the suit, and, therefore for his own benefit, but from which he derived no benefit, it was beneficial to defendants, and they promised to pay for it, and the promise is within the holding in *Forbis v. Inman*, 23 Or. 68, 31 Pac. 204.

Also the agreement included much more than was contemplated by the lease or due from plaintiff, if defendants were relying upon the lease; viz., it required him to store the whole crop of hops in the hop house and not move them out of Polk county until the decision of the Supreme Court. This was complied with, and was a sufficient consideration for the whole promise.

The motion is denied.

(56 Or. 126)

E. H. MOOREHOUSE & CO. v. WEISTER CO.

(Supreme Court of Oregon. April 12, 1910.)

APPEAL AND ERROR (§ 263*)—RESERVATION OF GROUNDS FOR REVIEW—NECESSITY FOR EXCEPTIONS—INSTRUCTIONS.

The correctness of an instruction cannot be reviewed, where no exception was saved thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1532; Dec. Dig. § 263.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

On petition for rehearing. Former holding overruled, and judgment of the lower court affirmed.

For former opinion, see 107 Pac. 470.

McBRIDE, J. In our former opinion in this case (107 Pac. 470) we held that the judgment should be reversed on account of the giving of the following instruction: "Of course, if you find the goods were so sold as claimed by the plaintiff, it would be your duty to return a verdict or find that the amount due therefor from the defendant to the plaintiff was \$517, as alleged." We held this instruction to be erroneous, in that it assumed the value of the goods to be fixed as a matter of law, when, in fact, such value was one of the disputed questions in the case. Appellant's printed abstract shows that this instruction was excepted to; but, upon comparing the abstract with the transcript on file, we find this to be an error, and that no exception was saved to the particular instruction held by us to be erroneous.

Our former holding is overruled, therefore, and the judgment of the court below is affirmed.

(66 Or. 147)

PORTLAND FISH CO. et al. v. BENSON et al.

(Supreme Court of Oregon. April 12, 1910.)

1. FISH (§ 12*)—STOCKING STREAMS—CLOSING STREAMS—STATUTES.

B. & C. Comp. § 4106, providing that the board of fish commissioners may stock the various streams of the state with salmon and other fish, and, for purpose of protecting the same, may close the streams for an indefinite period, to be determined by them, must be construed in reference to the habits of the fish, relative to which the board acts.

[Ed. Note.—For other cases, see Fish, Dec. Dig. § 12.*]

2. FISH (§ 12*)—SALMON—CLOSED SEASON—PROGATION—STATUTES.

Under B. & C. Comp. § 4106, providing that the board of fish commissioners may stock the streams of the state with salmon, and, to protect the same, close the streams indefinitely, the board stocked a stream with salmon, and closed the stream from March 1st to May 1st. B. & C. Comp. § 4074, as amended by Laws 1903, p. 233, § 7, makes it unlawful to take salmon under 12 inches in length, and its provision for fishing appliances makes it impossible to catch the young fry. By another statute, the stream was closed from March 15th to April 15th of each year. When salmon are about one year old they migrate to the sea, and when four years old they return to the spawning beds and both male and female die after spawning once. The spawning season begins in July and the migratory movement begins as early as February and continues until October. Held, that section 4106, when construed with the habits of the salmon was intended to protect the fish prior to the spawning season, and had no reference to young fry, which were provided for by section 4074, and hence the closed season was reasonable and valid.

[Ed. Note.—For other cases, see Fish, Dec. Dig. § 12.*]

3. FISH (§ 12*)—STOCKING FISH—CLOSED SEASON—NOTICE.

Under B. & C. Comp. § 4106, providing that the board of fish commissioners may stock the various streams of the state with salmon, and, to protect the same, may close the streams indefinitely, and shall publish notice of the closing, and making it unlawful to fish in such stream after such notice until a like notice is published that the stream is open, where the board in closing the stream specifically limits the closed season no opening notice is necessary.

[Ed. Note.—For other cases, see Fish, Dec. Dig. § 12.*]

4. CONSTITUTIONAL LAW (§ 236*)—EQUAL PROTECTION OF LAWS—ORDER OF FISH COMMISSIONERS.

An order of the board of fish commissioners acting under B. & C. Comp. § 4106, closing a portion of a stream which they had stocked with salmon, does not deny the equal protection of the law to fishermen in that portion of the stream because other fishermen in other parts of the stream were not affected, since the order affected all similarly situated.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 236.*]

5. CUSTOMS AND USAGES (§ 8*)—CONTROL OF STATUTE.

Where a custom contravenes the express provisions of a statute, the statute will prevail.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 8-10; Dec. Dig. § 8.*]

6. FISH (§§ 1, 8*)—RIGHTS OF STATE—REGULATION.

The title to the bed of all navigable rivers being in the state, the title to fish before they are captured is in the state in its sovereign capacity, in trust for all its citizens; and the right to fish is subject to such laws as the Legislature may enact tending to protect them from extinction by exhaustive methods of capture.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 1, 16; Dec. Dig. §§ 1, 8.*]

7. INJUNCTION (§ 105*)—CRIMINAL PROSECUTIONS.

Generally, equity will not enjoin criminal prosecutions, even under a void law, where the defendant may have a full and adequate remedy at law, but, where the enforcement of the void law would deprive a party of property rights, its enforcement may be enjoined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. § 105.*]

8. INJUNCTION (§ 85*)—REMEDY AT LAW—VOID ORDER OF FISH COMMISSIONERS.

Where a statute empowering a board of fish commissioners to close a stream after having stocked it is valid, that an order made in pursuance of the statute closing a stream against fishing on penalty of criminal prosecution is irregular in the matter of notice, etc., will not give equity jurisdiction to enjoin the enforcement of the order, since there is an adequate remedy at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Suit by the Portland Fish Company and others against F. W. Benson and others. From a decree dismissing the complaint, plaintiffs appeal. Affirmed.

This is a suit to enjoin the board of fish commissioners from enforcing an order made by it closing to fishing the lower Willametta

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and the Clackamas rivers from March 1 to May 1 of 1910.

The complaint alleges that in the month of January, 1910, the board issued the following order and notice: "Know all men by these presents: That, whereas, the board of fish commissioners of the state of Oregon and the United States Bureau of Fisheries have propagated and stocked and are propagating and stocking the waters of the Willamette and Clackamas rivers and their tributaries, in the state of Oregon, with salmon fish; and whereas, said streams are frequented by salmon fish, and, for the purpose of protecting the same, the said board of fish commissioners has decided to close the said Willamette river and its tributaries below and north of the falls thereof at Oregon City, and all of the Clackamas river and its tributaries, to prevent fishing therein, in any manner whatever, for salmon fish, during the period of time herein specified. Now, therefore, notice is hereby given by said board of fish commissioners that said Willamette river and its tributaries, below and north of the falls thereof at Oregon City, and all of said Clackamas river and its tributaries, are, and each of them is, hereby closed to fishing, in any manner whatever, for salmon fishing, between 12 o'clock noon on the 1st day of March, 1910, and 12 o'clock noon on the 1st day of May, 1910; and it is and will be unlawful to fish for or take or catch any salmon fish in any of said waters during said period of the time above specified. Any and all persons whomsoever so fishing in violation of this notice will be prosecuted as by law provided;" that plaintiffs are engaged in the business of catching fish in such streams for market; that the streams are closed by statute from March 15th to April 15th of each year, but during the remainder of the time included in the order they have had and exercised the right to fish in the streams, and that by immemorial custom such right is a vested right. The order was made under the authority of section 4106, B. & C. Comp., and, so far as important here, reads: "The board of fish commissioners is authorized by this act to propagate and stock the various waters and streams of this state with salmon (and other fishes) * * * and for the purpose of protecting the same they are hereby authorized to close any stream * * * frequented by salmon, or any stream which they have stocked * * * (for that purpose) they shall cause notice thereof to be filed in the office of the county clerk in each county in which such stream * * * lies, and shall publish such notice in some public newspaper * * * for four successive weeks. * * * and shall cause like notices to be published for such time in three conspicuous places on the banks of such stream; * * * and it shall be unlawful at any time after the expiration of the date specified in said notice for any person to fish * * * until notice

shall be filed and likewise published * * * of the opening of such stream * * * for fishing." The proceedings of the board in issuing the notice and in the service thereof are alleged to be irregular, without authority, and void, for the reason, among others, that the order was not authorized by the board at a regular or an adjourned meeting, or at a meeting specially called for that purpose; that the closing of the streams is unnecessary for the protection and guard of the propagation of salmon; that the notice was not served as required by law; that it infringes upon a vested right of plaintiffs and a custom of long standing.

Defendants demurred to the complaint for the reason that it does not state facts sufficient to constitute a cause of suit, and that the court has no jurisdiction of the subject-matter of the suit. The demurrer was sustained, and decree rendered thereon dismissing the complaint. Plaintiffs appeal.

Isham N. Smith, for appellants. A. M. Crawford, for respondents.

BAKIN, J. (after stating the facts as above). Salmon fishing is a very extensive industry in Oregon, and the Legislature has for many years sought to protect that industry by the enactment of various laws, among which is section 4106, B. & C. Comp., above quoted, to the end that the supply of salmon shall not become exhausted, and it must be assumed that, in enacting these laws, the Legislature had in mind the conditions and habits of the various species of salmon, so far as known, and some of these conditions and habits will aid us in construing section 4106, supra, which is the authority for the board's action complained of here. It is asserted by those who have made a special study of salmon and their habits that the young fry do not remain in the fresh water, but soon after they are a year old and while they are yet quite small they migrate to the sea. At probably four years of age they return to the streams for spawning, usually to the one in which they were originally spawned. The movement of the salmon up the stream toward the spawning beds is prompted by the breeding instinct, and begins as early as February and may continue as late as October. And it is established that soon after spawning both males and females die, each individual spawning only once. The spawning season begins usually in July, continuing as late as October, varying according to the species, and the locality of the stream. See Manual of Fish Culture, by Geo. M. Bowers, United States Fish Commissioner; and American Food and Game Fishes, by D. S. Jordan and Barton W. Everman. The question arises, Does the statute authorize the board to close the stream against fishing during a period prior to the spawning season? Plaintiffs contend that it

only authorizes the closing for the protection of the young fish, but such protection is already provided by section 4074 as amended (Laws 1903, p. 233), which makes it unlawful to take or fish for salmon under 12 inches in length, and also the provisions as to fishing appliances make it impossible to catch the young fry while they are in the streams. Neither is protection needed for the spawning fish thereafter, as they are of no value. But the closed season contemplated by section 4106 may be for an indefinite period which may include the whole year, as neither the season nor the length of the closed period are mentioned, but it may be closed indefinitely, as appears from the last clause of the section, which provides for a notice when the board shall declare the stream open to fishing. The statute refers to other fishes as well as salmon, the habits of which are very different from salmon, and the statute must be applied to each according to its habits. The protection of the statute may include, and must have been intended to protect, the run of the fish to the spawning beds which as to salmon is the greater need, and the notice closes the stream for two months during which the fish need protection for the purpose of propagation. And as in this case the closed period is specifically limited no special order or notice of the opening of the stream is necessary.

Plaintiffs contend that the period during which the board has ordered the streams closed is unreasonable, in that the time necessary to protect and guard the propagation and growth of salmon in such streams does not include the time from March 1st to 15th and April 15th to May 1st. This objection is based on the theory that the purpose of this statute is to protect the young fry, but we have concluded otherwise, as they need no additional protection during the first year of their existence as we have already seen. The history of the habits of the fish shows that for their propagation it is imperative that they shall be permitted to proceed up the streams during the earlier months of the year and this is within the protection, as to salmon, contemplated by the Legislature and intended by the board.

Again, it is urged by plaintiffs that the order of the board denies equal protection of the law to plaintiffs in that the notice has the effect to close portions of the stream leaving other portions of it open, but this affects the locality and not the individual; where the stream is open it is open to everybody, and there is no discrimination or spoliation of property. A law that operates only in a limited territory to accomplish a specific purpose does not deny equal protection of the laws, as it affects all persons equally and impartially who are similarly situated. 6 A. & E. Ency. 80. To constitute a law a violation of the fourteenth amendment of the Constitution of the United States, it must be such as dis-

criminate against the individual or a class of persons, and does not apply to all persons similarly situated. 6 A. & E. Ency. 78. Nor can a custom to fish in those streams aid plaintiffs, for when a custom contravenes the express provisions of a statute, the statute will prevail. 12 Cyc. 1054. The title to the bed of all navigable rivers being in the state, the right to fish therein is subject to its control and supervision. *Hume v. Rogue River Packing Co.*, 51 Or. 257, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 885. The title to the fish before they are captured is in the state in its sovereign capacity, in trust for all its citizens, and the right to fish is subject to such laws as the Legislature may enact tending to protect them from extinction by exhaustive methods of capture. This question is settled by the opinion of Mr. Justice Moore in *State v. Hume*, 52 Or. 1, 95 Pac. 808, in which he says: "It is a generally recognized principle that migratory fish in the navigable waters of a state, like game within its borders, are classed as animals *feræ naturæ*, the title to which, so far as that claim is capable of being asserted before possession is obtained, is held by the state in its sovereign capacity in trust for all its citizens; and, as an incident of the assumed ownership, the legislative assembly may enact such laws as tend to protect the species from injury by human means and from extinction by exhaustive methods of capture." See, also, *In re Deinger* (C. C.) 108 Fed. 623.

The defendants contend that plaintiffs have a complete remedy at law, and therefore equity will not entertain a suit to enjoin the enforcement of the order of the board, while plaintiffs insist that equity will entertain jurisdiction where property rights will be destroyed and criminal proceedings instituted under a void law, and that the facts in this case are within that rule. It is a general rule that equity will not enjoin criminal prosecutions, even under a void law, when the defendant may have a full and adequate remedy at law. *High on Injunction*, § 1244; *Spelling on Extra. Rel.* § 24; *Thompson v. Tucker*, 15 Okl. 436, 83 Pac. 413. See note to this case in 6 Am. & Eng. Ann. Cas. 1012. But the enforcement of a void law or a proceeding *ultra vires*, whether it is attempted to be enforced by criminal prosecution or otherwise, which, if enforced, would deprive a party of a property right, may be enjoined. This distinction is well stated in *High on Injunction*, at section 68: "So equity will not interfere by injunction to restrain municipal officers from the prosecution of suits for the violation of city ordinances, such proceedings being of a quasi criminal nature, since equity will not interfere with the execution of the criminal law, whether pertaining to the state at large or to municipalities. * * * If, however, the act concerning which an arrest or criminal prosecution is threatened affects civil property and its enjoyment, in

protecting the property right, equity may properly enjoin the criminal prosecution. But in such case its interference is founded solely upon the ground of injury to property and the necessity of preserving property rights." See, also, *L'Hote v. City of New Orleans*, 51 La. Ann. 93, 24 South. 608, 44 L. R. A. 90. To the same effect is *New Orleans Baseball, etc., Co. v. New Orleans*, 118 La. 228, 42 South. 784, 8 L. R. A. (N. S.) 1014, 118 Am. St. Rep. 366, reported in 10 Am. & Eng. Ann. Cases, in the note to which, at page 760, it is stated: "The reported case lays down the well-settled rule that when penal ordinances injuriously affect existing property rights, their legality or constitutionality may be inquired into by a court of equity, and their execution enjoined in a proper case"—where many cases are cited. It is said in *Bryan v. Birmingham*, 154 Ala. 447, 45 South. 922: "The jurisdiction of equity is purely and exclusively civil, and such courts are without power to enjoin or restrain threatened crimes or threatened prosecutions, and this rule applies to prosecutions under municipal ordinances as well as state laws." To the same effect is *High on Injunc. § 1326*; and Mr. Justice Moore makes the same distinction in *Sandys v. Williams*, 46 Or. 327, 80 Pac. 642, and in *Hall v. Dunn*, 52 Or. 480, 97 Pac. 811. It is stated in *Spelling on Extra. Rel. § 611*, that it is well settled that injunction will not issue to prevent officers from doing acts authorized by valid laws. *High on Injunc. § 1309*.

In the case before us the statute is valid, and the order of the board was made in conformity with the power conferred, and therefore was not an infringement of a civil right of plaintiffs. They have no right to fish for salmon during the period during which fishing is forbidden by the order and notice, and whether they are criminally liable for a violation of the order, by reason of the insufficiency of the service of the notice, equity will not entertain jurisdiction to determine, the remedy being complete at law. This same principle is recognized in tax-sale cases. It is only when the tax is void for jurisdictional defects that equity will interfere. *Welch v. Clatsop Co.*, 24 Or. 452, 33 Pac. 934. It is said in *Albany & Boston Mining Co. v. Auditor General et al.*, 87 Mich. 391: "Equity will not interfere to restrain the collection of the public revenue for mere irregularities."

Our attention is called to the case of *In re Fish Seizure*, 5 Ohio Dec. 553. The questions involved in that case only relate to the confiscation of property for violation of the statute, and has no bearing upon the validity of the statute involved here, providing for the protection of the fish or the authority of the board to make the order complained of.

Therefore the complaint is insufficient to give the court jurisdiction, and the decree of the lower court is affirmed.

(58 Or. 117)

TALBOT v. W. K. SMITH SECURITY SAVINGS & TRUST CO. et al.

(Supreme Court of Oregon. April 12, 1910.)

BOUNDARIES (§ 54*) — ESTABLISHMENT — SURVEY.

Where there is conveyed, out of a larger tract of the grantor, a specific quantity of land by metes and bounds, leaving nothing indefinite or uncertain, the grantor can defeat a boundary as fixed thereby, by reason of a subsequent erroneous survey and the consequent setting of stakes inconsistent with the description in the deed, only by showing the grantee has lost part of the conveyed land by some means known to the law, such as an agreement within the statute of frauds, settlement of a disputed boundary, or adverse possession.

[Ed. Note.—For other cases, see *Boundaries*. Dec. Dig. § 54.*]

On motion for rehearing. Denied.

For former opinion, see 107 Pac. 480.

EAKIN, J. By the motion it is suggested that the court is in error in stating that it may be taken as conceded that the descriptions in the deeds include the ground claimed by plaintiff. That the 160 rods south from the north line of the claim, which the deeds designate as the south line of the Watson and Beal tracts, extends to the south line of the land claimed by plaintiff, there is certainly not one word of controversy. Not a witness was called to show where the courses and distances of the descriptions in the deeds would locate the south line of these tracts, and as the donation claim is just a mile square, it must be on the middle line of the claim, and there would be no room for controversy here if such measurements do not extend south of the north line of the tract plaintiff is contending for. Defendants only claim the ground described in their deeds.

Again, it is suggested that Miss Talbot fixes the time of the Henry survey as the time of the sale to Watson. Miss Talbot testified on May 22, 1907, that, "I was 54 years old day before yesterday." The Watson deed was made November 23, 1856, so that she was just 3½ years old at that time. Her recollection now of the time and circumstances of a survey made when she was 3½ years old can hardly be depended on to determine whether it was made before or after the execution of the deed to Watson, for the purpose of contradicting or controlling the description contained in the deed. However, she testified that the survey was made in 1858, but if she meant 1856 yet she says the survey followed the making of the deed to Watson. Therefore the description in the deed has no reference to that survey or its stakes, and such stakes did not become monuments in any manner affecting the description in the deed. Counsel for plaintiff say that her contention is for the location, on the ground, of a line 160 rods south of the north boundary of the Talbot claim, as located at the time of the

deed, evidently meaning the Henry survey. But that survey was not made at the time of the execution of the deed. However, plaintiff is entitled to have the line located 160 rods south of the north line of the claim. To defeat the descriptions in the deeds, plaintiff also urges that the fence line or a stake set by some one has been acquiesced in for a long time, and should control. But there never was any dispute as to where the line should be; nor was there any circumstance to call for a settlement of a dispute. Legal agreements as to disputed boundaries are based upon the fact that the true line is not only in dispute, but to some extent undefined and unknown. *Lennox v. Hendricks*, 11 Or. 33, 4 Pac. 515. Here there was no dispute, no indefiniteness or uncertainty; nor was there a settlement of a pretended dispute. On the contrary, the grantors conveyed, out of a larger tract, a specific quantity of land by metes and bounds, leaving nothing indefinite or uncertain. And the grantor or his heir now seeks to dispute the description, not by reason of a mistake, but because, by erroneous surveys, stakes were set inconsistent with that description. She can only do this by showing that the grantee has lost part of the land conveyed to him by some means known to the law; such as an agreement within the statute of frauds, settlement of a disputed boundary or adverse possession, none of which has been shown in this case.

As to the description in the deed by Watson to Beal, the point of beginning is: "A stake or corner" identified by courses and distances, but plaintiff is not relying upon this stake or corner, nor is it shown to be a monument controlling the measurements. The description places the south line 160 rods south of the north line of the claim, and "to contain just 20 acres no more and no less." The description in the deed from Talbot to Beal commences at a "stake or corner" which is 160 rods south of the north line of the claim, "said stake, corner or beginning place, being the southeast corner of a tract of land sold by the above parties to W. P. Watson," "to contain just 10 acres no more or less." There can be no doubt as to the meaning of these descriptions; they being specific as to lines and quantity of land conveyed, and the purpose being to make the south line of both tracts conform to the south line of the original Watson tract. No monument is mentioned as a controlling or permanent one. It is said in *Hale v. Cottle*, 21 Or. 580, 586, 28 Pac. 901, 902: "If it appear from the face of the conveyance, in the light of surrounding circumstances, that the courses and distances as given correctly describe the land intended to be conveyed, they will of course prevail," regardless of the monuments mentioned.

The motion is denied.

(56 Or. 157)

TAYLOR SANDS FISHING CO. v. BENSON et al., State Land Board.

(Supreme Court of Oregon. April 12, 1910.)

1. NAVIGABLE WATERS (§ 37*)—ISLANDS—BED OF STREAM.

Under Act Feb. 14, 1859, c. 33, § 11 Stat. 383, conferring on the state of Oregon on its admission ownership of all that part of the Columbia river lying south of the north boundary of the state, the state, subject to the paramount right of navigation, had power by statute to convey all the islands in the river, or any land forming a part of the bed thereof.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 203; Dec. Dig. § 37.*]

2. NAVIGABLE WATERS (§ 36*)—"HIGH-WATER MARK."

The term "high-water mark" with reference to tide lands is the line on the shore which is reached by the limit of the flux of the usual tide.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 186; Dec. Dig. § 36.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3289-3290.]

3. NAVIGABLE WATERS (§ 37*)—"TIDE LANDS"—ISLANDS.

Plaintiff sued to restrain the State Land Board from leasing certain tide lands, and alleged that plaintiff was engaged in fishing for salmon in the Columbia river, which were hauled upon the shore of tide lands described, of which plaintiff was the owner by means conveyances from the state, and also of the accretions thereto, that a survey had been made of an imperceptible accumulation of land by natural causes in front of plaintiff's land, and that T. had applied to the board for a lease thereof, which, if granted, would prevent plaintiff from pursuing its business. Plaintiff, though alleging that the lands in controversy were covered by water to a depth of four to six feet for a large part of the day, also charged that the land lay between ordinary high and low tide in the river. *Held*, that the land could reasonably be inferred to be tide lands, part of an island, within Laws 1907, p. 206, providing that no accretions to islands previously sold by the state should be leased, and that no tide or overflowed lands except those connected with the shore should be sold until 10 years after the approval of the act.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 203; Dec. Dig. § 37.*]

For other definitions, see *Words and Phrases*, vol. 8, p. 6970.]

4. NAVIGABLE WATERS (§ 44*)—TIDE LANDS—SALE—ACCRETIONS.

Where tide lands bordering on a navigable river are purchased from the state to obtain places on which to draw seines into shallow water, the law of accretions applies, and the state thereafter has no authority to lease land forming by accretion further out in the river, the effect of which would be to destroy the rights of the grantees of the lands to which that leased was added by accretion.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 276; Dec. Dig. § 44.*]

5. INJUNCTION (§ 74*)—SCOPE OF REMEDY—ACTS OF STATE OFFICERS.

Where public officers under color and claim of right are proceeding to impair either public or private rights, or when their proceeding will result in injury to private citizens without any corresponding benefit to the public, or when the aid of equity is necessary to prevent a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

multiplicity of suits, an injunction will be allowed against them.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 142; Dec. Dig. § 74.*]

Appeal from Circuit Court, Marion County; William Galloway, Judge.

Suit by the Taylor Sands Fishing Company against F. W. Benson and another, constituting the Oregon State Land Board. From a decree of dismissal, plaintiff appeals. Reversed and remanded.

This is a suit to enjoin the leasing of real property. The material averments of the complaint are to the effect that the plaintiff, the Taylor Sands Fishing Company, is a corporation, and the defendants, F. W. Benson and George A. Steel, the former being Governor and Secretary of State and the latter the State Treasurer of Oregon, constitute, by virtue of their respective offices, the State Land Board; that plaintiff is engaged in fishing for salmon in the Columbia river with seines, which are hauled to the shore of certain tide lands in Clatsop county, particularly describing the premises; that plaintiff is the owner, by mesne conveyances from the state of Oregon, of these lands and also of the accretions thereto; that M. Troyer caused a survey to be made of such imperceptible accumulation of land by natural causes, and thereupon applied to the State Land Board for a lease thereof; that the defendants, unless restrained, will demise the same to him and his associates, who will operate seines thereon and prevent plaintiff from pursuing its business; that the lease will cast a cloud on its title, and cause a multiplicity of suits; and that it has no plain, speedy, or adequate remedy at law for the redress of its grievances. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of suit, was sustained, a temporary restraining order which had been granted set aside, and the suit dismissed, from which decree the plaintiff appeals.

B. E. Coovert and C. A. Bell, for appellant. A. M. Crawford and George G. Bingham, for respondents.

MOORE, C. J. (after stating the facts as above). The adequacy of the complaint being the question to be considered, its averments will be examined. It is alleged that on April 26, 1902, plaintiff's grantor purchased from the state of Oregon the tide lands described. The statute then in force contained a clause as follows: "The State Land Board is hereby authorized to sell tide lands, tide flats not connected with the shore, and all lands held by the state by virtue of her sovereignty." B. & C. Comp. § 3301. This section was enacted in 1899, probably in consequence of the decision in *Elliott v. Stewart*, 15 Or. 259, 14 Pac. 418, in which case it was held that un-

der the prior law, providing for the disposal of state lands, no authority had been conferred to convey the title to sand bars in the Columbia river not connected with the shore. Oregon, on its admission to the Union, February 14, 1859, became the owner of all that part of the Columbia river, a navigable stream, lying south of the north boundary of the state. Act Feb. 14, 1859, c. 33, 11 Stat. 383. Subject to the paramount right of navigation, Oregon when it was thereafter empowered by enactment could, by its constituted agents, convey any of the islands in that river or any land forming a part of its bed. *Bolsa Land Co. v. Burdick*, 151 Cal. 254, 90 Pac. 532, 12 L. R. A. (N. S.) 275; *Illinois C. R. R. Co. v. Illinois*, 146 U. S. 387, 435, 13 Sup. Ct. 110, 36 L. Ed. 1018. By the clause of the statute hereinbefore set forth, the plaintiff, as the grantee of the state by mesne conveyances, became possessed of an estate in fee simple in the tide lands described in the complaint, if the averments of that pleading are true as confessed by the demurrer. *State v. Portland Gen. Elec. Co.*, 52 Or. 502, 95 Pac. 722, 98 Pac. 160.

The title being thus vested, the remaining questions to be considered are whether or not the area of the premises can be augmented by accretions, and, if so, can the defendants, who are officers of the state, be enjoined from leasing such gradual accumulations of the soil. Chapters 2 and 3, tit. 32 (B. & C. Comp.), which included section 3301, supra, were repealed, and another act adopted in lieu thereof. Laws Or. 1907, c. 117. The substituted enactment authorizes the sale or leasing of tide and overflowed lands, and contains a clause as follows: "And it is further provided, no accretions to islands heretofore sold by the state shall be leased and that no tide or overflowed lands, excepting those connected with the shore, shall be sold until ten years after the approval of this act." Section 19. The defendants' counsel, invoking an allegation of the complaint that the tide lands therein described are covered by water to a depth of four to six feet for a large part of each day, insist that the premises are not part of an island, but are a shoal, and, such being the case, the land so designated by metes and bounds cannot be enlarged by accretions. This averment should be construed in connection with another allegation of the plaintiff's pleading, to the effect that it is the owner of all the tide lands so mentioned which are "lying between ordinary high and low tide line in the Columbia river." The common high-water mark, occurring in places where the alternate rising and falling of the ocean and of bays and rivers affected by it twice in each lunar day, means a line on the shore which is reached by the limit of the flux of the usual tide. Interpreting in pari materia such clauses, it is reasonably to be inferred therefrom that the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tide lands mentioned are a part of an island.

If, however, it should subsequently appear from testimony to be given that such lands constitute a sand bar which is wholly covered by water at each high tide, we do not think the overflow of the premises would render them incapable of enlargement by accretions; for, as was said by Mr. Justice Burch in *Fowler v. Wood*, 73 Kan. 511, 549, 85 Pac. 763, 776 (6 L. R. A. [N. S.] 162, 117 Am. St. Rep. 534): "It is not necessary to give a formation on the bed of a river a specific name in order that proprietary rights may attach to it. In many states lands totally or partially submerged are made the subject of grant by the sovereign in order that they may be reclaimed for useful purposes. Islands that arise from the beds of streams usually first present themselves as bars.

* * * Before it will support vegetation of any kind a bar may become valuable for fishing, for hunting, as a shooting park, for the harvest of ice, for pumping sand, and for many other well-recognized objects of human interest and industry. If further deposits of alluvion upon the borders would make it more valuable, no reason is apparent why the law of accretion should not apply." When tide lands bordering on a river are purchased from the state for the purpose of obtaining places on which to draw seines into shallow water, so as to take the fish inclosed in these large nets, valuable rights are thus secured; and, if the law of accretions is not applicable to such premises they would soon become worthless to their legal owners, for in every river of moderate flow the current carries sediment which, lodging below obstructions, extends the banks further into the stream. If it were conceded that imperceptible accumulations of soil by natural causes were not a part of such tide lands, it would necessarily follow that each addi-

tion thereto of earthy matter would belong to Oregon, and, notwithstanding a prior lease of the alluvion, for the purpose of fishing, had been consummated and the term unexpired, the state could let the accretions which always border the stream, thereby rendering valueless the prior disposal, and making a lease for a specific term a tenancy at the will of the lessor. As the consequences supposed would be so disastrous to all tenants but the last, we think reason supports the assertion that the plaintiff is entitled to the accretions, if any have been made, to its tide lands. *Hume v. Rogue River Packing Co.*, 51 Or. 237, 243, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865.

If the defendants, as members of the State Land Board, are unlawfully interfering with the private rights of the plaintiff, equity will intervene, and prevent by injunction a continuance of the injury. *High, Inj.* (4th Ed.) § 1308. This author, at the section noted, says: "And it may be stated, as a general rule, that when public officers, under color and claim of right, are proceeding to impair either public or private rights, or when their proceeding will result in serious injury to private citizens, without any corresponding benefit to the public, or when the aid of equity is necessary to prevent a multiplicity of suits, an injunction will be allowed." As analogous to the principle thus announced, see *Dunn v. State University*, 9 Or. 357, 362; and *Salem Mills Co. v. Lord*, 42 Or. 82, 90, 69 Pac. 1033, 70 Pac. 832.

We think the complaint makes out a *prima facie* case against the defendants, and, this being so, the decree is reversed, the demurrer overruled, the temporary injunction restored, subject to the order of the trial court, and the cause remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

(56 Or. 183)

CASTEL et al. v. KLAMATH COUNTY et al. (Supreme Court of Oregon. April 19, 1910.) INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTION—CONTEST—WRIT OF REVIEW—INTERESTED PARTY—RECORD.

A writ of review to re-examine the action of the county court in making an order declaring the result of a county election regarding the prohibition of the sale of intoxicating liquors was properly dismissed, where the record showed that petitioners were not parties to the proceedings, nor appearing in the county court and resisting the order, and were, hence, no more interested than other citizens.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 37.*]

Appeal from Circuit Court, Klamath County; Henry L. Benson, Judge.

Petition by A. Castel and another for writ of review against Klamath County, J. B. Griffith, County Judge, and others. From the judgment, plaintiffs appeal. Affirmed.

F. H. Mills, for appellants. D. V. Kuykendall, for respondents.

MOORE, C. J. This is an appeal by the plaintiffs, A. Castel and Kent Ballard, from a judgment dismissing a special proceeding instituted to re-examine the action of the defendants, Klamath County, J. B. Griffith, as county judge, and Fred Melhase and Albert Walker, as county commissioners, constituting the county court, in making an order declaring the result of a county election held June 1, 1908, to determine whether or not the sale of intoxicating liquors as a beverage should be interdicted, and absolutely prohibiting the sale thereof within the prescribed limits, except for medicinal and other purposes allowed by statute.

The plaintiffs, as petitioners in the application for a writ of review, severally allege that he is a citizen taxpayer, and qualified elector of the city of Klamath Falls, in that county; that Castel is operating in that city a brewery, in which business he has invested about \$10,000; that Ballard, pursuant to lawful authority, is engaged in conducting therein a licensed saloon; and that in consequence of the order complained of the plaintiffs have been deprived of valuable property rights without an opportunity of being heard respecting their several injuries in a court of competent jurisdiction. An examination of the transcript fails to show that either of the plaintiffs appeared, in person or by counsel, in the county court of Klamath county during the consideration of the matter in question, or in any manner resisted the order, the making of which they seek to review. So far as appears from the return, which was made pursuant to the writ, neither Castel nor Ballard was a party to the proceedings, and hence no more interested therein than any other citizen or taxpayer of the county, and for that reason is not entitled to a determination of his

rights. Raper v. Dunn, 53 Or. 203, 99 Pac. 889; Garrison v. Richardson, 101 Pac. 900.

Other objections are urged against the order of prohibition, on the ground that it is void. It is sufficient to say, however, that since this appeal was taken and perfected each question now presented has been determined adversely to the plaintiffs' contentions.

It follows that the judgment should be affirmed, and it is so ordered.

(56 Or. 368)

BURNS v. WITTER et ux.

(Supreme Court of Oregon. April 19, 1910.)

1. VENDOR AND PURCHASER (§ 22*)—CONTRACTS—DESCRIPTION OF PROPERTY.

A failure to specify in the memorandum of the original contract the place where it was executed ought not, and the omission from the writing of the township, range, county, and state, will not, render nugatory the contract, if the description given can without alteration be applied to a particular tract, so that the court can say from extrinsic evidence that the minds of the parties met and agreed on the identity of the distinct piece of land intended to be the subject-matter of their negotiations.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 27; Dec. Dig. § 22.*]

2. VENDOR AND PURCHASER (§ 22*)—CONTRACTS—DESCRIPTION OF PROPERTY—SUFFICIENCY.

If on its face a memorandum for the sale of realty contained such a specification of real property, that, by the aid of parol testimony, the description given can apply to only one particular tract of land, it is sufficient, but if it appears from extrinsic evidence that the description can refer to more than one parcel, the ambiguity is patent and the instrument is void for uncertainty.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 27; Dec. Dig. § 22.*]

3. EVIDENCE (§ 461*)—PAROL EVIDENCE—LAND CONTRACTS.

In construing a land contract, the terms of which are uncertain, it is the duty of a court to take into consideration all the incidents surrounding the consummation of the agreement, for which purpose parol testimony is admissible, not to vary the stipulations there expressed, but to assume the positions occupied by the respective parties, when it appears that they were of one mind concerning a writing, which purports to have expressed what was their serious contemplation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.*]

4. VENDOR AND PURCHASER (§ 128*)—LAND CONTRACTS—ESTATE TO BE CONVEYED.

A contract to sell realty imports, in the absence of any stipulation respecting the matter, an agreement to convey a title to the premises in fee simple.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 234-237; Dec. Dig. § 128.*]

5. VENDOR AND PURCHASER (§ 59*)—CONTRACTS—CONSTRUCTION—PARTIES.

A contract which recites that it has been entered into with a designated person for the sale of land, creates an inference that he is the purchaser thereof.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 90; Dec. Dig. § 59.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. SPECIFIC PERFORMANCE (§ 114*) — LAND CONTRACTS — DESCRIPTION OF PROPERTY — PLEADING.

A complaint for specific performance which sets out a memorandum of a land contract, reciting that the seller bargained and sold his farm containing 40 acres, no section, township, range, county, or state being specified, nor any town, village, or city designated as being the place where the contract was consummated, and which alleged the correct description bargained for, is not demurrable because of uncertainty of description, since it may be shown by extrinsic evidence that there was only one tract of land to which the description given could apply, in which case the memorandum would be good.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-372; Dec. Dig. § 114.*]

Appeal from Circuit Court, Multnomah County; John B. Cleland, Judge.

Suit by James Burns against C. G. Witter and wife. From a judgment sustaining a demurrer and dismissing the suit, complainant appeals. Demurrer overruled, and cause remanded.

This is a suit to enforce the specific performance of the following contract: "This agreement, made between Charles Witter and James Burns, July 19th, 1906, certifies that I have this day bargained to sell my farm containing 40 acres in consideration of \$3,000, \$100 of which is paid to bind said bargain, the remaining \$2,900 to be paid Dec. 1st, at which time I give full possession. C. G. Witter. Mrs. C. G. Witter."

It is alleged in the complaint that at all the times stated therein the defendants were husband and wife and in possession of the S. $\frac{1}{4}$ of the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 5, in township 1 S. of range 4 E. of the Willamette Meridian in Multnomah county, Or., containing 40 acres, designated as their farm, but owned by the husband, and the only piece of real property that he, she, or they owned, claimed, or occupied; that on July 19, 1906, the parties hereto entered into the agreement mentioned, stipulating that the remainder of the consideration for the land should be paid December 1, 1906, at which time the plaintiff tendered to the defendants \$2,900 and demanded of them possession of the premises, but they refused to comply therewith, and now decline to carry out their part of the agreement; and that before the commencement of this suit the sum of money specified was deposited with the clerk of the lower court for them. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of suit, was sustained, and the suit dismissed, from which decree the plaintiff appeals.

Virgil A. Crum and George S. Shepherd, for appellant. John C. Shillock, for respondents.

MOORE, C. J. (after stating the facts as above). Though the demurrer challenges the

entire complaint, the principal part assailed is the contract, a copy of which is set forth therein. An examination of the agreement will show that in attempting to describe the premises, no section, township, range, county, or state is specified, nor is any town, village, or city designated as being the place where the contract was consummated.

In *Bogard v. Barhan*, 52 Or. 121, 125, 96 Pac. 673, 674, the locality where the memorandum purported to have been executed was held to be the vicinity in which the land intended to be conveyed was situate. In deciding that case, Mr. Justice Eakin says: "The contract is dated at Woodburn, Oregon, and in the light of that fact, and that all the other property is referred to as at Woodburn, the designation of 'his 5-acre residence property lying west of the Catholic Church,' and 'party of the second part is to occupy his residence property until September 30,' clearly indicates that it is the property in which he was residing in that vicinity, and by extrinsic evidence its location and boundaries may be easily ascertained. At any rate, on the face of the agreement, it is sufficiently definite for identification." In *Mead v. Parker*, 115 Mass. 413, 414, 20 Am. Rep. 110, the court, referring to a similar memorandum, says: "In the present case the writing bears date at Boston; which might indicate that the property was in Boston. But that is an inference of fact, not conclusive." To the same effect is the case of *Pelletreau v. Brennan*, 113 App. Div. 806, 99 N. Y. Supp. 955, 956, where it is said: "As the parties were dealing in the city of New York, the legal inference is that the contract refers to land there."

A failure to specify in the memorandum the place where it was executed ought not, and the omission from the writing of the township, range, county, and state will not, render nugatory an instrument relating to real property if the description given can, without alteration, be applied to a particular tract, so that the court can say, from extrinsic evidence, that the minds of the parties met and agreed upon the identity of the distinct piece of land intended to be the subject-matter of their negotiations. 13 Cyc. 549; *McCullough v. Olds*, 108 Cal. 529, 532, 41 Pac. 420; *Lloyd v. Bunce*, 41 Iowa, 660; *Garden City Sand Co. v. Miller*, 157 Ill. 225, 233, 41 N. E. 753. If, on its face, the memorandum contain such a specification of real property that by the aid of parol testimony the description given can apply to only one particular tract of land, it is sufficient; but if it appear, from extrinsic evidence, that the delineation set forth can refer to more than one parcel, the ambiguity is patent and the instrument void for uncertainty. *Brandon v. Leddy*, 67 Cal. 43, 7 Pac. 33.

In construing a land contract, the terms of which are uncertain, it is the duty of a court

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to take into consideration all the incidents surrounding the consummation of the agreement, for which purpose parol testimony is admissible, not to vary the stipulations there expressed, but, as it were, to assume the positions occupied by the respective parties when it appears that they were of one mind concerning a writing which purports to have expressed what was their serious contemplation. *Devlin on Deeds*, § 1012; *Pomeroy, Contracts*, § 90. As illustrating this rule, *Mr. Justice Wells*, in *Mead v. Parker*, 115 Mass. 413, 415, 20 Am. Rep. 110, says: "When all the circumstances of possession, ownership, situation of the parties, and of their relation to each other and to the property, as they were when the negotiations took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement. That parol evidence is competent to furnish these means of interpreting and applying written agreements is settled by the uniform current of authorities." It will be remembered that the complaint sets forth the situation of the defendants with reference to "my farm containing 40 acres" at the time the memorandum was executed, and alleges the incidents relating to the premises particularly described in the pleading, so that it is reasonably to be inferred that the specification given in the contract could not apply to any other piece of real property. These averments are sufficient to admit extrinsic evidence to substantiate the facts thus detailed. A contract to sell real property imports, in the absence of any stipulation respecting the matter, an agreement to convey a title to the premises in fee simple. *Hughes v. Parker*, 8 Mees. & W. 244, 247. So, too, a contract which recites that it has been entered into with a designated person for the sale of land, creates an inference that he is the purchaser thereof.

The allegations of the complaint are sufficient to present for consideration the remaining question as to whether or not the memorandum subscribed by the defendants contains such a description of the land that a court can say from parol testimony to be introduced, so as to apply the specification to a part of the earth's surface, that the parties were negotiating for the respective purchase, and the sale and conveyance of a particular tract which can be identified. "A 'farm,'" says a text-writer, "may be defined by parol evidence showing what lands, house, and buildings have been used and known as constituting the farm." *Jones, Real Prop.* § 345. This author, in the following section, observes: "Land described as 'my residence,' 'my homestead,' 'my place,' 'my lot,' may be identified by parol evidence if necessary." Thus in *Lick v. O'Donnell*, 3 Cal. 59, 58 Am.

Dec. 383, it was held that a deed for "one-half of my lot," accompanied by proof that the grantor owned at the time but one lot in the place, was not void for uncertainty in the description.

In *Lente v. Clarke*, Adm'x, 22 Fla. 515, 519, 520, 1 South. 149, 151, the following memorandum was held to be sufficient, to wit: "Dec. 18, 1883. I agree to make good titles in fee to my forty near the Garrison lands in Hernando county to Wm. K. Lente. Consideration, \$75. Received. Thomas W. Clarke. Witness, M. P. O'Neal"—the court saying: "The rule is that the contract or memorandum must identify or point out a special tract of land as within the minds of the parties, and intended to be conveyed. It must so describe the land as it can be found, or located, or in other words, there must be such a description as can be applied to a particular piece of land as the subject of the contract. A detailed description is not necessary. Where the description shows that a particular tract as distinguished from other lands is meant, then parol evidence can be resorted to to apply the description, or identify, or locate the land, though the description be somewhat general. However precise the description, a resort to parol evidence for such purpose is always necessary to apply it, or ascertain the land described. This is not adding anything to the terms of the agreement or memorandum, and consequently not a violation of the statute."

In *Colerick v. Hooper*, 3 Ind. 316, 56 Am. Dec. 505, the memorandum was as follows: "I have this day sold my lot to Alexis Coquillard on the plat in the town of South Bend, on the plat of said town on the river bank. I have received value and will make the deed as soon as convenient. August 11, 1835. D. H. Colerick. Attest: H. R. Colerick." In a suit to enforce the specific performance of the agreement the court held that the relief prayed for should be granted, saying: "The bill, in this case, avers that Colerick had, at the date of said agreement, one lot, and but one, in said town, and that it was lot No. 94, for which a conveyance was sought in this suit. We think the bill sustainable." The principle thus announced was followed in the case of *Torr v. Torr*, 20 Ind. 118, where the description was: "All my interest in a certain tract of land"—setting forth the section, township, county, and state, but omitting the range. In *Andrews v. Pearson*, 68 Me. 19, 20, the court says: "Freeman Allen was the owner of a farm of ancient and well-defined boundaries. He undertook to convey it to the plaintiff. He first described it as his 'homestead farm.' He then undertook to give a further description of it by naming the several parcels or lots of which it was composed. One of them is described as 'twelve and a half acres out of a lot numbered eight in the first range.' This portion of the farm in fact contained twenty-five acres"—and it was

held that the larger tract was granted by deed.

In *Locke v. Rowell*, 47 N. H. 46, 51, a memorandum signed by Sarah A. Locke stating, "that I have rented my farm," it was held that the clause quoted was sufficiently definite to allow the admission of extrinsic evidence to apply the description to the place, the court saying: "As to the question that verbal testimony was admitted by the court to show what farm she rented—the term 'farm,' or 'homestead farm,' is ambiguous. What is meant by such expressions may be shown by parol evidence."

In *Waring v. Ayres*, 40 N. Y. 357, 361, Mr. Justice Woodruff, referring to a memorandum, says: "The description is, 'Two lots owned by me in 116th street, New York, between 8th and 9th avenues, said lots being twenty-five feet front by about seventy-five feet deep.' Now, if no other lots will answer that description, there is no want of certainty in respect to the subject, i. e., the property to be conveyed." It was held in that case that parol evidence was admissible to identify the lots so owned at the place specified.

In *Barry v. Coombe*, 1 Pet. 640, 651, 7 L. Ed. 295, the court, referring to the description in a writing, says: "The words are, 'by my purchase of your ½ E. B. wharf and premises, this day, as agreed on between us, \$7,578.63.' Brief as it is, this memorandum contains a condensed summary of all the essentials to a complete contract." It was accordingly held that extrinsic evidence was properly received to explain the terms employed and to apply the description to the premises.

In *Crotty v. Effler*, 60 W. Va. 258, 54 S. E. 345, the memorandum which formed the basis of a suit for specific performance was as follows: "Received of Julia Crotty One Hundred Dollars \$100 in cash as first payment one a pice of Land that I have sole to her this day for one hundred dollars per acre. It being a pice of land sole to John Effler by the Welch improvement 5 acres more or less and that joins the Crotty land and the balance of the (bal. of the money \$100 per acre is to be paid when it is surveyed & deed maid to the said Crotty Feb. 5, 1903. Barbara Effler." In construing this description it was held not void for uncertainty. Mr. Justice Cox saying: "Although the state, county, and district may be omitted from the description, it is essential that the land agreed to be sold be so described as to be capable of being distinguished from other land. It is not necessary that the contract should contain such a description as, without the aid of extrinsic testimony, to ascertain precisely what was agreed to be sold."

The memorandum in the case at bar is, in our opinion, susceptible of explanation, in

order to apply the description therein contained to the land particularly described in the complaint, and this being so an error was committed in dismissing the suit. The decree will therefore be reversed, the demurrer overruled, and the cause remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

(56 Or. 163)

STATE v. MCGINNIS.

(Supreme Court of Oregon. April 12, 1910.)

1. STATUTES (§ 104*) — DISORDERLY HOUSE (§ 16*)—REPEAL—RE-ENACTMENT—"COMMON FAME."

B. & C. Comp. § 1932, punishes, upon conviction, one who shall keep a house of ill fame for purposes of lewdness, etc., and section 1933 provides that in all prosecutions under the preceding section "common fame" shall be competent evidence under the indictment. Laws 1905, c. 211, amended section 1932 so as to read as follows: "Any person who shall keep or permit to be kept, either in a house, boat, etc., a house of ill fame for the purpose of lewdness, etc., in any house, etc., or other place of which he is the owner, lessee, etc., shall be guilty of a misdemeanor and punished." Held that, where a statute is amended "so as to read," the amended section is not considered to have been repealed and re-enacted, but, in absence of a clear provision to the contrary, only the additions to the original statute are considered as a new enactment, and, as the provisions of the original section 1932 were substantially carried into the amended section, the original section remained in force after the amendment, so that section 1933 applied thereto, and hence, in a prosecution for keeping a house of ill fame, "common fame," which serves to establish a character either of a person or thing, was competent evidence to show whether the house was habitually used for purposes of prostitution (citing 3 Words and Phrases, 2672).

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 239; Dec. Dig. § 164; * Disorderly House, Cent. Dig. § 22; Dec. Dig. § 16.*]

2. CRIMINAL LAW (§ 398*)—EVIDENCE—BEST EVIDENCE.

The best evidence obtainable must be produced to prove a fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 879; Dec. Dig. § 398.*]

3. CRIMINAL LAW (§ 421*) — HEARSAY — REPUTE AS TO FACT—POSSESSION OF LAND.

While, as a rule, in absence of statute, ownership or possession of land cannot be proved by general reputation, hearsay evidence is admissible to establish possession where by reason of antiquity proof by living witnesses is impossible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 976; Dec. Dig. § 421.*]

4. DISORDERLY HOUSE (§ 16*)—PROSECUTION — EVIDENCE—ADMISSION—COMMON FAME.

Under B. & C. Comp. § 1933, providing that in all prosecutions for keeping a house of ill fame "common fame" shall be competent evidence in support of the indictment, common reputation of accused's ownership of the house alleged to have been used as a house of ill fame was admissible to prove her ownership thereof.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. § 22; Dec. Dig. § 16.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. CRIMINAL LAW (§ 1134*)—CHARGES—CONSTRUCTION.

In reviewing alleged error in an instruction, it must be examined with reference to the particular facts to which it was intended to be applied.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1134.*]

6. CRIMINAL LAW (§ 799*)—PROSECUTIONS—INSTRUCTIONS.

In a prosecution for keeping a house of ill fame, an instruction, in response to the argument of accused's counsel, that, unless the jurors themselves were guiltless of the offense of which accused was charged, they should follow the Saviour's admonition given with reference to the woman taken in adultery, that "it is not a question of casting the first stone or any other stone; the jury has nothing to do with that," was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1944-1946; Dec. Dig. § 799.*]

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

Hattie McGinnis was convicted of keeping a house of ill fame, and she appeals. Affirmed.

J. A. Carson and W. M. Kaiser, for appellant. W. C. Winslow, for the State.

MOORE, C. J. The defendant, Hattie McGinnis, having been convicted of the crime of keeping and setting up, for the purpose of prostitution, fornication, and lewdness, a house of ill fame, which, it is alleged, she owns and to the possession of which she is entitled, appeals from the judgment which followed. Her counsel contend that the alteration of a section of the Code, which formerly defined the offense and prescribed the punishment for a commission thereof, having been preceded by the clause, "is hereby amended so as to read as follows," repealed the prior law, made the change a new enactment, removed it from the effect of another section applicable to the original act, whereby common fame was made competent evidence to substantiate the averments of an indictment, rendering inadmissible evidence of general reputation respecting any allegation of the formal accusation, and that in receiving proof of such common fame, over objection and exception, an error was committed. The section of the prior law when first enacted was as follows: "If any person shall keep or set up a house of ill fame, brothel, or bawdyhouse for the purpose of prostitution, fornication, or lewdness, such person, upon conviction thereof, shall be punished," etc. B. & C. Comp. § 1932. For a violation of the provisions of the act thus set forth, the following method of proving the offense was permissible, viz.: "In all prosecutions for the crime defined in section 1932, common fame shall be competent evidence in support of the indictment," etc. Id. § 1933. The part first quoted was altered, to wit: "That section 1932 of Bellinger and Cotton's

Annotated Codes and Statutes of Oregon be and the same is hereby amended so as to read as follows: (Sec. 1932) Any person who shall keep or set up, or suffer or permit to be kept or set up, either in a house, boat, ship or vessel, a house of ill fame, brothel or bawdyhouse, for the purpose of prostitution, fornication or lewdness, in any house, room or shop, or other building whatsoever, or any boat, booth or other place of which he is the owner, lessor, lessee, or to the possession of which he is entitled, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished," etc. Laws 1905, c. 211.

Whatever the rule may be in other jurisdictions, it is settled in this state that where a section of an act is amended "so as to read as follows," and the later law sets forth the changes contemplated, the parts of the old section that are incorporated in the new are not to be treated as having been repealed and re-enacted, but are to be considered as portions of the original statute, unless there is a clear declaration to the contrary, in the absence of which it is only the additions that have been made to the original section that are to be regarded as a new enactment. *Stingle v. Nevel*, 9 Or. 62; *Eddy v. Kincaid*, 28 Or. 537, 41 Pac. 156, 655; *Small v. Lutz*, 41 Or. 570, 67 Pac. 421, 69 Pac. 825; *Allison v. Hatton*, 46 Or. 370, 80 Pac. 101; *Renshaw v. Lane County Court*, 49 Or. 526, 89 Pac. 147. A comparison of the primary section with the amended enactment will show that the language of the former is set forth in the latter without material alteration. As the original section of the act remained in force, notwithstanding the amendment added other clauses thereto, common fame, which serves to establish a character either of a person or to a thing (3 Words & Phrases, 2672), was competent evidence to substantiate the issue whether or not the house in question was habitually used for the purpose of prostitution. It is not to be supposed that the crime of adultery or fornication will be committed in public, or that parties guilty thereof will be taken in the very act; and such being the case, in order to suppress vice of that form, the statute declares that resort may be had to the character of proof indicated, and, such evidence having been made competent by express enactment, no error was committed in receiving testimony as to the general reputation of such house. B. & C. Comp. § 1933.

The court, over objection and exception, permitted witnesses to testify as to the reputation of the defendant's ownership of the house alleged to have been used for immoral purposes, and of her right to the possession thereof, and it is maintained by her counsel that errors were thereby committed. By an inspection of section 1932, B. & C. Comp., as amended, it will be ascertained that it is the owner of a structure, or the person entitled to the possession thereof, who keeps or sets

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

up, or suffers or permits to be kept up, a house of ill fame, who is deemed guilty of the crime of maintaining a brothel. It would seem that the offense thus denounced comprises acts either of omission or commission, and that if the owner of the structure should lease it for the purpose of prostitution, or knew that it was being used therefor and interposed no objections thereto, he might be convicted of the offense proscribed. In such case, however, evidence of his title by the production of certified copies of his deeds, or by proof of his adverse holding, would probably be the most efficient means of establishing that fact, which proof could be secured from the public records or from persons conversant with the fact, without requiring the defendant to furnish evidence which might tend to his conviction. The same mode of proof would undoubtedly be equally efficacious in the case of a lessor who sublet real property under the circumstances so supposed, providing evidence of the demise were recorded. By the amended statute, a lessee of property who keeps or sets up a house of ill fame is guilty of a misdemeanor, and upon conviction thereof may be punished. A lease of real property for a term not exceeding one year may be effectuated without a conveyance or other instrument in writing. B. & O. Comp. § 793. Since a valid estate in land can be created for the term and in the manner thus indicated, and as a right to the possession of premises to which a lessee is entitled might not be established in a criminal action to which he was a party, or in a cause where the lessor might be found guilty for his act of commission or omission, many persons who commit crimes of the kind herein complained of might go unpunished, unless special means were adopted to repress their vicious practices. The rules of law require the production of the best evidence obtainable to substantiate an issue, and, as reputation respecting the right to the possession of property by a lessee or by an owner in the cases conjectured may be the only kind that can be procured, statutes have been adopted making proof of common fame admissible to establish the ownership of real property and of a right to its possession. In the absence of legislative enactment, however, ownership or possession of land cannot usually be substantiated by proof of general reputation. *Berniaud v. Beecher*, 76 Cal. 394, 18 Pac. 598; *Wendell v. Abbott*, 45 N. H. 349. An exception to this rule exists, rendering hearsay evidence admissible to establish a right to the possession of land in cases where by reason of antiquity it is impossible to obtain the requisite proof from living witnesses. *McEwen v. Portland*, 1 Or. 300; *Casey's Lessee v. Inloes*, 1 Gill (Md.) 430, 39 Am. Dec. 658, 669. Our statute (B. & C. Comp. § 1933) does not limit "common fame" to the evil behavior prevailing in a

bawdyhouse, and such phrase may be as well employed to establish the other averment of the indictment respecting the ownership of the property or the right to its possession as the general reputation of the building, and, such being the case, no error was committed in admitting the evidence in question.

The court, in its charge, said: "It is not a question of casting the first stone or any other stone. The jury has nothing to do with that." An exception was reserved to the language so employed, and it is insisted that an error was committed in giving it. It is argued by defendant's counsel that the part of the instruction thus repeated was given in response to and in refutation of their discussion of the facts to the jury to persuade them, if possible, to "temper justice with mercy." It is fair to assume that by the argument advanced the jury were in effect admonished by defendant's counsel that, unless they were guiltless of the particular offense of which she was then being tried, they should follow the declarations of the Saviour, made when a woman was brought before him charged with adultery. The instruction complained of must be examined as an application of law to the particular facts involved. The duty of jurors is to determine an issue according to the rules announced by the court. It is not their province to base a verdict on their preconceived notion of justice, their passions, prejudices, or personal experience acquired in violations of the moral code. The instruction correctly stated the law and no error was committed in giving it.

It follows from these considerations that the judgment should be affirmed; and it is so ordered.

(66 Or. 169)

STATE v. RICHIE. SAME v. LELAND.
SAME v. DOWNING.

(Supreme Court of Oregon. April 12, 1910.)

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

Dollie Richie, Rose Leland, and Julia Downing were each convicted of keeping a house of ill fame, and each appeals. Judgments affirmed.

J. A. Carson and W. M. Kaiser, for appellants. W. C. Winslow, for the State.

MOORE, C. J. The defendants, Dollie Richie, Rose Leland, and Julia Downing, were separately indicted, tried, and convicted of the crime of keeping and setting up, for the purposes of prostitution, fornication, and lewdness, houses of ill fame, to each of which, it is alleged, the defendants were severally entitled, and each appeals from the sentence pronounced against her.

These causes were by stipulation of the parties, tried in this court upon the same brief as in the case of *State v. McGinnis*, 108

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Pac. 132. As these causes involve the same legal principles as stated in the opinion in the case mentioned, the conclusion there reached is decisive herein; and hence each judgment referred to is affirmed.

(56 Or. 170)

STATE v. THOMAS.

(Supreme Court of Oregon. April 12, 1910.)

CRIMINAL LAW (§ 789*)—TRIAL—INSTRUCTIONS—REASONABLE DOUBT.

A statement, in an instruction defining reasonable doubt, that the jury is not entitled to resolve itself into "doubting Thomases," who refuse to be convinced by any testimony, merely called the jury's attention to the fact that, though the character of the house charged to be a house of ill fame and the right to its possession depended upon general reputation, such evidence, if believed beyond a reasonable doubt, was sufficient to establish those facts, and was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1906; Dec. Dig. § 789.*]

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

Emma Thomas was convicted of keeping a house of ill fame, and she appeals. Affirmed.

J. A. Carson and W. M. Kaiser, for appellant. W. C. Winslow, for the State.

MOORE, C. J. The defendant, Emma Thomas, was convicted of the crime of keeping and setting up, for the purpose of prostitution, fornication, and lewdness, a house of ill fame, to the possession of which, it is alleged in the indictment, she is entitled, and she appeals. The court, after giving the ordinary definition of a reasonable doubt, said: "The jury is not entitled to resolve itself into 'doubting Thomases,' who refuse to be convinced by any testimony." An exception having been taken to the language so used, it is contended by defendant's counsel that an error was committed in giving such part of the charge. As the disciple to whom reference is thus made denied the reports of his associates, and asserted he would not believe their statements, unless, by his own senses, he was convinced as to the truth of their declarations, the court undoubtedly meant by the illustration given to call the attention of the jury to the fact that, though the character of the house and the right to its possession depended upon evidence of common fame, such general reputation, if believed beyond a reasonable doubt, was sufficient to establish the averments of the indictment.

The explanation thus given was, in view of the kind of proof produced, a good exemplification of the law applicable to the facts, and tended to elucidate the definition of a reasonable doubt. No error was committed as alleged; and hence the judgment is affirmed.

(56 Or. 184)

NICKLAUS v. GOODSPEED, County Judge, et al.

(Supreme Court of Oregon. April 19, 1910.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 37*)—CHANGE OF BOUNDARIES—POSTING OF NOTICE—PROOF—SUFFICIENCY.

Under B. & C. Comp. § 3365, as amended by Sess. Laws 1903, p. 125, providing that the district boundary board may, at its discretion, on petition of three or more legal voters, change or divide the districts of its county, and that the superintendent shall cause to be posted, etc., notices for the proposed change, an affidavit of the posting of the notices made by the superintendent and filed in his office, was sufficient proof of the posting, no statute requiring such proof to be made in any particular manner.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 37.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 32*)—CHANGE OF BOUNDARIES—"DISCRETION."

Under Laws 1907, p. 193, the county school superintendent and the county judge and commissioners constitute a board for dividing the county into convenient school districts. B. & C. Comp. § 3365, as amended by Laws 1903, p. 125, provides that the district boundary board in its discretion may, on the petition of three or more legal voters, change or divide the districts of the county. Laws 1907, p. 194, § 4, provides that when any organized school district shall cease to maintain a public school for two years or to contain at least six children, then all the moneys in the hands of the district clerk or board of directors shall be turned over to the district boundary board for three years thereafter, and if during that time such district shall maintain a public school therein, and shall contain at least six children, the board shall surrender the money, etc., to the directors of the district; but that on failure of the district to comply with such provisions it shall become unorganized territory and cease to be a district. Held that, no power being granted to the boundary board to abolish a district, the board could not change the boundaries of a district so as to leave less than six children therein, the word "discretion," as used in the statute, not meaning absolute or arbitrary power, to be exercised to the injury of another.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 52-54; Dec. Dig. § 32.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2005-2099.]

Appeal from Circuit Court, Tillamook County; Geo. H. Burnett, Judge.

Petition by Jacob Nicklaus for writ of review against H. F. Goodspeed, County Judge, and others. From an order dismissing the writ, plaintiff appeals. Reversed.

On December 20, 1907, there was filed in the office of the county school superintendent of Tillamook county two petitions, identical in language and purport, signed by the legal voters for school purposes in school districts Nos. 32 and 50, respectively, praying for a change in the boundaries of those districts, so as to include a portion of district No. 50 within the boundaries of district No. 32. On December 21, 1907, there was issued from the office of the county school superintendent notices of such proposed change signed by him, which were posted as required by

law, and on the 3d day of January, 1908, an affidavit was filed by W. D. Gladwill, showing the proper posting of the notices, but not stating that he was authorized by the superintendent to perform such duty. On January 4, 1908, the district boundary board being in session, the appellant and one Jacob Kumm appeared before the board and objected to the proposed change, and moved to dismiss the petition upon two grounds: (1) Because the proposed change would leave district No. 50 with only four children of school age, which would result in a disorganization of the district; and (2) because sufficient proof of posting notices of the proposed change had not been made. The board disregarded the motion, and made the change conformably to the petitions. Plaintiff sued out a writ of review to the circuit court, and from an order dismissing the writ he appeals to this court.

Talmage & Johnson, for appellant. W. H. Cooper, for respondents.

McBRIDE, J. (after stating the facts as above). The objection to the proof of posting notices of the proposed change is untenable. Section 3365, B. & C. Comp., as amended by Sess. Laws 1903, p. 125, provides that the district boundary board may "at its discretion, upon petition of three or more legal voters interested, change or divide the districts of its county;" and the same section, as amended, provides that the superintendent "shall cause to be posted," etc., notices for the proposed change. The notices posted, as shown by the record, were signed by the superintendent. The affidavit of posting was filed in his office and he is ex officio a member and secretary of the district boundary board. When he presented these notices and the proof of posting them, the board had sufficient evidence to justify it in finding that he had caused them to be posted, especially in the absence of any statute expressly requiring such proof to be made in any particular manner, or, indeed, at all.

The second objection is more serious, and for a proper understanding of the matters involved it will be necessary to consider certain provisions of the statute: (1) The county school superintendent and the county judge and commissioners constitute a board for dividing the county into convenient school districts. Laws 1907, p. 193. (2) The district boundary board in its discretion may, upon the petition of three or more legal voters, change or divide the districts of its county. B. & C. Comp. § 3365, as amended in 1903 (Laws 1903, p. 125). (3) When any organized school district within the state of Oregon shall for any reason cease to maintain a public school for two years, or shall for two years cease to contain at least six children of school age, then all moneys in the hands of the district clerk or board of

directors shall be turned over to the district boundary board, and it shall be the duty of such district boundary board to take care of the money and other property for the term of three years thereafter, and if, during that time, such district shall maintain a public school therein, and shall contain at least six children of school age, then the boundary board shall surrender the money, and other property to the legal directors of the district. Laws 1907, p. 194, § 4. The same section also provides that, upon failure of the district to comply with the provisions above set forth, it shall become unorganized territory and cease to be a district.

The record of the proceedings of the board shows that plaintiff, his wife, and another property owner in district 50, filed affidavits, showing that if the proposed change is made there will remain only four children of school age in district 50. There is no countershowing nor any finding that contradicts these affidavits. Neither is there anything in the record showing that the board heard any testimony upon the subject. The manifest effect of the proposed change, therefore, would be to deprive the four children of plaintiff of the benefit of a school and eventually to disorganize the district. While we are willing to concede the wonderful productiveness of Tillamook county, we must take conditions as we find them, and will not speculate on the probability that other children may be born or arrive at school age in time to save the district from final dissolution. There is no power granted to the district boundary board to abolish or destroy a district, and where such power is not granted it does not exist. *School District v. Palmer*, 41 Or. 485, 69 Pac. 453. What the board cannot do directly it cannot do indirectly.

Some emphasis is laid on the word "discretion," as used in the statute in connection with the powers granted the board, but discretion and arbitrary power are far from being synonymous terms. "Discretion, when vested in an officer, however, does not mean absolute or arbitrary power. The discretion must be exercised in a reasonable manner, and not maliciously, wantonly, and arbitrarily, to the wrong and injury of another. *Taylor v. Robertson*, 16 Utah, 330, 52 Pac. 1. In the case at bar, while we do not question the good intent of the board and their desire to do justice in the premises, we are satisfied that the effect of their decision is to deprive the children of plaintiff of the privilege of attending a public school in their own district, and eventually to abolish the district; and that it was not an act governed and regulated by a sound discretion, but arbitrary and unjust.

The decree of the circuit court will be reversed, and the action of the district boundary board set aside.

(82 Kan. 256)

UDALL MILLING CO. v. ATCHISON, T. & S. F. RY. CO.

(Supreme Court of Kansas. April 9, 1910.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§§ 35, 59*)—RECIPROCAL DEMURRAGE ACT—RECOVERY OF PENALTY—LIMITATIONS.

The reciprocal demurrage act (Laws 1905, c. 345), among other things, provides that when a shipper applies to a railway company for cars, they must be furnished within a specified time, and that if the railway company fails to furnish them within that time, it shall forfeit \$1 per day for each car failed to be furnished. *Held:* (1) In an action brought to recover penalties under that act, that the one-year statute of limitations applies. (2) That for each day of neglect after the prescribed time a penalty of \$1 per car was at once incurred, on which the statute of limitations began to run. Each penalty was a distinct liability, and when the statute was set in motion on such a liability, it continued to run until the action was commenced or barred. (3) The subsequent furnishing of the cars demanded by the railway company stopped the accumulation of penalties, but did not arrest the running of the statute as to penalties already incurred.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. §§ 35, 59.*]

2. CARRIERS (§ 20*)—RECIPROCAL DEMURRAGE ACT—RECOVERY OF PENALTY.

It is the duty of a railway company to provide such equipment and cars as will meet, not only the ordinary and usual requirements of the traffic, but also to provide for such increase of business and demands for cars as can reasonably be anticipated. If, however, there is a rush of business or a congestion of traffic which could not reasonably have been anticipated, and there is a delay arising from circumstances beyond the control of the railway company, it will be deemed to be abnormal, and such an unavoidable accident as will excuse noncompliance with the demand for cars, and relieve the company from the penalties provided for in the act.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 36; Dec. Dig. § 20.*]

Appeal from District Court, Cowley County; C. L. Swarts, Judge.

Action by the Udall Milling Company against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Action to recover amounts alleged to have been forfeited by the failure of the railway company to furnish cars demanded by the Udall Milling Company for the shipping of freight between Udall and other points in Kansas. In their petition the milling company alleged that they had made eight different applications for cars which the railway company did not furnish. Based on these refusals, they set forth eight counts in their petition. A demurrer was sustained as to the first, second, seventh, and eighth counts, and the case went to trial upon the third, fourth, fifth, and sixth counts. In the third count, among other things, it was alleged that on December 20, 1906, a written demand was made for three box cars, each of 60,000

pounds capacity for immediate delivery at Udall, to be loaded with grain for Winfield, and that they paid the railway company \$22.50, being one-fourth of the freight charged for the cars ordered, and the agent of the company gave them a receipt for that amount, stating the purpose for which the receipt was given. It is then alleged that no cars were delivered under the order until February 7, 1907, being a delay of 36 days. At that time one car was delivered, another was delivered on the following day, and the third on February 20, 1907, being a delay of 49 days on the last car. It is alleged that by reason of these refusals and delay there was a forfeiture of \$121, for which judgment was asked. The remaining three counts were similar to the third, except as to the time of demand for cars and the extent of the delay in furnishing them. In addition to a general denial, and that the third cause of action was barred by the statute of limitations, the railway company alleged: "That at the various times alleged there was a great congestion and increase of traffic on the line of defendant's railroad, which was not, and could not reasonably have been, anticipated on the part of the defendant. By reason of such increase and congestion of traffic at the times alleged in the petition, it became impossible and impracticable for the defendant to furnish cars and equipment in sufficient number to handle with promptness all of the traffic offered to it. The defendant railway company operates many thousand miles of railroad in this and other states, and that the increase and congestion of traffic aforesaid was general over the entire system of railroad operated by defendant. Said increase and congestion of traffic were not confined to the railway system operated by the defendant, but that such condition applied generally to the railroads of the United States, and that by reason thereof it was, at the time alleged in said petition, impossible for defendant to procure cars and engines from other railroad companies, by means whereof it might provide for the traffic on its own line, and that by reason of such increase and congestion of traffic, when cars for through shipments were turned over to other railroads, it became and was impossible for the defendant to secure a prompt return of the cars and equipment to its own line, so as to furnish a prompt service to its own patrons. That long prior to the times alleged in the petition of the plaintiff, and up to and including said times, the defendant company had sought to secure the purchase and building of cars and equipment, so as to meet every possible requirement, from the various companies engaged in the manufacture and sale of cars and equipment, but that, owing to the general increase in traffic and the general demand for cars and equipment, it became impossible for it to secure from such companies engaged in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the manufacture and sale of cars a sufficient supply of such cars and equipment to meet the full requirements of its traffic. That in so far as it was able, having due regard for the requirements of shippers on other parts of its line and system, defendant furnished plaintiff and all other shippers their due and proportionate share of cars and equipment. The aforesaid increase and congestion of traffic were due in part to unprecedented crops, and to an unusual and unforeseen increase in manufactures and in mining, which the defendant could not have reasonably anticipated. Prior and up to the time of the aforesaid increase and congestion of traffic defendant had sufficient cars and equipment to meet the ordinary and usual requirements of its business." There were averments, too, that under the laws of the United States and of the state the railway company is not permitted to discriminate between shippers, and to have furnished the cars upon the demand of the milling company would have resulted in a discrimination against other patrons of the road. It was also alleged that the reciprocal demurrage act under which the applications were made violates the laws and the Constitution of the United States so far as it relates to interstate shipments. A trial was had, in which evidence tending to support the allegations of the petition was given. A demurrer to the evidence of the milling company was overruled. The railway company then introduced testimony tending to support the allegations which it had made by way of excusing it from furnishing the cars demanded, and to show that conditions existed which made the provisions of the reciprocal demurrage act inapplicable to the case. The verdict and judgment were in favor of the milling company, and the railway company has appealed.

Wm. R. Smith, O. J. Wood, and A. A. Scott, for appellant. Jackson & Noble, for appellee.

JOHNSTON, C. J. (after stating the facts as above). The first question arising on the appeal is whether the third cause of action stated in the petition was barred by the statute of limitations. It arises under the reciprocal demurrage act, which provides that if the application of the shipper be for 10 cars or less, the railway company must furnish them within three days from the time of demand, and that a railway company failing to furnish them within that time shall forfeit \$1 per day for each car it fails to furnish. Laws 1905, c. 345. In this case the application for cars was made on December 29, 1906, and hence on January 2, 1907, the railway company was in default. As the liability was a forfeiture imposed by statute, the one-year limitation provided for in subdivision 4, § 17, of the Code of Civil Procedure (Gen. St. 1909, § 5610) applies. *Joyce v. Means*, 41 Kan. 234, 20 Pac. 853; *Beadle v. K. C., Ft. S. & M. R. Co.*, 48 Kan. 379, 29

Pac. 696; *Wey v. Scofield*, 53 Kan. 248, 36 Pac. 333. For the first day of neglect to furnish cars, beginning January 2, 1907, the railway company became liable for a penalty of a dollar on each car, and for every successive day thereafter new penalties were incurred. Each was a distinct liability, on which the statute of limitations began to run at the time it was incurred. As was said in *Colo. Fuel & Iron Co. v. Lenhart*, 6 Colo. App. 511, 41 Pac. 834: "When the liability to the penalty is incurred, the creditor's cause of action for its recovery accrues, and the statute is set in motion, and does not stop until the action is commenced or barred." *Rector, etc., of Trin. Ch. v. Vanderbilt*, 98 N. Y. 170; *Wells v. Cooper*, 57 Conn. 52, 17 Atl. 281; *Atwood v. Lockwood*, 76 Conn. 555, 57 Atl. 279; *Patterson v. Wade*, 115 Fed. 770, 53 C. C. A. 1; *State Savings Bank v. Johnson*, 18 Mont. 440, 45 Pac. 662, 33 L. R. A. 552, 56 Am. St. Rep. 591; *Town of Londonderry v. Arnold*, 30 Vt. 401; *Hazleton v. Porter*, 17 Colo. App. 1, 67 Pac. 170.

The bar had fallen on most of the penalties involved in the third count when the action was commenced, but as to the penalties which had accrued within one year prior to the commencement of the action, of course, a recovery may be had. It is suggested that the ultimate furnishing of the cars by the company in some way tolled the statute. The recognition of the demand for cars, or an acknowledgment that compliance with the demand was a duty unperformed, did not affect the liabilities already incurred, nor arrest the statute of limitations as to them. A written acknowledgment of an existing liability founded on contract will operate to toll the statute, but no such provision is made as to torts or penalties arising from the violation of statutes. The furnishing of the cars stopped the accumulation of new penalties, but it did not arrest the running of the statute of limitations on the penalties incurred. It is argued that, if a cause of action is deemed to have accrued at the end of each day, that would necessitate a multiplicity of suits growing out of the same transaction, and that therefore all of the violations should be regarded as constituting one comprehensive cause of action. The same point was made in *Wells v. Cooper*, supra, where an action was brought to recover penalties which accrued every month by an officer's neglect to file a certificate in the town-clerk's office. It was held that each month's neglect was a complete offense in itself, and that all that were more than one year old were barred by the statute of limitations. It was there contended that the aggregated forfeitures might well be regarded as one and all included in one cause of action. The court responded by saying: "While we concede the right to recover all of the separate forfeitures as one sum, yet we must regard the separate forfeiture for each month's neglect as standing by itself in contemplation of the

statute, and as cut off by it where one year has elapsed before the bringing of the suit. In order to determine conclusively when the statute begins to run we have only to determine conclusively when a suit for recovery of any forfeiture might be first brought. There cannot be any doubt that a suit might be brought at the end of the first month's neglect, and repeated at the end of each subsequent month's neglect. The purpose and efficiency of the statute would be entirely destroyed if this were otherwise." Whether or not the penalties may be set up in one count of a petition does not in any way affect the running of the statute of limitations as to those penalties incurred from day to day because of the continued neglect of the railway company. Neither will the furnishing of the cars after the liability has arisen arrest the running of the statute.

The question remains: Did the facts pleaded by the railway company, and in support of which it offered testimony, except the case from the operation of the reciprocal demurrage statute? It declares "that the provisions of this law shall not apply in cases of strikes, unavoidable accidents, or other public calamity." The jury was instructed that: "In the judgment of the court it has neither pleaded nor proved in this case that any failure to furnish cars was the result of either strikes, unavoidable accidents, or other public calamity." This was a practical determination of the case in favor of plaintiff. In the abstract it is stated that there is testimony tending to sustain the allegations of the answer; and in deciding whether there was error in the instructions, we need only inquire whether the facts pleaded by the railway constitute any defense to the plaintiff's action. Are any of the causes alleged by the railway company for its failure to provide the cars demanded valid or sufficient?

The statute was interpreted to some extent in *Patterson v. Railway Co.*, 77 Kan. 236, 94 Pac. 133, 15 L. R. A. (N. S.) 733. The contention there was that the regulations of the statute were so unreasonable and drastic as to transcend the regulating power of the Legislature. It was conceded to be competent for the Legislature to make regulations requiring railway companies to promptly provide facilities for the speedy transportation of property or persons, but it was held that, to be within the police power of the state, these regulations must be reasonable. It was recognized that, if the statute made absolute requirements with which the carrier could not comply, or which were unreasonable and oppressive, it could not be sustained. To uphold the statute a liberal view was taken of the provision that the carrier should not be liable to penalties for strikes, unavoidable accidents, or other public calamities. A Texas statute, from which ours appears to have been taken, provided that the only excuses for failure to furnish cars on demand were strikes or other public calamities. The en-

forcement of that statute came before the Supreme Court of the United States, and that court in holding the statute to be invalid stated that: "An absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state, and amounts to a burden upon interstate commerce." *Houston & Tex. Cent. Railroad v. Mayes*, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772. To meet just such a contention our Legislature broadened the exception, and enlarged the excuses for delay or noncompliance with the demands for cars. It added the excuse of unavoidable accident, and this term was held to include an undesigned contingency, an abnormal or phenomenal happening, something against which the railway company could not be expected to provide, or something causing a delay which a company could not well avoid. So interpreted, the statute was upheld, and but for that view the court must have followed the decision in *Houston & Tex. Cent. Railroad v. Mayes*, supra. Referring to the allegations of the answer, the excuses alleged are in effect that there were unprecedented crops in the state, and an unexpected increase in the products of the factories and mines, and that there was a congestion of traffic, which made it impossible and impractical for the company to promptly meet the demands for cars. This increase and congestion, it is said, affected other lines in this and other states, so that it was impossible to obtain cars or equipment from other railway companies, and impossible for it to procure a return of its own cars which were transported beyond its own line. Now, a large crop is not unusual or phenomenal in Kansas, and hence that may not be a very good excuse. Neither is it easy to understand why the larger products of the mines and factories might not have reasonably been foreseen. It is alleged, however, that the congestion of business was not limited to its own line, but that it was of such a character as made it impossible to obtain cars from other sources, or to secure a return of its own cars which had gone beyond its own lines. In addition to that the company alleged that long prior to that time "it had sought to secure the purchase and building of cars and equipment, so as to meet every possible requirement, from the various companies engaged in the manufacture and sale of cars and equipment, but that, owing to the general increase in traffic and the general demand for cars and equipment, it became impossible for it to secure from such companies engaged in the manufacture and sale of cars a sufficient supply of such cars and equipment to meet the full requirements of its traffic." In other portions of its answer it is alleged that the company had on hand sufficient cars and equipment to meet the ordinary and usual requirements of its business. Now, if that precaution had

been taken, and there was a rush and congestion of business which could not reasonably have been anticipated, and it was impossible to borrow or buy cars from any source, it would appear that there was a good excuse for noncompliance with the demands.

In *Houston & Tex. Cent. Railroad v. Mayes*, supra, it was said of the Texas statute that: "It makes no exception, in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather." These things were mentioned as circumstances wholly beyond the control of the company, and that an arbitrary infliction of a penalty for an unavoidable delay was unreasonable. It was further remarked that: "While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of traffic, a pressure upon the railroad facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance." It is the duty of a railway company to provide such equipment and cars as will meet, not only the ordinary and usual requirements of the traffic, but also such increase of traffic and demand for cars as can be reasonably anticipated. If, however, there is a rush of business or a congestion of traffic which could not reasonably have been foreseen, and a delay arises from circumstances wholly beyond the control of the company, it should be regarded as abnormal, and such an unavoidable accident as will relieve the company from the penalties of the act. The averments of the answer, although somewhat general, set up a sufficient excuse, and stated a defense under the statute, and the holding of the court to the contrary was material error.

The judgment will therefore be reversed, and the cause remanded for a new trial. All the Justices concurring.

(38 Wash. 151)

OLSON v. GILL HOME INVESTMENT CO.
et al.

(Supreme Court of Washington. April 8, 1910.)

1. EXPLOSIVES (§ 8*)—INJURIES FROM NEGLIGENT STORAGE—CULPABLE NEGLIGENCE—EVIDENCE.

In an action for injury to a boy by an explosion of dynamite with which he was playing, evidence held to show that defendants were negligent in storing the dynamite in a vacant struc-

ture on unfenced lots, in violation of a city ordinance, and in leaving a door unlocked in a locality where, as they knew, boys frequently went, whether as trespassers or otherwise.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.*]

2. NEGLIGENCE (§ 10*)—LIABILITY FOR NATURAL AND PROBABLE CONSEQUENCES.

A defendant, sued for damages resulting from negligence, will be held liable for the natural and probable consequences of his negligent acts.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 12; Dec. Dig. § 10.*]

3. NEGLIGENCE (§ 62*)—PROXIMATE CAUSE—INTERVENING CAUSE.

The act of an intervening third party, contributing to the injurious result of the original negligence, does not in all cases excuse the original wrongdoer, and if such intervening act could, or in exercise of ordinary prudence should, have been foreseen, the original act still remains the proximate cause.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 79; Dec. Dig. § 62.*]

4. EXPLOSIVES (§ 8*)—INJURY TO BOY—PROXIMATE CAUSE—QUESTION FOR JURY.

In an action for injury to a boy by the explosion of dynamite with which he was playing, evidence held to present a question for the jury as to the proximate cause of the accident.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.*]

5. EXPLOSIVES (§ 8*)—INJURY TO BOY—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injury to a boy by the explosion of dynamite with which he was playing, evidence held to present a question for the jury as to his contributory negligence.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.*]

6. NEW TRIAL (§ 107*)—NEWLY DISCOVERED EVIDENCE.

There was no abuse of discretion, by the refusal of a new trial for newly discovered evidence, which only affected the credibility of witnesses and the weight of their evidence.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 225; Dec. Dig. § 107.*]

7. DAMAGES (§ 132*)—EXCESSIVENESS—PERSONAL INJURIES—LOSS OF BOTH HANDS BY BOY.

An award of \$25,000 for the loss of both hands by a boy of tender years is not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 372; Dec. Dig. § 132.*]

En Banc. Appeal from Superior Court, Pierce County; John A. Shackelford, Judge.

Action by Ernest Olson, by guardian ad litem, against the Gill Home Investment Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Leander T. Turner, Ellis, Fletcher & Evans, and Sandford C. Rose, for appellants. H. M. Owens and Bates, Peer & Peterson, for respondent.

CROW, J. This action was commenced by Ernest Olson, a minor, by M. E. Olson, his guardian ad litem, against Gill Home Investment Company, a corporation, and Clark N. Gill, its president and manager, to recover damages for personal injuries. From a judg-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ment in plaintiff's favor, the defendants have appealed.

The appellant Gill Home Investment Company was engaged in selling an addition to the city of Tacoma, and was itself owner of four unfenced lots therein, located at the intersection of two public streets. A small building constructed for toilet purposes was located on these lots, about 125 feet from one, and 39 feet from the other, street. A board screen or wall, about six feet high, was in front of the unlocked toilet door. Between the toilet and the nearest street was a small toolhouse. Some weeks prior to the accident, which caused respondent's injuries, the appellant corporation commenced the construction of a cement building, and Clark N. Gill, its president and manager, caused a box and several loose sticks of Hercules stumping powder (hereinafter called dynamite, a term used by the witnesses) to be removed from the toolhouse and stored on a shelf in the toilet, doing so to protect workmen who went into the toolhouse. The shelf was located on plates, upon which the rafters rested, about six feet eight inches above the floor and five feet eight inches above the seat of the toilet. The toilet door was left unlocked. A pile of sand, attractive to children, but designed for use in mixing concrete, was kept on appellants' lots near the toilet. A public school was about three blocks distant. Several residences, the homes of children, were located in the vicinity. A number of young school boys, including the respondent, were in the habit of playing upon appellants' lots. They occasionally visited and used the toilet, as did other persons, most of whom were appellants' employes. One of the boys, Wesley Depew, nearly 14 years of age, discovered the box and loose sticks of dynamite, and told his twin brother, Leslie Depew, of such discovery. On a Sunday prior to the accident Leslie Depew, with two younger boys, went to the toilet and took a loose stick of dynamite, which they hid under a stump. Wesley Depew had previously taken some dynamite, caps, and fuses, which he says he found in the toilet. He exploded one of these caps, and gave some of them to the respondent, who was then about 13 years of age. On the day of the accident Leslie Depew and two other boys, accompanied by respondent, took the dynamite, caps, and fuse, to some vacant ground one-fourth of a mile distant, where respondent attached a cap and fuse to the stick of dynamite, and, igniting it, unsuccessfully tried to explode it under a large stump. He then attempted to explode it with a lighted paper, but, again failing, undertook to remove the cap by prying it from the dynamite with a stick. This produced an unexpected explosion, which caused respondent to lose both of his hands.

Appellants have filed admirable briefs, in which numerous assignments of error, involving many interesting points, are presented; but their controlling proposition is that the

trial court erred in refusing to instruct the jury to return a verdict in their favor. They, in substance, contend (1) that the respondent and other boys were trespassers, to whom they owed no other duty than not to willfully or maliciously injure them; (2) that if appellants were in fact negligent (which they deny), their negligence was not the proximate cause of the accident; (3) that intervening between the storage of the dynamite and the injury were the criminal acts of the boys in stealing the dynamite, caps, and fuse, which acts were the proximate cause of the accident, and (4) that the respondent was guilty of contributory negligence as a matter of law. The respondent contends that the sand made the place attractive to the boys; that they had been in the habit of frequently playing there, a fact well known to appellants; that appellants were guilty of negligence in leaving the loose dynamite in the unlocked toilet, where it was apt to be found and taken by the boys, and that such negligence was the proximate cause of the accident.

To sustain appellants' contention that the boys were trespassers Clark N. Gill and two or three employes of the corporation testified that they had driven them away on several occasions. It is manifest that the boys repeatedly went upon the lots to the appellants' knowledge. This being true, we think the evidence is sufficient to show that the appellants were guilty of the grossest and most culpable negligence in storing the dynamite as they did, concededly in violation of a city ordinance, and in leaving a door unlocked in a locality where, as they knew, the boys frequently went, whether as trespassers or otherwise. They knew the dynamite was a dangerous agency. There is no evidence that they were then using it, or that they intended to use it in the immediate future, or that they would need it at any time. The evidence rather indicates that the dynamite was unlawfully stored and left for an indefinite time in an unlocked, vacant structure, where the appellants must have known the children were liable to be, either as trespassers or otherwise. In support of their contention that they are not liable to respondent, whom they claim to have been a trespasser, the appellants cite *Curtis v. Tenino Stone Quarries*, 37 Wash. 355, 79 Pac. 955; *Burnett v. Ft. Worth Light & Power Co. (Tex.)* 112 S. W. 1040, 19 L. R. A. (N. S.) 504; *Masser v. Chicago, R. I. & P. Ry. Co.*, 68 Iowa, 602, 27 N. W. 776; *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1; *Le Duc v. New York C. R. R. Co.*, 92 App. Div. 107, 87 N. Y. Supp. 364; *Kelly v. Benas*, 217 Mo. 1, 116 S. W. 557, 20 L. R. A. (N. S.) 903; *Felton v. Aubrey*, 74 Fed. 350, 20 C. C. A. 436. None of these cases are similar to the one at bar. In each of them the defendant was charged with negligence in operating, constructing, or maintaining certain appliances, machinery, or plants used in and necessary to the conduct of his or its business. In the *Tenino Case* the plaintiff, a child,

was injured by machinery which constituted a part of the defendant's plant. In the *Burnett Case* the plaintiff, a boy, went upon a roof, where he was electrocuted by a wire which, although negligently exposed without being insulated, was nevertheless a part of the defendant's plant. In the *Masser and Le Duc Cases* the children trespassed upon railways. The other cases are similar in principle. It was necessary in each instance for the defendant to have and operate the appliance which caused injury to the trespassing boys. The defendants, even had they known of the trespassing, could not have entirely refrained from installing and operating their several plants or appliances, and at the same time continue their business. In the *Curtis Case* this court said: "To hold, as a general and universal rule of law, that the owners of mills and factories must so construct and maintain their premises as to be reasonably safe for trespassers, infants, or adults, regardless of how they may gain admission, would be destructive of all industry and all property rights. We are satisfied, therefore, that the respondent violated no duty it owed to the appellant as a trespasser upon its premises."

Here the appellants, having no apparent use for the dynamite, and knowing of the trespassing proclivities of the boys, needlessly stored it, a most dangerous agency, where, in the exercise of ordinary prudence, they should have anticipated the trespassing boys would readily find, be attracted by, and take it. Under such circumstances we cannot hold that the trespassing of the boys should, as a matter of law, excuse the appellants from liability. The degree of care required of those who have control of dangerous explosives is discussed in *Mattson v. Minnesota, etc., R. Co.*, 95 Minn. 477, 104 N. W. 443, 70 L. R. A. 503, 111 Am. St. Rep. 483, the court saying: "The degree of care required of persons having the possession and control of dangerous explosives, such as firearms or dynamite, is of the highest. The utmost caution must be used in their care and custody, to the end that harm may not come to others from coming in contact with them. The degree of care must be commensurate with the dangerous character of the article (*Keasbey on Electric Wires* [2d Ed.] 269, 270), and is greater and more exacting as respects young children. As to such, the care required to be exercised is measured by the maturity and capacity of the child. *Railway Co. v. Stout*, 17 Wall. (U. S.) 657, 21 L. Ed. 745. What would constitute reasonable care with respect to adults might be gross negligence as applied to a young child. 7 Am. & Eng. Enc. Law (2d Ed.) 441, and cases cited. The case at bar, within these rules, is even stronger than the so-called 'turntable cases.' There is nothing so attractive to young boys as articles of an explosive nature, and the greater the volume of sound that may be produced therefrom the greater the attraction. As com-

pared with an ordinary turntable, dynamite is vastly more attractive, and far more dangerous. Young children are incapable of comprehending the dangers in handling or exploding the same, and their natural instincts urge them into experiments with it whenever it comes within their reach. In view of these considerations, the rule of law imposed upon him who possesses such dangerous articles should be more exacting than in the case of a turntable; and, applying the rule to the facts before us, it is clear that the jury was justified in finding negligence upon the part of the defendant. It failed to take proper care of dynamite brought into this vicinity, and left it exposed upon the premises where children had, to the knowledge of its servants, been in the habit of loitering and amusing themselves."

The strongest case cited in favor of appellants' contention is *Finkbeiner v. Solomon*, 225 Pa. 333, 74 Atl. 170, in which a child was injured by an explosive claimed to have been negligently stored; but the court said: "The facts of the case bring it close to the line of what might be deemed negligence, but we cannot say that the view taken by the court below was wrong. It cannot be said that placing a box of such caps upon a dark shelf in a barn is in itself a negligent act. If defendant had thrown the caps out loosely, where children were likely to play and would be apt to find them, the case would have been very different." Although appellants did not loosely throw out the dynamite, caps, and fuse, they might as well have done so as to have placed them where the boys were apt to, and did readily, find them, a result appellants should have anticipated. We do not think the decision cited is so controlling, in principle as to require a withdrawal of this case from the jury.

Appellants, citing many authorities, further contend that their negligence, if conceded, was not the proximate cause of the accident, but that the intervening criminal act of the boys in stealing the dynamite, caps, and fuse, and their subsequent acts in attempting to explode the same, were the proximate cause. In an action for damages resulting from negligence the defendant will be held liable for the natural and probable consequences of his negligent acts. To create such a liability the injury complained of must result from the negligence charged, which will not be considered as too remote, if the resulting accident might have been reasonably anticipated. The act of an intervening third party, contributing to the injurious result of the original negligence, does not in all cases excuse the original wrongdoer. If such intervening act could, or in the exercise of ordinary prudence should, have been foreseen, the original act still remains the proximate cause of the injury. In this case it was for the jury to determine whether the appellants, who carelessly and illegally stored, and it might be said aban-

done, a dangerous explosive, should have anticipated that it might come into the possession of young boys who frequented the place, even though they were trespassers. "In addition to the requirement that the result should be the natural and probable consequence of the negligence it is commonly stated that the consequence should be one which, in the light of attending circumstances, an ordinarily prudent man ought reasonably to have foreseen might probably occur as the result of his negligence." 29 Cyc. 493; *Nelson v. McLellan*, 31 Wash. 208, 71 Pac. 747, 60 L. R. A. 793, 98 Am. St. Rep. 902; *Akin v. Bradley E. & M. Co.*, 48 Wash. 97, 92 Pac. 903, 14 L. R. A. (N. S.) 586; *Wellington v. Pelletier*, 173 Fed. 908, 97 C. C. A. 458; *Mattson v. Minnesota, etc., R. Co.*, supra; *Powell v. Deveney*, 3 Cush. (Mass.) 300, 50 Am. Dec. 738; *Scott v. Shepard*, 2 W. Bl. 892; *Englehart v. Farrant & Co.*, 1 Q. B. R. 1897, 240; *Myers v. Sault St. Marie P. & P. Co.*, 3 Ont. L. R. 600; *Labombarde v. Chatham Gas Co.*, 10 Ont. L. R. 446; *Clark v. Chambers*, 3 Q. B. 1878, 327, 7 Cent. Law J. 11; *Lynch v. Nurden*, 1 Q. B. 29; *Illidge v. Goodwin*, 5 C. & P. 190; *Lake v. Millikin*, 62 Me. 240, 16 Am. Rep. 456; *Harriman v. Pittsburgh, etc., Co.*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; *Lane v. Atlantic Works*, 111 Mass. 136; *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154; *Mize v. Rocky Mountain Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659; *Fishburn v. Burlington, etc., R. Co.*, 127 Iowa, 483, 103 N. W. 481.

No two cases can be found which are identical, and there is an irreconcilable conflict of authority on this question, but we think the above-mentioned cases, and many others that might be cited, announce correct principles of law applicable to the facts now before us. In *Myers v. Sault St. Marie Pulp & Paper Co.*, supra, a workman employed by the defendants ascended a movable stepladder to work near the unguarded rim of a cogwheel. When he was about to descend, a truckman moved the ladder, causing him to fall on the unguarded wheel. The contention was made that the defendants' negligence in failing to guard the cogwheel, as required by statute, and in failing to provide an immovable ladder, was not the proximate cause of the accident, but that the wrongful act of the truckman in moving the ladder was such proximate cause. The issue was submitted to the jury, and the appellate court, speaking through *Armour, C. J. O.*, said: "The jury having found that the injury to the workman was caused by the negligence of the defendants in no way guarding the wheel, and in not properly fastening the ladder to the floor, and this finding being, as I think, supported by the evidence, the next question is, did the intervention of the workman in wrongfully taking away the ladder relieve the defendants from the consequences of their negligence? and I think not, for the de-

fendant's negligence still remained an operating cause of the workman's injury. According to what is said by Lord Esher and Rigby, L. J., in *Englehart v. Farrant & Co.*, [1897] 1 Q. B. 240, the question whether the negligence of the defendants was an effective cause of the workman's injury was a question for the jury, and, if so, they have in effect determined it, by finding as they did in their answers to the third and seventh questions submitted to them. And I think that the authorities show that the intervention of the workman in wrongfully taking away the ladder did not relieve the defendants from the consequences of their negligence." In *Labombarde v. Chatham Gas Co.*, supra, where plaintiff received an electric shock, the court said: "But if the actual throwing of the loose guy wire over the other wires were the act of some passer-by, who thought to put it out of the way, or even of some mischievous urchin, it seems to me such a likely and probable thing to happen that it is not too remotely connected with the act of cutting the guy wire from its fastenings and leaving it loose on the ground to render those guilty of the latter negligence liable for the consequences which ensued, though an independent agency had intervened as their immediate cause. The original negligence of the workmen of the defendant company was an effective cause of the injury to the plaintiffs. *McDowall v. Great Western R. W. Co.*, [1902] 1 K. B. 618, [1903] 2 K. B. 331, 337, 338." The recent case of *Wellington v. Pelletier*, supra, is especially pertinent. There the defendant's employes had negligently left a number of cars standing on a spur track at the head of a grade, secured only by setting the brakes. They should have been further secured by fastening or blocking the wheels. Some children, playing about the cars, released the brakes, causing them to run down and kill defendant's employé, who was working in a trench between the rails of the spur. It was held that the intervening act of the children did not prevent the defendant's negligence from being the proximate cause of the accident. The court said: "It is claimed that the interposition of the boys in this case was the interposition of a new efficient cause, which, if interposed, the law says eliminates the original cause. On the other hand, it has been thoroughly understood, since the leading case of *Scott v. Shepard*, 2 W. Bl. 892, well known as the 'squib case,' that the interposition even of human beings, acting under circumstances which deprive them of periods for reflection, or known to be of classes which are ordinarily governed by unreasoning impulses, does not come within the class of responsible interventions referred to. This is illustrated in one direction by the squib case, and in the other direction by the well-known cases where young children, either through carelessness or inattention, have been intrusted with dangerous weapons. The

general principle is sufficiently discussed in Pollock's Law of Torts (8th Eng. Ed.) 45 et seq. The rule on which the plaintiff relies in this respect was authoritatively stated and applied by the Court of Appeal in 1896, in *Engelhart v. Farrant*, [1897] 1 Q. B. 240."

In this case, it was for the jury to determine whether respondent and the other boys, considering their age, their experience, and their knowledge of right and wrong, were in their acts governed by unreasoning and natural impulses. That the question of proximate cause was properly submitted to the jury, see *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Union Pac. Ry. Co. v. Callaghan*, 56 Fed. 988, 6 C. C. A. 205; *Denver, etc., R. R. Co. v. Robbins*, 2 Colo. App. 313, 30 Pac. 261.

Appellants make other assignments of error based upon instructions given and refused, but the foregoing discussion disposes of them adversely to their contention. The instructions given fully, fairly, and correctly stated the law, and properly submitted all issues of fact to the jury for their consideration.

It is contended that the criminal act of the boys in stealing the dynamite was such an independent, intervening act as to insulate the appellants' negligence and relieve them from liability. The question as to whether the boys fully understood the criminal import of their act was properly submitted to the jury, and determined adversely to the appellants' contention, as was also the question of the contributory negligence of the respondent; he being of tender age. There was evidence tending to show that the boys, including respondent, did to a limited extent realize that dynamite was a violent explosive. They were trying to explode it; but the evidence further shows that they did not fully understand or appreciate all of its dangerous qualities. They supposed it could only be exploded by some method of ignition, and when they lit the fuse, they dodged behind large stumps for protection. It is evident, however, that they did not anticipate that any explosion could be produced in the manner in which it was produced. In the light of respondent's tender years, his limited knowledge, his lack of experience, and all of the facts and circumstances disclosed by the evidence, we cannot hold that he was, as a matter of law, guilty of such contributory negligence as to relieve the appellants from liability, but must hold that the question of his contributory negligence was an issue for the jury.

It appears that, on a previous trial, the boys Wesley and Leslie Depew gave evidence tending to show that, when they took the dynamite, caps, and fuse, they understood they were guilty of the act of stealing. On the last trial their evidence tended to show that they did not understand their acts to be

criminal, but supposed they were taking abandoned property, and at the time thought nothing about any criminal act or wrong being involved. After the trial certain affidavits were procured from the boys, tending to show that they did understand the criminal nature of the acts involved, and upon these affidavits as newly discovered evidence, the appellants moved for a new trial. They now contend that the trial judge erred in denying their motion. Upon the last trial they were permitted to, and did, show the previous testimony of these boys, and were a new trial to be now granted, it could again be shown that on different occasions there had been some conflict in the boys' testimony. Even then their credibility and the weight of their evidence would still be a question for the jury. We fail to see that the trial judge abused his discretion or invaded any of appellants' rights in denying the motion for a new trial. The jury awarded damages in the sum of \$25,000, for which judgment was entered. Appellants now contend the award is excessive. While the verdict is large, the respondent sustained most terrible injuries. We do not think we would be justified in ordering any reduction.

The judgment is affirmed.

RUDKIN, C. J., and DUNBAR, PARKER, MOUNT, FULLERTON, and GOSE, JJ., concur.

(41 Mont. 84)

STATE ex rel. COBURN v. DISTRICT COURT OF NINTH JUDICIAL DIST. et al.

(Supreme Court of Montana. April 2, 1910.)

1. PAYMENT (§ 6*)—PLACE FOR PAYMENT.

In the absence of any agreement on the subject, a debt is payable where the creditor resides, or wherever he may be found.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

2. VENUE (§ 7*)—ACTION ON CONTRACT.

Rev. Codes, § 6504, provides that actions on contracts may be tried in the county in which the contract was to be performed. *Held* that, where the complaint in an action for wages did not allege directly that the contract of employment was to be performed in B. county, but did show that the place of employment was in that county, that the services were rendered there, and that defendants thereupon became debtors to plaintiff for the wages earned, the rule that, in the absence of any agreement, a debt is payable wherever the creditor resides or may be found applies, and the action was properly brought in B. county, though defendants resided in another county.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 13-16; Dec. Dig. § 7.*]

Application by the State, on the relation of Wallace Coburn, for writ of prohibition, against the District Court of the Ninth Judicial District in and for the County of Broadwater and Hon. W. R. C. Stewart, Judge thereof. Dismissed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Galen & Mettler, for relator. John A. Mathews, for respondents.

HOLLOWAY, J. In December last John J. Warren commenced an action in the district court of Broadwater county against Wallace Coburn and others to recover wages for work and labor done by Warren and the others, whose claims had been assigned to him. The complaint in that action alleges that the defendants were engaged in operating the Silver Wave mine in Broadwater county. The claim asserted by Warren for wages earned by him individually is typical of all. In that respect his complaint alleges that at the Silver Wave mine, in Broadwater county, and at the special instance and request of the defendants, he performed 104½ days' work, as a miner, for the defendants, at the agreed price of \$4 per day, less \$1 per day for board. Service of summons was made upon defendants Wallace Coburn and Larssen, in Lewis & Clark county. Those two and defendant Templeton appeared by demurrer, and also filed a motion asking the court to change the place of trial to Lewis & Clark county, on the ground that none of the defendants reside in Broadwater county, that all of them were served with summons in Lewis & Clark county, and that defendants Wallace Coburn and Larssen are residents of the last-named county. This motion recites that it is made upon the affidavit annexed thereto. The only affidavit appears to be one by defendants Wallace Coburn and Larssen, to the effect that each was served with summons in Lewis & Clark county, and that each was, at the time of the commencement of the action, ever since has been, and now is, a resident of Lewis & Clark county. The district court denied the motion, and directed the defendants to answer. Application was thereupon made in this court for a writ of prohibition, restraining the district court from proceeding further in the action. The alternative writ was issued, and the district court appeared by answer, which merely sets forth the proceedings had in the lower court, more in detail, but does not raise any material issue of fact. The matter was thereupon submitted to this court for determination. We do not decide that prohibition is an available remedy in an instance of this kind. That question was not raised nor argued in this court. The only question submitted was: Was the contract for the breach of which Warren sued to be performed in Broadwater county?

Section 6504, Rev. Codes, provides: "Actions upon contracts may be tried in the county in which the contract was to be performed." It will be observed from the statement above that the complaint does not in terms allege that the contract of employment was made or was to be performed in Broadwater county; but it does disclose that the

place of employment was in that county, that the services were rendered there, and that defendants thereupon became debtors to plaintiff and his assignors for the wages earned. Under these circumstances we think the rule running through the law of contracts generally, except with reference to negotiable promissory notes, should be invoked, viz.: "It is the duty of the debtor to find the creditor and make tender to him, and not the duty of the creditor to find the debtor and make demand for payment." 3 Page on Contracts, § 1420; Hughes on Tender, § 312. It has been the rule in England for centuries that, where the place of payment is not specified, the debtor must seek his creditor, if within the "four seas," and make tender to him. Shepp. Touch. § 136; 2 Story on Contracts, § 1329. The same rule is announced by other authorities, as follows: "In the absence of any agreement upon the subject, a debt is payable where the creditor resides, or wherever he may be found; and ordinarily the debtor in such case is bound to seek the creditor to make payment to him, provided the creditor is within the state when the payment is due." 30 Cyc. 1185. "If no place for the payment of a money obligation is specified, the debtor is required to seek the creditor and make payment to him personally." 22 Ency. Law (2d Ed.) 533. If at the time this contract of employment was entered into there was not any place of payment mentioned, the parties will be held to have intended that the contract should be construed in view of the rule of law above, and what was actually intended becomes as much part of the agreement as any express provision, if there is not anything in the contract inconsistent therewith. In other words, in the absence of anything more specific than appears from this record, we hold that the entire contract was to be performed at the mine in Broadwater county, and that the parties to the agreement never contemplated that the men engaged in daily labor at the mine should have to go to some other county to collect their wages. See, also, Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 Pac. 855, 65 L. R. A. 90.

The trial court properly denied the motion for a change of venue, and these proceedings are therefore dismissed.

Dismissed.

BRANTLY, C. J., and SMITH, J., concur.

(12 Cal. A. 645)

GEORGE J. BIRKEL CO. v. HOWZE et al.
(Civ. 750.)

(Court of Appeal, Second District, California.
Feb. 15, 1910.)

GAMING (§ 11*)—GAMBLING CONTRACTS—OPTION TO REPURCHASE STOCK.

A contract reciting that certain shares of corporate stock have been delivered on an agreed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

valuation, and that the right and option is reserved in the person receiving the stock, at any time after the expiration of one year, on demand to reassign and redeliver them, and receive the money paid, with interest, is not within Const. art. 4, § 26, providing that all contracts for the sale of corporate stock on margin, or to be delivered at a future day, shall be void.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 11.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by the George J. Birkel Company, a corporation, against John Howze and others. Plaintiff had judgment, and defendants appeal. Affirmed.

Clair S. Tappan, for appellants. E. S. Williams, for respondent.

ALLEN, P. J. The complaint filed by plaintiff sets out a written instrument in the words and figures following: "Sept. 1st, 1906. George J. Birkel Company, Los Angeles, Calif. —For value received, we herewith hand you twenty-five (25) shares of Mount Washington Company stock certificates No. 60, 61, 64, at a total value of twenty-five hundred (\$2,500) dollars. We agree, at the expiration of one (1) year from date, on demand, to purchase said stock for twenty-five hundred dollars, with interest added at six per cent. per annum from date. [Signed] Jno. Howze, Robert Marsh, J. E. Marsh."

It is averred that on August 6, 1907, plaintiff gave notice to defendants that on September 1, 1907, it would demand of defendants that they pay the sum of \$2,500, with interest, for said stock under said agreement; that accordingly the certificates mentioned evidencing the shares specified were duly indorsed by plaintiff so as to assign and transfer the same to defendants, and a tender made and a demand of payment; that defendants refused to accept or pay for said shares of stock. Defendants, in their answer, admit the execution of the instrument, but deny the other allegations of the complaint, and allege further that the contract attempted to be set forth in plaintiff's complaint is void, inasmuch as it is repugnant to the provisions of section 26, art. 4, of the Constitution of the state of California. Upon the trial of the action the court found in favor of plaintiff upon all of the issues, and rendered judgment accordingly; defendants appeal therefrom upon the judgment roll.

The only question, therefore, presented upon this appeal is as to the character of the written instrument—the basis of the action. The constitutional provision referred to is: "All contracts for the sale of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void." It is appellants' contention that this instrument upon its face is one indicating a gambling transaction. With this we do not agree. This instrument, un-

der section 1643, Civ. Code, is entitled to such a construction as will make it lawful, operative, and capable of being carried into effect, if it can be done without violating the intention of the parties. As we read the instrument, it declares upon its face that certain shares of stock have been delivered to plaintiff upon an agreed valuation, and that the right and option is reserved in plaintiff at any time after the expiration of one year, upon demand, to reassign and redeliver the shares and to receive the money paid, with interest. Agreements of this kind are not within the spirit of the constitutional provision referred to. The object sought by this constitutional provision was to strike down a species of gambling in mining stocks—an evil then rife in this state. *Cashman v. Root*, 89 Cal. 382, 26 Pac. 883, 12 L. R. A. 511, 23 Am. St. Rep. 482. "It is not the purpose of this provision of the Constitution to interfere with legitimate business, or to make void all time contracts for the purchase of shares in incorporated companies." *Kullman v. Simmens*, 104 Cal. 600, 38 Pac. 363. It is true that this form of contract could be used to effect a prohibited transaction, but, if its true character is different from that expressed upon its face, the burden is upon the party seeking to be relieved therefrom to show such variance. There is nothing in this record indicating that the transaction is other than the one which upon its face it purports to be. In addition to this, it is said by our Supreme Court in *Gay v. Dare*, 103 Cal. 459, 37 Pac. 466, that in all classes of cases where a purchaser pays the price, but stipulates that he may, if he so desires, return the property and receive back the price paid, it is usually held not to be a contract of purchase, but is the exercise of an option of rescission, and the title upon the exercise of the option at once vests in the original vendor.

Viewing this case, therefore, from either standpoint presented, we think the judgment of the trial court was warranted and the same should be affirmed; and it is so ordered.

We concur: SHAW, J.; TAGGART, J.

(12 Cal. A. 648)

PEOPLE v. SHEHADEY. (Cr. 107.)

(Court of Appeal, Third District, California.
Feb. 16, 1910. Rehearing Denied by
Supreme Court April 15, 1910.)

1. CRIMINAL LAW (§ 1110*)—APPEAL—TRANSCRIPT.

Though an order appearing in the transcript on appeal in a criminal case did not on its face show that the time to pass sentence was extended for the purpose of hearing a motion for new trial, a certificate authorized under rule 14 (78 Pac. x), showing that by the minute entry the time was extended for such purpose, imported verity, and not that any change in the minute entry was made; the implication be-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing that the transcript failed to give the entry as it in fact existed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1110.*]

2. HOMICIDE (§ 203*)—EVIDENCE—DYING DECLARATIONS.

All the attending circumstances, such as the seriousness of the wound inflicted on deceased, may be considered in determining whether he made his dying declaration under a sense of impending death.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*]

3. HOMICIDE (§ 203*)—EVIDENCE—DYING DECLARATIONS—ADMISSIBILITY.

Where deceased stated that defendant shot him, that he was going to die, and would not live long enough to see a doctor, and bade goodbye to those present, dying five minutes later, his statement was admissible as a dying declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*]

4. HOMICIDE (§ 221*)—DYING DECLARATION—SUFFICIENCY OF EVIDENCE.

Evidence held to support the dying declaration of deceased that accused shot him.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 221.*]

5. CRIMINAL LAW (§ 572*)—ALIBI—SUFFICIENCY OF EVIDENCE.

In a murder trial, evidence held insufficient to establish an alibi.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 572.*]

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

S. Shehadey was convicted of murder, and from the judgment, and from an order denying his motion for new trial, he appeals. Affirmed.

C. H. Fairall and R. B. Stalder, for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted of murder in the first degree and was sentenced to imprisonment for life. He appeals from the judgment of conviction and from the order denying his motion for a new trial. The points urged in the brief for reversal of the judgment and order are (1) that there was no sufficient foundation for the admission of the dying statement of deceased; (2) that, if the dying statement of deceased can be considered, it is not supported by evidence sufficient to sustain a verdict of conviction; (3) that there was nothing in the conduct of the defendant, subsequent to the homicide, indicating guilt on his part; (4) that defendant established an alibi.

1. At the argument the point was made for the first time that the time appointed for pronouncing judgment was extended to a date unauthorized by section 1191, Pen. Code, as amended in 1909, and hence, upon the authority of *Rankin v. Superior Court*, 106 Pac. 718, the order denying defendant's motion for a new trial must be reversed and a new trial ordered as provided by section

1202, Pen. Code, as amended in 1909. The verdict was rendered June 9, 1909, and the court thereupon fixed Saturday, June 26, 1909, at 9 o'clock a. m., "as the time for passing sentence." Section 1191, Pen. Code, was amended April 14, 1909, and took effect June 13, 1909, so that when the order was made, June 9th, the court was acting under the old law, by which the court was not limited in its power to defer sentence, and the time for sentence was properly fixed for June 26th. The transcript, as filed, showed, on that day, to wit, June 26th, the following: "On motion of the defendant, it is ordered that the time for passing sentence herein be and the same is continued to July 2, 1909, at 10 o'clock a. m." And the transcript shows that on that day defendant came into court with his attorney, and asked for a new trial. The order as appearing in the transcript does not on its face show that the time to pass sentence was extended "for the purpose of hearing or determining any motion for a new trial," in which case the court, under section 1191, could have extended the time 10 days. Since the transcript was filed, however, the Attorney General has filed a certified copy of the "Minute Entry of June 26, 1909, vol. 3, page 220, Minutes of the Superior Court, Mariposa County," reading as follows: "June 26, 1909. 'People v. S. Shehadey. Present: J. J. Trabucco, Judge, officers of the court, the district attorney, the defendant and his attorney, G. G. Goucher. On motion of the defendant, it is ordered that the time for passing sentence herein be and the same is hereby continued to July 2, 1909, at 10 o'clock a. m., so as to enable defendant to prepare affidavits of newly discovered evidence on motion for new trial.' The continuance thus given, counting from June 26th, as we may, was within the 10 days allowed by section 1191. Defendant replies: 'We admit the power of the court to change its records to conform to the truth, but there is nothing in the record before the court at this time to show that such change has been made upon the order of the court.' The answer is that the latest certificate, showing what the minute entry in fact is, comes to us importing verity, and not that any change in the minute entry has been made. The implication is that the transcript failed to give the minute entry as it in fact existed and the certificate was authorized under rule 14 (78 Pac. x), by which either party may 'for the purpose of correcting any error or defect in the transcript suggest the same in writing, * * * or may produce the same duly certified without such order.' It is not claimed by defendant that the minute entry as last certified is not correct. It appears by the foregoing that the court was acting within its powers, and not in violation of section 1191, and it is therefore unnecessary

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to consider further the scope and meaning of that section.

2. The defendant kept a small store at the town of Varian, Mariposa county, a station on the Yosemite Valley Railroad, on the Merced river, and lived with his family in the rear part of the store building. Near by he also kept a saloon. T. F. Halloran, whom he was charged with killing, was a section hand of the railroad company at that point, and up to about two weeks before his death had boarded and lodged with defendant's family, but had moved into a small cabin 67 feet distant from the Shehadey saloon, or Tent saloon, as sometimes so called, which latter is 67 feet from the Shehadey store or residence. From Halloran's cabin to the railroad section house is 266 feet. From the window in the section house, as testified to by civil engineer N. C. Ray, he could see the door of Halloran's cabin, and could also see a man when walking all the way to the Shehadey saloon. Deceased died from a gunshot wound inflicted by a No. 12 shotgun loaded with No. 7 shot and fired at very close range. The witnesses differed as to the time the shot was heard, varying from 8 p. m. to about 9 p. m. of April 5th. The moon was full and shining brightly. It was testified that the deceased appeared at the section house a few minutes after the noise of the shot was heard. He "was in his shirt sleeves and drawers" and "in his stockings feet." The section house was occupied by one Hernandez and his wife and they kept boarders. There were three or four men in the house at this time. Two of them went for John Varian, the postmaster at Varian, who lived about a half a mile distant. He went at once to the section house, and found Halloran lying on a quilt suffering from "a large wound, a little to the right of the navel side, right under the short rib. One of his hands had the middle finger gone from the first joint, and the other two fingers the points were injured." The evidence, aside from the alleged dying statements of deceased, was circumstantial, and not in itself conclusive, or very strongly incriminatory. It is not probable that defendant would have been convicted but for the statements in question, and it is, therefore, important first to inquire as to their admissibility.

Witness John Varian testified: "Halloran said that he was going to die, and that he would like to tell me something about his estate, how he wanted it divided, which he stated. He said that defendant shot him, that he came to the door, and tried to force the door, and he was in bed at the time, and finally defendant went off from the door and came up to the door and hollered to him, and told him that SI wanted to see him. He went to the door, and, as he opened the door, he said defendant shot him. I told Halloran that I did not think that he was going to

die. I said to him as soon as the doctor would get there he would fix him in shape, and he said, 'I will never live long enough to see a doctor.' Before Halloran died, I went to Halloran's cabin at his request to get \$20 in coin in his pants and some blankets, as he was getting cold, and he requested me to take charge of his cabin, which I did. Halloran died about 11:40 a. m., April 5th" (a. m. should read p. m., as clearly appears). On cross-examination the witness testified: "Halloran said he knew defendant because he knew him by his voice and clothes. * * * It was near 9 p. m. when they came after me. It took me about 12 minutes to go up to the section house. * * * When Halloran died, there were present Mr. Plyler, myself, some of the section men, and two wood choppers."

Witness Plyler testified: "I am a merchant. * * * My store is about one-fourth mile from defendant's store and Varian station. * * * Two Mexicans came after me on the night of April 5th, and I arrived at Halloran's bedside before he died. He was lying on the floor in the section house. He had a big hole on the right side of his body. The inside part of it came away out. Nearly three inches protruded. Halloran said 'that Shehadey came to my door and told me SI wanted to talk to me, and shot me all to pieces.' He said good-bye to all of us and died. He died within five minutes after he made the last statement. He made the statement more than once that he was going to die." The witness arrived at the section house about 10:15 p. m. of the 5th of April. The testimony of the coroner was that there "was an oblong wound measuring $2\frac{3}{4}$ inches in length and $1\frac{1}{4}$ inches in width on the right side of the abdomen of deceased. An eighth of an inch of the first finger of the right hand was shot off. About one-fourth of an inch of the second finger of the right hand was off the same as the others. There were no other wounds of consequence. I found shots in the entrails and in the flesh near the wound in the abdomen. I picked these shots out of the intestines and some from the edges of the wound."

We are aware of the strictness of the rule governing the admissibility of dying declarations, and that the courts should and do exercise extreme caution in their admission. The sense of impending death is deemed a sufficient substitute for an oath, but the test of cross-examination—a most valuable medium of ascertaining the truth—is wanting. In *People v. Sanchez*, 24 Cal. 17, 24, Mr. Justice Sanderson stated the rule in these words: "An undoubting belief existing in the mind of the declarant at the time the declarations are made is indispensable to that sanction which the law exacts." In *People v. Bemmerly*, 87 Cal. 117, 25 Pac. 266, the court said: "It is enough, if it satisfactorily appears in any mode that they were made under that sanction, whether it be di-

rectly proved by the express language of the declarant, or be inferred from his evident danger, or the opinion of medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind." 1 Greenl. Ev. § 158. The cases hold that all the attending circumstances may be considered in determining whether the deceased made the dying declaration under a sense of impending death. *People v. Yokum*, 118 Cal. 437, 50 Pac. 686; *People v. Lem Deo*, 132 Cal. 199, 203, 64 Pac. 265. Among the circumstances that may be considered as influencing the mind of the declarant is the seriousness of the wound inflicted upon him. It seems to us that the learned trial judge was justified in accepting the statements as coming within the rule and in letting them go to the jury.

3. It appeared that defendant and deceased, while the latter was living with the family of the former, had some angry words growing out of a small account for goods purchased by deceased from defendant; also, that defendant had shown some bitterness towards deceased because of his undue attentions of the wife of defendant. In this connection defendant had made some threats of bodily injury to deceased. Whether it was because of this disagreement, or because defendant's wife on account of her sickness could no longer cook for deceased, that he left and went to his cabin, does not very clearly appear. Judging from defendant's feeling towards deceased at that time, it is altogether likely that he quit defendant's house because of the unfriendly attitude of defendant towards him.

Witness Nickerson, chief engineer of the Yosemite Valley Railroad, received a letter from defendant, dated March 13, 1909. Defendant is a Syrian by birth, and could neither read nor write the English language. This letter was written by his stepdaughter at his dictation, and he admitted having dictated it. The letter is principally a complaint against deceased, and in it defendant alludes to his demand upon deceased to pay his bill, and also refers to his interference with his family.

Aaron Varian testified that he was employed hauling freight for defendant; that he arrived at his store with a load on the evening of April 5th. He testified: "While defendant and I were returning to the store from the barn, we could see a light in Halloran's cabin and defendant said: 'There is that damned son of a bitch that has got a light in his house.' He was somewhat angry." John Varian, Jr., testified: "I had a conversation with defendant on or about March 17, 1909, relative to Halloran, wherein I asked him how Halloran was getting along. Shehadey said, 'Oh, that son of a bitch, some day when I am feeling right, I

will fix that Irish son of a bitch.' At that time Halloran was not boarding at Shehadey's. He was boarding over at his cabin where he built his house. When defendant spoke of Halloran, he said it kind of laughing."

Richard Carter testified that at the time Halloran left defendant's house and moved to his cabin he had a conversation with defendant. "I told defendant that Halloran was eating his breakfast, and defendant said he was going to make out Halloran's bill right away, and, if he did not pay it that day, he would kick his head off. Defendant also said that Halloran wanted to play with his wife, and he did not want any man to play with his wife, that he could make his own babies, and make them quick if he wanted to." Witness Wiley was present and testified to this conversation. This testimony was put forward as tending to show motive. Obviously, as the provocation to a murderous assault, the facts present no very persuasive proof, and yet we cannot say but that in defendant's mind they might have been a contributing cause leading to a strong feeling for revenge.

Mrs. Louisa Hernandez, wife of Benino, who kept the section house, testified: "Before the wounded man came to the house, I looked out of the window in the dining room, and saw a man dressed in white leave the house where the wounded man lived and walk rapidly toward the saloon. I don't know if he went into the house or the saloon. It was three or four minutes after I saw this man before the wounded man came to my house. I heard a shot just a little while before I looked out the window." On cross-examination, she testified: "When I heard the shot, my husband and friend were at my bed, and I was in the kitchen. I naturally looked out of the window immediately I heard the shot. It was moonlight, and I could see everything, but did not look very long. When I saw the white figure, it was right at the door of the wounded man's cabin. The white figure went towards the house or the saloon; and I think it was a man. When I last saw him, he was up on the hill, the bank, the grade. I saw a gun in his hand. * * * I did not have much time. I was only there a few moments. The figure I saw while looking out the window wore white pants or white drawers; don't know which. I only had a glimpse of the figure. It was 3 o'clock p. m. when the wounded man came to the house by my watch in the kitchen."

It was in evidence that defendant had a shotgun of No. 12 bore, and that he kept ammunition for such a gun in his store. There was evidence that the defendant was dressed that evening in light-colored clothes. Hernandez had a gun of this bore, but he testified that it had not been used for some time before. Deputy Sheriff Walter Davis testified that he reached Varian about mid-

night, and Halloran was dead. "The Shehadey store is a wooden structure, and his residence is in the rear part of the store. I went around the building several times, but heard no noise of any kind in it. I went to the front door of Shehadey's store and residence a little after midnight, and called in a loud voice as follows: 'Solomon, Shehadey, Shehadey.' I received no reply. I arrested defendant about daylight on the morning of the 6th day of April, as he came out. I told him that this piece of business last night was pretty bad. He said he did not know anything about it. I said, 'There is a man shot,' and he said, 'I don't know nothing about it,' and I said the section boss was shot. I asked him if he had a gun, and he said he had. He went into the room and pointed to the gun. I told him to walk past, and I came and took the gun. The gun was standing at the head of the bed. The bed had the appearance of having been occupied. * * * Both barrels of the gun were empty." The testimony of defendant, his wife, and stepdaughter was, that defendant went to bed with sick headache about 6 p. m., was called up to wait upon certain customers who bought some articles, and went to the saloon and had a drink with defendant, and that he returned from the saloon to the house and went to bed again and remained there until morning; that they none of them knew of the shooting nor heard of it until the next morning, although the whole neighborhood seems to have been aroused and aware of the tragedy. Undersheriff Paine took charge of defendant on the 6th, and took the gun from Deputy Sheriff Davis. "Defendant said it was his gun. I observed both barrels. They had been cleaned since they were fired. The left barrel was very much cleaner than the right. * * * I had a conversation with defendant. He said that he did not hear any shot, and heard no noise during the night, as he was asleep. He said he went to bed at 7 and was asleep by 7:30. * * * In a conversation with defendant, I asked him if he and deceased ever had any trouble, and he said they had a little difference about a bill. Defendant also stated that deceased had bothered his wife by going into her room and kind of making free with her. J. H. Ellis asked him in my presence if it didn't make him 'mad for Halloran to bother your wife,' and he said, 'I think my wife is all right; that is her business.'" The three persons who called at the store on the night of the 5th testified that defendant drank with them and was slightly intoxicated, and that

they parted with defendant at 8:45 p. m. The homicide was committed after these persons left defendant, and it must have been very soon thereafter. Defendant's wife and stepdaughter did not retire, according to their testimony, until about 11 o'clock, but they testified that they heard no shot, and knew nothing of the homicide that night. The section house where the deceased lay was but 114 feet distant from the Shehadey store and Halloran's cabin was about 135 feet distant. It would seem hard to believe that with all the coming and going of that night to this section house no one at Shehadey's heard what it was about. Without further comments, our conclusion is that the dying declarations of the deceased find support in the evidence.

4. The proof of alibi rests largely upon the testimony of defendant, his wife, and stepdaughter and upon the variance in the testimony as to the time when the shot was fired. Mrs. Hernandez testified that the wounded man came to her home at 8 o'clock as shown by her watch in the kitchen. Other testimony of the people's witnesses shows that it must have been after half past 8 o'clock and near to 9. There was time for defendant to have gone to the cabin from his saloon, after parting with his customers, and committed the crime and returned to his house before 9 p. m., as the distance was but 67 feet. The jury evidently did not accept the testimony of defendant and his family as to his whereabouts the night of the 5th of April. We have set out most of the facts and circumstances on which the verdict rested. But in this as in all similar cases there was no doubt an atmosphere surrounding the trial which, while indefinable, had its influence upon the jury, but could not be incorporated in the record. This atmosphere is sometimes charged with local prejudice and passion and improperly influences the jury. But a careful reading of the record here fails to disclose any evidence that witnesses were testifying under outside pressure in any degree. There was no evidence that any person other than defendant had any feelings of enmity against the deceased, nor was there any evidence casting the slightest suspicion on any one other than defendant.

There are no assignments of error committed in the course of the trial. Defendant seems to have been ably defended, and his cause is well presented here.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(12 Cal. A. 658)

TACKETT v. HENDERSON BROS. CO. et al.
(Civ. 684.)(Court of Appeal, Third District, California.
Feb. 18, 1910. Rehearing Denied by
Supreme Court April 15, 1910.)1. **ELECTRICITY (§ 16*)—INJURIES INCIDENT TO
USE—FAILURE TO INSPECT.**

Failure to discover that a live wire was lying on the ground near a walk from 1 o'clock p. m. on Friday until 6:30 o'clock p. m. the following Sunday is such negligence as renders the owner liable for the resulting death of a child, where the same could have been discovered by reasonable care and inspection.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 16.*]

2. **ELECTRICITY (§ 18*)—INJURIES—CONTRIBUTORY NEGLIGENCE.**

A boy 11 years of age is not guilty of such contributory negligence in touching a wire lying on the ground near a walk as to prevent recovery against the owner for his death thereby, where there was nothing to indicate that it was charged with electricity.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 18.*]

3. **PRINCIPAL AND AGENT (§ 159*)—LIABILITY OF PRINCIPAL FOR NEGLIGENCE OF AGENT.**

The owners of property are liable for the negligence of persons acting within the scope of their employment in the management of the property for them.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 599-613; Dec. Dig. § 159.*]

4. **NEGLIGENCE (§ 4*)—NATURE—"DUE CARE"—"ORDINARY CARE."**

The terms "due care" and "ordinary care" as used in the law of negligence are relative terms, and mean a degree of care commensurate with the danger involved.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 6; Dec. Dig. § 4.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2221, 2222; vol. 8, p. 7643; vol. 6, pp. 5029-5042; vol. 8, pp. 7739, 7740.]

5. **ELECTRICITY (§ 14*)—INJURIES INCIDENT TO USE—CARE REQUIRED.**

A person or corporation using wires charged with electricity is bound, while the public is not, not only to know the extent of the danger arising from them, but to use the very highest degree of care practicable to avoid injury.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 7; Dec. Dig. § 14.*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by J. L. Tackett against Henderson Bros. Company, a corporation, Maria Cary Sanborn, and others. Plaintiff had judgment, and defendants other than the corporation appeal. Affirmed.

A. L. Levinsky, for appellants. J. A. Plummer, for respondent.

BURNETT, J. There is no serious controversy as to the facts herein, which may be stated as follows: The appellants own all the wires, poles, and electrical appliances used for distributing electricity in the town of Lodi, San Joaquin county; Cary Bros. being the managers of the plant. The electric-

ity which they distribute is purchased by them from the American River Electric Company. This company has no control nor supervision over the wires or electrical appliances belonging to appellants. Appellants strung the wire in controversy a year before the electrocution of plaintiff's minor child, caused by coming in contact with said wire. This wire was given two wraps around a pole, carried across a sidewalk over an office building, and attached to an iron pipe of a water tank. It was an ordinary galvanized wire, uninsulated, and having the appearance, as some of the witnesses stated, of being used as a guy wire, and not as one charged with electricity. Said wire was used as a "third leg" or ground wire of the system, and it thus saved the expense of another wire. From the date of its erection until the death of said child no attention seems to have been paid to this wire. At a time when the current was shut off an employé of Henderson Bros., thinking that said wire was a guy wire, cut it in order to change the iron stand pipe to which it was attached. The wire was cut between 1 and 2 o'clock of Friday, August 2d, and remained in that condition until Sunday evening between 6 and 7 o'clock of August 4th. At this time the deceased, who was nearly 11 years old, was walking north on Sacramento street with his mother, he being on the sidewalk and she being in the street. When he saw the wire he called to his mother, saying: "This is the electric wire." He then grasped hold of it, and this resulted in his immediate death. Appellants were not notified that the wire was to be cut, or any change was to be made in it, nor did they have any knowledge that it had been cut until after the death of the said child, Millard M. Tackett. The wire did not fall by reason of any structural infirmity or defective fastening. The entire length of the wires owned by appellants in the town of Lodi was about 15 miles, which could be inspected in one day, and the scene of the catastrophe was only a short distance from the office of the company. It appears also that other persons saw the wire, and attempted to take hold of it, believing from its appearance that it was not charged; the testimony showing that even electrical experts, seeing a wire wrapped as this, would conclude that it was simply a guy wire.

Many questions of law are discussed by appellants, and various reasons are assigned for a reversal of the judgment, but the vital propositions involved are: (1) Were appellants chargeable with negligence? and (2) was the deceased guilty of contributory negligence in taking hold of the said detached wire?

As to the first, upon special issues submitted, the jury found that the "defendants Cary Bros., by the exercise of reasonable care and inspection, could have discovered the condi-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion of the fallen wire between about 1 o'clock Friday afternoon and about 6:30 o'clock the following Sunday afternoon," and also that "the wire which was placed in position by the defendants Cary Bros., at the time it was placed in position, and up to the time when it was cut loose from the iron pipe on the tank, was dangerous to any person passing underneath." In reference to this latter finding it may be observed that the menace from the wire in position lay in the fact, as has already been indicated, that its appearance and adjustment were such as to lead to the belief that it was not charged with electricity. This finding, however, need not be considered at length, since the general verdict as to negligence follows from the answer to the aforesaid special issue as to the ability of appellants to ascertain the condition of the wire after it was cut, and before the accident.

We think it was unquestionably the duty of appellants to make frequent inspection of the system, and upon reason and authority it must be held that their ignorance of the condition of said wire amounts to actionable negligence, with the burden imposed of responding in damages for any injury occasioned thereby. That they omitted a plain and imperious duty in the premises appears from the testimony of the manager that: "So far as I knew, the wire as I strung it across there remained in the same condition it was put up until the day somebody cut one end. I paid no further particular attention to that wire that I know of after it had been put up. I told Mr. Bauer under certain conditions that wire was dangerous. * * * I cannot tell how long it had been prior to the occurrence that I had given the wire any attention." It is apparent, of course, that no attention was paid to it during the interval to which we have referred, as otherwise it would not have been allowed to remain hanging loose. The contention of appellants in this connection is that they are relieved of responsibility because they had no actual knowledge of the condition of the wire. But in view of the character of the agency with which they were dealing, and the solicitude of the law for human life, the failure to exercise diligent and proper care to obtain information is equivalent to actual knowledge of the situation, as far as their civil liability is concerned.

The ground for the strict exaction of the law in reference to the obligation of appellants is well set forth in the opinion of the court in *Mitchell v. Raleigh Electric Company*, 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735, as follows: "The defendant company was engaged in the business of manufacturing, producing, leasing, and selling light made from the use of electricity, which is the most dangerous and deadly power recognized as a necessary agency in developing our civilization and promot-

ing our comfort and business affairs. It differs from all other dangerous utilities. Its association is with the most inoffensive and harmless piece of mechanism, if wire can be classified as such, in common use. In adhering to the wire it gives no warning or knowledge of its deadly presence; vision cannot detect it; it is without color, motion, or body; latently and without sound it exists, and, being odorless, the only means of its discovery lie in the sense of feeling, communicated through the touch, which, as soon as done, becomes its victim. In behalf of human life and the safety of mankind generally it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition." Many cases to the same effect in connection with the foregoing are cited in *Shawnee Light & Power Co. v. Sears*, 21 Okl. 13, 95 Pac. 449, wherein it is held that: "An electric light company, using the public streets of a municipality for its poles, wires, and appliances in conducting its business, is required to exercise the highest degree of care, and to maintain in the best possible condition the best appliances known to the science to render its business safe and to use that degree of care, caution, and circumspection in keeping with the dangerous character of its business." In the *Sears Case*, supra, the chief complaint of appellant was directed against an instruction informing the jury that it was "the duty of defendant to keep its appliances in a safe condition for those who might be brought in close proximity with them in traveling along the public streets, and if plaintiff, without fault on her part, was injured as complained of, then she was entitled to recover damages in the action." In reference to this instruction the court said: "At the time instruction No. 3 was given by the court, plaintiff's evidence had shown that, without fault on her part, proceeding on the public highway in a place where she had a right to be, she came in contact with the appliances of the defendant company at the edge of the footwalk; that the appliance was one in a most exposed place, and where people were liable to come in contact with it, and one which in the operation of its plant the defendant did not use for the transmission of its current, and in which its current would not then have been except for the want of due care and regard for safety on its part or its servants. Under these circumstances the instruction was given, and the question arises: Was the company liable from a showing of these facts? We hold that it was, and that this is sustained by a great weight of authority in this country and in England"—citing, on [page 24 of 21 Okl.], page 453 [of 95 Pac.] a long list of authorities.

The Supreme Court of Montana stated the

rule in slightly different phraseology as follows: "The owner or operator of an electric plant is bound to exercise a reasonable degree of care in erecting pole lines, selecting appliances, insulating the wires wherever people have a right to go and are liable to come in contact with them, and in maintaining a system of inspection by which any change which has occurred in the physical conditions surrounding the plant, poles, or lines of wire, which would tend to create or increase the danger to persons lawfully in pursuit of their business or pleasure, may be reasonably discovered. It would hardly do to say that the defendant can only be required to exercise due diligence after it receives notice of any defect in its appliances, or of any change in the physical conditions surrounding them, for this would be placing a premium upon negligent ignorance." *Bourke v. Butte Electric & Power Co.*, 33 Mont. 267, 83 Pac. 473. In *Mitchell v. Charleston L. & P. Co.*, 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577, it was held that: "Where a company permitted for a day and a half a circuit breaker to be displaced so as to allow a trolley system to come in contact with a telephone wire, it is guilty of negligence. Irrespective of how the displacement occurred."

In Pennsylvania the rule as to gas companies is stated as follows: "While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say, in general terms, that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken. This would require, in the case of a gas company, not only that its pipes and fittings should be of such material and workmanship, and laid in the ground with such skill and care, as to provide against the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of leaks that might occur from deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in business." Similarly, in *District of Columbia v. Woodbury*, 136 U. S. 463, 10 Sup. Ct. 995 (34 L. Ed. 472), it is held as to those having the care of the streets that they are responsible for their condition if they have actual or constructive notice thereof, and that it is their duty to keep themselves informed concerning the same, and "if a street remains in a dangerous condition so long that the authorities could not help, in the exercise of ordinary care and diligence, knowing that fact, and did not know it because they failed to exercise proper diligence, then the law imputes notice to them; in other words, they have notice in contemplation of law and that is constructive notice." The same principle is affirmed in the courts of this state. In *Giraudi v. Electric Imp. Co.*, 107 Cal. 124, 40 Pac. 106 (28 L. R. A. 596, 48 Am. St. Rep. 114), it is said: "Defendant

was using a dangerous force, and one not generally understood. It was required to use very great care to prevent injury to person or property. It would have been comparatively inexpensive to raise the wires so high above the roof that those having occasion to go there would not come in contact with them." In *Davoust v. City of Alameda*, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, it is held that, "where the death was caused by a live wire negligently allowed by the city to remain upon a beaten path four feet wide over a vacant lot which had been used for many years by residents of the neighborhood in going from their homes to a railroad station, it was sufficient to prove the negligence of the city."

Many other cases are cited by respondent in line with the foregoing, which emphasize the great care required of such companies for the protection of life and property, and our attention has been called to none holding that careless ignorance exonerates from liability. Of course, when the injury to the wire is done by another without the knowledge of the owner, the latter would be entitled to a reasonable time to repair the damage, but here we are satisfied that the failure of appellants for such an interval to ascertain the condition of the wire cannot be justified nor excused.

If the deceased had accidentally touched the wire, there could be no difference of opinion among reasonable persons as to the liability of appellants. The problem, however, is somewhat complicated by the fact that the act was voluntary on his part, and hence the claim is made of contributory negligence. This is rendered more plausible by the consideration that he was an unusually bright boy, but, after all, the question is: Was his conduct under the circumstances indicative of the want of that care which is to be expected, and which the law demands of a boy of his age, seeing what he saw and knowing what he knew? In the solution of the question we cannot lay out of view the fact that he was a mere child, that he did not know of the dangerous character of the wire, and that there was nothing in its appearance to indicate that it was a live wire. That a person of this boy's age is not held to the same degree of caution as is required of an adult will not be challenged by any one, and it is abundantly supported by the cases. That he did not know the wire was dangerous is shown by his conduct in grasping it, *res ipsa loquitur*. It is not at all probable that the boy would have seized the wire if he had any knowledge or intimation of the hazard involved. His actions show that he was deceived by the appearance of the wire; and, since appellants were responsible for that condition likely to mislead even experienced electricians, they cannot escape liability upon the ground that the deceased should not have been deceived. The question is at least open to frank and reason-

able discussion, and as we view it, the conclusion that the lad was not chargeable with contributory negligence is not unreasonable. We, therefore, feel bound by the finding of the jury adverse to the contention of appellants.

As to this point we refer also to some of the decisions expressing views in line with the foregoing. In *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786, it is said: "A child of 10 years of age is not chargeable with contributory negligence because he took hold of a wire in the street charged with a deadly current of electricity, if there was nothing from which even an adult could have inferred that the wire was carrying any current of electricity whatever." Therein is announced the rule that: "A child is held to such care and prudence as is usual among children of his age and capacity." In the course of the discussion we find this language: "We should be very loath to declare an adult guilty of negligence for grasping a wire such as this one, under circumstances such as the defendant contends surrounded the deceased. We certainly cannot declare that this boy, whose conduct must be judged with due regard for his boyish nature and habits, negligently caused his own death." In *Temple v. McComb City Electric Light & Power Company*, 89 Miss. 1, 42 South. 874, 11 L. R. A. (N. S.) 449, 119 Am. St. Rep. 698, it is held that: "If a boy climbs into a tree through the branches of which an uninsulated electric wire has been placed by an electric light company, and he is injured by coming in contact with such wire, the company is liable therefor, when the tree is such as any small boy would be attracted to and use in his play." In the *Giraudi Case*, supra, the rule is clearly stated by our Supreme Court as follows: "The mere fact that a dangerous agency is used raises no presumption that the public know enough of its nature to avoid the danger which may arise from its use, and the public—aside from the consumers using the commodity—owe no duty to those introducing it; but it is the duty of those making a profit from the use of a dangerous element, such as electricity, to use the utmost care to prevent injury to any class of people, and they must protect those possessing less than ordinary knowledge of the character of the commodity. * * * Where a person injured from contact with electric wires was ignorant of the danger that might result from the contact, a less degree of care is demanded of him than would have been required if he had been informed of the danger; and what constitutes reasonable care must be judged by the circumstances of the case of which the jury are the judges." See, also, *Griffin v. United Electric Light Co.*, 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477. Without multiplying authorities, we conclude that it would be harsh and brutal to hold that beyond reasonable controversy the

deceased was guilty of contributory negligence, and that it was against the mandate of the law to submit the determination of this question to the judgment of the jury. To hold with appellants would be to indorse the doctrine that a snare may be laid for the unwary, and that the guilty may take refuge behind the childish credulity of the innocent.

The cases cited by appellants in opposition to these views do not reach the point. We notice specifically only two California decisions. *Studer v. S. P. Co.*, 121 Cal. 400, 53 Pac. 942, 66 Am. St. Rep. 39, and *George v. Los Angeles Ry. Co.*, 126 Cal. 358, 58 Pac. 819, 46 L. R. A. 829, 77 Am. St. Rep. 184. In the former it was held that: "A child between 12 and 13 years old, who attempts to cross between the cars of a freight train standing at a crossing, and while in the act of climbing over the couplings, is killed by the sudden and unannounced starting of the train, is chargeable with contributory negligence as matter of law"—and furthermore that: "Children, as well as adults, must use the discretion which persons of their years ordinarily have, and cannot be permitted with impunity to indulge in conduct which they know, or ought to know, to be careless." The danger there was obvious to any child of that age of ordinary intelligence, and it was held that the risk was so great and so manifest that the deceased had no right to assume it. In the *George Case* the question of contributory negligence was submitted to the jury, who found for the defendant, and the Supreme Court held it was proper to leave this question to the jury, "free from any presumption as to plaintiff's incapacity." In those cases the danger was open to the observation, and could be comprehended by children over 10 years old, of average intelligence. Here the danger was hidden and concealed, and by reason of the negligence of appellants would not be suspected even by adults, and therefore an altogether different situation is presented.

The court's instructions, as we view them, stated the law correctly. There seems to be no valid objection to instruction No. 3, charging that: "The owners of property are liable for any acts of negligence upon the part of persons who may be managing such property for them, and if you believe from a preponderance of the evidence that the Cary Bros. were guilty of the negligence charged in the complaint, and that their negligence was the proximate cause of the death of Millard Tackett, and that at the time of the death of said Tackett the Cary Bros. were acting as managers of the electric system at Lodi for the defendants Blanch D. Cary and Maria Cary Sanborn, then your verdict should be, not only against the Cary Bros., but also against the said Blanch D. Cary and Maria Cary Sanborn." The instruction is hypothetical, does not assume any fact as proven, embodies a correct principle of law, and is based upon the evidence. The only criticism that

could be directed against it is that it does not specifically require that the acts of the managers, in order to bind the principal, must be within the scope of their employment, but that element is necessarily implied, and the jury were explicitly so directed in another instruction.

An instruction was also given that: "The terms 'due care' and 'ordinary diligence' as used in the law of negligence are relative terms, and mean a degree of care commensurate with the danger involved. * * *

Wires charged with an electric current may be harmless, or they may be in the highest degree dangerous. The difference in this respect may not be apparent to ordinary observation, and the public, therefore, while presumed to know that danger may be present, are not bound to know its degree in any particular case. The company or persons, however, using such a dangerous agent are bound to know the extent of the danger, and to use the highest degree of care practicable to avoid injury to any one who may be lawfully in proximity to its wires, and liable to come accidentally in contact therewith. * * *

Where one places or maintains a wire charged with a highly dangerous current, or a wire likely to become charged with a highly dangerous current, over a public street, the law requires that he must use the highest or utmost degree of care in the construction, maintenance, and operation of said wire, and he must use the best materials and most approved methods of construction to prevent injury to any one who may lawfully or accidentally come in contact therewith and also use due care and circumspection over such wire to prevent it from sagging down within reach of pedestrians lawfully using a public street or sidewalk space adjacent thereto. Any failure to observe these requirements renders the person so failing liable for all damages that may thereby be caused to others who, without fault of their own, come in contact with such wire or wires." The objection to this instruction made by appellants is that: "The jury were instructed that, while the public may be presumed to know the danger, they are not bound to know its degree, and furthermore that these appellants were compelled to exercise due care and circumspection to prevent the wire from sagging down, which was not a fact in the case, because the wire did not sag down, and therefore these appellants had performed their duty. It sagged down by reason of having been cut without notice to these appellants, and it was an instruction not based upon the evidence, and, like the last instruction, permitted the jury to romance, guess, and surmise."

The proposition however, as to the degree of knowledge has been affirmed in many decisions, among them the case of *Fitzgerald v. Edison Electric Illuminating Company*, 200

Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732, wherein it is said: "A person or company using wires charged with an electric current is bound while the public is not, not only to know the extent of the danger arising from them, but to use the very highest degree of care practicable to avoid injury, etc. The duty is not only to make such wires safe by proper insulation, but also to keep them so by constant oversight and repair." It is also directly upheld in this state by the *Giraudi Case*, supra. There was evidence also—in fact, it is undisputed—that the wire was 'sagging' or hanging down over the sidewalk for two days. It is true that, as before seen, it was cut by another, but appellants' negligence consisted in allowing it to remain so. The objections of appellants are thus seen to be without merit.

Many objections were made to the admissibility of evidence. We do not feel called upon to review them in detail. We think no prejudicial error was committed. Some of the questions were proper on behalf of the defendants other than appellants; and, if the answers thereto should not have been considered as against the latter, it is sufficient to say that there was no request to so limit them, and there were other questions where an objection was overruled that were not answered at all.

We find no material conflict in the special findings of the jury, nor do we think they are opposed to the general verdict. The case seems to have been fairly tried, the verdict is a very moderate one, and we think the judgment and the order denying the motion for a new trial should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

(47 Colo. 593)

MILBURN v. HAWORTH.

(Supreme Court of Colorado. April 4, 1910.)

1. CANCELLATION OF INSTRUMENTS (§ 24*) — ASSIGNMENTS—TENDER OF CONSIDERATION.

Where the evidence showed that plaintiff suing to cancel an assignment of ditch stock had been overreached by defendant, and did not know at the time he made the assignment that he had signed away such stock, and no consideration was received for it, there was nothing for plaintiff to return or to offer, regardless of what might have been given plaintiff for other things entirely different from the ditch stock.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 33; Dec. Dig. § 24.*]

2. WITNESSES (§ 215*) — PRIVILEGE—CLERGYMEN.

In an action to set aside an assignment of stock for fraud, defendant cannot claim that statements made in the presence of a minister and three members of his church, who were called together by defendant, were privileged, under Rev. St. 1908, § 7274, providing that a clergy-

man shall not be examined as to any confession made to him in his professional character, etc. [Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 778; Dec. Dig. § 215.*]

Appeal from District Court, Larimer County; Jas. E. Garrigues, Judge.

Action by Frank P. Haworth against Luther P. Milburn. From a judgment for plaintiff, defendant appeals. Affirmed.

H. M. Minor, for appellant. Frank J. Annis and Fred W. Stow, for appellee.

MUSSER, J. This is an action to cancel the assignment of a share of ditch stock alleged to have been fraudulently obtained by the defendant from the plaintiff.

In giving his reasons for the judgment in this case, the trial judge, after saying he had taken extra pains to watch the plaintiff and defendant upon the witness stand, and commenting on the difference in character apparent from an observation of the parties, said: "When we come to take into consideration the whole history of the case and look at the motives and impulses that inspired these men to act, what they intended to accomplish, we find on the part of one well-laid design, and upon the part of the other, lack of design and simplicity. You find one willing to deceive, willing to practice deception for the purpose of accomplishing his own aggrandizement." And, after further commenting on the evidence as showing design, cunning, and a disposition on the part of the defendant, Milburn, to overreach this plaintiff, the trial judge further said: "I find, as a matter of fact, that Mr. Haworth was overreached by Mr. Milburn in this transaction and in the procuring of the bill of sale and of the quitclaim deed. I further find that Mr. Haworth did not know at the time he met the defendant, and signed these papers, that he was signing away what purported to be his rights to the ditch stock, and that he was deceived thereby by the misrepresentations, conduct, and manner of Mr. Milburn. * * * I am going to hold that this transfer of stock was obtained fraudulently, that Haworth was overreached, and that the subsequent transfers were fraudulent." In the face of such findings by the trial court, supported by competent evidence and found in the light of a personal observation of the witnesses themselves, this court is bound to say that the bill of sale and deed of the ditch stock were obtained from the plaintiff by the fraud of defendant. Hence the authorities cited, showing when written instruments will not be set aside in the absence of fraud or showing that fraud was not present, are not applicable here.

The plaintiff did not receive or accept any consideration for the transfer of the ditch stock. He did not know he was transferring

it. The transfer of it was never mentioned in the conversations between plaintiff and defendant. The defendant, by artifice and fraud, concealed the fact of its transfer from the plaintiff. If plaintiff accepted any consideration, it was for things entirely other and different from the ditch stock. Having accepted nothing for the ditch stock, there was nothing for the plaintiff to return or offer to return. The defendant made certain statements in the presence of four members of his church, including the minister, whom he had assembled of his own motion. It is claimed that these statements were privileged, and ought not to have been admitted in evidence. Such communications to be privileged must fall within the third subdivision of section 7274, Rev. St. 1908, which provides that: "A clergyman or priest, shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs." The statements made by the defendant to his fellow churchmen, including the minister, were not made to the minister in his professional character in the course of discipline enjoined by the particular church. It does not appear that the proceeding was at all connected with the discipline of the church. On the contrary, it appears that the gathering was of defendant's own invention. The statements were made in the same manner that they would have been made to any other four gentlemen whom the defendant might call together.

There is no error in this record prejudicial to the defendant. The judgment is right, and is therefore affirmed.

Judgment affirmed.

STEELE, C. J., and CAMPBELL, J., concur.

(47 Colo. 547)

GREAT WESTERN SUGAR CO. et al. v. WHITE et al.

(Supreme Court of Colorado. April 4, 1910.)

1. APPEAL AND ERROR (§ 1010*) — REVIEW — FINDINGS OF TRIAL COURT — CONCLUSIVE-NESS.

A finding of the trial court supported by sufficient competent evidence is binding on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979; Dec. Dig. § 1010.*]

2. WATERS AND WATER COURSES (§ 254*) — CONTRACT TO SUPPLY WATER — CONSTRUCTION.

Under a contract by which a stream of water measuring four cubic feet per second of time flowing through a canal was to be supplied, and, if needed between certain dates each year, the water was to be supplied from such water as could be lawfully got in the canal or in a reservoir, the maximum quantity to be drawn from the reservoir not to exceed one twenty-fifth

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

part of the total amount of water that would be in the reservoir each year, where the water which could be lawfully got in the reservoir was that which came to the headgate of a certain ditch, and the water which could be lawfully got into the canal was the accretions and seepage from the reservoir and a river, the maximum quantity to be drawn from the water coming to the headgate of the ditch could not exceed one twenty-fifth part of such water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. § 254.*]

Appeal from District Court, Weld County; Jas. E. Garrigues, Judge.

Action by Charles A. White and others against the Great Western Sugar Company and another. Judgment for plaintiffs, and the Sugar Company alone appeals. Affirmed.

Wolcott, Vaile & Waterman and H. N. Haynes, for appellant. Charles D. Todd, for appellees.

MUSSER, J. On December 26, 1900, the Greeley & Loveland Irrigation & Land Company was the owner of two ditches and a reservoir, supplied from the Big Thompson river. One of the ditches was the Loveland and Greeley canal, hereinafter referred to as the canal, a large ditch running a distance of about 25 miles easterly from the river. The other was the Barnes ditch, heading about two miles up the river from the canal, and running in an easterly direction about seven miles. The reservoir, which was constructed in 1893, was about three-quarters of a mile north of the canal, and was fed by the Barnes ditch. From the time of its construction to the year 1901, without dispute, and by the finding of the court to the commencement of this action in 1904, it appears that all of the water reaching the headgate of the Barnes ditch was diverted from the river and carried through that ditch into the reservoir. From thence the water was drawn off through a tunnel and open ditch, emptied into the canal, and, through the latter, delivered to water consumers along the canal, who were owners of reservoir rights. A reservoir right was the right to receive one three hundredth part of such water as might be annually stored in and capable of being drawn off at the outlet of said reservoir, and the company owning the reservoir agreed to use ordinary diligence to fill the reservoir each year from its appropriation. There were in all 300 of these rights. Aside from the water which was discharged into the canal directly from the reservoir, the only other sources of water supply for the canal were the accretions in the river below the headgate of the Barnes ditch and such water as might come by seepage from the reservoir. Each of the aforesaid ditches were enlargements of older ditches with certain rights for direct irrigation, which are left out of view in the discussion of

this case. On December 26, 1900, the land company had disposed of about 133 of these reservoir rights, and on that date it entered into a contract with the grantors of appellant, who contemplated the erection of a sugar factory and desired water to use in its operation. The part of the contract material here, after omitting the formal parts, is as follows: "That, in consideration of the stipulations herein contained and the annual rental to be paid as hereinafter specified, the party of the first part (the land company) hereby agrees to supply continuously to the parties of the second part (appellant's grantors), or their assigns, a stream of water measuring four cubic feet per second of time flowing through the canal of the party of the first part, known as the Loveland and Greeley Canal, if needed, between September 15th and February 15th, in each twelve months covered by this agreement, beginning with September 15th, 1901, and ending on February 15th, in the year A. D. 1911, from such water as the said party of the first part may be able to lawfully get into its said canal or its Loveland reservoir each year, but the maximum quantity to be drawn from the said reservoir during the said period shall not exceed one twenty-fifth part of the total amount of water that may be in the reservoir each year. Said water to be used in the sugar beet factory which the parties of the second part are now contemplating erecting adjoining the town of Loveland in the county of Larimer, state of Colorado, and for no other purpose. The party of the first part, its successors or assigns, shall not be held accountable for the quality of water to be furnished under this agreement, neither shall the party of the first part be liable for any failure of supply nor for any shortage in the supply of water herein contracted for that may arise by reason of litigation or want of legal right of the party of the first part to take, sell, carry, or deliver water for the purposes herein mentioned, nor by reason of drouth or any casual or unforeseen or unavoidable accident to its ditches or reservoir, or works connected therewith, but, in case of any shortage in the supply as aforesaid, the party of the first part shall allow the parties of the second part or their assigns a pro rata deduction from the sum herein stipulated to be paid each year by the parties of the second part." Afterwards the land company transferred its ditches and reservoir to the Greeley & Loveland Irrigation Company, hereinafter called the "irrigation company," and the grantees in the contract transferred the contract to the appellant, hereinafter called the "sugar company." After entering into the contract of December 26, 1900, with the grantors of the sugar company, the land company or the irrigation company, or both, sold about 155 reservoir rights to various parties. The

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

contracts covering these 155 rights were the same as the contracts covering the 133 rights theretofore sold. These 288 rights, with the $\frac{1}{25}$ mentioned in the contract, which seems to have been regarded by the irrigation company as 12 rights or $\frac{1}{25}$ of 300 rights, disposed of all the reservoir rights prior to the commencement of this action.

The pleadings in this action are very voluminous. The appellees, White, Houston, and Steele, each owning several reservoir rights, some of which were sold before and some after the date of the contract to supply water to the sugar factory, began this action against the irrigation company and the sugar company, setting up the construction, ownership, and details of operation of the ditches and reservoir, the reservoir contracts, the contract with the grantors of the sugar company, and alleging, in substance, that the irrigation company had supplied and would continue to supply to the sugar company more than one twenty-fifth of the water which was collected in the reservoir, or capable of being collected therein, either by permitting water to pass by the headgate of the Barnes ditch and into the canal or by taking it direct from the reservoir, so as to supply the sugar company a continuous flow of four cubic feet per second and at times more than that amount, and praying that the sugar company be restrained from demanding or receiving more than one twenty-fifth of such water as may annually be stored in the reservoir, and from diverting from the Barnes ditch water that may be lawfully stored in the reservoir from September 15th to February 15th in each year, and that the irrigation company be required to divert into the Barnes ditch and store in the reservoir all water coming to the headgate of the Barnes ditch during that period.

The court below found the issues in favor of the plaintiffs, and, in short, adjudged that all of the water reaching the headgate of the Barnes ditch should be diverted through that ditch and stored in the reservoir during the nonirrigation season; that the sugar company was not entitled to any water from the reservoir unless it failed to get four cubic feet per second elsewhere, and then not in excess of the one twenty-fifth part, and the court found that the sugar company was not entitled to any of the water that was stored in or capable of being stored in the reservoir through the Barnes ditch, except the one twenty-fifth part as aforesaid. By the judgment, the sugar company must depend upon the accretions of water in the river below the headgate of the Barnes ditch and the seepage into the canal from the reservoir, and, if from these sources it does not receive a flow of four cubic feet per second, it may demand and receive from the reservoir enough water to make up the deficiency, not exceeding the one twenty-fifth part. The sugar company has appealed to this court. Its position is briefly stated in

the reply brief as follows: "Our claim is the contract called for a continuous stream of four feet when available from the supply coming down the river to grantor's system during time specified, to be supplemented, if needed, by one twenty-fifth of water previously impounded in Lake Loveland, as a reserve to insure the quantity called for if at times the full river supply might not be available." The sugar company thus claims that under the contract of December 26, 1900, it is entitled to receive in the canal a continuous flow of four cubic feet per second from the water which reaches the headgate of the Barnes ditch, and that, if insufficient water reaches the headgate of the Barnes ditch to supply such a flow, it may receive from the reservoir enough water to make up the deficiency, not exceeding one twenty-fifth of what may be stored in the reservoir. While nothing is said in the quotation from the brief about the holders of reservoir rights, elsewhere it is said that, while the claimed rights of the sugar company cannot interfere with the holders of the 133 rights purchased before December 26, 1900, the reservoir rights sold after that date are subject to the contract as construed by the sugar company. The errors assigned all turn upon the construction of that contract. If the construction by the lower court is right, the judgment is right.

It is contended that during the operation seasons, from 1901 to 1903, immediately after making the contract, the factory owners received a continuous flow of four cubic feet per second. The sugar company in its claim does not make clear from whence this flow came. It claims that this was a construction of the contract by the parties themselves, which permitted a continuous flow of four cubic feet per second from the waters of the irrigation system, and that this construction is deserving of great, if not controlling, weight. If the weight of a contemporaneous construction by parties to an ambiguous contract be admitted as contended for, it cannot be applied here, for what was done by the parties to the contract from 1901 to 1903 does not conform to the construction now contended for. The court found, and that finding is binding because supported by sufficient competent evidence, that during all portions of the nonirrigation seasons, from the construction of the reservoir in 1893 to the commencement of this action in 1904, the owner of the reservoir "caused to be diverted, by means of its Barnes ditch, all of the waters flowing in said Big Thompson river at the headgate of said canal (Barnes ditch), and conveyed the same to said reservoir to be stored therein for the use and benefit of said corporation (owner of reservoir) and the holders of its reservoir contracts." So that from 1901 to 1903 the factory received a continuous flow of four cubic feet per second in one of two ways: First, from accretions in the river below the Barnes

ditch and seepage, supplemented by not exceeding one twenty-fifth part from the reservoir; or, second, from the reservoir in excess of the one twenty-fifth part. If the factory was supplied in the first way aforesaid, it was in entire harmony with the contract as construed by the court below. If, however, it received more than one twenty-fifth part of the water collected in the reservoir, it was in direct conflict with an unambiguous provision of the contract, and cannot be taken as a construction of a part of the contract, which needs no construction beyond its plain words. Another reason why it is doubtful whether the contemporaneous construction of the contract can have the weight contended for is that this contract affects the rights of third parties, the holders of reservoir rights who are not parties to it. Since the rights of those who are not parties to this contract are to be affected, it is likewise doubtful if the rule of strict construction against a grantor contended for should be applied here. In any event, it does not appear necessary to resort to such a rule. Human minds are bound to differ in the construction of a contract whenever there appears to be something in it that is ambiguous and uncertain. However, that which really appears ambiguous and uncertain to some may really appear unambiguous and certain to others.

What were some of the circumstances surrounding the water supply in the river at the time this contract was made? All of the water of the river coming to the headgate of the Barnes ditch had been appropriated for the reservoir, and for at least seven years before had been actually diverted from the river through the Barnes ditch into the reservoir, and from thence had been supplied to the holders of reservoir rights. If such diversion of all the water was to continue, the parties could not have had in mind any water from that source in excess of the one twenty-fifth part stipulated. What other supply, if any, appeared available? Before the contract was entered into, examinations of the water supply were made, and a measurement taken, and it was found that there were three cubic feet in the canal from seepage independent of any water from the river. The court found "that between the headgate of the Barnes ditch and the headgate of the Loveland and Greeley ditch (the canal) certain waters return into the Big Thompson river which are capable of being diverted by the Loveland and Greeley ditch, varying in amount from 3 to 10 cubic feet per second of time; that certain water came into the Loveland and Greeley canal below its headgate from the outlet of the reservoir and other sources which does not come directly from the river, and which aggregates from one to three cubic feet per second of time." The evidence showed, however, that much of this water was lost by seeping out of the canal

and otherwise before the factory was reached. It is alleged in the complaint that during the period from September 15, 1903, to February 15, 1904, the amount of water which the sugar company was entitled to receive from the accretions and seepage and $\frac{1}{25}$ of that in the reservoir averaged not to exceed $2\frac{1}{4}$ cubic feet per second, and varied in amount from time to time. However, here was a source of supply about which the parties might contract, and from which they might reasonably hope to obtain the four cubic feet per second without interfering with other appropriations theretofore made, except possibly to the extent of $\frac{1}{25}$ of the water in the reservoir. It is true that these accretions in the river and seepage in the canal were not certain and constant sources of supply. That the parties had in mind sources that were not certain and constant is evidenced to some extent by the fact that the supply was to be supplemented by water from the reservoir, if needed, and also by the fact that the contract itself protects the grantor in every conceivable way from a failure to supply four cubic feet continuously. It says that the grantor shall not be liable for a failure of supply, and then provides that there shall be no liability for any shortage in the supply occasioned by litigation, want of legal right to supply, drouth, or accident, and that, if there should be a shortage in the supply, there should be a pro rata reduction of the annual rental, which was fixed at \$625 a year.

Looking at the contract itself, it says that there were to be supplied continuously four cubic feet per second of time flowing through the canal "from such water as the said party of the first part may be able to lawfully get into its said canal or its Loveland reservoir each year." How much would the irrigation company be able to lawfully get into its reservoir each year? The answer is, all the water coming to the headgate of the Barnes ditch. There can be no dispute about that. After it has thus gotten into its reservoir such water as it might be able to lawfully get there and which is all the water in the river at the head of the Barnes ditch, what water can it lawfully get into its canal? The answer is, the accretions and seepage which have been mentioned. It would be impossible for the irrigation company to get into the reservoir such water as it might be able to get there, and at the same time get any part of that water into the canal directly from the river, for no part of such water can be in two places at the same time. From such water as may be lawfully gotten into the canal and such water as may be lawfully gotten into the reservoir the four cubic feet of the sugar company are to be drawn. If the contract stopped there, the construction contended for by the sugar company might be irresistible. It does not stop there, however. It continues: "But the

maximum quantity to be drawn from the said reservoir during said period shall not exceed $\frac{1}{25}$ part of the total amount of water that may be in the reservoir each year." The "total amount of water that may be in the reservoir each year" is, as before provided in the contract, such water as the irrigation company may be able to lawfully get into its reservoir, and which, as has been seen, is all the water coming to the head-gate of the Barnes ditch. It follows, therefore, that the maximum quantity to be drawn from the water coming to the head-gate of the Barnes ditch shall not exceed one twenty-fifth part of such water. To hold otherwise would be to render nugatory the limitation of the one twenty-fifth part. To say that under the terms of the contract more than one twenty-fifth part of the water which may be gotten into the reservoir may be taken at the head of the Barnes ditch, but only one twenty-fifth part of that which may be permitted to get into the reservoir may be taken, is in effect to entirely eliminate the limitation. Leaving out of view the difference, if any, in the loss by seepage, there is no difference in effect between taking the water directly from the reservoir and taking it on its way to the reservoir. In either way more than the one twenty-fifth part of the water which it may be able to get into the reservoir may be taken. The contract does not appear to be one for the supply of a constant stream of four cubic feet per second, but appears to be one for the supply of that amount of water if it can be obtained from the water mentioned, for it provides that in case of a failure of supply there shall be no liability, but a pro rata diminution of the rent to be paid.

To this court the contract appears to be unambiguous and certain, and as the lower court, after a more extensive examination of the facts and circumstances surrounding the making of the contract and its subject matter, gave it the same construction as this court, the judgment is affirmed.

Judgment affirmed.

STEELE, C. J., and CAMPBELL, J., concur.

(47 Colo. 559)

SAYRE v. SAGE.

(Supreme Court of Colorado. April 4, 1910.)

1. QUIETING TITLE (§ 12*) — POSSESSION OF PLAINTIFF—SUFFICIENCY.

A possession obtained peaceably, though by a trespass, and though taken for the purpose of bringing a suit to quiet title, is sufficient to maintain the suit.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 44, 45; Dec. Dig. § 12.*]

2. QUIETING TITLE (§ 43*) — PLEADINGS—ISSUES—EVIDENCE.

Where, in a suit to quiet title, the possession at issue under the pleadings was the pos-

session as it existed at the time the suit was commenced, evidence that defendant was in possession at the time of the trial was inadmissible, in the absence of a supplemental answer presenting such issue.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 84-87; Dec. Dig. § 43.*]

3. PLEADING (§ 277*)—SUPPLEMENTAL PLEADINGS—NECESSITY.

Matters occurring after the issues are made by the original pleadings cannot be considered unless brought into the case by supplemental pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 834; Dec. Dig. § 277.*]

4. PUBLIC LANDS (§ 114*)—RIGHT TO PATENT—TITLE.

Where the right to a patent has vested in a purchaser of public lands, the execution and delivery of the patent are mere ministerial acts, and a patent does not invest the purchaser with any additional property, but merely gives him better legal evidence of the title first acquired by his certificate of purchase.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 314; Dec. Dig. § 114.*]

5. PUBLIC LANDS (§ 114*)—RIGHT TO PATENT—TITLE.

Where a corporation purchased public lands and became entitled to a patent, and received a certificate of purchase, the title to the property vested in it, and the issuance of a patent, subsequent to its dissolution and the appointment of a receiver, conveyed no additional title, but was merely legal evidence of a title acquired by the receiver's receipt, and inured to the benefit of those who had obtained title through the proceedings to dissolve the corporation and their grantees.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 314; Dec. Dig. § 114.*]

6. CORPORATIONS (§ 621*)—DISSOLUTION—APPOINTMENT OF RECEIVER—TITLE.

If the appointment of a receiver of a corporation on its dissolution did not vest in the receiver title to real estate situate outside the state in which the appointment was made, the property outside of state remained the property of the corporation, and it could dispose of it as if no receiver had been appointed, and a conveyance by it to the receiver was valid.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 621.*]

7. CORPORATIONS (§ 621*)—DISSOLUTION—APPOINTMENT OF RECEIVER—TITLE.

If the appointment of a receiver of a corporation on its dissolution vested in the receiver the title to all property of the corporation, wherever found, the validity of a deed of the corporation, conveying to the receiver property outside of the court's jurisdiction, was immaterial.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 621.*]

8. WILLS (§ 434*) — FOREIGN PROBATE — EFFECT.

Under Mills' Ann. St. § 4678, providing how a will probated in another state may be admitted to probate in Colorado, a will admitted to probate in a sister state is not valid for the purpose of devising real estate in Colorado, and a copy of a will admitted to probate in a sister state is not admissible to establish title under the will to real estate in Colorado.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 940-944; Dec. Dig. § 434.* Evidence, Cent. Dig. § 1416.]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

9. TAXATION (§ 745*)—TAX DEEDS—LEGISLATIVE AUTHORITY.

The Legislature may prescribe the form and requisites of a tax deed.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 745.*]

10. TAXATION (§ 754*)—TAX DEEDS—VALIDITY.

An officer in executing a tax deed acts under a naked statutory power, and to be valid the deed must comply substantially with the statutory form.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1504; Dec. Dig. § 754.*]

11. TAXATION (§ 765*)—TAX DEEDS—VALIDITY.

Under Mills' Ann. St. § 3902, providing that a tax deed shall be signed by the treasurer in his official capacity, and attested by his official or private seal, a tax deed without one or the other of the seals is void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1524; Dec. Dig. § 765.*]

12. TAXATION (§ 765*)—TAX DEEDS—REQUISITES—SEAL—STATUTES.

Mills' Ann. St. § 441, providing that a conveyance of real estate need not be executed under the seal of the grantor, etc., affects private conveyances only, and has no application to tax deeds.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1524; Dec. Dig. § 765.*]

13. TAXATION (§ 745*)—TAX DEEDS—NECESSITY OF SEAL—REPEAL OF STATUTE.

Mills' Ann. St. § 3902, providing that a tax deed shall be signed by the treasurer in his official capacity and attested by his official or private seal, is a special statute, and is not modified by section 441, subsequently enacted, providing that conveyances of real estate need not be executed under the seal of the grantor; for it will not be assumed that the Legislature intends to modify a special statute by a subsequent general statute, in the absence of an intention to do so clearly appearing.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 745.*]

14. TAXATION (§ 805*)—SUIT TO SET ASIDE TAX DEED—LIMITATIONS.

Mills' Ann. St. § 3904, limiting the time within which to sue for the recovery of land sold for taxes, does not bar an action to set aside a tax deed, on the ground that it is void on its face.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.*]

15. ADVERSE POSSESSION (§ 70*)—COLOR OF TITLE.

Color of title can only arise out of a conveyance purporting to convey title to real estate.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 395; Dec. Dig. § 70.*]

16. ADVERSE POSSESSION (§ 79*)—COLOR OF TITLE—TAX DEED—LIMITATIONS.

Under Mills' Ann. St. § 3902, providing that when a tax deed is recorded, it vests in the grantee the title of the former owner, a tax deed does not purport to convey any title to real estate until it has been filed for record in the proper office; and Mills' Ann. St. Rev. Supp. §§ 2923e, 2924, relating to possession of lands under color of title, do not give the grantee in a tax deed color of title until it has been filed for record.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 462; Dec. Dig. § 79.*]

17. TAXATION (§ 805*)—ACCRUAL OF CAUSE OF ACTION—SUIT TO SET ASIDE TAX DEED.

Under Mills' Ann. St. § 2912, limiting the time within which to sue after the accrual of a cause of action, the bar does not begin to run against a suit to set aside a tax deed, as void on its face, until the deed is recorded, because it is only after it has been filed for record that any title of the owner is conveyed.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 805.*]

Appeal from District Court, Gilpin County; A. H. De France, Judge.

Action by W. L. Sage against Hal Sayre. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Dorsey & Hodges and Edward I. Thayer, for appellant. Elliott & Bardwell and Sam'l W. Johnson, for appellee.

GABBERT, J. Appellee, plaintiff below, brought suit against appellant, as defendant, to quiet title to the Borton lode mining claim, and to have a tax deed declared void. The judgment was in favor of the plaintiff, from which the defendant appealed.

The first point urged is that plaintiff failed to establish he was in possession of the property in controversy at the time he commenced his action. There is testimony from which it appears that defendant took possession of the lode claim in 1893, and possibly it might be said remained in possession until December, 1902, although it does not appear that he exercised any acts of possession over the property from September, 1898, to the commencement of this action. On the 8th of December, 1902, plaintiff had the property surveyed, and marked its boundaries with monuments and stakes, and employed a party, who performed work thereon for a few days. Suit was commenced by filing a complaint the next day. It does not appear that prior to the commencement of the action defendant resumed possession. It is urged that taking possession in the manner indicated was tortious, that it was for the purpose of bringing suit, and that possession acquired in such circumstances will not support an action to quiet title. In taking possession plaintiff committed no violence, nor did he obtain it by the use of unfair or corrupt means. The most that can be claimed is that he committed a trespass, but he obtained possession peaceably; and, even though it may have been for the purpose of bringing his action, a possession so obtained is sufficient for the purpose of maintaining a suit to quiet title. *Phillippi v. Leet*, 19 Colo. 246, 35 Pac. 540.

It is next urged that the court erred in rendering judgment in favor of the plaintiff because he failed to show that he was in possession of the property at the time the cause was tried. The defendant at the trial, over the objection of the plaintiff, intro-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

duced evidence that he was then in possession. This testimony was irrelevant and incompetent, and was evidently subsequently disregarded by the court. The possession at issue, as made by the pleadings, was the possession as it existed at the time the suit was commenced. If the defendant, by taking possession after the issues were made by the pleadings originally filed, could defeat the plaintiff's right to maintain his suit (a proposition upon which we express no opinion), it was necessary for him to have presented that issue by a supplemental answer. Matters occurring after the issues are made by the original pleadings cannot be considered or embraced in a decree, unless brought into the case by supplemental pleadings.

Plaintiff deraigned his title through a patent from the United States to the Rochester Gold Mining Company, a corporation. It is contended by counsel for defendant that this patent was of no force or effect, because of the following facts: The patent was dated August 1, 1877. The corporation had been dissolved, and a receiver appointed therefor on June 26, 1876. Upon these facts it is urged that no title passed by the patent because there was no corporate entity to receive it from the United States at the time it was issued. Whether or not this contention is sound, from the facts above narrated, is immaterial, because from other facts it is clear that the title to the property was in the corporation at the time the receiver was appointed. The company had purchased the lode claim from the government on the 7th day of June, 1876, and it became entitled to a patent as of that date, although it was not issued until the 1st of August the following year. Where the right to a patent has once become vested in a purchaser of public lands from the government, it is equivalent, so far as the latter is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become vested are mere ministerial acts of the officers charged with that duty. *U. S. v. Freyberg* (C. C.) 32 Fed. 195; *Simmons v. Wagner*, 101 U. S. 260, 25 L. Ed. 910. A patent does not invest the purchaser with any additional property in the land which it purports to convey. It only gives him better legal evidence of the title which he first acquired by his certificate of purchase issued by the officers of the local land office. *Omaha & Grant S. & R. Co. v. Tabor*, 13 Colo. 41, 21 Pac. 925, 5 L. R. A. 236, 16 Am. St. Rep. 185; *Struby-Estabrooke Co. v. Davis*, 18 Colo. 93, 31 Pac. 495, 38 Am. St. Rep. 266. By virtue of the certificate of purchase issued to the corporation prior to the time a receiver was appointed therefor, the title to the property in controversy was vested in it, and the subsequent issuance of the patent conveyed no additional title, but was merely legal evidence of the title acquired by the receiver's receipt, and inured to the benefit of those who had

obtained title through the proceedings to dissolve the corporation and their grantees.

The proceedings to dissolve the corporation were had in, and the receiver therefor appointed by, a court of competent jurisdiction in the state of New York. The decree dissolving the corporation directed that its estate, both real and personal, should vest in the receiver, upon his qualifying as specified. Subsequent to the qualification of the latter, the company executed to him a deed for the Borton lode. It is claimed that this deed is of no force or effect, for the reason that it was executed without an order of the court in which the dissolution proceedings were pending, and as the corporation had ceased to exist, it had no authority to execute such conveyance. We do not regard this proposition of any moment. If we should adopt the view of counsel for the defendant, to the effect that the appointment of a receiver for a corporation does not vest in him its title to real estate, situate outside the state in which the appointment is made, in support of which *Simpkins v. Smith & Parmalee Gold Co.*, 50 How. Prac. (N. Y.) 56, is cited, then it follows, on the authority of that case, that the Borton lode remained the property of the corporation, and could be disposed of by it as if no receiver had been appointed, and hence the deed of the corporation to the receiver was valid. On the other hand, if the law be as claimed by counsel for plaintiff that the appointment of a receiver on the dissolution of a corporation vests in the receiver the title to all property of the corporation wherever found, whether within or without the jurisdiction of the court making the appointment, in support of which *American Nat. Bank v. Nat. Benefit & Casualty Co.* (C. C.) 70 Fed. 420, *High on Receivers*, § 303, and *Owen v. Smith*, 31 Barb. (N. Y.) 641, are cited, the title to the subject-matter of controversy vested in the receiver.

The receiver conveyed the property in controversy to one W. N. Sage. Plaintiff claims title as follows: Sage died intestate, devising the property to his wife and son, the plaintiff. Mrs. Sage died intestate, leaving as her sole heir the plaintiff. The will was admitted to probate in the state of New York, the domicile of deceased. A certified copy thereof, together with certificates to the effect that it had been duly admitted to probate, and was proven agreeable to the laws and usage of the state of New York, was admitted in evidence on behalf of plaintiff. This, it is urged, was error, upon the ground that the will had not been admitted to probate in this state. We are of the opinion that the copy of the will was not admissible, and that the objection of defendant thereto was well taken, and should have been sustained. The probate of a will in one state does not establish its validity as a will devising real estate in another state, unless the laws of the latter permit it. *Robertson*

v. Pickrell, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049. Section 4678, 2 Mills' St., provides how a will probated in another state may be admitted to probate in this state; and, until this provision of our statute law has been complied with, we cannot assume that a will admitted to probate in another state is valid for the purpose of devising real estate in this, and hence it follows that the copy of the will admitted to probate in the state of New York, with the certificates mentioned attached, was not admissible for the purpose of establishing title in plaintiff to the property in controversy.

Counsel for plaintiff cite cases from other jurisdictions, particularly from the state of Illinois, wherein it is held that, where the certificate of the probate of a will in a foreign state shows that it was executed and proved according to the laws of that state, and such certificate is in the mode required by the statute of Illinois, it is admissible in evidence. These decisions rest upon a special statute of the state of Illinois, which provides that a will admitted to probate in a foreign state, when certified in the manner provided by the statute, shall be good and available in law in like manner as wills made and executed in the state of Illinois. See *Harrison v. Weatherby*, 180 Ill. 418, 436, 54 N. E. 237. See, also, *Lindley v. O'Reilly*, 50 N. J. Law, 636, 15 Atl. 379, 1 L. R. A. 79, 7 Am. St. Rep. 802, 814; *Smith v. Neilson*, 81 Tenn. 461, 466. We have no such statute.

The defendant claimed title to the disputed premises under a tax deed, and the remaining questions presented for determination are whether or not he established any title under such deed. Section 3902, 2 Mills' St., which was in force at the time this deed was executed, provides, in substance, that a tax deed shall be signed by the treasurer in his official capacity, and attested by his official or private seal. The deed in question had neither seal. The General Assembly has the authority to prescribe the form and requisites of a tax deed. The treasurer, in executing such deed, acts under a naked statutory power, and in order that it shall be valid, it must comply substantially with the provisions of the statute prescribing its form. That it must be attested by the official or private seal of the treasurer is a positive requirement of the statute, and is as necessary to its validity as any other. Without one or the other of the seals specified it is void. *Sutton v. Young*, 4 Neb. 319; *Deputron v. Young*, 134 U. S. 241, 10 Sup. Ct. 539, 33 L. Ed. 923; *Gue v. Jones*, 25 Neb. 634, 41 N. W. 555; *Reed v. Merriam*, 15 Neb. 323, 18 N. W. 137; *Gage v. Starkweather*, 103 Ill. 559; *Reed v. Morse*, 51 Kan. 141, 32 Pac. 900.

On behalf of the defendant it is urged that section 441, 1 Mills' St., which provides it shall not be necessary, in executing a conveyance of real estate, that it be executed

under the seal of the grantor, nor that any seal, scroll, or other mark be set opposite his name, which was passed in 1887, and subsequent to the statute to which we have referred, requiring the treasurer to attest a tax deed with his official or private seal, repeals this act. This contention is not tenable. The section only affects private conveyances. It makes no mention of official seals. Besides, the statute prescribing the form of a treasurer's deed is a special one, and it will not be assumed that the Legislature intended to modify it in any way by subsequent statute, unless the intention to do so clearly appears.

The county clerk testified that he had charge of all the records of his office, and after diligent search was unable to find any affidavit of the publication or posting of notice of tax sales on file in his office for the year the property in controversy was sold. By section 3885, 2 Mills' St., it is made the duty of the county treasurer to deposit such proofs with the county clerk. Counsel for plaintiff contend that the testimony of the county clerk rendered the tax deed invalid, while counsel for the defendant assert that, in view of the fact that many years have elapsed between the date of sale and the time of trial, the evidence of the county clerk that no such affidavit could be found was not sufficient to overcome the presumption that the law had been complied with. In view of the fact that the deed is void for reasons given, we do not deem it necessary to pass upon this question; but, in addition to the authorities cited by counsel, call attention to the case of *Bertha Gold M. & M. Co. v. Burr*, 31 Colo. 264, 73 Pac. 36.

The defendant pleaded the following statutes of limitation, as defenses:

"No action for the recovery of land sold for taxes shall lie unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer, any law to the contrary notwithstanding. * * * Section 3904, Mills' St.

"Every person in the actual possession of lands or tenements under claim and color of title made in good faith, and who shall, for seven consecutive years, continue in such possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements to the extent and according to the purport of his or her paper title. * * * Section 2923e, Mills' St. Rev. Supp.

"Whenever any person having color of title made in good faith to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven consecutive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the pur-

port of his or her paper title. * * * Section 2924, Mills' St. Rev. Supp.

"Bills of relief in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within five years after the cause thereof shall accrue, and not after." Section 2912, Mills' St.

Section 3904, supra, does not bar an action to set aside a tax deed upon the ground that it is void upon its face. *Gomer v. Chaffee*, 6 Colo. 314; *Brinker v. U. P., D. & G. Ry.*, 11 Colo. App. 168, 55 Pac. 207; *Dimpfel v. Beam*, 41 Colo. 25, 91 Pac. 1107; *Page v. Gillett*, 107 Pac. 200. The tax deed was issued in 1893 but was not recorded until September, 1898. This action was commenced in December, 1902, or less than seven years after the tax deed was recorded. Color of title can only arise out of a conveyance purporting to convey title to real estate. *Omaha & Grant S. & R. Co. v. Tabor*, supra; *Warren v. Adams*, 19 Colo. 515, 36 Pac. 604. By virtue of the provisions of section 3902, 2 Mills' St., which recites, in substance, that when a tax deed is recorded in the proper record of titles to real estate it vests in the grantee all the right, title, and interest of the former owner in and to the land thereby conveyed, a tax deed does not purport to convey any title to real estate until it has been filed for record in the proper office. Hence it follows that neither section 2923e, nor section 2924, supra, operates to give the grantee in a tax deed color of title until it has been filed for record. *Morris & Thombs v. St. Louis Nat. Bank*, 17 Colo. 231, 29 Pac. 802; *Wason v. Major*, 10 Colo. App. 181, 50 Pac. 741. Under section 2912, supra, the bar of the statute does not begin to run until the deed is recorded, for the reason that it is only after it has been filed for record that any title of the owner is conveyed. *Morris & Thombs v. St. Louis Nat. Bank*, supra. As it appears that defendant was not in possession of the lode mining claim in controversy for the period of seven years between the date his tax deed was filed for record and the commencement of the action against him, and that five years had not elapsed after his tax deed was recorded before plaintiff instituted his suit, and it also appearing, for the reasons given, that the deed was void upon its face, neither of the sections relating to limitations was available as a defense.

From the record before us it appears that defendant failed to establish any title under his tax deed; but, inasmuch as plaintiff failed to establish title to the premises in controversy, the judgment of the district court must be reversed, and the cause remanded for a new trial, and it is so ordered.

Reversed and remanded.

STEELE, C. J., and WHITE, J., concur.

(47 Colo. 598)

KIPP v. MILLER et al.

(Supreme Court of Colorado. April 4, 1910.)

1. BANKS AND BANKING (§ 49*)—STOCKHOLDERS' LIABILITY—ACTIONS TO ENFORCE—PARTIES.

Where the object of a suit by creditors of an insolvent banking corporation is to ascertain the liability of stockholders under Mills' Ann. St. § 533, defining the liability of stockholders in banks, neither the bank nor its assignee is a necessary party, but the suit may be maintained against the stockholders alone.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 76; Dec. Dig. § 49.*]

2. BANKS AND BANKING (§ 72*)—DISSOLUTION—ACTIONS—PARTIES.

Under Mills' Ann. St. § 509, providing that the dissolution of a corporation shall not impair any remedy for liabilities incurred previous to its dissolution, the dissolution of a banking corporation does not deprive its creditors of a remedy against it, though sought to be applied after the dissolution.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 148-151; Dec. Dig. § 72.*]

3. CORPORATIONS (§ 265*)—DISSOLUTION—STOCKHOLDERS—LIABILITY—ENFORCEMENT—PARTIES.

Where, on the dissolution of a corporation, a court of competent jurisdiction appointed an assignee to settle the corporate affairs, creditors suing to enforce the liability of stockholders under Mills' Ann. St. § 533, need not make the directors at the time of the dissolution parties defendant.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1099-1125; Dec. Dig. § 265.*]

4. EVIDENCE (§ 354*)—PRIVATE BOOKS AND RECORDS—ADMISSIBILITY.

In an action by creditors of an insolvent banking corporation to enforce the liability of stockholders under Mills' Ann. St. § 533, the books and records made and kept by the bank in the regular course of business are competent as admissions against interest, whether the books and records are of original entry or otherwise.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1480; Dec. Dig. § 354.*]

5. BANKS AND BANKING (§ 47*)—LIABILITY OF STOCKHOLDERS—ULTRA VIRES ACTS.

A state bank established branch banks without capital except as furnished by the state bank. Notes taken by the branch banks were made payable to the state bank, and all moneys deposited there were used by the state bank as its own. From the profits of the state bank and the branch banks dividends were declared. Such course of business continued for about eight years. Each depositor and borrower in the branch banks knew the relation to the state bank. Held that, though the act of the state bank in establishing branch banks was ultra vires, the stockholders of the state bank who shared in the profits of the branch banks with knowledge of the relations could not escape liability to creditors who, in good faith, dealt with the branch banks as a part of the state bank.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 47.*]

Appeal from District Court, City and County of Denver; Greeley W. Whitford, Judge.

Action by Alfred L. Miller and others against John E. Klipp and others. From a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

judgment for plaintiffs against defendant John E. Kipp, he appeals. Affirmed.

This is an action by plaintiffs below, Alfred L. Miller and others, on behalf of themselves and those similarly situated, as creditors of the State Bank of Monte Vista, against the defendants below, appellants here, including the bank itself, Norman H. Chapman, its assignee, and all of the stockholders not theretofore sued on like ground.

The object of the suit was to ascertain the amount of the bank's liabilities at the time of its dissolution, to obtain judgment therefor, and to have an ascertainment of the number of shares held by each defendant stockholder, and the pro rata amount of the gross indebtedness, for which each is liable, and for judgment against such as were served or appeared. The section of the statute counted on is 533, Mills' Ann. St., and reads as follows:

"Section 1. Shareholders in banks, savings banks, trusts, deposit and security associations, shall be held individually responsible for debts, contracts, and engagements of said associations, in double the amount of the par value of the stock owned by them respectively."

The stockholders named as defendants are all nonresident. None were personally served and none appeared, except the defendant Kipp, who made voluntary answer, and conducted a defense, which, if successful, on the main contention, exempts all stockholders from liability. Trial was had to the court. The amount of the bank's indebtedness was ascertained to be \$84,319.89, of which the defendant stockholders were found liable for \$77,147, or for 53½ per cent. of their statutory liability, which is double the amount of the face value of the stock held by each. Judgment for the full amount was entered against the bank, and the suit as to the assignee was dismissed, he having made disposition of, and fully accounted for, all assets that came into his hands. Complete ascertainment was made as to the shares held by each defendant stockholder, and their respective pro rata liability was fixed. The defendant Kipp was found to be the owner of five shares of stock, upon which his pro rata liability was \$535. Judgment and decree was entered accordingly. The defendant Kipp brings the judgment here for review.

Three points are urged, argued and relied upon for reversal:

First. That the bank was an improper party, which fact was pleaded in bar of the action;

Second. The admission of incompetent, immaterial and irrelevant proof, and its insufficiency to warrant the judgment; and

Third. Ultra vires, in that branch banks of the State Bank had been organized, whose assets were included in and covered by the assignment of the State Bank, and the claims of the creditors of which were allowed as

claims against the State Bank, and included in the ascertainment of the stockholders' liability.

Murray & Ingersoll, for appellant. Philo B. Tolles and Thomas D. Cobbe, for appellees.

BAILEY, J. (after stating the facts as above). The State Bank was organized on August 11, 1890, to continue for a period of 10 years next thereafter. The assignment was made on June 15, 1899, and this suit was begun on June 9, 1905.

The first suggestion is that inasmuch as, by the express terms of its charter, the State Bank ceased to exist on August 11, 1900, therefore it was neither a proper nor possible party to a suit, begun some five years thereafter; that the only persons who could properly be made defendants, as the bank's representatives, are those who were its directors at the time of its dissolution by expiration of its charter, and who are by statute made the trustees of its stockholders and creditors, with full power to manage and settle its corporate affairs. It is argued that the company itself being dead, and the directors, at the time of the dissolution of the company, and the survivors of them, not having been made parties, the judgment is a nullity and should be set aside for this reason alone.

While it may be conceded that, for the purpose of a final adjudication of all matters involved, the bank is a necessary party, such is not the case where a mere ascertainment of the liability of the stockholders, and judgment accordingly, is sought. Nor could the stockholders in such an action plead as a bar thereto the fact that the bank was not a party, because, as was said in *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145:

"Nor does the fact that neither the bank nor the assignee were made parties defendant, in any manner affect the rights of the stockholders, because, whether sued alone or in connection with the bank and its assignees, they would have the right to interpose any defense to the claim of the creditors which the bank could."

All of which is true and applicable here. The rights, the liabilities and the defenses of the stockholders are unaffected by the question whether the bank is a party, and a suit, strictly limited to relief against the stockholders, doubtless might be maintained against them alone.

However, that question is not here, since both the bank and its assignee are parties. The question is, can the suit be maintained against the bank, it having been instituted after the expiration of the bank's charter? We answer in the affirmative, since the cause of action arose while the charter was still in force and the bank a going concern. The dissolution of the bank did not deprive creditors of a remedy against it, although sought to be applied after that time. The right of action

by the creditor is clear and undisputed, and the remedy is preserved to him by express statute. Section 509, Mills' Ann. St., reads as follows:

"The dissolution for any cause whatever of corporations created as aforesaid, shall not take away or impair any remedy given against such corporations, its stockholders, or officers, for any liabilities incurred previous to its dissolution."

In *Steinhauer v. Colmar*, 11 Colo. App. 495, 55 Pac. 293, the law upon this subject was announced to be thus:

"The dissolution of a corporation cannot be pleaded in bar of an action against it where the cause of action arose before the dissolution."

In *Singer & Talcott Co. v. Hutchinson et al.*, the Supreme Court, in 176 Ill. 49, 51 N. E. 623, speaking to a like provision, had this to say:

"While the corporate capacity of this corporation was continued for two years after the expiration of its charter, or until April 10, 1894, in order to bring suits for the purpose aforesaid, its corporate capacity to be sued as a party defendant, for liabilities which accrued before its dissolution, was continued without limitation as to time, and therefore the general statute of limitations, only, would apply. Hence an action at law would lie against said corporation at any time within such general statute of limitations for a liability created before its dissolution, if brought before equity had obtained jurisdiction."

In any event, the contention that the directors of the bank, or the survivors of them, at the time of the expiration of its charter, should have been made parties is not sound, inasmuch as the bank, prior to that time, had transferred all of its property and effects to the assignee, who had taken possession and was engaged in closing up its corporate affairs, under the direction of the court and as its officer. The assignee is a party. Our statute provides in substance that, unless some other person or persons be appointed by some court of competent jurisdiction for the purpose, the board of directors at the time of the dissolution of the corporation shall be trustees of the creditors and stockholders to settle its corporate affairs.

The very thing contemplated by the statute had here taken place, before the bank charter expired. The assignee is an officer of court and may act only upon its orders and under its direction. The court had, in effect, possession of the corporate effects. The old directors of the bank, in these circumstances, had no office or function to perform under the statute. The title of all of the bank's property had passed to the assignee, with the right and power in him to settle its affairs. To have made the old directors defendants would have been an idle and vain thing. It would have served no useful purpose and could have advantaged

no one. In short, it is a matter about which the stockholders may not complain, as they are in no wise prejudiced.

On the questions of the sufficiency of the testimony, and errors in the admission thereof, it may be safely said that there was abundant, competent testimony to amply support the findings of the court and its judgment and decree. The testimony offered, to which objections were interposed, was largely of a record character, made and kept by the bank in the regular course of business, thoroughly identified and sufficiently authenticated. These books and records were clearly competent, as admissions against interest, if on no other ground, whether of original entry or otherwise. On the authority of *Zang v. Wyant*, supra, which relates to rulings on like objections, going to substantially all points here urged, the court below correctly overruled them. These views have the support of the following additional authorities, which might, were there occasion, be largely multiplied: *D. & R. G. v. Wilson*, 4 Colo. App. 355, 36 Pac. 67; *Plummer v. Struby*, 23 Colo. 190, 47 Pac. 294; *McHose v. Wheeler*, 45 Pa. 32; *Dows v. Naper*, 91 Ill. 44; *Whitman v. Granite*, 24 Me. 286; *Watson v. Phoenix Bank*, 8 Metc. (Mass.) 217, 41 Am. Dec. 500; *Chase v. Smith*, 5 Vt. 556.

The testimony offered and received was sufficient to make a prima facie case. The record shows that all the books of the three banks were brought into court, and were there subject to use and inspection by all. If the showing made, to which objection was urged, did not disclose the truth, the defendant had every opportunity and facility to overcome it, but that was not attempted.

For the purpose of this discussion it may be assumed that the action of the Monte Vista State Bank, in organizing and maintaining branches, was ultra vires. But even so, are the stockholders of the State Bank in position to take advantage thereof and so escape personal liability under the statute?

The State Bank was established about August 16, 1890, under the state law, with a capital of \$30,000. The following January its capital was increased to \$80,000, and presently thereafter two branches were put in operation with capital furnished by the State Bank, one at Creede, known as the Miners' Bank, and one at Garrison, known originally as the Bank of Garrison. Afterward the name Garrison was changed to Hooper, and that of the bank there to the Farmers' Bank. These banks were conducted by the State Bank as branches. They had no separate organization, and were part and parcel of the State Bank. They had no capital, except that furnished by the State Bank, and all property in their possession was the property of the State Bank. The notes taken by them were payable to the State Bank; all moneys deposited there were mingled with the funds of, and used by the State Bank, as its own. From the profits of the State Bank

and these branches, the salaries of the officers of the three banks, the running expenses thereof, and dividends, from time to time, to the stockholders of the State Bank, were paid. Such was the usual course of business, and continued from the time of the establishment of the branches to the date of assignment, on June 15, 1899, about eight years. The general publicity was given to the relations between these branch banks and the State Bank. The letter heads of the branches bore the legend that they were associated with the State Bank, with a capital of \$80,000, and that J. D. Maben, president of the State Bank, was also president of the associated banks. Each depositor in the branch banks knew its relation to the parent bank, as did every borrower, because all notes taken at the branch banks were made payable to the State Bank; indeed, their relations seem to have been a matter of common knowledge. The records of the directors' meetings disclose these relations. At these meetings, annually, the directors of the State Bank elected the cashier and other officers of the branch banks, except the president, who by virtue of his office as president of the State Bank, according to the testimony, served, and was published to the world, as the president of the branch banks. The stockholders may fairly be assumed to have been present at each yearly stockholders' meeting, either in person or by proxy. Can it be possible that those present at such meetings could fail of knowledge as to the existence of these branches? The records and correspondence show that a very considerable majority of the stockholders had actual knowledge thereof. Under all of these circumstances, including abundant opportunity, covering such a long lapse of time, the presumption must be that all of the stockholders had that knowledge. It is incredible that the fact can be otherwise. In the absence of effort to overcome this presumption by proof, knowledge on the part of the stockholders must be taken as settled.

The testimony further shows that the State Bank was largely sustained by the business of these branches, which is shown, by the official correspondence, to have been more profitable than the independent business of the State Bank. When the State Bank borrowed, it used, indiscriminately, as collateral, notes sent to it from the branches, as well as those taken directly by itself. The stockholders participated in profits from this method of doing business, by way of dividends. The State Bank itself secured a large share of its assets from the branch banks. It is too clear to require discussion that the corporation itself, under these conditions, ought not, and may not be permitted, to avail itself of the defense of ultra vires. No more should the stockholder, who has shared in profits, with either actual or presumptive knowledge, growing out of long acquiescence, and with ample opportunity

to obtain it, be permitted to do so, more especially since there is no offer to make return. It is certain that, had the business continued profitable, including that of the branch banks, the stockholder would have continued to accept dividends, without thought of ultra vires on the part of the bank. Neither the corporation, nor its stockholders, should be allowed to thus speculate upon the outcome of questionable conduct, accepting profits, so long as there are such, but repudiating, under the plea of ultra vires, liability when loss occurs.

The suit is in equity for a judicial ascertainment of the stockholders' liability, and for an adjudication according to the very right. Shall the creditors, who, acting in good faith, have dealt with these branch banks as part of the State Bank, and deposited their moneys upon the credit of the associated banks, with a capital of \$80,000, be turned away empty handed, on a plea by the stockholders, who have acquiesced in this course of dealing for upwards of eight years, accepting profits accruing therefrom, that the corporation had no authority in law to carry on and conduct its business after that particular manner, or in that particular place? Upon every consideration of fair dealing the answer to this proposition must be in the negative. The bank was a private corporation. No public question is involved. The matter is one calling merely for a just and equitable adjustment of money claims between individuals. The very right can only be done by holding the stockholders to their statutory liability, thus affording the innocent creditor such relief as that course may bring. By this method justice is done to all and wrong to none.

These views find support in our own decisions, and in the decisions of many other courts of last resort. In *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 12, 9 Pac. 780 (59 Am. Rep. 134), the court says:

"If a private corporation has accepted and retained the full benefit of a contract, which it had no power to make, the same having been fully performed by the other party thereto, and if the transaction is of such a nature that the party thus performing will suffer manifest hardship and injustice, unless permitted to maintain his action directly upon the contract, no other adequate relief being at his command, the defense of ultra vires may be disallowed." *Denver City I. & W. Co. v. Middaugh*, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234; *Arthur v. Isreal*, 15 Colo. 152, 25 Pac. 81, 10 L. R. A. 693, 22 Am. St. Rep. 381.

In *Darst v. Gale and Others*, 83 Ill. 136, the court says:

"It is the general rule that the plea of ultra vires shall not prevail, where, instead of advancing justice, it will accomplish a wrong. Where a corporation received money upon the faith of its acts and uses the same, and the contract has been fully performed, it,

or one succeeding to its rights, cannot plead a want of authority to do the act by which the money was obtained."

In *Boyce v. Mantauk G. C. Co.*, 37 W. Va. 73, 16 S. E. 501, a section of the syllabus reads, and the context of the opinion supports it:

"Where a stockholder has notice, or the means of becoming acquainted with contracts made by the corporation in which he is a stockholder, a court of equity will not allow him to remain quiet an unreasonable length of time, with a view of ascertaining whether the contract will result in profit to him, and then repudiate the contract if it has resulted in loss."

In 3 (2d Ed.) *Thompson on Corporations*, par. 2846, it is laid down as a general rule: "That stockholders authorizing or acquiescing in ultra vires acts cannot afterwards have the same avoided in equity." In support of which he cites, among others, the following cases: *Alexander v. Searcy*, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337; *Thompson v. Lambert*, 44 Iowa, 239; *Peabody v. Flint*, 6 Allen (Mass.) 52; *Dunphy v. Travellers' Newspaper Ass'n*, 146 Mass. 495, 16 N. E. 426; *Stewart v. Erie Trans. Co.*, 17 Minn. 372 (Gil. 348); *Ashhurst's Appeal*, 60 Pa. 290; *Watt's Appeal*, 78 Pa. 370; *McCampbell v. Fountain Ry. Co.*, 111 Tenn. 55, 77 S. W. 1070, 102 Am. St. Rep. 731; *Gilman v. Druse*, 111 Wis. 400, 87 N. W. 557; *Dimpfell v. Ohio R. R. Co.*, 110 U. S. 209, 3 Sup. Ct. 573, 28 L. Ed. 121; *Allen v. Wilson* (C. C.) 28 Fed. 677.

In the English case of *Gregory v. Patchett*, reported in 33 Bevan, p. 595, this was announced:

"Shareholders in a company cannot lie by, sanctioning, or by their silence at least acquiescing in, an arrangement which is ultra vires of the company, watching the results: and if it be favorable and profitable to themselves to abide by it and insist upon its validity; but if it prove unfavorable and disastrous, then to institute proceedings to set it aside. Therefore where shareholders complained of acts ultra vires, which they had acquiesced in for six years, relief was refused."

In *Morawetz on Private Corporations* (2d Ed.) par. 630, is as follows:

"Nor can the shareholders of a corporation avoid responsibility for the unauthorized acts of their agents, by abstaining from inquiry into the affairs of the company, or by absenting themselves from the company's meetings, and at the same time reap the benefit of their acts in case of success.

"If a shareholder fails to take the trouble of inquiring into the affairs of the corporation of which he is a member, or to attend its meetings, it seems no more than just that his supineness should be construed as an acquiescence in the proceedings of the majority."

In *Kent v. Quicksilver Mining Company*, 78 N. Y. 187, it was said:

"Where third parties have dealt with the company, relying in good faith upon the existence of corporate authority to do an act, there it is not needed that there be an express assent thereto on the part of the stockholders to work an equitable estoppel upon them. Their conduct may have been such, though negative in character, as to be taken for an acquiescence in the act; and when harm would come to such third parties if the act were held invalid, the stockholders are estopped from questioning it. We suppose acquiescence or tacit assent to mean the neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress, after knowledge of the committal of it, whereby innocent third parties have been led to put themselves in a position from which they cannot be taken without loss."

On the question of ratification, in paragraph 633 of *Morawetz on Private Corporations* (2d Ed.), this is found:

"The question whether an unauthorized act has been ratified by the members of a corporation is a question of fact to be decided by a jury in a court of law. It is not necessary, for this purpose, that an act of ratification be shown on the part of every individual shareholder; but proof of circumstances from which the court or jury can reasonably infer that the act in question was generally known among the shareholders, and was acquiesced in by them, will constitute at least prima facie evidence of ratification. In many cases knowledge may be presumed from circumstances, and assent may be implied from silence or a failure to act."

In *Thompson v. Lambert*, 44 Iowa, 239, the Supreme Court of that state says in discussing a question like in principle to the one here under consideration:

"If the stockholders, or any number of them, shall have been cognizant of such a misapplication of the funds borrowed by the corporation, and shall have participated in any advantages resulting therefrom, they will not be permitted to afterward set up such misapplication as a defense in an action by the lender against the corporation for his money.

"It is the duty of stockholders seeking relief from a misapplication of the corporate funds to take immediate steps to prevent it, and if with knowledge of the proposed illegal act they remain silent, they are bound thereby.

"The doctrine of ultra vires will be applied to the contracts of corporations only when such contracts remain wholly executory."

The opinion in *Central Trans. Co. v. Pullman*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, cited by appellant, as an authority, in support of his contention, in effect rather upholds the doctrine here announced, under conditions and circumstances such as are disclosed in this case. At page 60 of the reported opinion this language is used:

"A contract ultra vires being unlawful and

vold, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.

"In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

The case of *Ward v. Joslin*, 186 U. S. 142, 22 Sup. Ct. 807, 46 L. Ed. 1003, is not in point. There the bank president, in his official capacity, guaranteed for the corporation the payment of a note, between third parties, not paper of the company, or in which it was interested, purely as an accommodation, which act was without the scope of his authority, and beyond the power of the bank. The bank derived no benefit from the transaction, neither did the stockholder. Upon what principle of equity could he be bound or held by such ultra vires act?

No inflexible rule can be laid down, applicable in every case where the question of equitable estoppel is involved. The facts in each case must determine whether the doctrine is there applicable. In the one at bar, under its peculiar facts, it is eminently proper and fit to recognize and enforce it. The judgment and decree of the trial court is affirmed.

Judgment affirmed.

CAMPBELL and GABBERT, JJ., concur.

(47 Colo. 612)

SIMPSON v. PEOPLE.

(Supreme Court of Colorado. April 4, 1910.)

1. EMBEZZLEMENT (§ 14*)—BY AGENT.

Before one, charged with embezzlement of money intrusted to him as agent, can be convicted, it is necessary to prove that the money, or some part of it, was intrusted to him as agent.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 13-15; Dec. Dig. § 14.*]

2. EMBEZZLEMENT (§ 44*)—FIDUCIARY RELATION—SUFFICIENCY OF EVIDENCE.

In a prosecution for embezzlement of money intrusted to an agent, evidence held to show that the money was either given or loaned to defendant by the prosecuting witness, who was engaged to marry him, and hence a conviction was not warranted.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 67; Dec. Dig. § 44.*]

Error to District Court, Lincoln County; W. S. Morris, Judge.

John S. Simpson was convicted of embezzlement, and he brings error. Reversed and remanded.

Talbot, Denison & Wadley, for plaintiff in error. John T. Barnett, Atty. Gen., and James H. Teller, Asst. Atty. Gen., for the People.

GABBERT, J. Plaintiff in error was found guilty of embezzling money of the prosecuting witness, Lena Mann, under a count of the information charging him, in substance, with embezzling and converting to his own use the sum of \$1,500, the property of Mrs. Mann, which had come into his possession, and had been intrusted to his care by her, as her agent. From a sentence accordingly, the defendant has brought the case to this court for review on error.

The first point urged by his counsel is that the court erred in refusing to sustain challenges for cause to three jurors who served in the case. The defendant had previously gone to trial, at which time the opening statements of counsel were made, the evidence in chief of the prosecution introduced, and testimony on behalf of the defendant heard, except that he was not cross-examined, when, at his request, the trial was discontinued, and the jury discharged without having the cause submitted to them for determination. About two months later, at the same term, the cause was again called for trial, and among the jurors called were three who had served at the former hearing. They were challenged by the defendant because of their former connection with the case. The challenge was overruled. It is contended by counsel for defendant that this ruling was error, for the reason that they had formerly served as jurors in the same cause. The law of this state (section 3691, Rev. St. 1908) provides, in effect, that a juror summoned in a criminal case shall not be disqualified to serve by reason of any previously formed or expressed opinion with respect to the guilt or innocence of the accused, if the court, from the examination of the juror, or other evidence, shall be satisfied that he will render an impartial verdict according to the law and the evidence submitted to the jury in the trial of the cause. As the judgment of the district court must be reversed for another reason which we will later consider, we do not deem it necessary to determine whether or not, in view of the provisions of our statute, the mere fact that the jurors challenged had served at a former partial trial ipso facto disqualified them as jurors in the second trial, but suggest that, as the defendant was entitled to have his guilt or innocence determined by an impartial jury, and as it is the duty of the courts to fully protect this right, the interests

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the public and the rights of the accused to a fair trial before an impartial jury would have been better served by sustaining the challenges. *Schallman v. Royal Ins. Co.*, 94 Ill. App. 364.

Several other errors are assigned, only one of which, the sufficiency of the evidence to sustain the verdict, will be considered. The testimony discloses that the defendant has treated Mrs. Mann in a reprehensible manner, and it must have been the indignation which his treatment of her justly aroused that caused the jury to return a verdict of guilty, for the evidence does not justify the verdict they rendered. Defendant received a considerable sum of money from Mrs. Mann, and the theory of the prosecution was that the whole or greater portion thereof had been intrusted to him by her as her agent, with which to improve land she owned in this state, and to buy farm implements and other things necessary to do so, and operate it as a farm.

It can be of no benefit to quote from the testimony of Mrs. Mann, as, for the purposes of this case, it will be sufficient to state, in a general way, the different transactions between the defendant and herself, by which he secured from her the money he is charged with having embezzled. She and the defendant were engaged to be married. She was possessed of some means, and, having that confidence in his integrity which her relation to the defendant as her affianced husband would naturally inspire, she either gave or loaned him several hundred dollars. In the summer of 1906 Mrs. Mann was living in Indiana. She decided to come to Colorado with a party of friends. The defendant also wanted to come; but, as he did not have sufficient means to defray the expense of the trip, she gave him \$75, which, she says, he said he would repay. The defendant joined the party at Chicago. On reaching Limon, in this state, Mrs. Mann and the defendant, with others, left the train, and later went out and looked at land. Each of them located a quarter section, which joined each other. It was necessary for them to come to Denver to make the filings, and for the purpose of defraying the expenses of that part of the trip, and expenses incurred at Limon, Mrs. Mann advanced the defendant \$100 at Limon. The greater part of this money appears to have been expended in making the filings in the land office at Denver, and other expenses while in the city. Failing to repay these sums, or either of them, would not constitute embezzlement. From Denver the parties returned to Indiana. There they evidently discussed improving the land they had located. Mrs. Mann says she knew the defendant was without any means whatever. They agreed that they must have horses and farming implements, and that a

house would have to be built, and so, at different times after their return, she let the defendant have \$900, which he was to expend in that way. After receiving the money he again journeyed to this state, and remained about a month, when he again returned to Indiana. He and Mrs. Mann talked over how he had expended the \$900. He told her he needed more to complete his work and buy grain, and she let him have \$250 more. It appears that he again came to Colorado, and on his return to Indiana Mrs. Mann does not appear to have made any inquiries as to how he had expended the last sum she had advanced. Shortly after this the defendant told her that one of the horses purchased had died, and he would have to have another, when she again let him have the sum of \$250.

Without going into further details, it is evident from the testimony as a whole, that Mrs. Mann advanced these several sums, totaling \$1,400, to the defendant for their joint benefit, and with the expectation on her part that he would expend it in improving their land, buying farm machinery, and in making a home which they could occupy after they were married. It does not appear that the defendant spent any of the money in improving the land located by Mrs. Mann. He did build a house on his own, and purchased some stock and farm implements, all of which he appears to have appropriated to his own use. Very shortly after Mrs. Mann let him have the last \$250, he married another woman. The conduct of the defendant, as disclosed by the record, was certainly reprehensible, and it is not surprising that the jury lost sight of what facts were necessary to be established in order to constitute the crime of embezzlement; but, notwithstanding the conduct of the defendant, it is clear from the record before us that the wrong he committed was a civil wrong, and that no criminal liability was incurred nor criminal statute violated. Before the defendant could be convicted of the offense of embezzlement it was necessary to prove that the money, or some part thereof, which the defendant received from Mrs. Mann was intrusted to him by her as her agent. This the testimony fails to establish. In order to constitute embezzlement, the accused must occupy the fiduciary relation designated in the information or indictment, and he must have received the money or property he is accused of having embezzled in the capacity charged. 15 Cyc. 494.

The judgment of the district court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

STEELE, C. J., and WHITE, J., concur.

(47 Colo. 569)

BARTELL v. GRIFFIN.

(Supreme Court of Colorado. April 4, 1910.)

1. FRAUDULENT CONVEYANCES (§ 135*)—SALES—CHANGE OF POSSESSION.

Under Mills' Ann. St. § 2027, providing that a sale, unless accompanied by an immediate delivery and followed by an actual change of possession, shall be fraudulent as against the seller's creditors, a sale must be followed by an actual and continued change of possession, or the buyer is not protected as against the creditors of the seller, and chattels capable of manual delivery and removal may not remain in the apparent possession of the seller, or in the joint or concurrent possession of the seller and buyer, and mere proof of bona fide sale is not sufficient.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 427; Dec. Dig. § 135.*]

2. FRAUDULENT CONVEYANCES (§ 308*)—SALES—CHANGE OF POSSESSION—GOOD FAITH—QUESTION FOR JURY.

Where, on the issue of the validity of a sale as against creditors of the seller, the evidence was conflicting on the questions of change of possession and good faith of the transaction, the case should have been submitted to the jury.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 930, 940; Dec. Dig. § 308.*]

3. SHERIFFS AND CONSTABLES— (§ 138*) —WRONGFUL LEVY OF EXECUTION—ACTION—EVIDENCE.

Where, in an action against a sheriff for levying on the goods of plaintiff under an execution issued against another, the evidence on the issues was conflicting, justifying different conclusions, it was reversible error to permit the sheriff on cross-examination to state that, in case he lost the suit, he would look to his bondsman to settle with him for damages sustained.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 291; Dec. Dig. § 138.*]

Appeal from District Court, Boulder County; Christian A. Bennett, Judge.

Action by Joseph T. Griffin against Charles T. Bartell, as sheriff. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

George F. Dunklee and O. E. Jackson, for appellant. Montgomery & Brown and J. Maurice Finn, for appellee.

GABBERT, J. Appellant, as sheriff, levied upon personal property under an execution issued on a judgment against John R. Griffin, as the property of the latter. Joseph T. Griffin, his brother, commenced a replevin suit to recover possession of this property, claiming to be the owner thereof. The trial of the case resulted in a verdict and judgment in favor of plaintiff, from which the sheriff has appealed. Neither party has raised any question regarding the right of the sheriff to appeal, and we shall consider the case on appeal; but by so doing it must not be regarded as a precedent that a party defeated in a replevin suit can have the case reviewed by that method.

The defendant interposed two defenses:

(1) Fraud in law; and (2) fraud in fact. John R. Griffin had a grading contract which he claimed to have assigned and sold to his brother Joseph, together with a grading outfit, consisting of work horses, dump carts, wheelbarrows, and other tools, used in doing the work under his contract. This grading outfit is what was levied upon by the sheriff. Counsel for the defendant contends that the testimony did not establish such a delivery and continued change of possession of the property claimed to have been sold by John R. Griffin to his brother Joseph as would satisfy section 2027, 1 Mills' St., on the subject of Frauds. This proposition is vigorously controverted by counsel for plaintiff, who contends the evidence fully satisfies the statute referred to, and further claims there was no evidence whatever tending to prove that the transaction between the two brothers was not bona fide. We are not inclined to agree with either view in the sense that we should determine the facts at issue between the parties on the record before us, and direct what the judgment should be. Without attempting to give the testimony in detail, we think it is sufficient to say, for the purpose of disposing of the appeal, that there was testimony which strongly tended to prove both defenses interposed by the defendant, particularly, the first.

Section 2027, supra, provides, in substance, that a sale by a vendor of goods and chattels in his possession, unless accompanied by an immediate delivery and followed by an actual and continued change of possession, shall conclusively be presumed to be fraudulent as against his creditors. Under this statute the sale of chattels must be followed by an actual and continued change of possession to the vendee; otherwise he is not protected as against the creditors of his vendor. It does not permit chattels capable of manual delivery and removal to remain in the apparent possession of the vendor, nor does it admit of a construction whereby there may be a joint or concurrent possession in both the vendor and vendee; nor can a case be taken without its provisions by proving merely that the sale was bona fide. In short, unless the purchaser can show such a substantial compliance with the terms of the statute as affords notice to the community of a change in the ownership of the goods sold, the transaction constitutes a fraud in law, and is void as to creditors. *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. 809.

As there was a conflict in the evidence on the subject of a change of possession, and from the evidence taken as a whole the bona fides of the transaction might have been open to question, the case should have been submitted to the jury under appropriate instructions on the issues made by both the defenses.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

es interposed by the defendant. This, counsel for the defendant says, was not done for the reason that the instructions were conflicting, in that by them the jury could have rendered a verdict for the plaintiff upon the ground that the transaction with his brother was bona fide without regard to whether there had been an actual and continued change of possession of the property in controversy. This claim is not without merit, but the right to raise it is challenged upon the ground that no appropriate exceptions were saved to the instructions. Inasmuch as the judgment must be reversed and the cause remanded for a new trial for a reason we shall notice later, it is not necessary to determine either of these questions. The alleged errors in the instructions can be readily avoided, and there ought not to be any trouble in taking such exceptions to instructions as will save the right of the excepting party to have them reviewed by this court. Under the repeated decisions of this court, following *Bassinger v. Spangler*, supra, instructions can be readily framed which will submit the issues made by the answer in this case which are not conflicting, and will present clearly to the jury the questions of fact they are to determine.

At the trial, over the objection of defendant, counsel for plaintiff was permitted to ask the defendant, on cross-examination, the following question: "If you should lose this case, Mr. Bartell, you would look to the bondsmen to settle with you for any damages you would sustain?" To this he replied, "I surely would." There was no such issue in the case, and it was clearly error to overrule the objection made. What the verdict should be was in no manner dependent upon whether the defendant was or was not indemnified by the judgment creditors. We must assume that counsel representing the plaintiff presumed that a favorable answer such as was given would benefit his client by influencing the jury to render a verdict against the sheriff, because he would not lose anything by such a result. As was said, in substance, in *Coe v. Van Why*, 33 Colo. 315, 80 Pac. 894, in such case counsel who thus seeks to obtain an advantage for his client takes upon himself the risk of losing what he hopes to secure. Cases should be tried before a jury on competent testimony. The rights of litigants can only be preserved by adhering to this rule; and, when a party to an action insists on getting before a jury testimony which is incompetent, and is intended to prejudice the rights of his adversary, he does so at his peril, when, as in the case at bar, the testimony on the issues made by the pleadings is conflicting, or is of that character that different conclusions of fact might be deduced therefrom.

The judgment of the district court is re-

versed, and the case remanded for a new trial.

Reversed and remanded.

STEELE, C. J., and WHITE, J., concur.

(47 Colo. 584)

DENVER & R. G. R. CO. v. DERRY.

(Supreme Court of Colorado. April 4, 1910.)

1. CARRIERS (§ 239*)—INJURIES TO PASSENGER—RIDING ON PASS.

A carrier cannot claim that its liability for injuries to a passenger was only that which was due to one riding on a pass because the passenger had a ticket issued by the railroad to another, and by him given to the passenger, since it would be presumed in the absence of contrary evidence that the company received consideration for it.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 974, 975; Dec. Dig. § 239.*]

2. CARRIERS (§ 236*)—INFIRM PASSENGERS—DUTY TO RECEIVE.

A carrier is not bound to receive as a passenger one who is helpless or blind or otherwise incapable of properly caring for himself unless accompanied by a competent attendant.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 968-972; Dec. Dig. § 236.*]

3. CARRIERS (§ 326*)—INFIRM PASSENGERS—CARE REQUIRED BY THEM.

The care to be observed by one who is blind, traveling alone on railroad trains, is greater than that required of one without such infirmity.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1349-1351; Dec. Dig. § 326.*]

4. CARRIERS (§ 281*)—INFIRM PASSENGERS—CARE REQUIRED.

Where a carrier accepts a blind man without an attendant as a passenger, it must use at least reasonable care and diligence for his safety.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1093-1097; Dec. Dig. § 281.*]

5. CARRIERS (§§ 320, 347*)—NEGLIGENCE OF CARRIER—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a blind passenger, whether the passenger was negligent, and whether the employes of the carrier were negligent, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. §§ 320, 347.*]

6. CARRIERS (§ 411*)—BLIND PASSENGER—CONTRIBUTORY NEGLIGENCE.

Where a blind passenger asked a Pullman porter, telling him that he was blind, to assist him into a sleeping car, and the porter took hold of his arms and put him on the steps, plaintiff was not negligent in feeling his way along the car up the steps until he reached what he thought was a door but which was in fact the open space on the other side of the car, whereby he fell and was injured, since he was entitled to conclude that the porter, knowing of his infirmity, would watch him and guide his movements.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1579-1581; Dec. Dig. § 411.*]

7. CARRIERS (§ 414*)—SLEEPING CARS—EMPLOYEES—LIABILITY OF CARRIER.

When a sleeping car which belongs to a separate corporation is attached to and becomes part of the train of a railroad company, the employes of the sleeping car company are, as

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to the passengers of the railroad company riding on the sleeping car, to be regarded as employes of the railroad company for whose negligent acts the railroad company itself is liable.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1578, 1582, 1589; Dec. Dig. § 414.*]

8. CARRIERS (§ 414*) — DETACHED SLEEPING CARS — INJURIES TO PASSENGER — NEGLIGENCE OF EMPLOYÉ.

With the knowledge of a railroad company, it was customary for a sleeping car company to have its sleeper ready for passengers of the railroad company before the train to which it was to be attached arrived. A blind passenger, having a through ticket, changed cars at a station where a sleeping car was ready and having a berth therein, the porter of the train on which he had arrived took him over to the porter of the sleeping car who was informed of his blindness, and through his negligence the passenger was injured while attempting to go to his berth. *Held*, that the porter of the sleeping car was an employé, as to the passenger of the railroad company, and it was liable for the injury, though the sleeping car was not attached to any train.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1578, 1582, 1589; Dec. Dig. § 414.*]

9. CARRIERS (§ 247*)—INJURIES TO PASSENGER — CHANGING CARS—CONTINUING DUTY.

The passenger was at all times a passenger, since there is a continuing duty on the carrier to provide the passenger safe passage from the train to the depot, and from the depot to the sleeping car.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 984-993; Dec. Dig. § 247.*]

Appeal from District Court, Chaffee County; Morton S. Bailey, Judge.

Action by Robert J. Derry against the Denver & Rio Grande Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Valle & Waterman, Elroy N. Clark, and C. A. Chamberlin (Wm. W. Field, of counsel), for appellant. Potter & Banks (Floyd F. Walpole, of counsel), for appellee.

CAMPBELL, J. From a judgment rendered against the defendant railroad company in favor of plaintiff, Derry, as compensation for personal injuries suffered by him as the result of the negligence of its employes, this appeal is prosecuted. Derry is, and for many years has been, totally blind. He is a merchant living in Ouray, Colo., and often traveled upon defendant's railroad in carrying on his business, and was well known to defendant's conductors and trainmen, who were aware of his infirmity. He boarded defendant's train at Ouray, Colo., for a journey to Denver, having a round-trip first-class railroad ticket. The first part of the journey was by a narrow gauge train from Ouray to Salida. The second part by a standard gauge train from Salida to Denver. At Salida, through passengers left the narrow gauge train, which arrived about 8:30 p. m., and had to wait there about an hour and a half for a through train from the West, which

carried the narrow gauge passengers thence to Denver. At Montrose, en route to Salida, plaintiff bought of defendant's agent a berth, which entitled him to accommodations in a Pullman palace sleeping car, which, though owned by another company and managed and cared for by its own employes, was to be attached to, and form part of, defendant's train from Salida to Denver. It was customary for defendant to carry on its west-bound trains from Denver a standard gauge sleeping car, which was taken off at Salida and left standing near the depot on one of defendant's tracks in its yards, to be attached to defendant's east-bound train leaving Salida for Denver about 10 o'clock at night. Defendant's train reached Salida on schedule time. He alighted therefrom, with the help of the porter of the train, having previously requested the porter to take him to his sleeping car, and stood waiting by the side of the car until the porter had finished his duties in connection with assisting other passengers. It was a general custom of defendant, or the Pullman employes, with which the traveling public, including plaintiff, was familiar, to open this sleeping car and have it ready for the reception of passengers from the narrow gauge train destined to Denver, and who were supplied with tickets therefor, immediately upon their arrival, without requiring them to sit in the railway station or depot till the arrival of the connecting train from the West. Whether this custom was adopted by the sleeping car company upon its own initiative, or at the request of the railroad company, is not important. It was known to and recognized by the railroad company, and there is no evidence that it ever had objected thereto. Upon the night in question, after all the passengers had alighted from the narrow gauge car upon its arrival at Salida, and defendant's train porter had finished his duties in connection therewith, in compliance with the previous request, he assisted plaintiff and accompanied him to the sleeping car, which was, as usual, standing on a side track and ready for ticket holders, and which was to be attached to and form a part of defendant's east-bound train to Denver upon its arrival from the West, and the train porter delivered plaintiff to the Pullman porter, who was standing by its steps, at the end where the passengers were to enter, with a lighted lantern in his hand, ready to assist passengers supplied with berth tickets. There is some question as to whether the Pullman conductor was present. However that may be, the Pullman porter was informed by the plaintiff himself that he was blind, and a request was made of him by plaintiff in which another person present joined, for assistance into the car. The Pullman porter took hold of plaintiff's elbows and assisted him upon the lower step of the platform leading into the sleeping car. Plaintiff was carrying his overcoat

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thrown over his left arm and carrying his hand bag in his right hand. Believing, as he says, that the passageway into the car was safe and unobstructed, and supposing that he was being watched and guided by the Pullman porter, plaintiff proceeded up the steps, feeling his way along as best he could. When he reached what seemed to him to be the proper opening from the platform into the car, he stepped into the same, but it proved to be the passageway from the end of the platform away from the door of the car instead of into it, the same having been left open and not closed by a gate as was the usual custom at such times. The result was that plaintiff fell violently between the tracks and received the injuries to his arm for which he asks compensation in this action. The particular acts of negligence upon which he relies, as stated in the complaint, are that the Pullman porter, knowing of his infirmity, did not accompany him up the steps and into the car, or watch and guide his movements, and that defendant, through its employes, was negligent in that the gate was not closed, which, had it been in its proper place, would have prevented him from stepping from the front, or end, of the platform of the car.

As a preliminary objection, defendant, upon this review, contends that its liability to plaintiff is only that which was due him as a passenger riding on a free pass, which relation thereby created, if it does not entirely relieve defendant of all liability for negligence, imposes a duty different from that which rests upon it towards a passenger for hire. The record does not present such a case. Plaintiff had in his possession a first-class round-trip ticket from Ouray to Denver on defendant's road. He did not himself purchase this ticket or pay the railroad company directly therefor. It was issued, however, by the railroad company to another person and by him delivered to plaintiff. Whether the railroad company received a consideration for the ticket the record does not disclose, but, in absence of proof to the contrary, we are entitled to presume that it did. Counsel are mistaken in supposing that they made an offer to show the nature of the transaction concerning the ticket, or that a claim was made below that the ticket was issued by the company and received by plaintiff as a gratuity. The case therefore is as if plaintiff was a passenger for hire. The agents of the railroad company took his ticket when he presented it for passage, and he was entitled to the care and protection which the contract for carriage, evidenced by the ticket, gave him.

It may be that a railroad company is not bound to receive as a passenger one who is helpless or blind, or otherwise incapable of properly caring for himself, unless accompanied by a competent attendant. It may also be true that the care to be observed by one who is blind, traveling alone upon railroad

trains, is greater than that required of one without such infirmity. But when the railroad company accepts as a passenger one whom it knows to be incapable of taking proper care of himself, and who has no attendant, it must certainly use at least reasonable care and diligence for his safety, and, if it fails to do so, it is negligent. *Hanks v. C. & A. Ry. Co.*, 60 Mo. App. 274. No greater, or different, liability was imposed on defendant at the trial.

The objections to the rulings of the court in admitting and rejecting evidence and certain alleged rulings upon the pleadings and to the verdict are not of sufficient importance to merit separate discussion. If there was no error with respect to the assignments of negligence of defendant, and of contributory negligence of plaintiff, and to the rulings and instructions of the court with reference to the liability of defendant for the acts of employes of the sleeping car company, none of the other rulings of the court constitute error.

We discuss the questions of negligence together. It is said by defendant that plaintiff, knowing of his physical infirmity and of the dangers attending his movements in getting upon the car, was guilty of contributory negligence in attempting to enter the car without the active and continuous assistance of the Pullman porter; and it is further said, but not very seriously argued, that negligence on the part of the Pullman porter was not established. Whether or not, in the circumstances disclosed by the evidence, negligence of defendant and contributory negligence of plaintiff was established was rightly submitted to the jury, which found against defendant upon both issues. We might rest the discussion of this assignment solely upon that proposition. We say, however, that, upon the uncontradicted evidence, the affirmative defense of contributory negligence was not proved. When plaintiff asked the Pullman porter to assist him into the car, and the latter took hold of his arms and put him upon the step, being blind, and the porter knowing it, plaintiff was justified in believing that the porter was watching his movements and would see that he did not step off the end of the car, but would pass safely through the open door and into the car to his seat. He might well conclude that the porter, knowing of his physical infirmity, would watch him closely and guide his movements either by a word of warning, or by being in a position where he could touch him and properly guide his movements. Putting it as mildly as the facts justify, we say, also, that the porter, knowing of plaintiff's blindness, was guilty of reprehensible negligence in suffering plaintiff to proceed up the platform steps without even cautioning him, or watching him, or guiding his movements.

The chief ground relied upon for reversal is that the railroad company is not liable for the negligent acts of the employes of the

sleeping car company. It is, of course, conceded that, under the doctrine of *Penn. Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, when a sleeping car which belongs to a separate corporation is attached to, and becomes part of, the train of a railroad company, the employes of the sleeping car company are, as to the passengers of the railroad company riding in the sleeping car, to be regarded as employes of the railroad company, for whose negligent acts, which concern the safety or transportation of passengers, the railroad company itself is liable. But it is strenuously argued that the doctrine has not been, and cannot be, legitimately extended to the present case. To our minds the doctrine of the *Roy Case* is clearly applicable, and is but the logical extension of a recognized rule of master and servant. The contract between plaintiff and the railroad company, by which he was entitled to be carried from Ouray to Denver, was but partly performed when the narrow gauge train reached Salida. He certainly was a passenger up to the time he alighted from the train upon its arrival at that station. The journey, however, was incomplete, and a part of the contract was still to be performed. Had plaintiff been taken by defendant's train porter from the narrow gauge train to defendant's railway station or depot, he certainly would have been a passenger while going there, and would have continued to be a passenger all the time he was waiting there for the arrival of the east-bound train which would take him from Salida to Denver, the second stage of the journey. Since it clearly appears that, with the knowledge and tacit approval of the railroad company, the sleeping car company opened its sleeping car for the reception of passengers from the narrow gauge car immediately upon their arrival, which obviated the necessity of waiting in the railway station till the arrival from the West of the connecting train, and the porter of the sleeping car was standing at the platform steps with lantern in hand waiting to assist such passengers to enter the sleeping car, plaintiff was a passenger of defendant in going from the narrow gauge to the sleeping car, and during his movements in passing up the steps and into the car. Being a passenger, it was defendant's duty to take reasonable precautions for his safety and comfort. When defendant's train porter accompanied plaintiff to the sleeping car and turned him over to the Pullman porter, the latter, in assisting passengers into the sleeping car, was acting as the agent and employe of the railroad company in the same sense, and to the same extent, that he would be, had the sleeping car been actually attached to defendant's train after the train had been made up and was moving on the railroad tracks on its way from Salida to Denver, because such act of assistance concerned the

safety and transportation of a passenger. There is the same reason for saying that plaintiff was a passenger of defendant company from the moment of his arrival in Salida until the connecting standard gauge train from Salida to Denver started on its journey, as for saying that he was a passenger continuously between Ouray and Salida, or between Salida and Denver. The defendant was under the same obligation with respect to his safety throughout the entire journey as for any particular portion thereof. In *D. & R. G. R. R. Co. v. Hodgson*, 18 Colo. 117, 31 Pac. 954, and *A. T. & S. F. R. Co. v. Shean et al.*, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729, this court has held that the duty of a common carrier does not cease upon the arrival of its train at the place of a passenger's destination, but there is a continuing duty resting upon the carrier in providing the passenger safe passage from the train to the platform of the depot. The same obligation, of course, rests upon the carrier in providing a safe passage for the passenger in going from the depot to the train to take passage thereon, and in and about the platforms, and, as in this case, in providing for his safety in going from one connecting train to another, which it is necessary for the passenger to do in order to complete his journey. We have no hesitation in extending the doctrine of the *Roy Case* to the case made by the evidence in the case in hand. We think the following authorities also in principle sustain our conclusion: 4 *Elliott on Railroads* (2d Ed.) §§ 1579, 1625, 1640; *H. & S. F. J. R. R. v. Martin*, 11 Ill. App. 386; *B. & O. R. R. Co. v. State, etc.*, 60 Md. 449; *Shannon v. Boston & A. R. Co.*, 78 Me. 52, 2 Atl. 678. See, also, 7 *Rapalje & Mack's Digest of Railway Law*, 140; *Dwinelle v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611.

Affirmed.

STEELE, C. J., and MUSSER, J., concur.

(47 Colo. 596)

CITY OF PUEBLO v. BABBITT.

(Supreme Court of Colorado. April 4, 1910.)

1. MUNICIPAL CORPORATIONS (§ 812*)—DEFECTIVE STREETS—NOTICE OF INJURY.

The purpose of Rev. St. 1908, § 6661, providing that no action against a city for negligence shall be maintained unless a written notice is given, is to enable the city officers to make a proper investigation, and to prepare a defense to any action; and, if any inaccuracy in the notice did not mislead, and was made through an honest mistake or inadvertence, the inaccuracy is excused.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1696-1707; Dec. Dig. § 812.*]

2. MUNICIPAL CORPORATIONS (§ 821*)—DEFECTIVE STREETS—NOTICE OF INJURY.

Whether a notice to a city under Rev. St. 1908, § 6661, of the time, place, or cause of an

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

injury on a defective street was or was not prepared so as to mislead, and whether the city officials were or were not in fact misled by inaccuracies therein, are for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1757; Dec. Dig. § 821.*]

3. MUNICIPAL CORPORATIONS (§ 818*) — DEFECTIVE STREETS—NOTICE—SUFFICIENCY.

One suing for injury on a defective street may supplement the written notice served on the city, as required by Rev. St. 1908, § 6061, by parol proof to show that inaccuracies in the notice were not made for the purpose of misleading the city, and that they did not in fact mislead.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1738; Dec. Dig. § 818.*]

4. MUNICIPAL CORPORATIONS (§ 812*) — INJURIES ON DEFECTIVE STREETS — NOTICE — SUFFICIENCY.

Where the notice of injury recited that it occurred on the east side of an avenue between Thirteenth and Fourteenth streets, whereas it occurred on the avenue between Twelfth and Thirteenth streets, and the evidence showed that, shortly after the service of the notice, counsel for plaintiff advised the city attorney of its inaccuracy, and the city attorney and city engineer examined the defective avenue between Twelfth and Thirteenth streets, the notice was sufficient.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1696-1707; Dec. Dig. § 812.*]

Appeal from District Court, Pueblo County; John H. Voorhees, Judge.

Action by Lulu Babbitt against the City of Pueblo. From a judgment for plaintiff, defendant appeals. Affirmed.

W. O. Peterson, D. A. Highberger, and John A. Martin, for appellant. James H. Teller and J. H. McCorkle, for appellee.

STEELE, C. J. The written notice served upon the city clerk states that the injury occurred "about the middle of the block, on the east side of Grand avenue, and between Thirteenth and Fourteenth streets," whereas the injury occurred on the east side of Grand avenue between Twelfth and Thirteenth streets. Upon the trial the plaintiff was permitted to show that, within a short time after the service of notice, counsel for the plaintiff advised the city attorney of its inaccuracy, and that the city attorney and the city engineer both examined the defective sidewalk on the east side of Grand avenue between Twelfth and Thirteenth streets, the place where the plaintiff was injured. The court instructed the jury that the inaccuracy

in the notice was not sufficient to invalidate it, and that the notice was under the law and the evidence sufficient. The jury found the issues joined in favor of the plaintiff, and awarded her damages in the sum of \$1,000. From the judgment in favor of the plaintiff the defendant appealed.

The only question presented by the appeal is the sufficiency of the notice. Section 6061, Rev. St. 1908, provides: "Sec. 149. No action * * * against any city * * * on account of its negligence, shall be maintained unless written notice * * * is given. * * * But the notice given under the provisions of this act shall not be deemed invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of injury: Provided, it is shown that there was no intention to mislead, and that the city council or board of trustees was, in fact, not misled thereby." The contention of the city attorney is that, as the notice served did not correctly state the place of the injury, oral evidence was not admissible to explain or alter the notice, and that if the notice required any amendment, such amendment must be served as provided by law. The purpose of the statute in requiring notice to be given is to enable the city officials to make a proper investigation of the nature and cause of the injury, and to prepare to defend an action, if brought. The statute does not excuse inaccuracy in stating the time, place, or cause of the injury, if the intention in giving an inaccurate statement was to mislead, nor if the inaccuracy does in fact mislead, the city council; but, if the inaccuracy was made through an honest mistake or inadvertence, and the city council was not in fact misled thereby, then the statute does excuse the inaccurate statement. Whether the notice was or was not prepared so as to mislead, and whether the city authorities were or were not in fact misled, are questions for the determination of the jury (*Miller v. Camp Bird, Limited*, 105 Pac. 1105), and it was entirely competent for the plaintiff to supplement the notice by oral proof. It is not claimed that the notice was designed to mislead, nor that the city council was in fact misled, and the court properly instructed the jury that the notice, under the evidence and the law, was sufficient.

The judgment is therefore affirmed.
Judgment affirmed.

WHITE and BAILEY, JJ., concur.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(56 Or. 277)

HEWITT v. SMITH et ux.

(Supreme Court of Oregon. April 28, 1910.)

MORTGAGES (§ 463*) — FORECLOSURE — EVIDENCE.

In a suit to foreclose a mortgage securing a note, evidence held to show that defendants had a set-off against the note of the proceeds from a contract with the payee to board him and do his washing for \$120 a year, to perform his road work for \$10 a year, and pay him \$30 cash a year, all to be credited on the note.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 463.*]

Appeal from Circuit Court, Linn County; William Galloway, Judge.

Suit by H. H. Hewitt, executor of Edward Loat, against John Smith and wife. Decree for defendants, and plaintiff appeals. Affirmed.

This is a suit to foreclose a mortgage. On December 11, 1883, defendant John Smith executed to Edward Loat his promissory note for the sum of \$1,000, payable one year after date, with interest at the rate of 10 per cent. per annum, and containing the usual clause for attorney's fees. Afterward the rate of interest was reduced to 5 per cent. and to secure the payment of the note defendants executed to Loat a mortgage upon 160 acres of land in Linn county, Or. It is admitted by the complaint that \$500 have been paid on the principal of the note, and that the interest was paid until December 11, 1903, that Loat died January 12, 1904, and that plaintiff is the duly appointed and acting executor of the will of decedent. Plaintiff asks for judgment and a decree foreclosing the mortgage. The answer admits the execution of the note and mortgage as alleged, but denies that the note is unpaid, and alleges that on December 11, 1885, defendants entered into an agreement with Loat, whereby they should furnish him board and lodging, do his laundry work, take care of him in case of sickness, supply him with \$30 annually, and do his road work. Loat agreed to pay \$120 per annum for his board, washing, and care, and credit on the note the amount of cash advanced, the board at \$120, and the road work. The answer also alleges that defendants furnished the board and \$30 in cash annually, cared for Loat, did the laundry, and performed the road work to the amount of \$10 annually, until 1898, amounting in all to \$2,893; and pleads the same in payment of the note, and asks for the balance thereof, after satisfying the note. The affirmative matter of the answer is put in issue by the reply. The cause was tried by the court and a decree rendered in favor of defendants. Plaintiff appeals.

C. E. Sox and J. J. Whitney, for appellant. Weatherford & Wyatt, for respondents.

EAKIN, J. (after stating the facts as above). It appears from the evidence that

Loat was the stepfather of defendant John Smith, and that, about the date of the note, he, being about 68 years old, went to live with defendants, under an arrangement by which the price of his board was to be applied on the note. The first indorsement on the note is a statement that the interest shall be at the rate of 5 per cent., and not 10. This indorsement is not dated, but was evidently made about March 23, 1886. It is erased by both ink and pencil marks, following which are many indorsements of interest and of two payments upon the principal, viz., \$400, May 6, 1896; \$100, September 10, 1898. At the time of his death, Loat had a memorandum in his own writing as follows:

"(April 30, 1887. Cash 2 doll^s (two)"

"March 23, 1886. On my return this day to Crackersneck from the 'Crossing' of the narrow guage & Lebanon Railways, John Smith paid me *49½ dollars which is the balance of the interest due to me on the 1600 note for two years, 1883 & 1884, up to Dec. 1885. The same is credited on the record of the mortgage at Albany.....E. L. Mem^m. This is the 1st cash payment he has made me. My board & washing & the work of my road tax by him being considered equal to the other part of the interest at — per cent (not ten) as the note was drawn ten by mistake.

"This int. at 10 per cent per an. on 1600—\$160.

30—Cash	30\$ per year to pay the Tax.
10 Road Tax	10\$ value of road work done.
120 Board	120\$ value of board and washing, being at the rate of 2 ⁰⁰ /100 per week.

160 160\$"

There are also other memoranda on the same paper but not important here.

Plaintiff produced testimony tending to show that defendants were to board Loat and pay him \$30 cash each year for the interest on the note. And defendants produced testimony tending to show that they were to furnish Loat his board and do his washing for \$120 per annum, perform his road work for \$10 a year, and pay him cash \$30 a year, all of which was to be credited on the note. This would just pay the interest on the note at 10 per cent. as the note was written, and these terms were recognized by Loat for more than two years, at which time he reduced the rate of interest to 5 per cent., as shown by the indorsements on the note and by the memoranda. The testimony is very indefinite as to the making of the agreement and when and where it was made, but it is sufficiently established. Plaintiff lays stress upon the admissions of Smith made to Hewitt soon after the death of Loat to the effect that there were \$1,100 due on the note. But Smith was evidently speaking with reference

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to the fact that the two payments on the principal reduced it to \$1,100, and was not inconsistent with his claim that he had an offset against the note. His statements to Hewitt are not all consistent with his testimony; but, in the light of the whole of the evidence, the conflict is not such as to discredit him. There is no doubt that the first agreement was that Loat was to pay \$120 per annum for his board and washing, and there does not appear to have been any agreement or understanding between them by which it was changed. Loat's memoranda show that he allowed \$120 for each of the first two years, in which he states, it is "value of board and washing, being at the rate of \$2.30 per week." By plaintiff's theory defendants were only receiving \$40 a year, 77 cents a week for Loat's board, washing, and care during sickness, and, after the payment of the \$500 on the principal but 28 cents a week. This would be no compensation, and evidently was not contemplated by either party. Defendants both testify that the agreement was \$2.30 for board and washing, and Repley testified that Loat told him he was to pay \$120 a year. From the whole testimony in the case we think this is established by the preponderance of the evidence.

Decree affirmed.

(56 Or. 246)

MOON et al. v. RICHELDERFER.

(Supreme Court of Oregon. April 26, 1910.)

APPEAL AND ERROR (§ 14*)—FAILURE TO FILE TRANSCRIPT—RIGHT TO ABANDON APPEAL—SUCCESSIVE APPEALS.

After an appeal has been perfected, the right of appeal is lost, if appellant fails to file the transcript within time, since the filing of a transcript on time is expressly made jurisdictional by B. & C. Comp. § 553, and hence an appeal cannot be abandoned after failure to file a transcript, and a new appeal taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 49-51; Dec. Dig. § 14.*]

Appeal from Circuit Court, Sherman County; R. R. Butler, Judge.

Action by E. B. Moon and another against H. Richelderfer. From a judgment for plaintiffs, defendant appeals. Motion to dismiss appeal. Motion granted.

E. V. Littlefield, for appellant. J. B. Horsford, for respondents.

EAKIN, J. On July 13, 1909, plaintiffs recovered a judgment against defendant for \$200 and costs, and on October 22, 1909, defendant served and filed with the clerk of the circuit court a notice and undertaking on appeal, with proof of service duly indorsed thereon. No transcript was filed in the Supreme Court within the time allowed by law therefor. Thereafter defendant abandoned the appeal. On January 8, 1910, defendant served a second notice and undertaking on

appeal, which was filed in the circuit court on January 15, 1910. The transcript was filed in this court March 9, 1910. On March 11, 1910, plaintiffs filed a motion to dismiss the appeal for the reasons that it has not been taken in the manner or within the time provided by law, and that the Supreme Court has no jurisdiction to entertain the appeal.

When an appeal is perfected, it cannot be abandoned thereafter and a second appeal taken. The right of appeal is lost if the transcript is not filed within the time allowed by law or an extension thereof. This is jurisdictional. B. & C. Comp. § 553; *Nestucca Wagon Road Co. v. Landingham*, 24 Or. 439, 33 Pac. 983; *Davidson v. Columbia Timber Co.*, 49 Or. 577, 91 Pac. 441; *Harrington v. Snyder*, 53 Or. 573, 101 Pac. 392.

The appeal is dismissed.

(56 Or. 247)

GERMAN EVANGELICAL REFORMED BETHANY CHURCH OF SALEM v. SCHINDLER et al.

(Supreme Court of Oregon. April 26, 1910.)

JUSTICES OF THE PEACE (§ 36*)—JURISDICTION—QUESTIONS INVOLVING TITLE TO REAL PROPERTY.

Under B. & C. Comp. § 2218, providing that if it appear on the trial of a cause before a justice of the peace, from the evidence or the pleading, that the title to real property is in question, the justice shall make an entry thereof in his docket and certify the cause to the circuit court, where the complaint in forcible entry and detainer alleged that plaintiff was the owner in fee simple of the premises and entitled to possession, which the answer denied, the pleadings showed that the title to real property was in question and the justice was without jurisdiction to try the cause.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 91; Dec. Dig. § 36.*]

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

Action by the German Evangelical Reformed Bethany Church of Salem, Oregon, a corporation, against Lena Schindler and another. Plaintiff had judgment in justice court, and defendants appealed to the circuit court, where upon motion judgment was granted in favor of defendants, and plaintiff appeals. Affirmed.

This is an action of forcible entry and detainer brought in the justice court for Salem district, Marion county, Or. In the complaint it is alleged: "That the plaintiff is the owner in fee simple and entitled to the full and unobstructed possession of the following described premises, to wit: The west halves of lots Nos. 1 and 2 in block 87 in the city of Salem. * * * That the above-named defendants are now wrongfully and unlawfully in possession of the said premises, * * * and the said defendants unlawfully hold and retain the possession of the said premises * * * with force." The defendants by their answer "deny generally

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

each and every allegation therein contained," except that they admit occupancy of the premises. The cause was tried upon the evidence in the justice court, and judgment rendered for plaintiff. Defendants appealed to the circuit court, which, upon motion therefor, granted judgment in favor of defendants, and against plaintiff, upon the pleadings. Plaintiff appeals.

John Bayne, for appellant. John W. Reynolds and A. O. Condit, for respondents.

EAKIN, J. (after stating the facts as above). The motion for judgment upon the pleadings was properly granted by the circuit court. Section 2218, B. & C. Comp., being a part of the re-enactment of the Justice Code of 1899, provides that: "If it appear on the trial of any cause before a justice of the peace from the evidence of either party, or from the pleadings, that the title to real property is in question, which title shall be disputed by the other party, the justice shall immediately make an entry thereof in his docket and cease all further proceedings in the cause, and shall certify and return (the cause) to the circuit court." Prior to the enactment of the statute above quoted, the justice was only ousted of jurisdiction in such a case when it appeared from the evidence that the title to lands was in question. Hill's Code, § 2081; Malarkey v. O'Leary, 34 Or. 493, 497, 56 Pac. 521. But section 2218, supra, which is a part of the enactment of 1899, embraced the substance of section 2080, supra, with the additional provision that, if it appears "from the pleadings" that the title to real property is in question, it shall terminate the jurisdiction of the justice to proceed further with the trial, thus contemplating that the title, when alleged in the complaint, "may be disputed by the other party" by his answer, and in that manner terminate the proceedings in the justice court as effectually as by the evidence.

The complaint alleges that plaintiff is the owner in fee simple of the premises and entitled to possession thereof. The answer denies this allegation, and thus by the pleadings it appears that the title to the real property is in question, an issue which the justice has no jurisdiction to try.

The judgment is affirmed.

MOORE, O. J., did not sit in this case nor take part in its decision.

(56 Or. 390)

JERMAN v. MISNER.†

(Supreme Court of Oregon. April 26, 1910.)

1. APPEAL AND ERROR (§ 695*) — RECORD — SUFFICIENCY OF TRANSCRIPT.

Upon appeal from a decree for a trial de novo, appellant must incorporate in the transcript the evidence received in the lower court

under the express provisions of B. & C. Comp. § 553, subd. 1, and where the abstract of title to land, the title to which was in question, is not in the transcript, the sufficiency of the title cannot be inquired into.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2915; Dec. Dig. § 695.*]

2. FRAUDS STATUTE OF (§ 129*) — SALE OF LAND—PART PAYMENT AND POSSESSION.

Where a purchaser of land pays part of the price and takes possession, the sale is taken out of the statute of frauds so as not to require a written memorandum in order that the agreement may be specifically enforced.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287-326; Dec. Dig. § 129.*]

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Action by W. L. Jerman against J. L. Misner. Judgment for plaintiff, and defendant appeals. Affirmed.

Webster Holmes, for appellant. Geo. G. Bingham, for respondent.

MOORE, O. J. This is a suit by W. L. Jerman against J. L. Misner to enjoin the maintenance of an action to recover money, and to enforce the specific performance of a contract to convey real property. The facts are that the plaintiff owns at Woodburn seven-tenths of an acre of land which he desired to sell, and offered J. H. Richards, a real estate broker, \$100 if he could secure \$2,500 therefor. Richards, having learned that Misner was viewing property in that city, took him to the land mentioned. The defendant remarked there was no driveway from the street to the barn, but was informed by the broker that immediately east of the fence Jerman owned a strip 10 feet wide which was used as a passageway. The defendant, relying on such representation, and being pleased with the property, consummated with the plaintiff October 5, 1907, an agreement whereby he stipulated to give for the land the sum demanded by assigning to Jerman a note for \$1,000 which he held, secured by a real estate mortgage, and to pay the remainder of the consideration in cash within six weeks, plaintiff to furnish an abstract of the land so conveyed, while the vendee was to bring down a similar instrument of the subject of the mortgage mentioned. At the time the agreement was made nothing was said about the strip of land referred to, the defendant believing that it would be conveyed to him, while the plaintiff, not being the owner thereof, had no knowledge of any representations in relation thereto. Jerman had informed Richards that a 10-foot strip had been added to the original tract, which the broker supposed lay on the east and outside the fence, when in reality it was situated at the west and within the surrounding enclosure. The bargain having thus been struck, the defendant paid to Richards on account of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied May 24, 1910.

the purchase price \$420.80 and accepted a receipt therefor, in the nature of a memorandum of sale, which was subsequently amended by him in the presence of the parties and with their consent. The broker retained the commission offered, and gave the remainder of the money to Jerman, who removed his household goods from the premises, and Misner entered into possession thereof. When the abstracts were exchanged, the defendant discovered that the plaintiff had no title to the strip in question, and a controversy immediately arose concerning the property. Jerman refused to return the entire sum received, whereupon Misner moved off the land and commenced an action to recover the cash payment already made. Jerman filed an answer in that action, and as plaintiff instituted this suit in the nature of a cross-bill. Having tendered to Misner a deed to the premises, including the 10-foot strip on the east which had been purchased, the sealed instrument was deposited with the clerk of the court upon the defendant's refusal to accept it. This suit, being at issue, was tried and the relief prayed for in the complaint granted, the decree stipulating, however, that, upon the defendant's failure within 60 days to assign to plaintiff the note and mortgage and to pay the remainder of the purchase price, all his right to the real property should be barred and his previous payment forfeited, and he appeals.

The plaintiff, as a witness in his own behalf, testified that the defendant objected to the condition of the title to the land and also to the lack of ingress to and egress from the barn along the way pointed out by Richards; that the witness, when he learned of the misrepresentation, offered to return \$320.80, the sum he had received, which proposal not being accepted he proposed to buy the strip under discussion and to convey it to the defendant, who accepted the offer, providing the conveyance were made on or before the following Tuesday evening; that title to such strip was secured for \$100, and, before the expiration of the time specified, a conveyance of the entire tract, including such strip, was tendered to the defendant, who refused to accept it or to pay the consideration which he had agreed to give, and moved off the land. The defendant testified that the offer made to him was to complete the abstract to show a title satisfactory to him individually and also to secure a deed to the strip on or before the day specified; and that, knowing the title could not be perfected within the time limited, he acceded to the proposition.

The transcript shows that the abstract of the Woodburn land was admitted in evidence, but was not transmitted to this court. It is impossible, therefore, to say whether or not the title to the premises is perfect. As this is an appeal from a decree and the cause was to be tried anew, it was incumbent upon the

defendant, who is appellant, to incorporate in the transcript the evidence which had been received (B. & C. Comp. § 553, subd. 1), and his failure necessarily precludes any inquiry into the conditions of the title.

The same conclusion must be reached with respect to the memorandum of sale which, though amended in the presence of the parties and received in evidence, has not been brought up. The sufficiency of the writing, however, becomes immaterial, for the complaint alleges, and the testimony shows, that, pursuant to the terms of the contract, the defendant paid a part of the purchase price, and took possession of the premises, which facts are adequate to take the case out of the statute and to authorize a court of equity specifically to enforce the terms of the agreement. *Wagonblast v. Whitney*, 12 Or. 83, 87, 6 Pac. 399; *Wallace v. Scoggins*, 17 Or. 476, 21 Pac. 558; *Cooper v. Thomason*, 30 Or. 161, 45 Pac. 296; *Sprague v. Jessup*, 48 Or. 211, 218, 83 Pac. 145, 84 Pac. 802, 4 L. R. A. (N. S.) 410.

It is unnecessary to make any observations concerning the testimony, a careful examination of which convinces us that, pursuant to the subsequent personal agreement made by plaintiff and defendant, a deed to the land, including the strip, was tendered within the designated time, and Misner's refusal to accept the conveyance and to perform his part of the agreement makes him responsible for the ensuing difficulty.

It follows that the decree must be affirmed, and it is so ordered.

(56 Or. 250)

NORTHERN PAC. RY. CO. v. SPENCER.
(Supreme Court of Oregon. April 26, 1910.)

1. TRIAL (§ 161*)—NONSUIT—WAIVER OF MOTION.

The introduction of evidence by defendant before disposal of a motion of nonsuit for insufficiency of proof does not waive his motion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 369; Dec. Dig. § 161.*]

2. TRIAL (§ 165*)—NONSUIT—MOTION—JUDGMENT ON MERITS.

Where the court reserves decision on a motion for nonsuit for insufficiency of evidence and the defendant introduces evidence, the court has no power to make findings or enter a judgment on the merits without disposing of the motion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 373; Dec. Dig. § 165.*]

3. TRIAL (§ 165*) — NONSUIT — VOLUNTARY NONSUIT—NONSUIT BY CONSENT.

Under B. & C. Comp. § 182, subd. 1, defendant moved for a nonsuit for insufficiency of evidence, and, before final submission of the cause, plaintiff moved for a voluntary nonsuit under subdivision 3, but filed his motion too late. *Held*, that the action of the court in thereafter dismissing the action would be considered taken under subdivision 2, authorizing dismissal without prejudice with the written consent of the parties, since plaintiff's motion, though too late, amounted to an implied con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sent to defendant's motion, especially where the court failed to make any findings on any of the issues presented by the pleadings, as required by B. & C. Comp. §§ 158, 159.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 373; Dec. Dig. § 165.*]

4. JUDGMENT (§ 570*)—RES JUDICATA—DISMISSAL OF ACTION.

The action of the court in dismissing an action before final submission cannot be taken as an adjudication on the merits, where no findings on the issue presented by the pleadings are made, since without findings such judgment could not be a bar to another action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028, 1031, 1032; Dec. Dig. § 570.*]

Appeal from Circuit Court, Multnomah County; Thomas O'Day, Judge.

Action by the Northern Pacific Railway Company against E. W. Spencer, doing business under the name of the Dalles Transportation Company. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action for the recovery of \$660, alleged to be due plaintiff for the use by defendant of its wharf at the foot of Columbia street in Vancouver, Wash. Defendant answered with the usual denials, amounting to a denial of any liability therefor, and as an affirmative defense pleaded a counterclaim, alleging neglect by plaintiff properly to care for freight left by defendant on the plaintiff's wharf, and demanding damages in the sum of \$500, which counterclaim was thereafter, at defendant's request, stricken out and the answer amended, omitting same. The proceedings are fully set out in the record of the judgment entry contained in the bill of exceptions, which reads: "The above-entitled action having come on for trial on the 14th day of January, 1908, before the court without a jury (a jury having been waived), thereupon the defendant amended his answer by striking therefrom, with the permission of the court first had and obtained, the counterclaim therein contained; and evidence having been introduced on behalf of the plaintiff, and at the close of such evidence the defendant having moved the court for a judgment of nonsuit upon the ground that the evidence submitted by the plaintiff did not sustain the allegations of the complaint, and this motion having been taken under advisement and ruling thereon reserved, and thereupon the defendant having offered evidence in support of the allegations of his answer, and thereupon the plaintiff, by its counsel, having partially argued the questions of fact and questions of law involved herein, and the defendant, by his counsel, having partially argued the questions of fact and questions of law involved herein, the plaintiff thereupon moved the court for a judgment of nonsuit under section 182 of the Bellinger & Cotton's Annotated Codes of Oregon, and the court having reserved its ruling on the defendant's motion for nonsuit, it is now ordered, adjudged, and decreed that the motion of the plaintiff for a judgment of non-

suit be and the same hereby is denied; and it is further ordered, adjudged, and decreed that this action be, and the same hereby is, dismissed, and that the defendant go hence without day, and that the defendant recover his costs and disbursements against the plaintiff in the sum of \$47."

Carey & Kerr, A. L. Miller, and Harrison Allen, for appellant. R. W. Montague and Coovert & Stapleton, for respondent.

KING, J. (after stating the facts as above). This appeal presents a unique and probably an unprecedented situation. Defendant, by motion, demanded that the action be dismissed for insufficiency of proof. Before being passed upon, and after defendant had rested his case, but before final submission of the cause, plaintiff also filed a motion, asking that the cause be dismissed, seeking thereby a voluntary nonsuit. The motion interposed by defendant came under subdivision 3, § 182, B. & C. Comp., while plaintiff's motion was under subdivision 1 thereof. By the introduction of evidence before disposal of the motion, defendant did not thereby waive his motion for nonsuit (*Carney v. Duniway*, 35 Or. 131, 57 Pac. 192, 58 Pac. 105), and until passed upon the court had no authority either to make findings or to enter a judgment upon the merits. *Carroll v. Grande Ronde Elec. Co.*, 49 Or. 477, 90 Pac. 903. As held in the case last cited, defendant's motion, when granted, regardless of "how the judgment may be framed, or what recitals it may contain," could amount to nothing more than a dismissal without prejudice. Plaintiff's motion was filed under a different subdivision of the same section, and, while under section 182 of the Code it came too late (*United States v. Humason* [C. C.] 8 Fed. 73), it had for its object the same purpose as the motion filed by defendant, and constituted an implied consent thereto; thus bringing the case within the requirements of subdivision 2 of the section mentioned, amounting to a nonsuit by written consent of the parties. That the court so considered and treated it may be implied from the fact that findings were not made on any of the issues presented by the pleadings, as expressly required by sections 158, 159, B. & C. Comp. See *Jennings v. Frazier*, 46 Or. 470, 472, 80 Pac. 1011; *Freeman v. Trummer*, 50 Or. 287, 91 Pac. 1077; *Oregon Auto-Dispatch v. Portland Cord. Co.*, 51 Or. 583, 585, 94 Pac. 36, 95 Pac. 498; *Scott v. Ford*, 52 Or. 288, 295, 97 Pac. 99.

However, it appears from the errors assigned and arguments in the briefs of the counsel for the respective parties that this appeal is predicated upon the assumption that the judgment as entered, unless reversed or set aside, constitutes an adjudication on the merits, and therefore a bar to another proceeding; but, in the absence of findings on the issues, it cannot possibly have such effect. A dismissal

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

without such findings places the cause in a position analogous to an action where a jury trial is had, and the proceeding dismissed without a verdict (Scott v. Ford, 52 Or. 288, 295, 97 Pac. 99); and, regardless of what may be recited in the judgment, it can have no other effect. This position is fully sustained in Carroll v. Grande Ronde Electric Co., 49 Or. 477, 90 Pac. 903, in which it is held that notwithstanding a judgment of nonsuit recited that certain facts were there determined, which is wanting here, it merely amounted to surplusage, and would not bar a subsequent action. Applying the principles there enunciated to the case in hand, the issues here not having been passed upon, the judgment entered only amounts to a dismissal without prejudice, the costs being but an incident to the judgment, and not adding to its force or effect. Hoover v. King, 43 Or. 281, 286, 72 Pac. 880, 65 L. R. A. 790, 99 Am. St. Rep. 754.

The parties having received the relief demanded by their respective motions, neither is in position to complain. Finding no error in the record, the judgment is affirmed.

(56 Or. 256)

STOWELL v. HALL.

(Supreme Court of Oregon. April 26, 1910.)

1. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

Where there was no dispute that an automobile ran into a vehicle, frightening the horse, and injuring the driver, any error in admitting as a part of the res gestæ a statement of the driver that an automobile ran into the vehicle was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

2. EVIDENCE (§ 220*)—CONDUCT OF PARTY—ADMISSIBILITY.

Under B. & C. Comp. § 718, providing that evidence may be given of a declaration of another in the presence of a party and of his conduct in relation thereto, the declarations of third persons in the presence of a party charged with running his automobile into a vehicle injuring the occupant thereof, made when the party had an opportunity to contradict or explain the statements, were admissible against him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771-778; Dec. Dig. § 220.*]

3. TRIAL (§ 63*)—ORDER OF PROOF—DISCRETION OF TRIAL COURT.

The order of proof is within the sound discretion of the trial court, and the admission in rebuttal of testimony constituting proof in chief is not reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 151-153; Dec. Dig. § 63.*]

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by J. E. Stowell against E. D. Hall. From a judgment for plaintiff, defendant appeals. Affirmed.

C. V. Howard and L. W. Humphreys, for appellant. John H. Stevenson, for respondent.

MOORE, C. J. This is an action by J. E. Stowell against E. D. Hall to recover damages for a personal injury alleged to have been caused by the negligence of the defendant who, in operating an automobile on a highway, ran into a coupé in which the plaintiff was riding. The answer denied the averments of the complaint, and a trial was had resulting in a judgment against the defendant in the sum of \$763, whereupon he appeals.

The errors assigned relate to the admission of testimony, over objection and exception, and in order fully to comprehend the rulings in these particulars, it is thought proper to state the substance of the plaintiff's testimony respecting the time, place, and manner of the accident. He stated upon oath that on April 3, 1909, about 11:30 p. m., as he was driving east on Yamhill street, Portland, an automobile came up behind him, struck the shaft of the carriage, frightening and causing his horse to run away, and, in turning to the left on Sixth street, the vehicle was dashed against a structure at the corner, throwing him to the pavement, along which he was dragged to Morrison street, where, becoming disentangled, he was picked up and taken to the hospital.

Mr. Estes testified that he saw a horse dragging a person on Sixth street, leaving him at Morrison street, lying on the pavement, whom the witness recognized as the plaintiff. Estes was then directed as follows: "Now, what did Stowell say to you?" Again, "Now, just state to the jury what you said to Stowell, and what he said to you." Over objection and exception the witness replied: "I said, 'What is the matter, Jack, are you hurt?' And he said, 'Yes.' I said, 'What did it?' He said, 'An auto ran into my hack.'"

Ira McDulin, having testified, in effect, that he owned the coupé driven by Stowell when hurt, and that having learned the defendant was the owner of the license on the automobile causing the injury, he visited and conferred with him about the collision, was directed by plaintiff's counsel as follows: "State what conversation, if any, you had with Hall in regard to this accident." An objection, on the ground that no foundation had been laid for the defendant's impeachment, was overruled and an exception saved, when the witness answered: "I went to see Hall either Monday or Tuesday, April 5th or 6th. I went first in the morning, but Hall wasn't in, so I went back later and talked with him. I said, 'I came to see you in regard to that accident.' He said, 'I don't know anything about any accident.' I asked him if he hadn't run into a coupé on Yamhill street Saturday night, and he said he never ran into anybody. I asked him if he owned a red machine, No. 1092, and he said, 'What do you mean by machine?' I said, 'An automobile.' Hall said, 'I own a red automobile, but I don't know whether that is the number of it.' A boy in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the store spoke up and said, 'Yes, that is the number of your automobile.' The defendant's objection to the boy's statement having been overruled and an exception allowed, McDulin continued: "I asked Hall if he was not out in the automobile Saturday night, and if he had not come down Yamhill street? He said he had, but had got in early, and that he had not run into anybody. I asked him what time he got home. He called to a woman, who came forward from the back part of the store, and Hall turned to her, and said, 'What time did we get in Saturday night?' Hall pulled his hat down over his forehead so I could not see his face. The woman looked at him, and said, 'It was a little before 12, wasn't it?' The objection of defendant's counsel to the statement of this woman, having been overruled and an exception saved, the witness resumed: "Hall said, 'I suppose I might have come by there about that time, and somebody glauamed my number—some sorehead standing around there might have glauamed my number. I had a notion to go out and see this fellow out of sympathy, but I didn't run into anybody. I don't see how he could have got anybody's number if it happened the way the papers say.' " A motion to strike out all the testimony of this witness was denied and an exception granted. Evidence having been admitted tending to show that the defendant owned a red automobile which, at the time of the injury, carried license tag No. 1092, the plaintiff rested.

The witnesses for the defendant testified that on the night of the alleged injury he and three other persons were in his automobile at a place several miles distant from the scene of the hurt, which they did not pass until more than an hour after the occurrence, and that his automobile did not collide with the plaintiff's vehicle. Hall, as a witness in his own behalf, having admitted that the plaintiff's coupé might have been run into by an automobile as claimed, denied that the collision was caused by his machine, and thereupon rested his cause. Thereafter E. J. Martin, a witness for the plaintiff, was permitted, over objection and exception, to testify as follows: "I heard a horse rushing past and some one halloaing, and went to the window and looked out. I saw a gray horse running away, drawing a coupé, and saw a red automobile going east on Yamhill street at a rapid rate. It was a red machine, and was just past the corner. The horse and cab turned the corner. I did not see who was in the automobile, nor the number of the license."

Considering the exceptions noted in their regular order, it is contended that Stowell's declarations as to the cause of his injury did not constitute a part of the *res gestæ*, for

which reason they were inadmissible, and an error was committed in permitting Estes to detail the plaintiff's narration; citing in support of the principle asserted the cases of *Sullivan v. O. R. & N. Co.*, 12 Or. 392, 7 Pac. 508, 53 Am. Rep. 364, and *Fredenthal v. Brown*, 52 Or. 33, 95 Pac. 1114.

It will be remembered that Stowell, in his explanation of the origin of his injury, as told by Estes, did not attempt to identify any particular automobile or attribute his hurt to the defendant. It is difficult to perceive how Hall could have been prejudiced by receiving the testimony in question. We think any error in this respect was waived by the defendant who, as a witness in his own behalf, admitted that Stowell's coupé might have been run into by an automobile. There was therefore no dispute about the fact detailed by the statement, and if any error was committed in receiving the declaration in evidence, it was harmless and could not have injured the defendant. *State v. Hatcher*, 29 Or. 309, 312, 44 Pac. 554; *State v. Smith*, 47 Or. 485, 489, 83 Pac. 965.

It is insisted that in receiving McDulin's testimony detailing the declaration of the boy, who, referring to No. 1092 as evidencing a license, said, "Yes, that is the number of your automobile," and the statement of the woman in reply to Hall's inquiry as to the time of their arrival in the city on the night of the injury, "It was a little before 12, wasn't it?" errors were committed. We do not understand that any attempt was made to impeach the defendant, thereby making it necessary to call his attention to the time, place, and circumstance, or even to ask him if he had not made the statements imputed to him. The declarations of the boy and by the woman were made in the presence of Hall, who had an opportunity, without intimidation or interruption, to contradict or explain their statements, and, not having done so, his conduct in relation thereto was admissible. *B. & C. Comp. § 718*; *Patty v. Salem Flouring Mills Co.*, 58 Or. 350, 353, 96 Pac. 1106, 98 Pac. 521, 100 Pac. 298.

It is argued that an error was committed in permitting the plaintiff, over objection and exception, to offer in rebuttal the testimony of Martin, which constituted proof of the cause of action in chief, and not in explanation of any testimony given by the defendant. In *Davis v. Emmons*, 32 Or. 389, 395, 51 Pac. 652, this question was determined adversely to the present contention on the ground that the order of proof is a matter regulated by the sound discretion of the trial court, and the conclusion so reached, we believe, is supported by reason.

It follows that the judgment should be affirmed, and it is so ordered.

(56 Or. 253)

ANDREWS v. BROWN.

(Supreme Court of Oregon. April 26, 1910.)

1. BOUNDARIES (§ 32*)—ACTION TO ESTABLISH—PLEADING.

In a suit to establish a boundary line, the answer denied plaintiff's ownership of the lands included in the limits claimed by plaintiff as the boundaries of the land described in the complaint, and denied any dispute or uncertainty as to the boundary except as thereafter set forth, and alleged defendant's chain of title to certain land claimed by him, and that about 20 years previously, the boundary between plaintiff's grantors and defendant's grantors being uncertain, they agreed upon a boundary line, and that defendant and his grantors had been in possession of the land now claimed by plaintiff for more than 10 years. *Held*, that the answer, taken as a whole, denies that there is now any dispute or uncertainty as to where the original lines actually existed upon the ground.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 145; Dec. Dig. § 32.*]

2. BOUNDARIES (§ 26*)—ACTION TO ESTABLISH—JURISDICTION—NATURE AND FORM OF REMEDY.

In a suit in equity to establish a disputed boundary line, defendant alleged that, the location of the line being uncertain, plaintiff's grantors and defendant's grantors agreed upon a certain line, and that defendant and his grantors had been in possession of the land now claimed by plaintiff more than 10 years, and asked that the boundary be adjudged to be where the conventional line mentioned is located. *Held*, that the court had not jurisdiction to try the issue of the location of the conventional line and defendant's title by adverse possession.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 139; Dec. Dig. § 26.*]

3. APPEAL AND ERROR (§ 22*)—JURISDICTION ON APPEAL—WAIVER OF OBJECTION TO JURISDICTION.

On objection to the jurisdiction of the lower court to consider issues raised by defendant, the court on appeal will not take jurisdiction and try the issues, although the objection to the jurisdiction of the lower court is waived, but the parties will be left to their remedy at law.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 98; Dec. Dig. § 22.*]

Appeal from Circuit Court, Multnomah County; Earl C. Bronaugh, Judge.

Action by A. E. Andrews against Oliver J. Brown. From a judgment dismissing the suit, plaintiff appeals. Affirmed.

This is a suit to establish a disputed boundary line. The complaint is in the usual form, alleging plaintiff's ownership of certain premises, and that there is a dispute or controversy between the parties to this suit concerning the location of the boundary or dividing line between their lands. Defendant answered, denying plaintiff's ownership of the lands included within the limits claimed by plaintiff as the correct boundaries of the land described in the complaint, and denying any dispute or uncertainty as to the boundary, except as thereafter set forth. These denials are followed by two separate and

further answers, alleging by way of "answer, defense, and counterclaim" the defendant's chain of title to certain lands claimed by him, and alleging that about 20 years previously the boundary between plaintiff's grantors and defendant's grantors, being uncertain, doubtful, and unascertained, they agreed upon a certain boundary line; and that defendant and his grantors and predecessors in interest have been in actual, continuous, adverse, open, and notorious possession of the land now claimed by plaintiff for more than 10 years. Defendant asks that the boundary be adjudged to be where the conventional line above mentioned is located. Plaintiff denied the new matter in the answer, and objected, by reply, to the jurisdiction of the court to hear defendant's alleged counterclaim.

R. C. Wright, for appellant. J. N. Percy, for respondent.

MCBRIDE, J. (after stating the facts as above). For the sake of brevity we have omitted a full statement of the contentions of the parties. We think that the answer, taken as a whole, denies that there is now any dispute or uncertainty as to where the original lines, dividing the land of the parties, actually existed upon the ground; nor is there any substantial dispute in the evidence. The original lines called for by the deeds are practically where plaintiff claims them, and if defendant has any right to any of the land east of the line claimed by plaintiff it is by virtue of adverse possession, or by an agreement between the parties. The surveys made at the instance of the respective parties are practically identical, and there is no contention as to where a survey, according to the original conveyances, would place the line. Defendant's answer, taken as a whole, denies any present dispute or uncertainty as to the boundary lines, except that defendant claims to a conventional line and by adverse possession. The objection taken by plaintiff to the trial of either of these issues was well taken. *Love v. Morrill*, 19 Or. 545, 24 Pac. 916; *Dice v. McCauly*, 22 Or. 456, 30 Pac. 160.

The question whether there was a dispute or any uncertainty as to the actual boundary was the only matter left to try, and the court, properly concluding that there was none, dismissed the suit.

It is suggested by appellant that he is willing to waive his objection to the jurisdiction of the lower court to take cognizance of defendant's attempted defenses, and allow the whole matter to be tried out here. But if the lower court had not jurisdiction to consider these, we will not assume it on appeal, but leave the parties to their remedy at law.

This case is so similar to *Love v. Morrill*,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

supra, that we deem an extended opinion unnecessary. The decree of the lower court is affirmed.

(56 Or. 261)

HARRINGTON v. PHIPPS et al.

(Supreme Court of Oregon. April 26, 1910.)

APPEAL AND ERROR (§ 624*)—FILING TRANSCRIPT—EXTENSION OF TIME.

The appeal being, by provision of B. & C. Comp. § 549, subd. 4, perfected from the time the surety on the appeal bond, being excepted to, appears and justifies, within 30 days from which time appellant is required to file a transcript in the Supreme Court, unless, as provided by section 553, subd. 2, an order for extension of the time thereof be made within said 30 days, no jurisdiction is conferred on the Supreme Court by the filing of the transcript under an order of the trial court made after expiration of such 30 days, so that appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2746; Dec. Dig. § 624.*]

Appeal from Circuit Court, Jackson County; H. K. Hanna, Judge.

Action by John Harrington against W. E. Phipps and others. Judgment for defendants, and plaintiff appeals. Dismissed.

Robert G. Smith and H. K. Hanna, Jr., for appellant. Porter J. Neff, for respondents.

MOORE, C. J. This is a motion to dismiss an appeal. At the trial this action was dismissed, and the plaintiff, in order to review the judgment, caused to be served and filed a notice of appeal and an undertaking. Exceptions were taken to the sufficiency of the surety in the undertaking, who, pursuant to notice, appeared at the time appointed, January 25, 1910, and justified, whereupon the appeal became perfected. B. & C. Comp. § 549, subd. 4. Within 30 days from that time the appellant was required to file with the clerk of this court a transcript or an abstract on appeal, or to secure an order enlarging the time to file the same. Id. § 553, subd. 2. The trial court, on February 26, 1910, made an order allowing the plaintiff 30 days therefrom to file the transcript, and it was filed in this court February 28, 1910. The order, therefore, was made after the expiration of the 30 days specified, and no jurisdiction of the cause was conferred by the filing of the transcript.

The appeal must be dismissed, and it is so ordered.

(56 Or. 198)

STATE v. GOODAGER.

(Supreme Court of Oregon. April 26, 1910.)

1. CRIMINAL LAW (§ 1128*)—APPEAL—MATTERS NOT SHOWN BY RECORD—ADMISSIONS OF COUNSEL.

The public always has an interest in the liberty of the accused, of which he cannot be de-

prived except in the manner prescribed by law; and hence the prosecution may admit on appeal a state of facts in favor of accused which is not shown by the record.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1128.*]

2. CRIMINAL LAW (§ 1133*)—APPEAL—REHEARING—NEW THEORY OF CASE.

Counsel cannot be heard upon oral argument upon one state of facts there admitted, and after an adverse decision, move for rehearing, and urge that the facts previously conceded are not in harmony with the record.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1133.*]

On petition for rehearing. Petition denied.

For former opinion, see 106 Pac. 638.

KING, J. The state petitions for a rehearing, basing its principal contention on the ground that the record fails to show the conceded facts alluded to in the opinion.

The record discloses that the tragedy occurred in the back room of the main building. At the oral argument, constituting the last statement of counsel's position on appeal, counsel for the state admitted, and argued the case on the assumption, that defendant, at the time of the shooting, was in the saloon, where he was engaged in attending bar, from which it followed, as a matter of law, that he was where he had a lawful right to be. This admission, coupled with the testimony shown by the record, was ample to justify the conclusion reached in the former opinion.

The public always has an interest in the liberty of the accused, of which he cannot be deprived, except in the manner prescribed by law. *Hopt v. Utah*, 110 U. S. 574, 579, 4 Sup. Ct. 202, 28 L. Ed. 262; *Crain v. U. S.*, 162 U. S. 625, 644, 16 Sup. Ct. 952, 40 L. Ed. 1097; *State v. Walton*, 50 Or. 142, 149, 91 Pac. 490, 13 L. R. A. (N. S.) 811. It was, therefore, within the power of the state to make such admission in defendant's behalf. *People v. Lewis*, 127 Cal. 207, 59 Pac. 830; *State v. Goddard*, 146 Mo. 177, 48 S. W. 82.

Furthermore, counsel cannot be heard at an oral argument upon one theory or one state of facts, there admitted, and, after receiving an adverse decision predicated thereon, return by motion for rehearing, and urge in such motion, and at such hearing, that the facts previously conceded, and upon which the decision was rendered, are not in harmony with the record, and ask that he again be heard upon a different theory. Experimenting with the court in such manner, whether by design or oversight, cannot be sanctioned. To countenance such action would leave both the court and the litigants powerless to determine when litigation is terminated, and the object sought thereby defeated in the end by the hypothetical practice so established. The motion for rehearing is denied.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(56 Or. 233)

HOUCK et al. v. CITY OF ROSEBURG et al.
(Supreme Court of Oregon. April 26, 1910.)

1. MUNICIPAL CORPORATIONS (§ 474*)—PUBLIC IMPROVEMENTS — JURISDICTIONAL DEFECTS—ASSESSMENT OF BENEFITS.

Where, under Laws 1895, p. 548, the proceedings necessary to the jurisdiction of a city council in constructing a sewer are the declaration by ordinance whether the cost thereof shall be assessed to the property directly benefited, the appointment by the council of disinterested viewers to view the street and location of the sewer and determine what property is directly benefited thereby, and the extent and proportion of such benefit, the failure of the viewers to assess all the property jointly benefited is not jurisdictional.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1122-1124; Dec. Dig. § 474.*]

2. MUNICIPAL CORPORATIONS (§§ 488, 489*)—PUBLIC IMPROVEMENTS — ASSESSMENT OF BENEFITS—INJUNCTION.

Where, in proceedings for the levy of an assessment for a street improvement, the council has acquired jurisdiction, equity will not enjoin the collection of the assessment of benefits not assessed against all the property benefited on the complaint of the owner benefited by the improvement, who, with knowledge of its progress, permitted its construction without objection.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1151; Dec. Dig. §§ 488, 489.*]

3. MUNICIPAL CORPORATIONS (§§ 488, 489*)—PUBLIC IMPROVEMENTS — SPECIAL ASSESSMENTS—SUFFICIENCY OF NOTICE.

Where by the charter of a city (Laws 1895, p. 548, § 100), after viewers have reported the advisability of the construction of a sewer and the property benefited, it is provided that a notice of the report shall be published for 20 days in a newspaper, the constructive notice given thereby to an owner benefited by the improvement is sufficient to invoke the rule against him that, if without objection he permits the sewer to be constructed, he cannot complain of irregularity in the proceedings leading up to the assessment for benefits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. §§ 488, 489.*]

4. MUNICIPAL CORPORATIONS (§ 536*)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—FRAUD—INJUNCTION.

If the viewers and city council in constructing a sewer fraudulently omit from the assessment the lots on one side of the street, and assess the whole cost of the sewer on the property on the other side, the proceedings would be void, and ground for equitable relief.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1253; Dec. Dig. § 536.*]

5. MUNICIPAL CORPORATIONS (§ 454*)—ENJOINING SPECIAL ASSESSMENT—CONCLUSIVENESS OF COUNCIL FINDINGS.

In a suit to enjoin the collection of a sewer assessment brought by a property owner benefited by the improvement, because other property owners on the other side of the street who were also benefited were not assessed, the findings of the council as to the amount of property, which was directly benefited and the proportionate share thereof to be charged to each lot is conclusive in the absence of fraud.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 454.*]

6. MUNICIPAL CORPORATIONS (§ 538*)—SPECIAL ASSESSMENTS—FRAUD—EVIDENCE.

In a suit to enjoin the collection of a sewer assessment because property on the other side of the street was not assessed, evidence held insufficient to show that the council acted fraudulently, so as to authorize equitable relief.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 538.*]

7. MUNICIPAL CORPORATIONS (§ 454*)—PUBLIC IMPROVEMENTS—APPOINTMENT OF VIEWERS—OBJECTIONS.

Where under a city charter provision (Laws 1895, p. 548) it is incumbent on the council to appoint viewers to look over the proposed route of a sewer, and determine what property is directly benefited, an objection that the viewers were appointed by the mayor, and not by the council, is not tenable, where at a council meeting the viewers were appointed by the mayor, and the council acquiesced, and such appointment was recognized and reported as part of the transaction of the council.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 454.*]

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Suit by Mary E. Houck and others against the City of Roseburg and others. From a decree for defendants, plaintiffs appeal. Affirmed.

This is a suit by plaintiffs to enjoin the defendant city from collecting a sewer assessment. On December 5, 1904, the city council of defendant city decided to construct a sewer on the south side of Oak street, from Chadwick street to Main street, and by ordinance declared that the cost thereof should be assessed upon the property directly benefited thereby. On December 15, 1904, at a meeting of the council, the mayor appointed W. S. Hamilton, F. W. Haynes, and J. F. Barker viewers of the sewer, which appointment is recorded in the minutes of that meeting of the council as business transacted by the council. On January 5, 1905, the viewers filed with the city recorder their report that they had investigated the location of the sewer, that the sewer is badly needed, recommended its construction, and found that the following property (with the names of the owners thereof) will be directly benefited by the improvement, viz.: "Geo. E. Houck, Lot 5, Block 42. Sol Abraham Estate, Lot 4, Block 41. M. C. Gregory, Lot 5, Block 41. Orville Wilson, Lot 4, Block 40. City of Roseburg, Lot 5, Block 40." They also recommended that the cost of the sewer be assessed to the above-named property, each lot to bear its proportionate share of such expense, according to the number of lots adjacent to and benefited by the improvement. Thereafter, on the same date, the recorder of the city published in the "Plaindealer," a weekly newspaper published in Roseburg, for a period of 20 days, a notice that the city had determined to construct the sewer, and that the viewers had ascertained and determined that the lots named in the viewers' report,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

describing them, with the names of the owners, would be directly benefited by the construction of the sewer, according to the number of lots owned by each person, each lot to bear its proportionate share of the expense of such construction. No objection to the findings and determination of the viewers was filed by the owner of any of the property within 10 days from the final publication of the notice, which last publication was the 6th of February, 1906. The council determined the probable cost of the construction of the sewer, and an ordinance was presented, assessing upon each of the lots one-fifth of the estimated cost, which ordinance appears to have been read the first and second time on April 3, 1905, but was not finally passed upon until February 5, 1906. In this ordinance each of the lots was assessed \$56. The sewer was constructed prior to April 3, 1905. On May 1, 1905, plaintiff Leona Abraham filed with the recorder a protest, directed to the council, against the assessment of the cost, on the ground that the assessment is upon the property on one side of the street only, whereas direct benefits accrue to the property on both sides alike. By the complaint it is alleged that the five corresponding lots on the opposite side of the street are equally benefited with the lots on the south side, and that the action of the council in omitting from the assessment the lots on the north side of the street "was willful, arbitrary, and intentional, and was purposely done," knowing that the property so omitted was equally benefited with the property of plaintiffs. By sections 98, 99, 100, and 101 of the charter of the city of Roseburg (Laws 1895, p. 548) it is provided that the council shall have power to construct sewers, and to declare, by ordinance, before doing the same, whether the cost thereof shall be assessed upon the property directly benefited thereby; that, if it so declares, the council shall appoint disinterested freeholders to view the street and location of the proposed sewer, who shall ascertain and determine what property is directly benefited by such sewer, and the extent and proportion thereof. Upon the report being filed, the recorder shall immediately give notice thereof by publication for 20 days in some newspaper published in the city, specifying with convenient certainty the streets on which the sewer is to be located and the property ascertained and determined by the viewers to be benefited thereby. Within 10 days from the final publication of such notice the owner of any property ascertained to be directly benefited may file with the recorder any objections he may have to such findings, and the council shall at the next meeting consider such objections.

The answer denies parts of the complaint, and alleges that the plaintiffs appeared before the council by their attorney, and asked that the sewer be constructed on the south side of Oak street, as there was urgent

need of it by the property owners along the south side of that street, and, further, pleads the ordinances and other proceedings by the council in relation thereto as a compliance with the terms of the charter.

The cause was tried upon the evidence, and findings and decree rendered for defendants. Plaintiffs appeal.

Albert Abraham, for appellants. A. N. Orcutt, for respondents.

EAKIN, J. (after stating the facts as above). But one question is raised by the brief of appellants, viz.: Is the assessment of the cost of the construction of the sewer upon the property on the south side of the street void because it does not include all the property directly benefited? It may be stated as a rule in proceedings for the levy of an assessment for a street improvement that, if the council has acquired jurisdiction, equity will not grant an injunction to prevent the collection of the assessment for irregularities occurring in the subsequent proceedings on the complaint of the owner of property benefited by the improvement, who, with knowledge of its progress, permitted its construction without objection. *Smith, Law of Munic. Corp.* § 1263; *Wilson v. City of Salem*, 24 Or. 504, 34 Pac. 9, 691; *Barkley v. Oregon City*, 24 Or. 515, 33 Pac. 978; *Strout v. Portland*, 26 Or. 294, 38 Pac. 126; *Clinton v. Portland*, 26 Or. 411, 38 Pac. 407; *City of Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114; *Klepsch v. Donald*, 18 Wash. 150, 51 Pac. 352. The proceedings necessary to jurisdiction are that the council, having determined to construct a sewer at some designated location, shall declare by ordinance whether the cost thereof shall be assessed to the property directly benefited, the appointment of the council of disinterested viewers who shall view the street and location of the proposed sewer and ascertain and determine what property is directly benefited thereby and the extent and proportion of such benefits, and publication by the recorder of the notice provided by section 100 of the charter. *Laws 1895, p. 548*; *Clinton v. City of Portland*, *supra*. In *Wingate v. Astoria*, 39 Or. 603, 604, 65 Pac. 982, 983, Mr. Justice Bean says: "It is the settled law of this state, supported by the weight of authority, that, where the municipal authorities have jurisdiction to improve a street, a property owner who, with knowledge of such improvement, makes no objection until after the work has been completed, cannot enjoin the collection of the assessment on the ground that the proceedings have not been regular." As there stated, the objection that the local assessments were not in fact made according to the benefits does not go to the jurisdiction of the council to make the improvement, and therefore cannot be the basis of a suit to enjoin the collection of the assessment after the improvement has been made. It is im-

material that the plaintiffs did not have actual notice. The construction notice provided for by section 100 of the charter is all that is required. This gave plaintiffs ample opportunity to be heard as to any irregularities in the proceedings, and, not having taken advantage of that opportunity until after the work has been done, they are precluded thereby from asking equitable relief. *Barkley v. Oregon City*, 24 Or. 515, 520, 33 Pac. 978; *King v. Portland*, 38 Or. 402, 63 Pac. 2, 55 L. R. A. 812; *Paulson v. Portland*, 16 Or. 450, 463, 19 Pac. 450, 1 L. R. A. 673.

It is further alleged in the complaint that the action of the viewers and the council in omitting from the assessment the lots on the north side of the street and assessing the whole cost of the sewer upon the property above described was willful, arbitrary, and intentional, and purposely done. Such conduct on the part of the viewers or the council, if unreasonable, oppressive, and subversive of the rights of the plaintiffs, would amount to a fraud upon plaintiffs and render the proceedings void and ground for equitable relief. *Masters v. Portland*, 24 Or. 161, 165, 33 Pac. 540; *Beckett v. Portland*, 53 Or. 169, 172, 99 Pac. 659. But in an equity proceeding the findings of the council as to the amount the property is directly benefited by the improvement and the proportionate share thereof to be charged to each lot are conclusive in the absence of fraud. *Duniway v. Portland*, 47 Or. 103, 112, 81 Pac. 945; *Hughes v. City of Portland*, 53 Or. 385, 100 Pac. 942. The evidence in this case does not substantiate that allegation of the complaint. It also appears that Geo. E. Houck, the husband of plaintiff Mary E. Houck, and his attorney, Buchanan, appeared before council and asked for the construction of this sewer, representing that all the owners of the property on the south side of Oak street were anxious to have the sewer constructed. There is a conflict in the evidence as to whether there was a petition presented or not, but that is immaterial as the council is authorized to act in such cases upon its own motion; and the evidence offered, tending to show the contents of the petition, does not establish that the petitioners thereby agreed to pay the cost of the construction of the sewer. However, it appears that the members of the council were of the opinion that the sewer would not directly benefit the property on the north side of the street, and were opposed to the construction thereof if the expense was to be assessed equally upon the property on both sides of the street, and the matter was held in abeyance until, as the members of the council understood, it was agreed by Geo. E. Houck for himself and the other owners of the lots on the south side of the street that the sewer was to be constructed on the south side of the street and at the

expense of the property on that side. Several members of the council testified that it was the understanding between Houck and Buchanan, his attorney, and the council, that the sewer should be constructed on the south side of the street, the property owners on that side would pay for it, and that it would not have been constructed otherwise. They are corroborated in this to some extent by evidence tending to show that Gregory at least objected to the city permitting the property on the north side of the street to be connected with the sewer, on the ground that it was the private sewer of the property on the south of the street. Without determining that Leona Abraham knew that the council was constructing the sewer with the understanding that it was to be paid for by the lot owners on the south side, it is disclosed that the council and viewers were not acting arbitrarily or willfully, or from any improper motive in so assessing the cost of the sewer against the property on the south side of the street, nor were they seeking or taking any undue advantage of plaintiffs or any of them. The council had a right to assume that plaintiffs were acquiescing in the assessment of the cost as made by the viewers or they would have filed with the recorder objections thereto within the time fixed by the charter, viz., February 16, 1905, being 10 days from the date of the last publication of the notice, and, if they had done so, the council might then have abandoned the improvement if they saw fit.

Albert Abraham, the husband of plaintiff, Leona Abraham, and plaintiff M. C. Gregory were consulted by Geo. E. Houck as to the need of the sewer at the time it was brought before the council, and they favored its construction. Geo. E. Houck was acting for his wife, with her knowledge and consent, in securing its construction, and the action of the council in relation thereto was not an unreasonable or oppressive exercise or abuse of its powers, and therefore the case is not one of equitable cognizance.

The objection that the viewers were appointed by the mayor, and not by the council, is without merit. The record shows that at a council meeting the viewers were appointed by the mayor in which the council acquiesced, and such appointment is recognized and recorded as part of the transactions of the council.

The decree of the lower court is affirmed.

(56 Or. 171)

HANLEY v. CITY OF MEDFORD et al.

(Supreme Court of Oregon. April 19, 1910.)

1. COURTS (§§ 74, 75*)—TIME AND PLACE OF HOLDING.

To constitute a lawful court, the persons who assume to hold such court and dispense justice must be officially assembled under au-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thority of law, and, where the law prescribes the time and place for the holding of court, then time and place are as essential limitations of jurisdiction as are subject-matter and parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 247, 248, 255, 256; Dec. Dig. §§ 74, 75.*]

2. COURTS (§ 64*)—SPECIAL TERMS—CHANGE OF JUDGES—STATUTES.

Under the judicial system of Const. art. 7, § 2, and article 7, § 8, prevailing prior to 1878, each justice of the Supreme Court was ex officio judge of the circuit court of the district in which elected, and the power to call a special term was vested solely in such judge. The system was changed by Sess. Laws 1878, p. 32, § 7, in conformity with Const. art. 7, § 10, and required a circuit judge to be elected in each judicial district then existing, and provided that the duties and jurisdiction of said circuit court and the judges thereof shall be such as are provided by the Constitution and laws. Sess. Laws 1880, p. 48 (B. & C. Comp. § 943) § 1, authorizes circuit judges to hold circuit courts in any judicial district of the state where for any reason the judge elected for that district cannot attend, and section 2 (section 944), authorizes necessary orders to be made in any suit pending therein by any other circuit judge in the absence of the judge of the court. Section 4 declared an emergency because there was no law authorizing such change of judges. *Held*, that a judge of one circuit court under section 1 was not authorized to call a special term in another district, since that law was only an authority for a change of judges, and since only the supreme justices had authority to call a special term, and since it could not be said that the regular judge could not attend a court which as yet had no existence, and for the same reasons such order calling a special term could not be construed an order under section 2, Sess. Laws 1880.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 64.*]

3. COURTS (§ 64*)—SPECIAL TERMS—AUTHORITY OF JUDGE—ORDER OF GOVERNOR.

Held, also, that a circuit judge would have no authority to call a special term because he was ordered to do so by the Governor under Sess. Laws 1909, c. 65, appointing an additional judge to the second circuit and defining his powers, and providing that the duties of the judge provided for by this act in addition to those enumerated shall be to hold such terms of court and perform such other judicial duties in any of the judicial districts as may be required of him by the Governor, since such act did not give such judge any new power not possessed by all the circuit judges.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 64.*]

4. JUDGMENT (§ 415*)—EQUITABLE RELIEF—VOID JUDGMENT—INJURY TO PROPERTY.

Where, by a void judgment, a city has condemned land, and is threatening to enter on the land and dig a ditch thereon by virtue thereof, equity has jurisdiction to restrain action under such judgment, though it is void, since there is a cloud on the title to the property and a threatened trespass.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 782; Dec. Dig. § 415.*]

Appeal from Circuit Court, Jackson County; H. K. Hanna, Judge.

Suit by M. F. Hanley against the City of Medford and others. From a decree for complainant, defendants appeal. Affirmed.

In the early part of June, 1909, the city of Medford, Jackson county, Ore., began an ac-

tion in the circuit court of Jackson county to condemn and appropriate a right of way for constructing a pipe line in connection with its gravity water system across the farm and meadow lands of M. F. Hanley, the plaintiff herein. The action was instituted about the close of the regular March term of that court, which, however, adjourned for the term before the time for answering the complaint had expired. Thereafter, and within the time allowed by law, Hanley demurred to the complaint, whereupon the city applied to the Honorable H. K. Hanna, judge of the First judicial district and of the said court, sitting in chambers, to call a special term for the trial of the cause, setting up certain facts deemed by it to be material and of special and pressing importance to the city, demanding an early completion of its pipe line. The application, however, was denied, upon the ground of laches committed by the city in having neglected to begin its action in time to get the case at issue, and to avail itself of the jury impaneled to serve during the term just adjourned. Thereupon the Governor of the state, under authority supposed to be conferred by chapter 65 of the Laws of 1909, by his official order directed Honorable John S. Coke, one of the circuit judges of the Second judicial district, to proceed to Jackson county and call a special term of the circuit court for that county in the manner provided by law, and to try said cause. The Governor was induced to so act through an application and certificate addressed to him by the county judge of Jackson county, to the effect that, owing to the status of judicial business in that county, he, Judge Hanna, was unable to hold, and for that reason had declined to call, a special term of court. On July 17, 1909, Judge Coke in chambers at Marshfield, Coos county, which is in the Second judicial district, issued his order, calling a special term of the circuit court for Jackson county, to be held on August 2, 1909, without the request or assent of Judge Hanna, who was then in Jackson county, and who was qualified to call, and able to attend and hold a term of court, and try the said cause, had he deemed it proper so to do. The order so issued was entered by the county clerk in the journal of the circuit court for Jackson county, and on July 22, 1909, a copy thereof was attempted to be served upon the defendant Hanley in Jackson county. At the time appointed Judge Coke convened his court, and proceeded to a trial of the case; the county clerk and sheriff of that county being in attendance thereon, but Hanley, the plaintiff, not appearing. The demurrer having been overruled, a jury was called, to which the case was submitted upon such evidence as the plaintiff saw fit to present, and a verdict was rendered, assessing the defendant's damages in the sum of \$600. A city warrant for that amount payable to Hanley having been delivered to the clerk, a judg-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ment, condemning a right of way across Hanley's land, was entered in favor of the city. Immediately upon the adjournment of the special term, this suit was brought by Hanley to restrain the city from entering upon his land, and to expunge from the journal of the circuit court the record of the proceedings had at the so-called special term of court, upon the theory that the court pronouncing said judgment was not legally convened, and was not held by any person authorized by law to hold such court, and for these reasons it was not a court known to the law, and its judgment not a judgment of the law, and is therefore void.

The complaint avers substantially the facts heretofore stated, and, in addition thereto, it is alleged that the record so made is a cloud upon plaintiff's title; that the city asserts and gives out that it intends to enter immediately upon plaintiff's land, and dig thereon a trench $2\frac{1}{4}$ miles long, of sufficient depth to carry a pipe line more than 16 inches in diameter, much of which is across plaintiff's meadow land; that the meadow is upon a gentle slope, the soil thereof being underlaid with a rocky formation, which assists in subirrigating the land; that the digging of the trench will cut off subirrigation; that the land appropriated includes one of plaintiff's irrigating ditches, having a carrying capacity of 1,000 inches of water, which is necessary to the irrigation of his land; and that the digging of a trench thereon for a pipe line would destroy plaintiff's said irrigating ditch, to his great and irreparable injury. The answer contains no denial of any of the foregoing averments of the complaint, but affirmatively alleges that the special term of court was duly called and held for the trial of the cause, and that the judgment therein was duly rendered and given. The reply put the new matter of the answer at issue, and, the trial being had, a decree was rendered in accordance with the prayer of the complaint, from which defendant has appealed.

Robert G. Smith (Porter J. Neff, on the brief, for appellants. A. E. Reames, for respondent.

SLATER, J. (after stating the facts as above). The material facts of the case having been admitted by the answer, there are but two questions of the law to be considered and determined, namely: (1) Is the judgment of condemnation void, as the act of a court unknown to the law; and (2), if it is void, will this suit lie? We answer both of these questions in the affirmative. A judgment to be valid and binding must be the decision or sentence of the law, pronounced by a court or other competent tribunal upon a matter contained in the record. 1 Freeman on Judgment, § 2. The element of this definition, peculiarly applicable to the question in hand, is this: Was the decision in this case which purports to be a judgment of a court pronounced by a person then invested with ju-

dicial authority? "A court consists of persons officially assembled under authority of law at the appropriate time and place for the administering of justice." *Marsden v. Harlocker*; 48 Or. 90, 97, 85 Pac. 328, 331, 120 Am. St. Rep. 788. To constitute a lawful court, therefore, the persons who assume to hold such court and dispense justice must be officially assembled under authority of law, and the court must be held at the appropriate time and place appointed by law therefor. If the person assuming to act as judge was not then invested with judicial authority (that is, with the power of the law to declare and record its mandates), then his acts in attempting so to do are of no consequence whatever, and are void. And if he were fully invested with judicial authority, so as to make his pronouncement of the law effective, still the time and place of holding the court are equally essential; for, when the law prescribes the time and place for the holding of court, then time and place are as essential limitations of jurisdiction as are subject-matter and parties. *Ex parte Branch & Co.*, 63 Ala. 383; *McCool v. State*, 7 Ind. 378; *Brumley v. State*, 20 Ark. 77; *Norwood v. Kenfield*, 34 Cal. 329, 332; *Ex parte De Hay*, 3 S. O. 567.

To determine the question presented, it will be necessary to consider some provisions of the fundamental law: "The Supreme Court shall consist of four justices, to be chosen in districts by the electors thereof, who shall be citizens of the United States, and who shall have resided in the state at least three years next preceding their election, and after their election, to reside in their respective districts. The number of justices and districts may be increased, but shall not exceed five, until the white population of the state shall amount to one hundred thousand, and shall never exceed seven; and the boundaries of districts may be changed, but no change of district shall have the effect to remove a judge from office, or require him to change his residence without his consent." Article 7, § 2, Const. Section 8 of article 7 provides that: "The circuit court shall be held twice, at least, in each year, in each county organized for judicial purposes, by one of the justices of the Supreme Court, at times to be appointed by law; and at such other times as may be appointed by the judges severally, in pursuance of law." This latter section was intended to determine the person authorized to hold the court, and to require that it be held at particular times. As to the person, it is required that the circuit court be held by one of the justices of the Supreme Court, but it is not clearly expressed by which justice it is to be held in each particular county; yet we think it plainly inferable from the language of other sections of that instrument that it was intended that each justice of the Supreme Court was to be ex officio judge of the circuit court of the district in which he was elected; for the

several justices of the Supreme Court were required, not only to be elected in separate districts, but, after their election, to reside in their respective districts. Article 7, § 2, Const. We understand that to have been the interpretation of section 8 by this court, when, in deciding the case of *Cline v. Greenwood*, 10 Or. 230, 232, Mr. Justice Lord in delivering the opinion made use of the following language: "Although called Supreme Judges, they were not elected by the whole body of voters from the state, but by the voters from each judicial district from which they were chosen. They were 'justices of the Supreme Court'—five in number—and the offices they held were of such character and like number, for it was as justices of the Supreme Court that the duty of holding a circuit court in each county in their judicial districts devolved upon them under the Constitution." That section of the fundamental law of this state has always been so understood and so construed in practice up to the time the judicial system was changed by the Legislature in 1878, providing for the election of circuit and Supreme judges in distinct classes in conformity with section 10 of article 7. The act by which this was accomplished required a circuit judge to be elected in each of the judicial districts then existing, and to be residents of their respective districts, and prescribed that: "The duties and jurisdiction of said circuit court, and the judges thereof, shall be such as are provided by the Constitution and the laws." Sess. Laws 1878, p. 32, § 7. This latter provision was superfluous, since it does not purport to increase the jurisdiction of the court, or the judges thereof, and it does not require a law to make effective the jurisdiction conferred by the Constitution and the laws. The result, therefore, was to substitute for the justice of the Supreme Court previously elected from that district, a person elected in each judicial district as judge of the circuit court thereof. Each circuit judge possessed the same jurisdiction and power which previously had been vested in the justice of the Supreme Court, acting as circuit judge for that district, no greater and no less. He was the judge of that court. His general jurisdiction was confined to, but coextensive with, the limits of his district. This must necessarily be. Otherwise confusion would result in the exercise of judicial authority by the several judges of the circuit courts. If such were not the case, what necessity was there for the enactment of the law of October 25, 1880 (Sess. Laws 1880, p. 48)? This act consists of two principal sections, which are now sections 943, 944, B. & C. Comp. By section 1 of the act, authority is given to each of the several circuit judges of this state to hold circuit court in any of the judicial districts of the state, where, for any reason, the circuit judge, elected for such district, cannot attend or is disqualified to try any cause pending therein at the time

appointed for holding said court, or trying said cause; while section 2 authorizes necessary orders to be made in any suit or action pending therein by any other circuit judge, in the absence of the judge of the court. It must certainly be plain that up to the time of the enactment of this statute it was generally understood that each circuit judge did not possess general and concurrent jurisdiction with all other judges of that class over the entire state, but that the jurisdiction of each was confined to the territorial limits of his district. The very intendment of the act is to enlarge the jurisdiction of a circuit judge beyond the limits of his district. Section 4 of the act expressly declares that, "as there is no statute at present granting the authority provided for in this act, and as the same is necessary to a complete administration of the laws," therefore an emergency was declared. It is also equally plain that it was not the intent of the Legislature by this act to confer on a circuit judge general and concurrent jurisdiction throughout the state; but a limited and conditional jurisdiction, depending upon the existence of the exigency named therein. No judicial authority can be lawfully exercised thereunder by a circuit judge beyond the limits of his district until the exigency named in the statute exists, and on which its lawful exercise depends. The power given is to hold circuit courts in any of the judicial districts of the state at the time appointed by law or by the judge of the district in pursuance of law. This cannot include power to call a special term of the circuit court because the exercise of the power depends upon the inability of the judge of the district to attend. How can it be said that there is any inability of the judge to attend upon a court that does not legally exist? If no term has been appointed by law, and none has been called by him in pursuance of law, there is nothing upon which he is required to attend. And to say that some other judge may appoint a term at a time when the judge of the district may not attend, and create a duty to attend is to say that he himself may create the condition on which the existence of the power he is attempting to exercise depends; that is, that he may invest himself with authority to call a term. And for the same reason an order calling a special term of the circuit court in the district of another judge to try a particular cause is not an order in the action or suit to be so tried, as contemplated by section 2 of the act, being section 944, B. & C. Comp. Again, the law has appointed three terms of court to be held each year in Jackson county, as follows: The fourth Monday in March, the first Monday in September, and the second Monday in December. The term at which the judgment in question was rendered was not a regular, but a called, term, and its validity is called into question in respect both to the power of Judge Coke to call the term, as well as his

power to hold such term in a county of another district than the one in which he was elected.

The power to call a term was conferred originally upon the justices of the Supreme Court not acting collectively or together, but severally; that is, upon each individual acting as circuit judge in his respective district, and in reference to the court over which he had authority to preside, and not in respect to the circuit court of some other district, of which he was not primarily *ex officio* the judge. The word "severally" has been construed to be equivalent in meaning to "respectively." *Supervisors v. Thompson*, 61 Fed. 914, 926, 10 C. C. A. 154, 166; *Wolf, Adm'r, v. Railway Co.*, 55 Ohio St. 517, 535, 45 N. E. 708, 36 L. R. A. 812. This appears to have been the interpretation given to that clause of the Constitution by the legislative assembly of 1862, when it adopted the Dedy Code, of which section 864 (now section 890, B. & C. Comp.) declares: "The circuit courts are created and organized, and their several jurisdictions limited and defined by the organic law of the state. Article 7 of the Constitution. The terms of the court are either those appointed by law, or others appointed by the judge of the court." The peculiar force of the language to which attention is directed comes from the final words, "by the judge of the court," which specify a particular judge; not "a judge," or any one of a number of judges, but "the judge of the court." *State ex rel. Canady v. Black*, 34 S. C. 194, 201, 13 S. E. 361. As to the force to be given to the specifying adjective "the," see the following: *Ellis v. Karl*, 7 Neb. 381, 386; *United States v. Hudson* (D. C.) 65 Fed. 68, 71; *People v. Hamilton*, 58 N. Y. Supp. 584, 586; *Sharff v. Commonwealth*, 2 Bin. (Pa.) 514, 519; *Palmer, Adm'r, v. Kellogg*, 11 Gray (Mass.) 27, 28. Under the judicial "system" thus organized by the provisions of the fundamental law, and prevailing prior to 1878, it appears that each justice of the Supreme Court was *ex officio* the judge of the circuit court of the counties of the district in which he was elected, and the power to call a special term of court therein was vested solely in such judge, and not generally in the justices of the Supreme Court. In 1878 the Legislature, in conformity with section 10, art. 7, Const., provided, by enactment, for the election of Supreme and circuit judges in distinct classes, and for the necessary number of judicial districts and circuit judges therein. One judge was to be elected in each of such judicial districts, who was required to be a resident of his respective district. Since then the circuit judges, so elected, have occupied precisely the same position with respect to the circuit courts, and have been invested with the same judicial authority and jurisdiction previously occupied and exercised by the respective justices of the Supreme Court.

The order calling a special term was made by Judge Coke by direction of the Governor,

acting under authority of section 5 of the act of February 19, 1909 (Sess. Laws 1909, c. 65), which reads as follows: "The duties and judicial labors of the judge provided for by this act, in addition to those already enumerated in section 3 hereof, shall be to hold such terms of court and perform such other judicial duties in any of the judicial districts of this state, other than the second, as may be required of him by the Governor of this state; provided, that when such duties are required of him in any judicial district of this state, other than the second, the county judge of the county wherein such duties are required, shall make application to the Governor stating the reason and the necessity of such duties, and the Governor may, in his discretion thereon, direct the said judge to go and perform the same." This act provided for the appointment of an additional circuit judge for the second judicial district, and defined his duties with relation to the two judges then holding offices therein. Hon. John S. Coke was appointed by the Governor to the office, and at the time of making the order in question he was invested with all the judicial power of a circuit judge of the state, and under obligation to perform the duties imposed by the statute. Previous to this enactment, as we have seen, a circuit judge was clothed with but limited authority (section 943, B. & C. Comp.) to hold circuit court in any other of the judicial districts of the state than his own (section 944) to make necessary orders in any suit or action pending in another district. But the exercise by any circuit judge of the limited authority thus conferred was not obligatory, but merely permissive or optional. The intent of section 5 of the act of 1909 was not to invest him with any additional or unusual judicial authority not previously possessed by all other circuit judges of the state, but to impose upon him an obligation, a duty, of executing the limited powers conferred by section 943, B. & C. Comp., in any particular instance, when directed so to do by the Governor of the state. The act of 1909 speaks only of "the duties and judicial labors," and not of the judicial power and authority, of the judge appointed thereunder. It does not authorize the Governor to require of him the performance of some judicial act, which previous to the enactment was not within the official power of any circuit judge. But the sole intent is that he shall be required to hold such terms of court and perform such judicial duties as the law then contemplated he might perform. Therefore we conclude that at the time of the entry of the supposed judgment there was a complete void of authority of law in John S. Coke to create a legal term of court by calling a special term for Jackson county, as well as a lack of power in such person to hold such term. It follows that the assemblage of persons claiming to act as a court at that time was not a court known to our law, and hence all of the attempted proceedings

then had and entered of record were void, and of no effect whatever. *Baisley v. Baisley*, 15 Or. 183, 184, 13 Pac. 888; *Ex parte Branch*, 63 Ala. 383, 384; *McCool v. State*, 7 Ind. 378; *Batten v. State*, 80 Ind. 394, 397; *State v. Ray*, 97 N. C. 510, 513, 1 S. E. 876; *Brumley v. State*, 20 Ark. 77; *Norwood v. Kenfield*, 34 Cal. 329, 332; *Ex parte De Hay*, 3 S. C. 564, 567; *Gresham v. Ewell*, 85 Va. 1, 8, 6 S. E. 700.

The last point necessary to be considered is whether under the facts of this case and the law as we have found it in respect to the validity of the judgment, a court of equity has jurisdiction to grant the relief prayed for by the complaint. It is urged by the defendant that, although the judgment is void, plaintiff's remedy was by appeal from the supposed judgment, and that equity will not entertain a suit to set aside or cancel a judgment that upon its face is void. But some of the cases last cited go so far as to say that when there was no court no judgment could by law have been pronounced; that what was done under such circumstances was not only a nullity in the ordinary significance of the term, when applied to judgments of courts having no jurisdiction over the subject-matter or the parties, but is not even the act of a court, and is therefore not susceptible of an appeal, or subject to revision in an appellate tribunal. *Wicks v. Ludwig*, 9 Cal. 173. The writer is inclined to agree with this view of the law, but it is not necessary to rely upon such principle; for the plaintiff has alleged and shown that the pretended judgment is a cloud upon his title, and also that under cover thereof the defendant city is about to trespass upon plaintiff's premises, and dig up and destroy the substance of his estate. This court has held that, when the real purpose of invoking the interposition of equity is to prevent a cloud being cast upon plaintiff's title to real property, jurisdiction will be assumed. *White v. Espey*, 21 Or. 328, 28 Pac. 71; *George v. Nowlan*, 38 Or. 537, 541, 64 Pac. 1. The main purpose of this suit, however, is to restrain the city and its agents and employes from trespassing upon plaintiff's premises under cover of this void record, and doing that which will amount to a substantial destruction of his estate. There can be no doubt that, under such circumstances, equity will enjoin entries upon land for the purpose of making excavations in the soil against the consent of the owner, and to his irreparable injury. *Silsby v. Strong*, 38 Or. 36, 38, 62 Pac. 633; *Sheridan v. McMullan*, 12 Or. 150, 6 Pac. 497; *Bishop v. Baisley*, 28 Or. 119, 41 Pac. 936; *Roots v. Boring Junc. Lbr. Co.*, 50 Or. 298, 92 Pac. 811, 94 Pac. 182.

From this conclusion, it must necessarily follow that the decree of the lower court be affirmed; and it is so ordered.

(57 Or. 234)

KAISER et al. v. IDLEMAN et al.

(Supreme Court of Oregon. April 27, 1910.)

1. LIMITATION OF ACTIONS (§ 165*)—RUNNING OF LIMITATIONS—BARRING OF REMEDY.

The running of limitations on a note does not extinguish the right, but merely the remedy.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 649; Dec. Dig. § 165.*]

2. LIMITATION OF ACTIONS (§ 167*)—BAR OF DEBT AS AFFECTING SECURITY.

A mortgage to secure the payment of the debt evidenced by a note may be enforced though the remedy on the note is barred by limitations, and though the mortgage is, for certain purposes, a mere incident of the note, and passes with it.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 651-653; Dec. Dig. § 167.*]

3. LIMITATION OF ACTIONS (§ 163*)—PARTIAL PAYMENT—EFFECT.

A partial payment on a contract for the payment of money tolls the statute of limitations, because such payment operates to continue and keep in force the original promise.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 642-647; Dec. Dig. § 163.*]

4. STATUTES (§ 194*)—CONSTRUCTION—MEANING OF WORDS.

The rule that, where general words in a statute follow an enumeration of particular things, such words include only such things as are of the same kind as those specifically enumerated is but a rule of construction to aid in ascertaining the meaning of the Legislature, and it does not warrant the court in confining the meaning of the statute within narrower limits than that intended by the Legislature.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 272; Dec. Dig. § 194.*]

5. LIMITATION OF ACTIONS (§ 163*)—MORTGAGES—PART PAYMENT—"EVIDENCE OF INDEBTEDNESS."

A mortgage is an evidence of indebtedness within B. & C. Comp. § 25, providing that payment of principal or interest on any bill of exchange, promissory note, bond, or "other evidence of indebtedness," shall make limitations run from the time of such payment, and a part payment on a note, or on the mortgage securing it, tolls the statute as to the mortgage.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 642-647; Dec. Dig. § 163.*]

For other definitions, see *Words and Phrases*, vol. 3, p. 2525.]

6. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE.

Under B. & C. Comp. § 5859, providing that conveyances of real property not recorded within five days after their execution are void as to subsequent good-faith purchasers, the recording of a mortgage is constructive notice to subsequent purchasers; but a mortgagee who has recorded his mortgage may assume that the mortgagor continues to own the property, and he may deal with him as such owner, and, though he has notice of a transfer by the mortgagor, he may assume that the purchaser has informed himself of the condition of the title, and has taken it subject to the mortgage.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 513-539; Dec. Dig. § 231.* *Mortgages*, Cent. Dig. § 393.]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

7. LIMITATION OF ACTIONS (§ 163*) — MORTGAGES—PART PAYMENT.

Under B. & C. Comp. §§ 5, 24, 25, fixing the time for the commencement of actions on notes and on sealed instruments, and providing that the effect of any payment of principal or interest shall not be altered by the fact that no promise is sufficient evidence of a new contract unless the same is in writing and signed by the party to be charged, and that any payment of principal or interest on any bill of exchange, note, bond, or other evidence of indebtedness shall make limitations commence from the time of such payment, a part payment by a mortgagor, made after he has conveyed the property, but before the running of limitations, arrests the operation of limitations, but a payment after the debt has been barred does not revive the debt to the prejudice of his grantee.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 642-647; Dec. Dig. § 163.*]

Appeal from Circuit Court, Marion County; William Galloway, Judge.

Suit by W. M. Kaiser and another, as executors of Tilmon Ford, deceased, against C. M. Idleman and others. From a decree rendered on sustaining a demurrer to the complaint, plaintiffs appeal. Reversed and remanded.

On March 26, 1892, Tilmon Ford, plaintiffs' testator, loaned to C. M. Idleman \$4,000, taking therefor his promissory note payable two years after date, secured by a mortgage on certain real estate in Marion county. The mortgage contained the following covenant: "And the said C. M. Idleman does hereby covenant and agree to and with the said Tilmon Ford, his heirs and assigns, that he will pay the said principal and interest as the same become due according to the terms of said instrument of writing, to the owner or holder thereof, and will also pay or cause to be paid to the proper authorities, before the same become delinquent, all taxes of every kind that may be lawfully levied or assessed upon said instrument of writing or this mortgage, to the owner or holder thereof." The mortgage was duly recorded on the day of its execution. Idleman conveyed the land, on September 15, 1892, to Elenor A. Black, by a warranty deed, and in January, 1906, she conveyed the same to W. H. Black, her husband, who has ever since held the legal title. The complaint alleged that there had been paid, by Idleman, on the note and mortgage, various sums, which—with the date of each payment—are specifically set out in the complaint, the payments having been made in 1896, 1897, 1898, 1901, and 1907, respectively, each having been made before a period of six years had elapsed after the date of the preceding payment. The defendants, appearing separately, demurred to the complaint, on the ground that the suit was barred by the statute of limitations. The circuit court sustained the demurrer and dismissed the suit. Plaintiffs appeal.

M. E. Pogue, for appellants. A. E. Clark, for respondents.

McBRIDE, J. (after stating the facts as above). This appeal involves but one question: Did the payments made by Idleman upon the debt after he had conveyed the property to Mrs. Black operate to prevent the statute of limitations from running in her favor? By the provisions of section 5, tit. 1, B. & C. Comp., the limitation for the commencement of suits upon a sealed instrument is declared to be 10 years, and the limitation for an action upon a promissory note is fixed at six years by the succeeding section. Section 24 of the same title is as follows: "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest." Section 25 reads: "Whenever any payment of principal or interest has been or shall be made upon any existing contract, whether it be bill of exchange, promissory note, bond, or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made." With the foregoing provisions of the statute in view we will now proceed to examine the question, which, for the first time, comes before this court for decision. It is of far-reaching importance, and there is much diversity of opinion found in the decisions of various courts in regard to it, and before discussing them, perhaps it is well to consider the question upon principle. Primarily a contract of this kind is an agreement to repay a sum of money borrowed. The note did not constitute the debt; neither did the mortgage. The first was evidence of the debt, and the second—in addition to being evidence of its existence—furnished a security for its payment. As a legal colloquialism, we speak of owing a sum of money on a note or a mortgage. But what, in fact, is meant by this phrase is that we owe a debt evidenced by a note or secured by a mortgage. Hence, when money is borrowed and a note and mortgage given as security for its repayment, or as evidence of the terms and duration of the contract, for many purposes the note and mortgage constitute but one contract, a contract to repay money. It is true that there may be two remedies open to the creditor for the recovery of his money, but both arise out of the breach of one duty, which the law imposes upon the debtor, namely, to pay his debt according to the terms of his agreement. The law has wisely provided, in effect, that a promissory note, upon which no

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

payments have been made for a period of six years, shall cease to be valid as evidence of a debt, by providing that, after such lapse of time, it may not be declared upon as a substantive cause of action. The right is not extinguished, but the remedy—the efficient means of enforcing the right—is taken away. But if a mortgage has been given to secure the payment of the same debt, being a higher and more formally executed evidence of it, the law, notwithstanding it has taken away the remedy upon the note, has provided that the mortgage shall be evidence of the original obligation for a longer period; that is, 10 years. The note being by the law merchant readily transferable by indorsement and delivery, the courts, to facilitate the transaction of business, have held that, for certain purposes, the mortgage is an incident of the note, and passes with it; but it is no less true that both the note and mortgage are incidents of the original debt, and, taken together, they constitute the evidence provided by law to prove and render certain performance of the original contract of borrowing, and from the terms of a note and contemporaneous mortgage we get the complete contract between the parties. A partial payment upon a contract for the payment of money has always been held to toll the statute of limitations. In some jurisdictions this is held to be upon the theory that a new promise is thereby implied, and that a new period of limitations begins from the date of such promise, but in this state it is held that such result does not ensue by reason of a new promise, but that such part payment operates to continue and keep in force the original promise. *Dundee Invest. Co. v. Horner*, 30 Or. 558, 48 Pac. 175.

Applying these rules to the case at bar, it would seem that a payment by the debtor upon the note and mortgage—i. e., upon the mortgage debt—as alleged here, or a payment upon either, would serve to toll the statute as to both. Indeed, there would be no room for contention to the contrary had Idleman, the original mortgagor, retained the legal title to the mortgaged premises, unless, as contended by defendants, the provisions of section 25 do not embrace mortgage debts. It is contended that the words, “bill of exchange, promissory note, bond, or other evidence of indebtedness,” do not, under the rule of *ejusdem generis*, include mortgages, but are limited to instruments not under seal, and of like character to those specified. The rule is stated by a leading author as follows: “When general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those specifically enumerated.” 2 Lewis’ *Sutherland Stat. Const.* (2d Ed.) § 422. “The doctrine of *ejusdem generis* is but a rule of construction to aid in ascertaining the meaning of the Legislature, and does not warrant a

court in confining the operation of a statute within narrower limits than intended by the lawmakers. The general object of an act sometimes requires that the final term shall not be restricted in meaning by its more specific predecessors.” *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626.

In the section now under consideration the first language used is “payment * * * upon any existing contract, whether it be bill of exchange, promissory note, bond, or other evidence of indebtedness.” Here the general words precede the special enumeration, and certainly the words “any existing contract” are sufficiently broad to characterize the whole section. Moreover, a bond—by its very definition—is an instrument under seal, a specialty, and not so different from a mortgage, in the formalities required in its execution, that the latter is unfit to be associated with it in a statute. A mortgage is within the reason of the enactment. It may be given in connection with a promissory note or bond, or may contain the complete contract within itself, but in either case there is no reason for denying a payment made upon such a contract the same efficacy that it would have if made upon a promissory note or bill of exchange. A mortgage is certainly an “evidence of indebtedness,” and not infrequently the only evidence. *Chase v. Ewing*, 51 Barb. (N. Y.) 597. We conclude, therefore, that a part payment, either upon the note or mortgage, will toll the statute as to the mortgage. In this conclusion we are supported by the authority of decisions rendered in cases arising in this state. *Sutherland v. Roberts*, 4 Or. 378; *Allen v. O’Donald* (C. C.) 28 Fed. 346; *Cross v. Allen*, 141 U. S. 528, 12 Sup. Ct. 67, 35 L. Ed. 843.

The next and most difficult question is: Who is authorized to make such payment? On principle it would seem clear that the person who contracted the debt, gave the note, and executed the mortgage would be the only one to whom the creditor should be required to look for fulfillment of his obligations. Under section 5359, B. & C. Comp., conveyances of real property not recorded within 5 days after their execution are void as to subsequent purchasers in good faith of the same property. In other words, the recording of a mortgage is constructive notice to subsequent purchasers, but there constructive notice ceases. Having recorded his mortgage, the mortgagee is not compelled to watch the records to see whether or not the mortgagor has sold the property, but has a right to assume that he still owns it, and to deal with him as such owner. And even if he has notice of a transfer of the legal title, he has a right to assume that the purchaser has informed himself of the condition of the title, and taken it subject to incumbrances that are shown by the record to have a valid

existence. It is always in the power of a purchaser, before paying the purchase money, to make himself secure against an existing incumbrance, and, if he fails to do so, he ought not to require a mortgagee to be more diligent to protect him than he has been to protect himself. The weight of authority seems to indicate that a payment upon the mortgage debt by the original debtor, before the statute has run, has the effect to arrest its operation. "A purchaser with actual notice of the mortgage, or constructive notice by means of a registry, can avail himself of the presumption of payment from lapse of time only when the mortgagor could avail himself of it under the same circumstances. The grantee succeeds to the estate, and occupies the position of his grantor; * * * as, for instance, the purchaser of a part of the mortgaged premises cannot claim a presumption of payment of the mortgage from lapse of time when this presumption is repelled by payments of interest made by the mortgagor within 20 years, or by his admission within this time that the mortgage was then subsisting." 2 Jones on Mortg. § 1202. While the language above quoted was used by the author in reference to mortgages in jurisdictions where no statute of limitations existed, but where a lapse of 20 years was held to create a presumption of payment, we see no essential difference, in principle, between such a condition and that existing in the case at bar. If part payment by a mortgagor, after he has parted with his title or equity of redemption, can rebut the presumption of payment arising from lapse of time, to the prejudice of his grantee, it would seem to follow naturally that part payment by a mortgagor, similarly situated, would keep the mortgage alive under our statute of limitations.

The case of *Kendall v. Tracy, Hathaway & Hathaway*, 64 Vt. 522, 24 Atl. 1118, is in point on the matter at bar. In 1866 Kendall sold a farm to Tracy, taking his promissory note and mortgage on the farm in payment. In 1871 Tracy sold a portion of the farm to the Hathaways, who entered into possession and made extensive improvements. In 1889 Kendall brought suit to foreclose his mortgage. Tracy had made partial payments on the note from time to time to keep it alive. The defendants Hathaway pleaded the statute of limitations as to themselves. The court said: "The defendants cannot avail themselves of the statute of limitations. They could acquire by their deed no better title than Tracy had, which title he held subject to the petitioner's mortgage, and that mortgage was kept from the operation of the statute by payments made by Tracy to the petitioner." In *Barrett v. Prentiss*, 57 Vt. 297, the court say: "Was the claim barred by lapse of time? The payment was made by Prentiss, the maker of the mortgage and notes, after he had sold and quit possession of the premises. He was liable upon the

notes as maker; and a payment made by him, we hold, would rebut the presumption that the mortgage debt had been paid, not only as to him, but as to all who were grantees under him, they having taken their interest with constructive notice of the mortgage." In *Mack v. Anderson*, 165 N. Y. 529, 59 N. E. 289, the court, speaking of the effect of a payment made by a mortgagor after parting with his title, says: "The mortgagor could, of course, have kept the debt alive as to the Andersons, by making payments within the period of limitation, even without their knowledge or consent. Such payments would have bound the Andersons, not upon the theory that the mortgagor was their agent, but because the latter was simply paying his own debt, with which the land of the former was burdened." Nothing could be more applicable to the case at bar than the language above quoted. Idleman, the mortgagor, could have kept the debt alive as to the Blacks by making payments within the period of limitations, even without their knowledge or consent. See, also, *Perry v. Horack*, 63 Kan. 88, 64 Pac. 990, 88 Am. St. Rep. 225; *Jackson v. Longwell*, 63 Kan. 93, 64 Pac. 991; *Teegarden v. Burton*, 62 Neb. 639, 87 N. W. 337. We conclude, therefore, that payments by Idleman, before the statute had barred the action on the note, tolled the statute, not only as to him, but as to defendants as well.

We have examined the authorities submitted by defendants' counsel, and fail to discover that any one of them covers the exact point in issue. *Colonial, etc., Mortgage Co. v. Northwest Thresher Co.*, 14 N. D. 147, 103 N. W. 915, 70 L. R. A. 814, 116 Am. St. Rep. 642, merely holds that the absence of the original mortgagor from the state does not toll the statute of limitations as to his subsequent grantee. Although the course of reasoning by which the learned court arrived at this conclusion is somewhat unique, the conclusion itself is sound and fully in accord with the holding in this state. *Anderson v. Bexter*, 4 Or. 105. The case of *Lord v. Morris*, 18 Cal. 482, is not in point. In that case the mortgagors, after sale of the property, and after the statute had run, attempted to renew the note and debt; and it was held that they could make no new promise to the prejudice of their grantee. Some dicta used by the court in its opinion would seem to be favorable to plaintiffs' contention, but it must be taken to refer to the facts before the court, and be construed with those facts in view. In the case of *Day v. Baldwin*, 34 Iowa, 380, Baldwin, the original mortgagor, attempted to revive the mortgage debt as against his grantee after the right of action had become barred, and it was held that such recognition of the mortgage would not bind the grantee. The case of *Cook v. Prindle*, 97 Iowa, 464, 66 N. W. 781, 59 Am. St. Rep. 424, was a similar case, and the decision followed the rule announced in *Day v.*

Baldwin, *supra*. In *Zoll v. Carnahan*, 83 Mo. 35, it was contended that the absence of the vendee, against whose property a vendor's lien existed, tolled the statutes as to his subsequent grantee, and the court held adversely to this contention. What was said in the opinion in regard to the effect of a part payment by a mortgagor, under such circumstances, was not predicated upon any fact appearing in the case, and is pure dictum. The case of *Kendall v. Clarke*, 90 Ky. 178, 13 S. W. 583, arose upon an attempt to enforce a vendor's lien against a grantee of an original vendee. The court held squarely in that case that a payment by the vendee would not keep the lien alive against his grantee. The disfavor with which courts view vendor's liens may have accounted for this decision, though it does not so appear, and we concede this case to be fairly in point, as sustaining defendants' contention, but in view of the weight of authorities to the contrary, as well as what we deem, upon reason, to be the safe and salutary rule, we decline to adopt the reasoning of the case cited. In *Trustees, etc., v. Smith*, 52 Conn. 434, the maker of a note and mortgage conveyed his equity of redemption to a third party, who from time to time, for 15 years following, paid interest on the note. It was held that this did not toll the statute as to the original mortgagor. The reason given is that the party making the payments was not liable on the note, and that he was not in such privity with his grantor as to be his agent for the purpose of making a new promise. It will be seen that this decision proceeds upon the theory that a part payment constitutes a new promise, and must therefore be made by a joint debtor or some one having actual or implied authority to bind the original maker, a doctrine expressly repudiated in this state in *Dundee Invest. Co. v. Horner*, *supra*. The case of *Schmucker v. Sibert*, 18 Kan. 104, 28 Am. Rep. 765, is another case in which an attempt was made to revive a debt already barred by the statute, and is not in point here.

Without pursuing the subject further, it is sufficient to say that, outside of the case of *Kendall v. Clarke*, *supra*, which we deem unsound, and *Trustees, etc., v. Smith*, *supra*, which is based upon a construction of the statute of limitations different from that which prevails in this jurisdiction, the other cases cited resolve themselves into two classes: (1) Those in which it is held that absence from the state will not toll the statute as to a grantee of the mortgagor; (2) those in which it is held that a payment by the mortgagor, after the statute has run, will not revive the debt as against his grantee. The distinction between these cases and the one at bar is this: (1) In this state a part payment continues and keeps alive the original promise, while the absence of the primary debtor from the state has no such

effect. (2) The revival of a debt after it has once been barred is in the nature of a new promise or contract, not a continuation of the old; and a mortgagor has no authority to make such new promise to the prejudice of his grantee.

It follows from the conclusions here arrived at that the decree of the court below should be reversed, and the demurrer overruled, and the cause remanded for further proceedings not inconsistent with this opinion.

(57 Or. 325)

KEADY v. UNITED RYS. CO.

(Supreme Court of Oregon. April 26, 1910.)

1. EXCEPTIONS, BILL OF (§ 16*)—RESERVATION OF GROUNDS OF REVIEW—SUFFICIENCY OF BILL OF EXCEPTIONS.

A transcript of the reporter's notes of oral testimony and proceedings of a trial covering 324 pages of typewritten matter, certified to by the trial judge to be "a true and correct statement of all the proceedings had in said case, and together with the exhibits attached contains all of the evidence introduced on the trial," is not a bill of exceptions required by statute.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Cent. Dig. § 17; Dec. Dig. § 16.*]

2. APPEAL AND ERROR (§ 696*)—REVIEW—REFUSAL OF NONSUIT—SUFFICIENCY OF BILL OF EXCEPTIONS.

To justify a review of an alleged error in refusing a motion for an involuntary nonsuit, the bill of exceptions must affirmatively show that it contains all the evidence before the court when the motion was made.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2916, 2917; Dec. Dig. § 696.*]

3. EXCEPTIONS, BILL OF (§ 22*)—INCORPORATING EVIDENCE.

A separate bundle of papers fastened together, none of which bears any indorsement indicating that it had been used as evidence in the case, or had been filed therein by the clerk of the trial court, and which has not been made a part of the bill of exceptions by being physically attached thereto, or certified in any manner by the trial judge, merely having attached a certificate of the county clerk that the papers constitute exhibits in the case, is not a part of the bill of exceptions.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Cent. Dig. § 29; Dec. Dig. § 22.*]

4. PLEADING (§ 34*)—REVIEW—COMPLAINT NOT TESTED BY DEMURRER.

On appeal, the sufficiency of a complaint to state a cause of action which has not been tested by demurrer or by motion before trial will be more liberally construed than when tested by demurrer before trial.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 74; Dec. Dig. § 34.*]

5. CONTRACTS (§ 153*)—CONSTRUCTION—CONTRACTS SUSCEPTIBLE OF TWO CONSTRUCTIONS.

If a contract be susceptible of two different constructions, one tending to make it legal and the other illegal, that construction will be accepted which will make it legal rather than the other.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 734; Dec. Dig. § 153.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. CONTRACTS (§ 113*)—VALIDITY—FRAUD BY PERSONS HOLDING POSITIONS OF TRUST.

It is the policy of the law to secure fidelity in the discharge of their duties of all persons holding positions of trust and confidence, and to that end it will denounce as void agreements made by them with others which may tend to inflict a fraud on third persons interested, but where all the persons interested are parties to the contract, or have knowledge of its terms, and have expressly or impliedly agreed thereto, the contract will not be fraudulent as to them.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 521-541; Dec. Dig. § 113.*]

7. CORPORATIONS (§ 182*)—VALIDITY.

A contract with several stockholders of a corporation individually to pay them certain sums if they would agree to a sale of the corporate property, it not appearing that there were other stockholders of the corporation not parties to the contract, and the stockholders having agreed to the terms offered, so that if there was any inequality as to the amount the several shareholders were to receive respectively under the contract each must have consented to what the others were to receive, would not be deemed illegal as in fraud of any stockholder, especially where all the stockholders to the contract ratified what was done by assigning their claims to another.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 686-690; Dec. Dig. § 182.*]

8. EVIDENCE (§ 73*)—PRESUMPTIONS—CORPORATE ACTS.

Where a corporation sells property at public sale, it must be assumed that the reasonable value thereof was obtained by the officers of the corporation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 94; Dec. Dig. § 73.*]

Appeal from Circuit Court, Multnomah County; Thomas O'Day, Judge.

Action by L. Y. Keady against the United Railways Company. Judgment for plaintiff and defendant appeals. Affirmed.

See, also, 100 Pac. 658.

This is an action to recover money upon a contract. The complaint contains 25 separate causes of action, all of which, except the last, are upon claims assigned to plaintiff. Each of the 24 assigned causes of action first set forth are identical as to the character of the contract upon which the right to recover is based.

It is alleged, in effect, that at the time of the making of the contract sued upon the Oregon Traction Company was a corporation duly organized and existing under the laws of this state for the purpose of owning, purchasing, constructing, and operating railways herein and in the city of Portland; that such corporation owned and was in possession of valuable franchises from the state of Oregon and the city of Portland of rights of way and easements for the construction and operation of railways, and of rails and other property, all of a value greater than \$200,000; that the defendant corporation, desiring to purchase of the Oregon Traction Company all of its property, including rights of way and franchises, proposed to the several stockholders thereof

that if they would consent to the sale the defendant would, in consideration of such consent, pay to such several stockholders the amount that each of them had paid in cash upon his subscription to the stock of the corporation; that, in consideration of the offer so made, and relying thereon, at a duly called meeting of the stockholders of the Oregon Traction Company held on January 31, 1906, there was passed by unanimous consent of all the stockholders a resolution, authorizing the sale; that afterwards, on March 15th, in pursuance of such consent, the defendant purchased at public sale all of the corporate property of the Oregon Traction Company, receiving and accepting from it a proper conveyance thereof, and entered into possession of the property, which it now owns and holds; that each of plaintiff's assignors, who were stockholders of the Oregon Traction Company, has paid on his stock to the company the amount sought to be recovered in each particular cause of action; and that in consideration of his consent so given to the sale defendant promised and agreed to and with such stockholder to pay said amount, which it has failed to do. To this is added an averment of an assignment of each of the several claims to plaintiff before the commencement of the action.

The averments of the complaint, setting forth plaintiff's individual claim, are the same as those of the assigned claims, with the exception as to the amount to be paid. In that case defendant was to pay plaintiff the reasonable value of his 998 shares of stock, which are alleged to be of the value of \$35 per share. The answer consists of denials of the material averments of the complaint. Subsequent to the filing of this action, plaintiff brought a second action against the same defendant, upon the claims of 13 other shareholders, which had been assigned to him. The statement of the several causes of action therein is in the same language as those in the first complaint. This latter cause was put at issue upon an answer consisting of denials only. By consent of the parties an order was made by the court, consolidating these actions, and they were tried before a jury as one action. A verdict was returned in plaintiff's favor, and from the judgment entered thereon the defendant has appealed.

A. C. Emmons and W. M. Gregory (W. D. Fenton, on the brief), for appellant. Martin L. Pipes, for respondent.

SLATER, J. (after stating the facts as above). Many assignments of error, based on rulings of the court, on receipt and rejection of testimony, and on instructions given and refused, are presented for our consideration, but we are confronted with an objection entered by plaintiff's counsel to any

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

consideration thereof by the court. The objection is that no proper or legal bill of exceptions has been presented. There is on file a document indorsed "Bill of Exceptions," but it consists of a transcript of the reporter's notes of the oral testimony and proceedings of the trial, and covers 324 pages of typewritten matter, which has been certified to by the trial judge to be "a true and correct statement of all the proceedings had in said case, and together with the exhibits attached contains all of the evidence introduced upon the trial." It has been many times held by this court that such a transcript of the proceedings of a trial does not conform to the requirements of the statute, and is not a bill of exceptions. Counsel for appellant may term it a bill of exceptions, and so label it, but it is not one in fact. In some previous cases in this court, even where the infraction of the statute in such matters was not so extreme, and the burdens imposed upon the court not so great, this court has, of its own motion, refused to search through such a record to ascertain if error could be found. But in this case opposing counsel has entered an objection to the sufficiency of the bill of exceptions, insisting and protesting against the consideration thereof by the court. Under such circumstances, we cannot do otherwise than apply the reasoning found in the numerous previous rulings of the court announced in the following cases: *Beadle v. Paine*, 46 Or. 424, 80 Pac. 903; *Nosler v. Coos Bay Nav. Co.*, 40 Or. 305, 63 Pac. 1050, 64 Pac. 855; *MacMahon v. Duffy*, 36 Or. 150, 59 Pac. 184; *O'Connor v. Van Hoy*, 29 Or. 505, 45 Pac. 762; *Hamilton & Rourke v. Gordon*, 22 Or. 557, 30 Pac. 495; *Eaton v. Oregon R. & N. Co.*, 22 Or. 497, 30 Pac. 311; *Janeway v. Holston*, 19 Or. 97, 23 Pac. 850; *Tucker v. Salem F. M. Co.*, 15 Or. 581, 16 Pac. 426; *State v. Murray*, 11 Or. 413, 414, 5 Pac. 55. We therefore must decline to examine any of the assignments of error based upon rulings made by the trial court on the admission or rejection of testimony, or instructions given or refused by the court.

It is next insisted that this record, called a "bill of exceptions," cannot be examined by the court for the purpose of determining the question arising on a denial of the defendant's motion for a nonsuit, for the reason that it affirmatively appears upon the face thereof that the transcript, or bill of exceptions, does not contain all of the evidence. To review alleged error in refusing a motion for an involuntary nonsuit, the bill of exceptions must affirmatively show that it contains all the evidence before the court at the time the motion was made. *National Bank v. Fire Association*, 33 Or. 173, 50 Pac. 568, 53 Pac. 8; *Carney v. Duniway*, 35 Or. 131, 57 Pac. 192, 58 Pac. 105; *Adkins v. Monmouth*, 41 Or. 266, 68 Pac. 737.

The transcript of the evidence shows that considerable documentary evidence was offered by plaintiff upon his case in chief,

which was received and marked as exhibits in the case. The certificate of the trial judge to the bound volume of evidence is to the effect that it, together with the exhibits attached, contains all the evidence introduced upon the trial, but there are no exhibits attached, hence the effect of the certificate is that the transcript of the evidence alone does not contain all of the evidence. A separate bundle of papers fastened together, which appear to have been used as evidence in some case, has been sent up to this court, but none of the documents contained therein bear any indorsement indicating that they had been used as evidence in this case, or had been filed therein by the clerk of the trial court. They have not been made a part of the bill of exceptions by being physically attached thereto, nor are they identified in any manner by the trial judge. However, there is attached a certificate of the county clerk, to the effect that they constitute exhibits in the present case but that is not the identification required by the statute, and is not sufficient to make them a part of the bill of exceptions. *State v. Kline*, 50 Or. 426, 430, 93 Pac. 237; *Multnomah County v. Willamette Towing Co.*, 49 Or. 204, 214, 89 Pac. 389.

There is nothing, therefore, before this court which it can consider, excepting the question whether the complaint states a cause of action. This question was raised by defendant's motion for judgment on the pleadings, which motion was interposed after the testimony of all the parties was in. The sufficiency of the complaint, not having been tested by demurrer, or by motion before trial, it will be more liberally construed than when tested by demurrer before trial. *Cederson v. Oregon Nav. Co.*, 38 Or. 343, 62 Pac. 637, 63 Pac. 763; *West v. Eley*, 39 Or. 461, 65 Pac. 798; *Walker v. Harold*, 44 Or. 205, 74 Pac. 705; *Portland Iron Works v. Willett*, 49 Or. 245, 249, 89 Pac. 421, 90 Pac. 1000. The motion is urged on the theory that the alleged contract is void as against public policy. If a contract is susceptible of two different constructions, one of which tends to make it legal, and the other one illegal, that construction is to be given to the contract which will make it legal, rather than the one that will make it illegal. 2 *Parsons, Contracts* (9th Ed.) 500; 15 *A. & E. Ency.* 933; *Hobbs v. McLean*, 117 U. S. 569, 6 Sup. Ct. 870, 29 L. Ed. 940; *U. S. v. Central P. Ry. Co.*, 118 U. S. 235, 240, 6 Sup. Ct. 1038, 30 L. Ed. 173; *Hildebrand v. Bloodsworth*, 12 Or. 75, 80, 6 Pac. 233; *Arment v. Yamhill County*, 28 Or. 474, 479, 43 Pac. 653.

Plaintiff and his assignors were stockholders of the Oregon Traction Company, the property of which defendant wished to purchase. The property was necessary to the carrying on of the business for which the corporation was organized. To make the sale valid it was necessary that it should be authorized by a vote of the stockholders, and

not by the directors. It is urged that plaintiff and his assignors, being stockholders, owed a duty to their fellow stockholders and the creditors of the corporation, and that, therefore, they could not lawfully sell their vote in the transaction of corporate business, or contract to vote in a particular way in the management of corporate affairs, and that any such contract would be void, as being calculated to work a fraud upon the rights of other parties interested in the corporation. The principle of law stated is undoubtedly correct, but in our view it has no application to the facts in this case, as set forth in the complaint. The following authorities were cited in support of the contention named: 1 Cook on Stockholders, § 622; 1 Page on Contracts, § 408; *West v. Camden*, 135 U. S. 507, 10 Sup. Ct. 838, 34 L. Ed. 254; *Guernsey v. Cook*, 120 Mass. 501; *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847; *Wilbur v. Stoepel*, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568. As announced by these authorities, it is the policy of the law to secure fidelity, in the discharge of their duties, on the part of all persons holding positions of trust and confidence, and it does this by denouncing as void agreements made by them with others which may tend to inflict a fraud upon third persons interested, and hence it is held that a contract to make a private gain at the expense of a corporation is a fraud upon the corporation and other stockholders; and accordingly a contract between less than all of the stockholders of a corporation, for the election of one or more of the parties thereto to a lucrative office in the corporation is invalid. 1 Page on Contracts, § 408. But where all the parties interested are parties to the contract, or have knowledge of the terms of the contract, and have expressly or impliedly agreed thereto, there can be no possible fraud upon them.

The complaint does not state anything tending to show that there were any other stockholders than those named therein, but it avers that the defendant proposed to the several stockholders that, if they would consent to a sale, it would pay to the several stockholders the sum named in the complaint. Defendant's counsel, in their brief, have construed this to mean that the proposal so made was to all of the stockholders, and that before plaintiffs could recover they must offer proof, showing that all had consented thereto. While the offer was personal to each shareholder, yet it was made to all of them, and therefore, all of them being parties to the contract, each of them knew when making the contract for himself what every other one was to receive. If there were any inequality as to the amount the several shareholders were to receive respectively under the contract, which is not claimed, yet, as all agreed to the terms offered, each must have consented to what the others were to receive, and there could be no fraud upon any stock-

holder resulting from such contract. In *Jones v. Williams*, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436, the contract sued upon was assailed as void for the same reason asserted here. The contract was for the sale by the principal stockholder to plaintiff of a quantity of shares of stock in a corporation which owned and conducted a newspaper. The contract included an agreement to elect plaintiff to the position of managing editor at a fixed salary. A suit in equity was brought to enjoin defendants, some of whom were not parties to the contract, from committing a threatened breach thereof, by discharging plaintiff from his position. It appeared, however, that all the stockholders knew of the terms of the contract and had acquiesced therein, and the majority of the court held that for that reason it was not void. In *Wilbur v. Stoepel*, supra, plaintiff had an agreement with two of the three stockholders of the corporation who were directors. It was to the effect that, in consideration of the purchase of the stock by him, he would be employed as business manager of the corporation for the period of two years. The action arose from a breach of the contract. The pivotal question in that case was whether the third stockholder, although not a party to the contract, had consented to it. It was found as a fact that he had not, and the contract, for that reason, was declared void as against public policy. But it seems to have been conceded in the opinion that if it were shown that he had assented to the agreement the contract would have been binding and enforceable.

It may be argued that as plaintiff was to be paid the reasonable value of his shares, and not the amount of his cash contribution to the capital stock in payment of his shares, it was possible that his special contract would result in an unfair advantage to him, as against his fellow shareholders. But there is nothing in the complaint which discloses that there was any difference in fact between the cash value and the reasonable value of the stock, and we think we would be unwarranted in assuming that there was in fact any difference. In any event, all the parties appear to have ratified what was done by assigning their claims to plaintiff, and for that reason, if for no other, there appears to be no reason to impute a possible fraud upon any of them. We are equally unable to see how the agreement could operate to the injury of creditors, for it does not appear from the complaint that there were any creditors, and it also appears that the property was purchased by the defendant at public sale, and under such circumstances we must assume that the reasonable value thereof was obtained and received by the officers of the corporation for the payment of its debts.

We are of the opinion, therefore, that the complaint states a cause of action, and is sufficient, in substance, to support the judgment, which is affirmed.

(56 Or. 486)

DOYLE v. SOUTHERN PAC. CO.†

(Supreme Court of Oregon. April 28, 1910.)

1. APPEAL AND ERROR (§ 866*) — REVIEW — SCOPE AND EXTENT—RULINGS ON MOTION FOR NONSUIT AND DIRECTED VERDICT.

The court, on appeal from the denial of a nonsuit and from the refusal to direct a verdict for defendant, must consider the testimony in the light of inferences most favorable to plaintiff which the jury could give to it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3467, 3474, 3475; Dec. Dig. § 866.*]

2. MASTER AND SERVANT (§ 232*)—INJURIES TO SERVANT—PLACE OF EMPLOYMENT.

One employed as timekeeper of a crew engaged in improving railroad tracks, and required to constantly watch the men and to move about from place to place, may, in the performance of his duty, go on the track, and need not remain outside the tracks and out of danger of passing trains.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 678; Dec. Dig. § 232.*]

3. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether the timekeeper of a crew engaged in improving railroad tracks was guilty of contributory negligence in going on a track, instead of the space between the tracks, so as to preclude a recovery for his injuries by a passing engine, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1107, 1108; Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

Whether a railroad, causing injury to its timekeeper of a crew by running an engine against him, was negligent in running the engine at an excessive speed and in failing to ring the bell and to keep a proper lookout for servants on and near the track *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1033; Dec. Dig. § 286.*]

5. NEGLIGENCE (§ 56*)—"PROXIMATE CAUSE."

"Proximate cause" is defined generally as the cause which leads to, or may naturally be expected to produce, the result.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5758, 5769; vol. 8, p. 7771.]

6. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—PROXIMATE CAUSE—QUESTION FOR JURY.

Whether the proximate cause of an injury to the timekeeper of a railroad track crew was the negligence of the railroad in the operation of its engine, or the negligence of the timekeeper, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1131; Dec. Dig. § 289.*]

7. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

One employed as timekeeper of a crew engaged in improving railroad tracks may, when on a track in the performance of his duty, assume that servants in charge of engines or trains will properly perform their duties, and will not needlessly or recklessly expose him to danger by the improper movement of trains or engines under their control, and he is not, as a matter of law, guilty of negligence in

going on a track in the performance of his duty merely because, had he looked once more, he would have seen an approaching engine in time to have escaped from the track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1118; Dec. Dig. § 289.*]

8. MASTER AND SERVANT (§ 216*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—NEGLIGENCE OF FELLOW SERVANT.

An employé of a railroad assumes all reasonable risks incident to his employment, but, under the fellow servant act, he does not necessarily assume all risks resulting from the negligence of his co-servants; and, in the event of such negligence, proximately causing an injury, he is entitled to recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 567; Dec. Dig. § 216.*]

9. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

The burden of proving contributory negligence of a servant suing for a personal injury is on the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 908; Dec. Dig. § 265.*]

10. NEGLIGENCE (§ 136*) — QUESTION FOR JURY.

Where, in view of the facts, the question of negligence is one as to which men may honestly differ, the case is for the jury, though the facts are not in dispute, and it is only when the facts are such that all reasonable men must draw the same conclusion that the question of negligence is one of law.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 279, 280; Dec. Dig. § 136.*]

11. PLEADING (§ 248*) — AMENDMENTS — ALLOWANCE—"CAUSE OF ACTION."

Where, in an action for injuries to a servant run down by an engine, the complaint alleged that the railroad was negligent in running the engine at an unnecessarily high speed, and in negligently failing to give any signal of the danger or the approach of the engine, the allowance during the trial of an amendment, alleging that the railroad negligently failed to keep a sufficient, or any, lookout for persons on the track, did not change the original cause of action, but merely made the averments of negligence more definite and certain; a "cause of action" being that which produces the necessity for bringing action (citing Words and Phrases, vol. 2, p. 1015).

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 687, 693-700; Dec. Dig. § 248.*]

12. APPEAL AND ERROR (§ 877*) — REVIEW — PARTIES WHO CAN ALLEGE ERROR—ERRORS AS TO RESPONDENT.

Where instructions were as favorable to the defeated party as he could expect under the law, the court on his appeal will not determine whether any part of the instructions was erroneous as to the successful party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560, 3562; Dec. Dig. § 877.*]

13. APPEAL AND ERROR (§ 1024*)—REVIEW—QUESTIONS REVIEWABLE — FINDINGS ON CONFLICTING AFFIDAVITS.

Where the affidavits on the issue of improper remarks of the counsel of the successful party in his argument to the jury were conflicting, the court on appeal will not disturb the denial of a new trial, on the ground of such improper argument.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4020, 4027; Dec. Dig. § 1024.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied June 19, 1910.

14. APPEAL AND ERROR (§ 1004*)—REVIEW—QUESTIONS REVIEWABLE—AMOUNT OF RECOVERY.

Damages assessed by the jury in a personal injury action will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3944; Dec. Dig. § 1004.*]

15. NEW TRIAL (§ 162*)—GROUNDS—EXCESSIVE DAMAGES—REMITTITUR.

Where the trial court believed that the damages awarded in a personal injury action were excessive, but that the verdict was not the result of passion or prejudice or undue influence, it could deny a motion for a new trial on the ground of excessive damages, on condition that plaintiff remit all in excess of a specified sum.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 324, 325; Dec. Dig. § 162.*]

16. APPEAL AND ERROR (§ 1004*)—REVIEW—QUESTIONS REVIEWABLE—REFUSAL TO UNCONDITIONALLY SET ASIDE VERDICT.

Error cannot be predicated on the refusal of the trial court to unconditionally set aside a verdict on account of excessive damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3945; Dec. Dig. § 1004.*]

Appeal from Circuit Court, Lane County; L. T. Harris, Judge.

Action by M. J. Doyle against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action by M. J. Doyle against the Southern Pacific Company, for \$100,000 damages, on account of injuries received while in defendant's employ, through being run down by one of its engines. The grounds upon which recovery is sought appear from the pleadings; the issues framed thereby being set out in the instructions given to the jury by the court. Owing to the lucid and concise manner in which the questions and issues involved are there stated, the instructions (except as to those usually termed "statutory," concerning which no question is presented) are given in full, as follows:

"Gentlemen of the jury, it is made the duty of the court to instruct you as to the rules of law which shall be applied by you in determining the issues, which, under the pleadings, you are to decide. In this proceeding M. J. Doyle is known as plaintiff, and the Southern Pacific Company is known as defendant.

"The plaintiff has filed his complaint herein, and in his complaint alleges what he says is his ground of action and upon which he bases his claim of recovery; and in the complaint the plaintiff alleges that the defendant is a corporation having an organization and engaged in business in the state of Oregon, and as such corporation was at all times and dates hereinafter mentioned engaged in operating a railroad from the city of Portland in the state of Oregon to the city of San Francisco in the state of California and in commerce between said points. The answer which is filed by the defendant admits the allegations which I have just called your attention to, so that, in deciding this case, you

shall take as an admitted fact that the defendant is a corporation having an organization within the state of Oregon, and engaged in, and that it was engaged at the time mentioned in the complaint in, operating a railroad from the city of Portland in the state of Oregon to the city of San Francisco in the state of California. Now the complaint further alleges that on and prior to the 24th day of October, 1906, the plaintiff was in the employ of the defendant at and near the station of Divide in Lane county, on said railroad line of the defendant as a timekeeper, keeping the time of a number of sectionmen who were at work and engaged in preparing said road for commerce and the carrying of freight and passengers between said states. The defendant in its answer admits that prior to the 24th day of October, 1906, the plaintiff was in the employ of the defendant at and near the station of Divide, in Lane county, on said railroad line of the defendant as timekeeper. The allegation in the answer is that as to this paragraph which I have just read to you, the defendant denies all of the allegations thereof, except the one which I have said the defendant admits, and by reason thereof the defendant denied that on the date mentioned the plaintiff was keeping the time of a number of sectionmen, the date mentioned being the 24th day of October, 1906, who were at work on said road, and engaged in preparing said road for commerce and the carrying of freight and passengers between said states. Now, then, by reason of this allegation which is denied in the answer of defendant, it is necessary for you to determine, among other questions, whether or not the plaintiff was, on the 24th day of October, 1906, keeping the time of a number of sectionmen who were at work on said road and engaged in preparing said road for commerce and the carrying of freight and passengers between said states.

"The plaintiff further alleges in his complaint that on said 24th day of October, 1906, and while the said plaintiff was engaged in his duties, and was performing the same with all reasonable and ordinary care, the defendant and its employes in charge of and controlling and managing a certain engine operated upon said road and belonging to said defendant, and engaged in said interstate commerce upon said road, so carelessly and negligently run down upon the side track upon which the plaintiff was standing in the performance of his duties and in the exercise of ordinary care, at a dangerous, unsafe, and unnecessarily high rate of speed, and carelessly and negligently failed to give the plaintiff or the other men employed in the vicinity any signal or warning of the danger of the approach of said engine, and negligently failed and neglected to keep a sufficient or any lookout for persons upon the track, and especially for this plaintiff and other employes

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

likely to be upon the track. The defendant, as to this allegation to which I have called your attention, denies every allegation contained therein, except that the plaintiff was run over by one of the defendant's engines, as a result of which the plaintiff suffered an injury.

"Now, the plaintiff further alleges in his complaint that, by reason of the alleged negligence of the defendant, and without any fault upon the part of plaintiff, the engine struck the plaintiff when he was so in the performance of his duties, without any warning or notice, whereby he was thrown to the ground and bruised and mangled, and his limbs were crushed and broken, and that it was necessary to have both legs amputated above the knees, whereby the plaintiff lost his legs and feet, and was and will be crippled for all time, and incapacitated from his business and avocation as timekeeper and from carrying on any business requiring physical labor, and whereby he has suffered great pain and agony and discomfort, and whereby he will continue to suffer great pain and agony and discomfort during his entire life, and whereby he has been and will be prevented from enjoying the ordinary pleasures of life, and especially those pleasures and pursuits requiring the use of his feet and legs, and will be unable to care for himself, and will be compelled to employ some one to minister to and take care of him during the rest of his life. As to this further allegation to which I have last called your attention, the defendant denies each and every part thereof, except that the defendant admits that on October 24, 1906, plaintiff was run over by one of defendant's engines, as a result of which plaintiff sustained injuries to both of his legs resulting in their amputation. Therefore, in determining the issues to be tried in this case, you are to take as an admitted fact that one of the engines of the defendant ran over the plaintiff, and by reason thereof the plaintiff sustained injuries to both of his legs, resulting in their amputation. Up to this point and by reason of the allegations contained in the complaint, and the denials contained in the answer, the principal issue for you to determine is whether there was or was not negligence upon the part of the defendant. The alleged negligence upon the part of the defendant being his negligence alleged in the complaint, namely, that the defendant so carelessly and negligently operated said engine as to carelessly and negligently run down upon the side track upon which the plaintiff was standing in the performance of his duties and in the exercise of ordinary care, at a dangerous, unsafe, and unnecessarily high rate of speed, and carelessly and negligently failed to give the plaintiff or the other men employed in the vicinity any signal or warning of the danger or the approach of the said engine.

"It is further alleged in the complaint that the plaintiff was damaged in the sum of \$100,-

000. This allegation is denied by the answer; and, in addition to the issue to which I have called your attention, it is, of course, one of the issues to be tried. Now, in addition to the denials contained in the answer, and in addition to the admissions contained in the answer which I have called your attention to, the defendant set up what is termed in the answer a further and separate defense, and alleges that on October 24, 1906, while the defendant was running one of its helper engines on a side track at Divide, Or., said engine being then and there carefully run and operated, after the whistle on said engine had been sounded, and while the bell on said engine was being rung continuously, and said engine was moving at a moderate and reasonably safe rate of speed, the plaintiff herein, notwithstanding what he heard, and by the exercise of ordinary care and diligence should and could have heard said whistle and said bell, and notwithstanding he saw and heard, and by the exercise of ordinary care and diligence should have and could have seen and heard, said engine approaching in ample time to avoid said accident, suddenly, carelessly, negligently, and recklessly stepped onto and stood on said side track closely in front of said approaching engine, without giving to defendant or any one any notice or warning or opportunity to know of his presence, so that he was thereby struck by said engine without negligence on defendant's part, and was then and there knocked down by said engine and received the injuries to his legs complained of; that said injuries were received solely because of plaintiff's own negligence and want of care as aforesaid. To this further and separate answer of the defendant the plaintiff files another paper herein, which is designated as a reply. And in the reply of the plaintiff all of the further and separate matter constituting the further and separate defense, which I have called your attention to, is denied by the plaintiff, except that the plaintiff admits in his reply that the plaintiff was struck and knocked down by the engine of the defendant and received the injuries to his legs complained of. Now, by reason of the allegations contained in the further and separate answer and defense of the answer, and the denials thereto contained in the reply, an issue is raised which you are required to try, and that issue is the one as to whether or not the plaintiff was guilty of contributory negligence.

"Concisely speaking, the main issues and principal issues which you have to determine are: First, whether there was or was not negligence in the particulars alleged in the complaint upon the part of the defendant. If there was negligence upon the part of defendant in the particulars, or some of the particulars, named in the complaint, then whether there was or was not contributory negligence upon the part of the plaintiff. But if there was negligence upon the part of the defendant, and was not contributory negli-

gence upon the part of the plaintiff, then the next issue for you to determine is the amount of damages to which the plaintiff would be entitled, if any. I shall instruct you, gentlemen of the jury, more in particular, first, as to the issue of the alleged negligence upon the part of the defendant; and then more fully as to the alleged negligence upon the part of plaintiff, alleged by defendant as constituting contributory negligence; and then more fully as to the elements which you can take into consideration in estimating the amount of damages to be awarded to the plaintiff, if you find that the plaintiff is entitled to any damages. The only negligence charged in the complaint is that the defendant by its employes in charge of and operating and managing this helper engine carelessly and negligently ran the engine upon the side track upon which the plaintiff was in the performance of his duty, at a dangerous, unsafe, and unnecessarily high rate of speed, and carelessly and negligently failed to give plaintiff any signal or warning of the danger of the approaching engine, and carelessly and negligently failed to keep a sufficient or any lookout for plaintiff or other employes likely to be upon the track. It is not enough to entitle the plaintiff to recover merely to show the injury or accident, and that he received injury while in the employ of the defendant, but he must go further and prove, by a preponderance of the evidence, that the defendant was negligent as charged in the complaint, and that this negligence, if any, caused the plaintiff's injury. Proof of an accident and resulting injury is not sufficient proof to entitle plaintiff to recover. As I have stated, the mere fact that the plaintiff was injured, and that the defendant's engine caused the injury, does not entitle plaintiff to recover. The right to recover in this case, if it exists at all, is based upon the alleged negligence of the defendant in one or more particulars named in the complaint, which particulars are, as I have already charged you, that defendant negligently ran said helper engine upon the side track upon which plaintiff was in the performance of his duty, at a dangerous, unsafe, and unnecessarily high rate of speed, and carelessly and negligently failed to give plaintiff any signal or warning of the danger of the approach of the engine, and carelessly and negligently failed to keep a sufficient or any lookout for plaintiff and other employes likely to be upon the track; and, if it appears from the testimony that plaintiff was injured, and that this engine caused the injury, yet that the injury was without the fault or negligence of the defendant, and while the defendant was exercising ordinary care and prudence in the operation and movement of its engines, then the defendant would be entitled to a verdict. It was the duty of the defendant to exercise ordinary and reasonable care in moving the helper engine on the side track, so as to avoid injury to its employes, and to the plaintiff, if he was an em-

ployé at that time engaged in the performance of his duty. That its duty to exercise ordinary and reasonable care in moving said helper engine is such care as an ordinarily prudent person would and should use under the circumstances, and whether or not such care was or was not used in this particular case is a question of fact for you to determine.

"If you find by a preponderance of the evidence that the defendant ran such helper engine down the side track at a dangerous, unsafe, and unnecessarily high rate of speed, and that an ordinarily prudent person engaged in such business would not have so run said engine, and that by reason of such speed of said engine the plaintiff, without contributory negligence on his part, was injured, then plaintiff would be entitled to a verdict. If you find by a preponderance of the evidence that the defendant ran said helper engine down the side track, and did not ring the bell of the engine, sound the engine whistle, and if you further find that an ordinarily prudent person engaged in said business would have rung said bell or sounded said whistle, and that plaintiff, without contributory negligence upon his part, was injured because of the failure to ring said bell and sound said whistle, then your verdict should be for the plaintiff. If you find by a preponderance of the evidence that the defendant ran said helper engine down said side track, and the men operating said helper engine failed to keep such lookout as an ordinarily prudent person engaging in such business would have kept, and that the plaintiff was injured because said men in said engine failed to keep such a lookout as an ordinarily prudent man would have kept under such circumstances, and that the plaintiff is not chargeable with contributory negligence, then your verdict should be for the plaintiff.

"The burden of proof to show negligence upon the part of the defendant rests upon the plaintiff; and the plaintiff, before he is entitled to a verdict, must show, by a preponderance of the evidence, that the injury resulted from the engine being run at a rate of speed higher than an ordinarily prudent person engaged in such business would have run said engine, and that said injury resulted from failure of the men operating said engine to give such signals or signal as an ordinarily prudent person engaged in such business would have given, or that the injury resulted from the failure of the men in the engine to keep such a lookout as an ordinarily prudent person engaged in such business would have kept. But if the plaintiff fails to prove by a preponderance of evidence that said injury resulted from the engine being run at a rate of speed higher than an ordinarily prudent person engaged in such business would have run such an engine, and also fails to prove by a preponderance of the evidence that the injury resulted from the failure to sound the engine whistle and ring the engine bell, such as an

ordinarily prudent person engaged in such business would have done, and also fails to prove by a preponderance of the evidence that the injury resulted from the failure of the men operating the engine to keep such lookout as an ordinarily prudent person engaged in such business would have kept, then your verdict will be for the defendant. I instruct you that the defendant had a right to move its engine on this passing track in the way and manner in which ordinarily prudent persons, under the circumstances, engaged in that business would have moved the same, and that its employes in charge of the engine could move the same at a reasonable rate of speed, such as ordinarily prudent persons, engaged in that business, under the circumstances, would have moved the same. There was no speed limit at which this engine was required to be moved at that place, and it would not be negligence upon the part of the company or its employes to move that engine at that point on that side track at a high rate of speed, if the employes and other persons who might be in the vicinity could, by the exercise of ordinary care, have seen or discovered the movement of such an engine in time to avoid being injured by being on the track. Even if the fireman or engineer had seen Doyle standing on the track, they would have the right to assume that he would exercise the prudence and care of an ordinarily prudent person in avoiding accident or injury. The fireman or engineer was not bound to maintain a constant lookout toward the plaintiff, or any person who might have been on the track, or constantly to look at a point within any particular distance in front of this backing engine.

"In passing upon the question of whether or not there was negligence in the operation of said helper engine in the matter of speed, in the matter of giving signals and in the matter of keeping a lookout, and in determining whether there was neglect in these or any of these particulars, you have a right to consider the place where the injury occurred, the curvature of the road, the obstruction of the view, if any, the distance which could be seen upon the track, the men, and what they were engaged in along the track, and all other circumstances which surround the case and aid you in reaching a conclusion as to whether or not the manner in which the engine was operated, so far as it pertains to speed, signals, and lookout, was reasonably and ordinarily prudent under the circumstances. It is alleged by the defendant that the plaintiff was himself guilty of contributory negligence, and upon that question I charge you that the burden of proof is upon the defendant; and, if you are in doubt, and the evidence is evenly balanced upon that question, you should find for the plaintiff thereon; that is, the plaintiff is not obliged to show that he was without contributory negligence, but it must appear from the evidence, and by a preponderance thereof, that

the plaintiff was guilty of contributory negligence, to become available as a defense. If you find by a preponderance of the evidence that the plaintiff heard, or by the exercise of ordinary care and diligence should or could have heard, the whistle or bell, if sounded, you should find that plaintiff saw or heard, or by the exercise of ordinary care and diligence should or could have seen or heard, said engine approaching in ample time to avoid said accident, and stepped onto or stood on said track, and by reason thereof sustained the injury, then the plaintiff was guilty of contributory negligence, and the defendant would be entitled to a verdict. A railroad track is a place of danger, and the plaintiff, as a trackman employed to work at the place, was bound to know and anticipate that a train or engine might come at any time, and it was his duty to keep a careful lookout for the approach of any engine or train in either direction; if he got on the track between the rails when it was negligence for him so to do, and was thereby run over, he took the risk, and your verdict under those circumstances, if you so find, should be for the defendant. I instruct you that one who is working in a place of danger, where he is exposed to danger, must exercise his faculties for his own protection, and if he fails to do so, and his failure is the cause of the injury, he cannot recover therefor.

"I instruct you, further, that walking or standing upon a railroad track when trains or engines are at any time liable to pass, without looking or listening to see whether a train is approaching, is negligence which will prevent a recovery for any injury received by being run over by the engine. If the plaintiff was injured by reason of his own carelessness or negligence, he cannot recover, although you may find that his negligence may have been slight, and although you may find that the defendant may also have been negligent. If you find from the evidence that the plaintiff himself was careless or negligent at the time and place of the accident, and that this carelessness or negligence upon his part caused or contributed to his injury, then I instruct you that the plaintiff cannot recover, even though you may find that the defendant was also negligent. It was the duty of the plaintiff, as an ordinarily prudent person in going upon the track, to keep careful watch for the approach of any engine or train upon this track in either direction, and if he went upon the track and failed to look behind him, or to listen carefully for the approach of an engine or train which might be coming in his direction, and because of his failure to look or listen, or because he looked or listened carelessly or negligently, he did not discover the engine in time to avoid the accident, and he was thereby run over, he would not be entitled to recover. I instruct

you that, if you find from the evidence that the defendant by its servants and agents in charge of this engine gave the usual and ordinary warning of its approach on the side track at and immediately before the accident, by either sounding its whistle in the usual and ordinary manner at a reasonable distance from the plaintiff, or by ringing the bell, so that if the plaintiff had been in the exercise of ordinary care he could and should have heard such whistle or ringing of the bell and discovered the approach of said engine in time to avoid the accident, then the plaintiff is not entitled to recover, and your verdict should, in that event, be for the defendant. It is a question of fact for you to determine whether the plaintiff was guilty of negligent conduct which contributed to the injury. In determining whether the plaintiff was guilty of contributory negligence you have the right to take into consideration the employment of plaintiff, the duties of his employment, the business in which he was engaged, if any, at the time of the accident, the relative positions of the main and side tracks, the distance between the tracks, the nature of the ground next to the side of the track, the curvature of the track, if any, the train on the main track, and all the circumstances, whatever you find the circumstances to be; and if, under all the circumstances, you find that the plaintiff acted as an ordinarily reasonably prudent man would have acted, then he would not be guilty of contributory negligence; if you find that the plaintiff did not, under all the circumstances, act as an ordinarily prudent and careful man would have acted, then he must be deemed guilty of contributory negligence.

"In considering the case and arriving at a verdict it is your duty not to allow yourselves to be influenced or controlled by any consideration of feeling, passion, prejudice, or sympathy for or against either of the parties to the cause, nor will you be influenced or controlled by the fact that the defendant is a railroad corporation. It is your duty, and you are required under the law to try this case upon the law and the evidence as submitted to you here, and to try this case the same as if the parties to this suit were individuals. If you find that the plaintiff is entitled to a verdict, it will then be your duty to assess the damages the plaintiff has sustained by reason of the injury, and you have the right, when assessing the damages, to take into consideration the bodily pain and suffering the plaintiff has already undergone and will hereafter suffer on account of the injuries received, also the loss of power to perform labor and duties which he would be called upon to perform in his condition of life, and the impairment of his capacity to earn money, and the bodily and mental suffering to which the plaintiff will be subjected on account of the deformity occasioned by the loss of his limbs; and if,

after considering all of these elements of damages, you conclude that the plaintiff is entitled to recover, it is your duty to determine the sum that, in your judgment, will compensate plaintiff for injuries he received, not exceeding the amount asked for in the complaint. You are the exclusive judges of the credibility of the witnesses testifying in this case, and it is for you exclusively to determine the facts which are to be decided in this case. * * * Last Thursday you were taken to view the scene of the injury to the plaintiff. That was done for the purpose of enabling you to understand better and more clearly, if possible, the evidence that might be adduced here at the trial by witnesses testifying upon the witness stand; and, in determining the issues which are to be tried by you, you should so take and consider the evidence which has been offered here in the trial of this cause. * * *

A verdict was returned in plaintiff's favor for the sum of \$45,000, which was followed by a motion for a new trial, based upon various alleged errors occurring at the trial, prominent among which was "excessive damages, appearing to have been given under the influence of passion and prejudice." The motion was denied, on condition that plaintiff remit \$10,000 of the judgment, and file such remittitur within 20 days. To this plaintiff assented, leaving a judgment in his favor for \$35,000. Defendant appeals, assigning numerous errors, which will be considered in their logical order.

Wm. D. Fenton (R. A. Letter and John M. Pipes, on the brief), for appellant. Roger B. Sinnott and A. S. Bennett (Sinnott & Adams, Bennett & Sinnott, and A. C. Woodcock, on the brief), for respondent.

KING, J. (after stating the facts as above). At the close of the testimony offered on behalf of plaintiff defendant filed a motion for a nonsuit, alleging, as grounds therefor, that plaintiff had not proved a cause sufficient to be submitted to the jury, and that there was no evidence of any negligence on the part of the defendant, but that plaintiff was guilty of negligence contributing thereby to the cause of the injury, which motion was denied by the court. This was followed by the introduction of testimony on the part of defendant, and at the close of all testimony offered at the trial counsel for defendant renewed their motion for a nonsuit, and in addition thereto interposed a motion for a directed verdict in defendant's favor, based upon substantially the same grounds, both of which were overruled. This presents the question as to whether, taking the evidence as a whole, sufficient facts were proved to entitle the cause to be submitted to the jury. The testimony, together with the admitted facts bearing upon the points raised by the motion, when viewed in the light of inferences most favorable to plaintiff which the

jury was entitled to give it (*Kunz v. Oregon R. R. & N. Co.*, 51 Or. 191, 205, 93 Pac. 141, 94 Pac. 504), established the following facts:

Plaintiff, at the time of the accident, was 34 years old, in good health, and for 23 days had been and was in the employ of defendant as "timekeeper, and as a general man around, going for orders, and writing the amount of work done through the day, class of work," etc. It also appears to have been his duty, as assistant to the person in charge, to see that the men kept at work. Until he entered defendant's employ his experience, in connection with railways, was limited to that of conductor on one of the electric lines in Chicago. At the time of the casualty he had worked about three days in the immediate vicinity thereof as timekeeper, etc., of a "gang" of 40 men, being at a place called "Divide," on the boundary line between Douglas and Lane counties. At this point there were side tracks covering a distance of a half mile or more, used for the purpose of facilitating the operation and passage of trains running between Portland and San Francisco, near the south end of which was a turntable. The men were at various places along the tracks in a southerly direction from the main switch for a distance of about 1,100 feet, and, by the aid of what is termed "push cars," were distributing gravel along and between the tracks and rails, pushing the gravel under the ties, and doing various other kinds of work connected with the improvement of the tracks. It was essential to the accuracy of "timekeeping" that plaintiff frequently count the men to ascertain if any were missing, requiring a constant watch over the employes, who by reason of their occupation were continuously moving from place to place, making it incumbent upon plaintiff, while thus engaged, to move on and about the tracks.

Plaintiff went to work about 7 o'clock on the morning of the 24th, at which time a freight train arrived from the direction of San Francisco. This train was drawn by two engines, one of which was what is known as a "helper," and stopped for the purpose of leaving the "helper" at that place. The helper engine was uncoupled and moved onto the side track. The train then proceeded northerly towards Portland, while at the same time the helper engine, for the purpose of being reversed, moved southerly in the direction of the turntable. Plaintiff at the time had not noticed the extra engine, and, having no knowledge of its being left there, or of its being on the side track, stepped upon the side track and proceeded to walk southerly thereon, but before so doing looked in each direction, at which time he could not see the engine; the track being clear. Owing to the slight curvature in the track and the moving train, his vision in the direction from which the engine came was limited to a distance of about 200 feet. In this connection plaintiff, on cross-examination, further testified: "Q.

Why didn't you turn around and look? A. I could see the way I did. Q. Could you see all the way up to the switch? A. Not when the freight was there. Q. How far up could you see? A. There was a curve there. Q. How far could you see? A. I don't know the exact distance. Q. You could see 200 feet, couldn't you? A. Perhaps. Q. Don't you know that you could? A. Not the exact feet I don't. Q. Could you see when you turned your head sidewise? A. I turned partly around. Partly my head and partly my body. Q. Did you turn your body? A. I don't know exactly. I turned enough to know there was nothing coming. Q. When you looked, Mr. Doyle, whenever you did look, there was no engine in sight? A. No, sir. Q. What made you look. A. I was looking around. I was always taking precautions, looking around. I looked around. Q. You didn't expect the engine to come down the track? You never heard of one coming down before? A. No, sir. Q. Well, what made you look? A. That is, only I looked around everywhere."

The space between and on the outside of the tracks at that time was in such condition that he could not well have walked there, leaving the track, on which he was run over, the only reasonably convenient place in which to be while in performance of the duties devolving upon him. The train on the main track had started toward Portland; its arrival and presence had disconcerted his count of the men by scattering them, leaving them on different sides of and at various points along the tracks, and it was for the purpose of resuming his count and general lookout for the employes that plaintiff was proceeding upon the track in the vicinity of and among the men. In his three or four days' service at that place, plaintiff had seen no "helper" engine on the switch, and, as before stated, did not know one was to run upon it at that time. Before starting to walk down the side track he looked to see if any trains were coming in either direction, and after looking around "everywhere" a time or two, as he was in the habit of doing, to see if any train was in sight, but seeing none, and after walking a few steps, the helper engine, moving at the rate of between 20 and 40 miles an hour, without those in charge seeing any one upon the track, and without ringing the bell or otherwise giving any alarm, backed down the side track in the direction in which plaintiff was moving, running over him and injuring him in such a manner as to require the amputation of both his legs above the knees and near the hips.

It is ably argued by defendant's counsel that, notwithstanding the testimony tends to establish the facts above stated, plaintiff is not, as a matter of law, entitled to recover. In this connection it is maintained, among other things, that plaintiff at the time of receiving the injury was not where his employment called him, that he should have been on

the side of one of the tracks, or between the tracks, out of the way of danger, and that, the accident having occurred on a side track at a country siding, negligence on the part of the company cannot be predicated upon the rate of speed at which the engine was moving, or of the failure to provide or keep a sufficient lookout, or to give any signal of its approach. This position, however, is fully met and decided adversely to defendant's contention in *Rush v. Oregon W. P. Co.*, 51 Or. 519, 526, 95 Pac. 193. In that case it was urged that the plaintiff therein could have avoided the accident by being on the other side of the train; the work there, as here, requiring the exercise of judgment and discretion, and it was held a question for the jury to say whether defendant was negligent in selecting the side of the train, the exercise of which choice occasioned the injury.

In the outset of defendant's main contention it will be noted that when the accident occurred the engine was backing down upon the side track, not upon the main line, and that plaintiff was not in any sense a trespasser, but was working at the time and place where his duties called him. Each of these features have an important bearing on whether defendant was negligent, and the degree of care required of each of the parties hereto. As to whether plaintiff, in walking where he did, acted as a reasonable, prudent, and industrious man, engaged in the faithful performance of his duties, should have done, and whether the acts complained of constituted negligence on the part of the defendant, such as the rate of speed, failure to ring the bell, and lack of diligence in providing for and keeping a proper lookout for and on behalf of employes on and in the vicinity of the track, we think was for the jury to determine. The principles covering the questions thus presented were fully considered and determined to the above effect in the following decisions, and authorities collated therein. *Rush v. Oregon W. P. Co.*, 51 Or. 519, 526, 95 Pac. 193; *Hill v. Saugasted*, 53 Or. 178, 184, 98 Pac. 524; *Russell v. Oregon R. & N. Co.*, 54 Or. 128, 102 Pac. 619; *Abel v. Coos B. R. & E. R. & N. Co.*, 54 Or. 188, 192, 102 Pac. 796; *Bigelow v. Columbia Gold Min. Co.*, 54 Or. 452, 458, 103 Pac. 56; *Laury v. Northern Pac. Ter. Co.*, 56 Or. —, 105 Pac. 881; *Norwich Ins. Co. v. Oregon R. R. Co.*, 46 Or. 123, 132, 78 Pac. 1025. Owing to the large number of men, and dangers incident to frequent switching of trains among them, as claimed by defendant, and in view of the fact that it was often necessary to back the engine over the tracks, by reason of which the tender obstructed the view of the engineer and fireman in charge, the question whether an outlook should not temporarily have been maintained by some one upon the tender of the engine, or elsewhere in the immediate vicinity of the employes, for the purpose of avoiding accidents, for the few days the gang of men was working there, was for the jury,

and comes within the principles enunciated on this subject in *Laury v. Northern Pac. Ter. Co.*, *Russell v. Oregon R. R. & N. Co.*, above cited, and *Schleiger v. Northern Pac. Ter. Co.*, 43 Or. 4, 72 Pac. 324.

This brings us to a consideration of plaintiff's averred negligence. The question to be determined in that connection is whether the proximate cause of the injury was occasioned by defendant's negligence, or whether it resulted from the negligence of plaintiff. "The proximate cause," says Mr. Buswell, in his work on *Personal Injuries* (2d Ed.) § 97, "is to be defined generally as the cause which leads to, or might naturally be expected to produce, the result." The evidence tends to show that defendant was running between 20 and 40 miles an hour, and the jury could, under the statements of the various witnesses on the subject, have found the speed to be the maximum stated. It further appears that the bell was not rung, nor the whistle sounded, indicating that the plaintiff was not observed upon the track, and disclosing the necessity of defendant providing for a special lookout in such instances. Plaintiff's vision down the track, in the direction from which the engine came, was limited to about 200 feet. But a few seconds elapsed after plaintiff looked in that direction until he was struck. The engine's usual speed under such circumstances, as testified to by witnesses for the defense, was from five to eight miles an hour. Taking the maximum speed allowed when switching on side tracks, as in this instance, and in view of the number of men scattered along and in the vicinity thereof, this maximum would seem a reasonable limit. The time required to run 200 feet at such a rate would be approximately 17 seconds, or if going 40 miles an hour, between 8 and 4 seconds. Had the time been 17 seconds, it is probable that plaintiff, under the showing made, would have looked at least once, if not oftener, during that interval, and accordingly would have noticed the engine approaching, and thereby escaped injury. But with the high speed testified to, in order to have been reasonably safe, he would have been required to look every two or three seconds, making it necessary for him to stop work during the switching and passing of trains in that vicinity, and his usefulness thereby proportionately impaired. If 40 miles an hour under such circumstances, or even half that rate, were reasonable, then it might have been negligence in plaintiff not to have ceased work, but, as indicated, such rate was not within the rules or custom of defendant. Plaintiff, presumably, was desirous of retaining the good will of his employers, fulfilling without unnecessary interruption the duties assigned to him; and therefore, while working there and in that vicinity, entitled to be upon the track, with his safety provided for. Defendant's engine was where it had a right to be, and

plaintiff was where his duty called him, and he had a right to assume that defendant's employes in charge of the engine or trains would properly perform the duties resting upon them, and not needlessly or recklessly expose him to danger by the improper movement of cars or engines in their charge, or under their control. *Sorenson v. Oregon W. P. Co.*, 47 Or. 24, 32, 82 Pac. 10. An employe of a railway company assumes all reasonable risks incident to his employment, but since the adoption of the fellow servant act, *upheld in the case last cited*, he does not necessarily assume all risks resulting from the negligence of his co-employes; and, in the event of such negligence, if the proximate cause of an injury occasioned thereby, he is entitled to recover. The burden of proving contributory negligence was on the defendant (*Jackson v. Sumpter Valley Ry. Co.*, 50 Or. 455, 458, 93 Pac. 356), and as held in *Elliff v. Oregon R. & N. Co.*, 53 Or. 66, 76, 99 Pac. 76, whether the injury to plaintiff would have happened but for the negligence of the defendant in failing to keep a proper lookout for, or to warn him, or on account of the recklessness of its agents, or whether it was due to the plaintiff's neglect, is, under the most favorable view to the defendant, problematical, "and, in cases of doubt as to which of several probable causes produced a hurt, the case should be submitted to the jury for their determination of the question." And the true test as to whether a case should be taken from the jury is often said to be whether, if the jury should find for the defendant, it would be incumbent upon the trial court to set the judgment aside and grant a new trial. While this is the usual way of expressing the rule, it means but little, for the same test must be applied in each instance, and this test is as stated in *McLeod v. Chicago & N. W. Ry. Co.*, 104 Iowa, 140, 142, 73 N. W. 615, in which it is said: "It is also well settled that when, in view of all of the facts and circumstances, the question of negligence is one as to which men may honestly differ, the case is one for the jury; and this is true also when the facts are not in dispute. It is only when the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence becomes a question of law for the determination of the court." Also, *Hedin v. Railway Co.*, 26 Or. 155, 161, 37 Pac. 540; *Hecker v. Oregon Ry. Co.*, 40 Or. 6, 66 Pac. 270; *Palmer v. Portland Ry. L. & P. Co.*, 56 Or. —, 108 Pac. 211; *Donahue v. Portland Ry. Co.*, 56 Or. —, 107 Pac. 964; *Railway Co. v. Ives*, 144 U. S. 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Railroad Co. v. Powers*, 149 U. S. 45, 13 Sup. Ct. 748, 37 L. Ed. 642; *Stewart v. Sixth Ave. R. Co. (C. C.)* 45 Fed. 21; *Boston & M. R. Co. v. McDuffey*, 79 Fed. 934, 940, 25 C. C. A. 247; *Illinois Cent. Ry. Co. v. Jones*, 95 Fed. 370, 387, 37 C. C. A. 106. Plaintiff may, in fact, have been negligent, and the jury might have so found, but under the circum-

stances disclosed it cannot be imputed to him as a matter of law merely because had he looked once more he would have seen the engine approaching; for the proper performance of his duties at that particular time may have directed his attention elsewhere (*Gentzkow v. Portland Ry. Co.*, 54 Or. 114, 124, 102 Pac. 614), and "In determining whether an employe has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion." *Kane v. Northern Central Ry.*, 128 U. S. 95, 9 Sup. Ct. 16, 32 L. Ed. 339.

A large number of authorities are cited in support of defendant's position, but an examination thereof discloses that, owing to the difference in the circumstances surrounding the accident in each instance, but few are in point. To illustrate, in the case of *Cogswell v. Oregon & C. R. R. Co.*, 6 Or. 417, 425, deafness was held to have been the primary cause of the accident; *McBride v. Northern Pac. R. R. Co.*, 19 Or. 64, 23 Pac. 814, is to the effect that one, before crossing a track, must look and listen, and is not analogous to the case at bar, either in facts or complications presented; *Smith v. City Ry. Co.*, 29 Or. 542, 46 Pac. 136, 780, is cited as holding that negligence is presumed. This case, however, does not go to that length; it merely holds on this point that, from a state of facts established, negligence could be inferred or be presumed, thus manifestly not in point. In *Brunell v. Southern Pac. Co.*, 34 Or. 256, 56 Pac. 129, the accident occurred through the negligence of plaintiff, coupled with the gross negligence of a fellow servant, for whose acts defendant, under the law then in force, was not liable. *Hecker v. Oregon R. R. Co.*, 40 Or. 6, 66 Pac. 270, so far as it has any application to the questions here involved, is against defendant's contention. The great majority of the cases cited from other states are where the accidents occurred at crossings, or where the party injured was a trespasser, or strangers traveling along, or on the track for their own convenience, or instances where the party injured was in no way connected with the defendant, and had no occasion to be upon the railway track; and there is a vast difference between cases of that class and the one under consideration. The same strictness to look and listen is not required of railway employes upon and working along a railroad track as is demanded of persons crossing the railway, or those upon the track as trespassers, and not in the railway's employ. As said by Mr. Chief Justice Kinne, in referring to the plaintiff in *McLeod v. Chicago & N. W. Ry. Co.*, 104 Iowa, 140, 144, 73 N. W. 615: "Had he been a mere trespasser or a stranger to the defendant, passing along the track in a place of danger for his own convenience, there can be no doubt that his failure to look

would, under such circumstances preclude his recovery. But the same rule does not obtain as to an employé who is engaged in the discharge of his duty; that is, it cannot be said that an employé, passing along the side of the track in the performance of a duty enjoined upon him, is in duty bound to look and listen for an approaching engine or train to the same extent, or with the diligence of a traveler at a crossing." And in discussing the facts in that case, which in part are analogous to those presented here, it is also observed: "Can it be said that honest men, considering all of the evidence fairly, would reach but one conclusion, and that, that defendant was not negligent, or, if it was, that plaintiff was guilty of contributory negligence? It occurs to us that there was much evidence tending to establish the defendant's negligence. It was, as the evidence shows, the duty of the employés operating the switch engine to be on the lookout for employés on or near the tracks, and to warn them of the approach of the engine by ringing the bell, blowing the whistle, or in some other manner to notify them of its approach. The bell was not rung, nor the whistle sounded, nor was the plaintiff in any way warned of the approach of the engine. In view of this and other evidence, it cannot be said that honest men must reach the conclusion that the defendant was not negligent. Therefore the question of the defendant's negligence was not one of law for the determination of the court." See, also, *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Palmer v. Portland Ry. Co.*, 56 Or. —, 108 Pac. 211, decided at this time, where the same point is considered.

In *Bucklew v. Railway Co.*, 64 Iowa, 608, 21 N. W. 105, 106, the court, in referring to a railway employé engaged in the performance of his duty, observes that, if "absolutely required to look and listen for approaching trains or unexpected movements of the train in his charge, his usefulness would be greatly impaired. We think the question as to the duty of such employé to look and listen for the movements of trains before he steps or walks on the track must be left for the jury to determine." So in *Baltimore & O. S. Ry. v. Peterson*, 156 Ind. 364, 373, 59 N. E. 1047, the court observes: "The rule which exacts of a traveler or other person about to cross a railroad track the caution to look in both directions, and also to listen in order to ascertain if a train is approaching, is not applied in all its strictness to workmen engaged in the line of their duty at work upon a railroad track. * * * Appellee's intestate is shown to have been rightfully upon appellant's track at the time of the accident, engaged as its servant at his post of duty, and he had a right to assume that appellant, in the movement of its trains, would be controlled by the requirements of the ordinance in controversy. The mere fact that he was upon the track in the discharge of his duty,

and may have failed to look and listen for approaching trains, did not, under the law, constitute negligence per se. Such omission may or may not be negligence under the particular circumstances of a case, but of this fact the jury must be the judge." To the same effect see *Farley v. Chicago, R. I. & P. R. Co.*, 56 Iowa, 337, 9 N. W. 230; *International & G. N. Ry. Co. v. Villareal*, 36 Tex. Civ. App. 532, 536, 82 S. W. 1063; *Jordan v. Railroad Co.*, 58 Minn. 8, 59 N. W. 633, 49 Am. St. Rep. 486; *Omlinger v. Railroad Co.*, 4 Hun (N. Y.) 159.

A few of the cases cited from other jurisdictions appear to sustain appellant's contention, but, being at variance with the well-settled principles upon the subject heretofore announced by this court, they must be disregarded. The case of *Morris v. Boston & Maine R. R.*, 184 Mass. 368, 68 N. E. 680, appears to support defendant's theory herein. In that case the plaintiff, in order to perform the duties devolving upon him, was required to work in such position and locality as to be in danger from passing trains. Another place less dangerous, within a few feet of the point where struck, was possible, as in this case and in *Rush v. Oregon W. P. Co.*, hereinbefore cited, and as appears in practically all cases of this character; but the decision is not predicated upon that ground alone. In referring to the accident in the case of *Morris v. Boston & Maine R. R.* the court observes: "Only a moment after he looked both ways, the engine, with the snowplow, came round the curve without sounding the whistle or ringing the bell, coasting down a grade of 60 feet to the mile, with steam shut off, and he was struck by it or by the snow it threw off." And, notwithstanding the evidence disclosed that the plaintiff had looked immediately before, and saw no train, the court held him guilty of contributory negligence, and, because he was not looking at the moment when the train suddenly came in sight, reversed the judgment entered in his favor. In other words, to have been free from such negligence and entitled to recover, the plaintiff, whose work required him to be in a stooping posture, would necessarily have been compelled to do no work at all, but to stand patiently from morning until night, watching for trains; the absurdity of which is obvious. The holding in that instance, based upon precedents formerly established in that state, as well as decisions of like import cited from one or two other jurisdictions, are not only at variance with the decided weight of authority, but so clearly inconsistent with the fundamental principles of reason and justice that they should be deemed of little, if any, weight as precedents, outside of the jurisdictions where rendered. In any event, the decisions of this court uniformly hold to a different view. In the light of all the circumstances surrounding the casualty in question,

as presented by the record, we are of the opinion that ample testimony was adduced to entitle the cause to be submitted to the jury. The motions for nonsuit and to direct a verdict were properly denied.

It is argued that the court erred in permitting the plaintiff, during the progress of the trial, to amend his complaint by adding to the third paragraph the clause: "And negligently and carelessly failed and neglected to keep a sufficient or any lookout for persons upon the track, and especially for this plaintiff and other employees likely to be upon the track." The averments preceding it were to the effect that defendant was negligent in causing its engine to be run at an unsafe and unnecessarily high rate of speed, "and carelessly and negligently failed to give the plaintiff, or the other men employed in the vicinity, any signal or warning of the danger or the approach of the said engine." This amendment is not a new or additional cause of action. A cause of action consists of that which produces the necessity for bringing action. Words and Phrases, vol. 2, p. 1015. The primary cause for the institution of the proceeding here was the injury occasioned by the alleged negligence of defendant; and, in addition to making the averments respecting negligence more definite and certain, this averment merely supplements the cause of action previously alleged with the charge of another act of negligence, without in any wise changing the original cause of action, or adding another thereto, the granting of which was within the discretion of the trial court. In this holding we are sustained by the following decisions upon the subject: *Osgood v. Osgood*, 35 Or. 1, 7, 56 Pac. 1017; *Davis v. Hannon*, 30 Or. 192, 46 Pac. 785; *Jester v. Lipman*, 40 Or. 408, 410, 67 Pac. 102; *Ridings v. Marion Co.*, 50 Or. 30, 91 Pac. 22. The foregoing considerations dispose of assigned errors 1 to 15 inclusive.

The sixteenth error complained of was in the refusal of the court to instruct, as requested, that: "Even if the fireman or engineer had seen Doyle standing in the track, they would have the right to assume that he would get out of the way in time to avoid being struck." We think the instructions given were sufficiently clear upon this and other points presented, and that no prejudice resulted in the refusal to give the instruction. The instructions given are as favorable as defendant could expect under the law, and whether any part thereof was erroneous as respects plaintiff's rights is not involved, and we express no opinion thereon.

The seventeenth assignment of error concerns the refusal of the court below to set aside the judgment and grant a new trial. The first point intended by this assignment relates to certain remarks alleged to have

been made by plaintiff's counsel in the oral argument before the jury. The record contains affidavits of one of the attorneys for defendant in support thereof, with countervailing affidavits by one of the opposing counsel. The issues thus presented were considered by the trial judge, who heard the argument, and who was therefore in better position than this court to determine the sufficiency thereof. We find nothing in the record which would justify us in holding that the court abused its discretion in denying the motion on that account; and the same may be said concerning the point raised by the motion in reference to the juror complained of. *State v. Powers*, 10 Or. 145, 45 Am. Rep. 138.

The next and last error assigned concerns the alleged excessive judgment, which it is insisted should be reviewed by this court. It has been settled by numerous decisions in this jurisdiction that damages assessed by a jury will not be disturbed on appeal. After hearing the entire trial, carefully considering the affidavits presented in support of the motion, and finding that in its opinion the jury was not acting from the standpoint of passion or prejudice or any undue influence of any kind, the trial court was of the opinion that the damages allowed were excessive, but denied, as it had a right to do, the motion for new trial, on condition that plaintiff remit all in excess of \$35,000, which was done. It is settled in this state that error cannot be predicated upon a refusal of a trial court to unconditionally set aside a verdict on account of excessive damages. *Sorenson v. Oregon W. P. Co.*, 47 Or. 24, 33, 82 Pac. 10.

The judgment is affirmed.

(56 Or. 262)

PALMER v. PORTLAND RY., LIGHT & POWER CO.

(Supreme Court of Oregon. April 26, 1910.)

1. TRIAL (§ 165*)—MOTION FOR NONSUIT—REVIEW OF EVIDENCE.

The court, on motion for nonsuit, must view the testimony in the light most favorable to plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 374; Dec. Dig. § 165.*]

2. STREET RAILROADS (§ 81*)—OPERATION—CARE REQUIRED.

More care is essential to the proper operation of street cars than is usually required on the part of steam railroads.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 172; Dec. Dig. § 81.*]

3. STREET RAILROADS (§ 85*)—OPERATION—RECIPROCAL RIGHTS.

The rights of travelers on a street on which street cars are operated, and the right to operate street cars, are reciprocal; and the travelers and the car men must act with due regard for the rights of others, and the public

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

may assume that in the operation of the cars municipal ordinances will be observed.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 193, 195; Dec. Dig. § 85.*]

4. STREET RAILROADS (§ 117*)—OPERATION—NEGLIGENCE—QUESTION FOR JURY.

Whether the moving of street cars at a greater speed than permitted by a municipal ordinance is negligence is for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 247; Dec. Dig. § 117.*]

5. NEGLIGENCE (§ 56*)—"PROXIMATE CAUSE."

"Proximate cause" is defined generally as the cause which leads to or may naturally be expected to produce the result.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5758, 5769; vol. 8, p. 7771.]

6. STREET RAILROADS (§ 117*)—COLLISION—NEGLIGENCE—QUESTION FOR JURY.

Whether there was negligence in the operation of a street car which ran into a traveler and injured him *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 246; Dec. Dig. § 117.*]

7. STREET RAILROADS (§ 117*)—COLLISION—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a traveler, injured in a collision with a street car while attempting to cross the street in front of the car, was guilty of contributory negligence in failing to look for the approaching car immediately before attempting to cross the track *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 248, 249, 255; Dec. Dig. § 117.*]

8. STREET RAILROADS (§ 112*)—INJURIES TO TRAVELER — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF.

The burden of proving contributory negligence of a traveler, struck by a street car while attempting to cross the track in front of an approaching car, is on the street railroad.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 228; Dec. Dig. § 112.*]

9. NEGLIGENCE (§ 136*)—PROXIMATE CAUSE—QUESTION FOR JURY.

Where the proximate cause of an injury is problematical, the case must be submitted to the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 292, 297, 300, 327; Dec. Dig. § 136.*]

10. STREET RAILROADS (§ 113*)—INJURIES TO TRAVELER — NEGLIGENCE—EVIDENCE—CITY ORDINANCE.

In an action for injuries to a traveler in a collision with a street car running at an excessive rate of speed, the ordinance fixing the maximum speed and the evidence offered in connection therewith to show the speed limit in the city, are admissible.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 237; Dec. Dig. § 113.*]

Moore, C. J., dissenting.

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

Action by Laura Palmer against the Portland Railway, Light & Power Company. From a judgment of nonsuit at the close of plaintiff's testimony, she appeals. Reversed, and new trial ordered.

This is an action for damages sustained by plaintiff by reason of injuries inflicted in a collision between an electric car, operated on defendant's street railway in the city of Salem, and a single buggy, drawn by one horse, in which plaintiff was riding. The evidence tends to show that, just before the accident, plaintiff and her husband drove down High street to the intersection with State street, and then turned easterly up State street, with the intention of turning south at Cottage street, a distance, approximately, of 800 feet from High street. When the buggy turned east at High, plaintiff saw defendant's car standing still, about 450 feet west. The buggy was driven at a speed of about nine miles an hour up State street, parallel with the north rail of defendant's track, and about four feet therefrom. Plaintiff's husband was driving, but she was directing his movements and keeping watch for the approach of street cars. There is no evidence showing at what moment, after plaintiff first saw the car, it was put in motion, but she testified that, when the buggy reached Church street, she again looked, and noticed that the car was from a block and a quarter to a block and three-quarters behind the buggy, or between 400 and 600 feet distant. After passing, but near, the center of the next block, she saw that the car was behind them "about" three-quarters of a block, a distance of approximately 250 feet. Proceeding from this point to the intersection of Cottage and State streets, less than half a block, she directed her husband to turn south on Cottage street. She did not at that moment look or listen for the approaching car, nor was the speed of the horse slackened, and when they turned to cross the track they perceived the car within 40 feet of the buggy, running at a great speed, probably 20 miles an hour, at which moment the horse's front feet were on the car track. The driver attempted to swing his horse to the left to avoid the accident, but the car struck the rear of the buggy, shattering it, and throwing plaintiff to the ground and injuring her. The car, as the evidence tends to show, was a penitentiary car, used for conveying convicts to and from their work, and no bell was rung, nor any signal whatsoever given of its approach. Plaintiff testified that she was familiar with the speed and manner in which street cars were usually operated in Salem, and there was other evidence tending to show that the speed attained by the car in question was much greater than usual, and about 20 miles an hour. Plaintiff offered in evidence the ordinance, granting the street railway franchise to defendant's grantor, which provides that cars should not be run at a greater speed than 10 miles an hour, but this evidence was rejected. It was shown that State street is 99 feet wide, that the car track is practically in the center of the street, and that there

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were no wagons or other vehicles in the vicinity when the accident occurred. At the conclusion of plaintiff's testimony, the court granted a nonsuit, and she appeals, assigning as error the sustaining of defendant's motion for nonsuit and exclusion of evidence showing defendant to have been operating under an ordinance, limiting the speed of cars within the corporate limits of the city of Salem to 10 miles an hour.

John A. Carson (Carson & Brown, on the brief), for appellant. Franklin T. Griffith (Geo. G. Bingham, on the brief), for respondent.

KING, J. (after stating the facts as above). To test the sufficiency of the proof under a motion for nonsuit, the testimony must be viewed in the light most favorable to plaintiff. *Kunz v. O. R. & N. Co.*, 51 Or. 191, 205, 93 Pac. 141, 94 Pac. 504. Some of the witnesses testified to the effect that the car was running about 20 miles an hour. Plaintiff testified that, when opposite the courthouse corner, the car was not less than a block and a quarter, or a distance of about 440 feet to their rear; that after driving to a point near the center of the next block, in front of the post office, she again looked, at which time the car was at least three-fourths of a block distant; that she supposed it was running at the regular rate of speed, the limit of which is fixed by ordinance at 10 miles an hour, and that after looking the last time the buggy was driven to the intersection of Cottage street, or about 150 feet, before attempting to cross the track.

It is too well-settled to admit of serious discussion that more care is essential to the proper operation of street cars than is usually required on the part of steam railways. The rights of travelers upon the streets, whether in vehicles or otherwise, are reciprocal; all must act with due regard for the rights of others. The public has the right to assume that at least the requirements of municipal ordinances will be observed; and the question as to whether the moving of cars at a greater speed than permitted by law constitutes negligence is for the jury. *Beck v. Vancouver Ry. Co.*, 25 Or. 32, 34 Pac. 753; *Wolf v. City Ry. Co.*, 45 Or. 457, 72 Pac. 329, 78 Pac. 688; *Donohoe v. Portland Ry. Co.*, 56 Or. —, 107 Pac. 964. It is held in *Donohoe v. Portland Ry. Co.* that "it must appear that, although the defendant was negligent, the injury was caused by the unlawful speed, without contributory negligence of the person complaining, which was the proximate cause of the injury." But, in this instance, it is manifest that had defendant's car not exceeded the reasonable rate of speed prescribed by ordinance, which plaintiff had a right to assume, no collision would have occurred. As stated in *Buswell on Personal Injuries* (2d Ed.) § 97, quoted with approval in *Elliff v. O. R. & N. Co.*, 53 Or. 66, 76, 99 Pac. 76, 79:

"The proximate cause is to be defined generally as the cause which led to or might naturally be expected to produce the result." Now, applying this rule, let it be remembered that plaintiff had a right to travel upon the street, and near to, or even upon, the track, and to cross the street at any suitable point, especially at a crossing, as attempted on this occasion, and defendant had a like right to be upon its track thereon; each being required to be reasonably prudent in the exercise of their respective privileges. But, as shown, there was ample evidence from which the jury could find that defendant was negligent; and, whether plaintiff was also reckless, and thereby contributed to and was the proximate cause of the collision, depends upon whether she used due diligence in watching the approaching car before attempting to cross the track, or looked in sufficient time to come within the usual prudential requirements.

After looking, and before attempting to cross the track, plaintiff traveled 150 feet; this distance, according to the effect of the testimony adduced in her behalf, was covered in 10 to 11 seconds. Had the car, during that space of time, not exceeded the maximum rate of speed of 10 miles an hour, it would have traveled approximately 160 feet. When plaintiff last looked the car had about 400 feet to run before it could overtake them; therefore, when they attempted to cross the street, they were entitled to assume that the car was about 240 feet to the rear, thus giving them about 15 seconds in which to cross the track before the possibility of a collision. Hence there was no real necessity to look again, unless it was incumbent upon them to take notice, or to presume that the defendant was violating the ordinance by running at a reckless speed. The evidence does not justify such an assumption, and that a person should so presume is never required. True, many persons, before attempting to cross the track under such circumstances, might have looked again, but whether a failure so to do, when the car could reasonably have been expected to be from 230 to 240 feet distant, with at least 15 seconds in which to drive less than 20 feet (when at the rate they had been driving they could have covered 225 feet), is certainly a matter concerning which reasonable minds may differ, necessitating a submission thereof to the jury.

It also appears that had the car been under proper control, and not going at an unreasonable speed, it could have been stopped in time to prevent a collision; thus supplementing the plaintiff's proof, tending to establish as a question for the consideration of the jury that defendant's negligence was the primary cause of the accident. *Donohoe v. Portland Ry. Co.*, 56 Or. —, 107 Pac. 964; *Kunz v. O. R. & N. Co.*, 51 Or. 191, 205, 93 Pac. 141, 94 Pac. 504. The burden of proving

contributory negligence is on the defendant. *Gentskow v. Portland Ry. Co.*, 54 Or. 114, 120, 122, 102 Pac. 614. And, as held in *Elliff v. O. R. & N. Co.*, 53 Or. 66, 76, 99 Pac. 76, where the proximate cause of the injury is problematical, as certainly appears here, the case should be submitted to the jury. Or, as said by Mr. Justice Lamar in *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 682, 683, 38 L. Ed. 485: "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court." To the same effect, see *Hedin v. Railway Co.*, 26 Or. 155, 161, 37 Pac. 540; *Hecker v. Oregon Railroad Co.*, 40 Or. 6, 66 Pac. 270; *Webb v. Heintz*, 52 Or. 444, 447, 97 Pac. 753. See, also, *Doyle v. Southern Pacific Co.*, 56 Or. —, 108 Pac. 201, and authorities there collated on the subject. To affirm the judgment of the trial court would not only be at variance with the principles enunciated in the foregoing authorities, but manifestly inconsistent with the views announced and adopted in the following additional decisions by this court upon the subject: *Galvin v. Brown & McCabe*, 53 Or. 598, 608, 101 Pac. 671; *Crosby v. Portland Ry. Co.*, 53 Or. 496, 502, 100 Pac. 300, 101 Pac. 204; *Webb v. Heintz*, 52 Or. 444, 446, 97 Pac. 753; *Wolf v. City Ry. Co.*, 45 Or. 446, 457, 72 Pac. 329, 78 Pac. 668; *Geldard v. Marshall*, 43 Or. 438, 73 Pac. 330; *Shobert v. May*, 40 Or. 68, 66 Pac. 466, 55 L. R. A. 810, 91 Am. St. Rep. 453.

The learned court below erred in excluding the ordinance and proof offered in connection therewith for the purpose of showing the speed limitation prescribed by ordinance within the city, and in sustaining the motion

for nonsuit. The judgment will according be reversed, and a new trial ordered.

MOORE, O. J., dissents.

(56 Or. 269)

BOGARD v. BARHAN et al.

(Supreme Court of Oregon. April 26, 1910.)

1. DEEDS (§ 117*)—PROPERTY CONVEYED—CONVEYANCE OF BUILDING.

A conveyance of a particular building conveys by implication so much of the land upon which it is situated as is necessary to the use of the building.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 336; Dec. Dig. § 117.*]

2. SPECIFIC PERFORMANCE (§ 10*)—CONTRACT TO CONVEY.

Though an agreement erroneously described a larger estate or area than the vendor owned or intended to convey, he will be compelled to convey, and the purchaser to accept, any interest which the vendor had, when the purchaser knew and consented that only the interest actually possessed was the subject of the agreement, so that the fact that the written agreement was to convey a store building would not prevent a suit to compel specific performance by a conveyance of the first story thereof, where that was the part of the building owned by the vendor and intended to be conveyed.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 23; Dec. Dig. § 10.*]

3. TIME (§ 15*)—CONSTRUCTION—DATE.

When an instrument specified the month in which something is to be done, but omits the year, it is to be assumed, in absence of a contrary implication, that the month intended was that named next ensuing.

[Ed. Note.—For other cases, see *Time*, Dec. Dig. § 15.*]

4. SPECIFIC PERFORMANCE (§ 114*)—ACTIONS—PLEADING—ALLEGATIONS—TERMS OF CONTRACT.

In an action to compel specific performance of an agreement to transfer a store building, etc., and pay a certain sum in cash and give a note for another sum in consideration of the transfer of other property, it could be inferred from an allegation in the complaint that the cash payment was to have been made when the parties exchanged deeds that it was intended that the note should be given at the same time.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 357; Dec. Dig. § 114.*]

5. EXCHANGE OF PROPERTY (§ 4*)—CONTRACT—CONSTRUCTION.

Though a contract for the exchange of land did not provide the time when the note to be given as part of the consideration was to be executed, it will be held that the note was to bear the same date as the agreement to convey [citing 5 Words and Phrases, p. 4575].

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. § 4; Dec. Dig. § 4.*]

6. VENDOR AND PURCHASER (§ 75*)—CONTRACT—CONSTRUCTION.

Where a contract to convey provided that one party should pay a certain sum in cash as a part of the consideration, such sum was payable at all events within a reasonable time, if the time of payment was not stated in the contract.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 118; Dec. Dig. § 75.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

7. FRAUDS, STATUTE OF (§ 108*)—WRITING—SUFFICIENCY — STATEMENT OF CONSIDERATION.

A mutual agreement to exchange land is a sufficient consideration to sustain a contract under B. & C. Comp. § 797, making an agreement for the sale of realty void, unless it or some memorandum thereof expressing the consideration is in writing, and subscribed by the party to be charged.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 220; Dec. Dig. § 108.*]

8. SPECIFIC PERFORMANCE (§ 105*)—ACTIONS—DEFENSES—PREMATURE ACTION.

In a suit to compel specific performance of a contract to exchange property, an objection that the suit was brought before the property was to be delivered under the contract was untenable to defeat the suit where the deeds could be executed pursuant to the decree without compelling defendant to relinquish possession until the time he was to deliver possession under the contract; there being no plea in abatement of the suit on the ground of objection stated.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 325; Dec. Dig. § 105.*]

9. DEEDS (§ 59*)—DELIVERY—RECORD.

A deed not delivered to the grantee, but placed on record without her knowledge, passed no title.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 138; Dec. Dig. § 59.*]

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Action by Z. T. Bogard against A. Barhan and another. From a judgment for plaintiff, defendants appeal. Affirmed.

See, also, 52 Or. 121, 96 Pac. 673.

This is a suit by Z. T. Bogard against A. Barhan and C. Barhan to enforce the specific performance of a contract, of which the following is a copy, to wit: "Woodburn, Ore., June 16, 1906. This agreement made this date between A. Barhan, party of the first part, and Z. T. Bogard, party of the second part, witnesseth: That the party of the first part agrees to transfer to the party of the second part the following described property: The brick store building occupied by Beebe & Whitman located in Woodburn, Marion county, Oregon; also my 15-acre farm located one mile north of Woodburn, Marion county, Oregon; also to pay one hundred dollars cash and give my note for eight hundred dollars payable on or before eight years in payments of one hundred dollars each year with interest at the rate of 8% payable annually. For this the party of the second part agrees to transfer to the party of the first part his 5-acre residence property laying west of the Catholic Church; also lot 7 block 2 Tooze's addition to Woodburn. (Each party to bring abstract down to date.) And it is further agreed that the taxes on property of party of first part is to be assumed by party of second part and that on party of second part to be assumed by party of first part, and that party of second part is to occupy his residence property until Sept. 30th; and that party of first part is to occupy the 15-acre

farm until the party of the second part gives possession of his residence property. A. Barhan. Z. T. Bogard." A former decree herein was reversed for the reason that the attempted description of the premises, as stated in the complaint, was too indefinite to authorize the relief sought. *Bogard v. Barhan*, 52 Or. 121, 96 Pac. 673. The cause having been remanded, the complaint was amended so as specifically to designate each tract of land in question, the "brick store building" being described as "all that portion of lot 4 in block 1 of Woodburn, Marion county, Oregon, together with that portion of the first story only of the I. O. O. F. Building located thereon, which said portion of said lot is described as follows," giving the boundaries thereof. It is also alleged that A. Barhan stipulated to pay \$100 "when the said parties should exchange deeds, and to execute his promissory note," etc., as stated in the agreement; that on June 26, 1906, for the purpose of evading the terms of the contract and without any consideration therefor, he executed to his mother, the defendant C. Barhan, a pretended deed of the brick store building; and that, though the sealed instrument was never delivered, it was the next day copied in the records of deeds of Marion county, which simulated conveyance was a scheme to defraud the plaintiff. A demurrer to the complaint as amended on the ground that it did not state facts sufficient to constitute a cause of suit being overruled, an answer was filed admitting that the contract mentioned was signed by A. Barhan, but denying every other averment of the initiatory pleading. For a separate defense it is alleged that the negotiations which had been pending between him and plaintiff for the exchange of their respective tracts of real property were consummated June 14, 1906, but two days thereafter by mutual consent and upon a sufficient consideration the writing was changed so that instead of transferring "the brick store building," and giving a note for \$800, A. Barhan was to convey his residence property in Woodburn to plaintiff and to give him a note for \$400 payable on or before four years "from that date," in annual installments of \$100 each, with interest at the rate of 8 per cent. per annum, and that at all times he has been ready, able, and willing to perform his part of the altered contract. For a further answer it is alleged that neither of the defendants made or signed any agreement "expressing the consideration" concerning the sale of the real property or of any part thereof, as described in the complaint, or that they identified the premises in any manner. For a third defense, it is averred that prior to June 16, 1906, A. Barhan was indebted to his mother in the sum of \$1,275, with accrued interest, evidenced by promissory notes, and to secure their payment he executed to her a deed, absolute in form, but which was in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tended as a mortgage upon the brick store building, that she accepted this deed without knowledge of any claim by the plaintiff to the premises, and that the transaction was, without fraud. The reply having denied the allegations of new matter in the answer, the cause was tried, resulting in a decree as prayed for in the complaint, and the defendants appeal.

E. P. Morcom and Geo. G. Bingham, for appellants. John A. Carson and Thomas Brown, for respondent.

MOORE, C. J. (after stating the facts as above). In the former opinion in this cause it was determined that the description set forth in the contract, if properly delineated in the complaint, was sufficient to authorize the admission of parol testimony to identify the premises. *Bogard v. Barhan*, 52 Or. 121, 96 Pac. 673. From a re-examination of the question so involved, we are satisfied that the conclusion correctly states the law applicable thereto. *Burns v. Witter*, 108 Pac. 129.

Several objections are now urged against the sufficiency of the contract that were not entertained at the prior trial. These matters will be considered in the order in which they occur in the memorandum. Thus it is insisted that the specification, "the brick store building," does not describe any land, and for that reason an error was committed in decreeing a conveyance of the premises occupied by the structure, or of any real property, for the contract was entire, and the insufficiency of any of its terms necessarily defeats the whole agreement, since the premises to be exchanged by the respective parties were treated by them as indivisible. The doctrine first asserted is untenable; for, as is said by an author, "courts have frequently decided that a conveyance of a building or barn used as a term of description will convey also the land upon which the building or structure may be erected." *Devlin on Deeds*, § 1200. In the section following that to which notice is attracted it is observed: "But only so much of the land as is necessary to the use of the structure will pass by implication by a conveyance of the structure itself," etc. It will be remembered that, though the memorandum refers to "the brick store building," etc., the complaint specifically describes the supporting real property, and alleges that only the first story of the building is involved in this suit. It is maintained that such discrepancy is so great as to defeat a specific performance of this part of the contract in decreeing which an error was committed. Though an agreement erroneously describes a larger estate or a greater area than the vendor owned or intended to convey, the purchaser will be compelled to accept such interest or superficies when he had knowledge thereof and consented that only the title or extent of land then actually possessed by the vendor was the subject of their consummated negotiations. *Pomeroy, Cont. (2d Ed.)* §

346. The rule thus announced is equitable and must be similarly applicable to each party who seeks specifically to enforce a contract to convey a building; and, as the complaint alleges and the evidence shows that only the lower story of the structure mentioned and the real property covered thereby were intended to be conveyed, no error was committed as alleged.

It is contended that the contract in question does not indicate when the sum of \$100 in cash referred to in the memorandum was to have been paid, or the note for \$800 given, or specify what year on "September 30th" thereof Bogard was to surrender the possession of his residence property, under which circumstances the writing is too indefinite, and the court erred in its decree. Considering these matters in their reverse order, the rule is well settled that, when a month is specified in a written instrument which omits to state the year intended, it will be inferred, in the absence of any implication to the contrary, that it is the designated month then next ensuing. *5 Words & Phrases*, 4575. It will be recalled that the complaint states that the \$100 in cash was to have been paid "when the said parties should exchange deeds," and it is fairly to be inferred from such averment that it was intended the note for \$800 should have been given at the same time. Although no testimony was offered on this subject, since the contract was received in evidence showing that it was executed June 16, 1906, we think the note was to have been dated the same as the agreement. This conclusion seems to be supported by the averments of the answer, which state that by the modified agreement the \$400 referred to therein was to have been paid "on or before four years from date"; that is, from June 16, 1906. In any event, however, the \$100 mentioned was to have been paid in cash within a reasonable time, which has certainly elapsed since the subscription of the contract. At the trial testimony was given respecting the alleged modification of the agreement, but we think it satisfactorily appears that the only change made after the contract was signed related to the abstracts of the respective parties, which clause, by mutual consent, was mutilated by drawing a line through it, but is hereinbefore set out in full, though in parentheses.

There is no merit in the allegation of the answer that the memorandum in question is void for failure to express a consideration, as required by enactment. *B. & C. Comp. § 797*. It will be kept in mind that the agreement specified that the land of the respective parties was to have been exchanged. This statement shows a legal quid pro quo, and hence asserts a sufficient inducement to satisfy the requirement of the statute.

As possession of a part of the premises was not to have been delivered until "September 30th," it is argued that, if the year omitted from the memorandum was intended to be

1906, this suit was commenced prior thereto, and therefore prematurely brought, for which reason an error was committed in rendering the decree. No plea in abatement was interposed or objection urged on the ground now asserted to defeat the maintenance of this suit, and, as the execution of the deeds is the relief sought, such redress could have been granted without a relinquishment of the possession of a part of the land until the time therefor had arrived.

We conclude, therefore, that the suit was properly instituted; that the agreement is not void for uncertainty, either as to the description of the premises or the time for the performance of the conditions; and that the parol testimony applies the specification of the memorandum to the particular real property to the exclusion of all other tracts.

The remaining question is whether or not the execution of the deed by A. Barhan to his mother was a scheme adopted to circumvent a specific performance of the agreement herein. That he was indebted to his mother in the sum claimed is evidenced by the promissory notes offered in evidence. We do not think, however, that she was urgently insisting upon the payment of these obligations or the giving of security therefor, and feel satisfied that he executed to her the deed in question, thinking it would bar a recovery herein. His deed was not delivered to his mother, but placed on record, evidently without her knowledge, and, this being so, no title passed thereby. *Cravens v. Rossiter*, 116 Mo. 338, 344, 22 S. W. 736, 38 Am. St. Rep. 606, 608. In that case it is said: "The delivery of the deed to the recorder for the purpose of having it recorded did not amount to a delivery to the defendant, for the recorder was not the agent of defendant, and hence had no authority to accept it. Besides this, he did not undertake to accept it for or in behalf of the defendant. He received it, recorded it, and transmitted it to the grantor. The grantor did not part with his dominion over the deed until after it had been recorded. * * * Recording a deed by the grantor, without the grantee's knowledge or assent, does not of itself operate as a delivery of the deed. 1 Devlin on Deeds, § 290, and cases cited. There was therefore no delivery of this deed until the defendant received notice of its existence, and that was long after the date of the judgment."

It follows from these considerations that the decree should be affirmed; and it is so ordered.

(13 Ariz. 10)

ROBERTSON v. TERRITORY.

(Supreme Court of Arizona. April 2, 1910.)

1. CRIMINAL LAW (§ 121*)—CHANGE OF VENUE—GROUNDS—PREJUDICE—DISCRETION.

An application for a change of venue for an alleged prejudice against defendant in the

community rests largely in the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 241; Dec. Dig. § 121.*]

2. CRIMINAL LAW (§ 786*)—INSTRUCTIONS—CREDIBILITY OF ACCUSED.

In a prosecution for homicide, the court charged that defendant had offered himself as a witness in his own behalf as he was entitled to do, and that the jury should consider his testimony as any other witness, but that, in determining the credit to be given thereto, they should consider his very great interest in the result, the effect of a verdict on him, and determine how far, if at all, such interest might color his testimony, that, if his statements carried with them belief in their truth, the jury should receive and act on them, and, if not, they might reject them. *Held* that, while such charge was not error, the instruction was undesirable, and should not be given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1737, 1895-1901, 1960, 1984; Dec. Dig. § 786.*]

3. CRIMINAL LAW (§ 1137*)—APPEAL AND ERROR—INVITED ERROR.

Where, in a prosecution against a peace officer for homicide in killing deceased while attempting to arrest him, defendant requested an instruction that on the day in question deceased was in the actual commission of a misdemeanor in the presence of accused, which the court gave, accused could not claim on appeal that deceased was committing a felony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

4. HOMICIDE (§ 105*)—ACTION OF PEACE OFFICER—SEPARATE TRANSACTIONS.

Where defendant, a peace officer, having been unsuccessful in his attempt to arrest deceased in the street at the time of deceased's commission of a misdemeanor, returned later armed to effect the arrest, and a conflict then occurred in which defendant shot deceased, the transaction was not continuous, and defendant's liability for the homicide depended on the circumstances surrounding the transaction at the time of the killing, rather than when decedent committed the misdemeanor.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 135; Dec. Dig. § 105.*]

5. HOMICIDE (§ 105*)—EXCUSABLE HOMICIDE—ARREST—MISDEMEANOR—RIGHTS OF OFFICER.

In arresting a man for a misdemeanor, an officer may not use unnecessary bodily harm or kill the person he is arresting, even though he may escape, but it is the duty of the officer to get other persons to assist him, and later on to overcome the accused person's resistance and place him under arrest, the officer being authorized to inflict death or great bodily harm only to save his own life or to prevent great bodily harm to himself in the accused's resistance of arrest.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 135; Dec. Dig. § 105.*]

6. CRIMINAL LAW (§ 822*)—INSTRUCTIONS—REVIEW AS A WHOLE.

Instructions in a criminal case must be considered as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990-1995, 3158; Dec. Dig. § 822.*]

Appeal from District Court, Graham County; before Justice Frederick S. Nave.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

William D. Robertson was convicted of manslaughter, and he appeals. Affirmed.

Stoneman & Jacobs, W. K. Dial, and Kibbey, Bennett & Bennett, for appellant. John B. Wright, Atty. Gen., for the Territory.

KENT, C. J. It is assigned as error that the trial court erred in not granting a motion for a change of venue because of the alleged prejudice against the defendant in the community. This is a matter that rests largely in the discretion of the trial court. We have examined the affidavits submitted on both sides upon the motion, and we are led to the conclusion that the trial court in denying the application for change of venue did not abuse the discretion vested in it. *Elias v. Territory*, 9 Ariz. 1, 76 Pac. 605.

The second assignment of error is in relation to the following charge of the court: "The defendant has offered himself as a witness in his own behalf. The statutes give him that right, and you should consider his testimony as you would that of any other witness. However, in determining the credit to be given his testimony, you may consider the very great interest he must have and feel in the result of this case, and the effect which a verdict would have upon him, and determine to what extent, if any, such interest may color his testimony or affect his credibility. If his statements be convincing and carry with them belief in their truth, you have the right to receive and act upon them. If not, you have a right to reject them." This charge in this precise language has been twice approved by this court. *Halderman v. Territory*, 7 Ariz. 120, 60 Pac. 876; *Prior v. Territory*, 89 Pac. 412. While the giving of this instruction was therefore not error on the part of the trial court, we believe that in some respects it is an undesirable instruction to be given, and we recommend to the district courts that its use be discontinued.

Exception is taken to certain portions of the instructions given by the court to the jury. A statement of the facts in the case is necessary in order that the contention of the appellant may be made clear. On the day of the homicide there was in progress in the town of Safford in Graham county a celebration of the independence of the republic of Mexico. A large crowd had assembled in the town attracted by the celebration, and some of the persons participating therein had become intoxicated. One Wayne Pursley, of whose homicide the appellant was convicted, was among those in this condition. The deceased had a reputation for fighting and quarrelsomeness when drunk. He was a robust man of great strength. He had had a violent altercation with one Campbell, and was swearing and using violent and threatening language in the presence of the people. His attitude was that of a drunken disturber of the peace, threatening whomsoever in any way opposed him. The appellant, Robertson,

was at that time the marshal of the town of Safford. He was not a man in robust health. To him Campbell, after having been severely maltreated by the deceased, appealed for protection against further assaults by the deceased. At the time there was excitement, tumult, and disorder on the street. Appellant, responding to the appeal of Campbell, said: "I will go out and stop him—talk to him" (meaning the deceased). Appellant approached the deceased, who was demanding of the people holding him to be let loose to get at Campbell, and accosted him saying: "Here, Wayne, that won't do. You can't do that. There are too many women and children on the street to be talking that way. You will have to go with me." Deceased said he would not go. Appellant then placed his hand upon the deceased, who knocked appellant down. Appellant got up, and a bystander attempted to calm the deceased, and the deceased knocked the bystander down. Appellant again took hold of the deceased and they clinched and fell, the appellant on top. The crowd then interfered, pulled the appellant off, rescued the deceased from the appellant, and took him away to a neighboring house. The appellant went to a saloon and got his revolver, and called upon a friend of the deceased to assist him, saying to him: "I have got to get him. Will you go with me?" Meanwhile the friends of the deceased had been unable to keep him in the house where they endeavored to have him remain to have the wounds that he had received in the contest with Campbell further dressed. The deceased, however, resisted the efforts of his friends to restrain him indoors, insisting that his injury was trifling, and went on through the house and out into the yard of the house, where the appellant came up to him. The deceased was still in a violent mood. The appellant addressed the deceased as an officer, saying that the deceased must come with him, and referred to his conduct. A bystander asked that the deceased might be allowed to return to the house to have his wounds further dressed. The appellant said that he would take the deceased to the doctor or anywhere else that he wanted to go. Up to this time there is no evidence that appellant exhibited anger or made any demonstrations or threats indicative of any other purpose than to have the deceased submit quietly to his authority as an officer. The deceased said, however, that the appellant should not arrest him, and, according to some testimony, applied opprobrious epithets to him and struck at him. At this juncture the brother of the deceased interfered, and many other people of the crowd rushed in, and there was confusion. The brother of the deceased told the appellant that he should not arrest the deceased, and then the appellant pulled his gun. The brother grabbed the gun, and attempted to wrest it from the officer. In the meantime the deceased was striking at the officer with an open knife. The deceased,

his brother, and the appellant were all together engaged in a struggle. The appellant struck the brother of the deceased over the head with his gun and the brother fled. The deceased was still fighting with the appellant. The appellant struck him twice over the head with the gun, but the blows did not stop the onslaught of the deceased. The officer became exhausted and fired upon the deceased, and still the deceased did not stop, and he again fired, and the deceased fell mortally wounded, and died almost instantly. The foregoing statement of facts we have summarized from the statement thereof in appellant's brief. It presents the defendant's case in the most favorable light. Many of the facts as stated are contradicted by the testimony of other witnesses, and a number of witnesses testified that at the time the fatal shot was fired the deceased was retreating and had declined further struggle; but there is evidence in the record tending to establish the facts as appellant claims they occurred.

There were several instructions requested by the defendant, all of which were given by the court, except that in one instance a sentence was stricken by the court from an instruction as requested. The court charged the jury that the indictment charged the appellant with the crime of murder alleged to have been committed upon the person of Pursley. The usual instructions were given respecting the necessity of the joint operation of act and intent, the presumption of innocence, the necessity of the territory proving all of the material allegations of the indictment beyond a reasonable doubt, defined a reasonable doubt, the province of the jury with respect to the evidence, and defined the various degrees of homicide. At the request of the defendant, the jury were also instructed that the deceased was in the actual commission of a misdemeanor in the presence of the appellant, who was at the time a peace officer, to wit, the town marshal of the town, but limited the effect as to the time of the commission of the misdemeanor to the time when the deceased was in the street, and while the incidents covered by the testimony which occurred in the street were in progress. The jury were told that it was the duty of a peace officer to enforce the law by arresting those who in his presence commit a misdemeanor or any other grade of crime; that the duties of officers with respect to arrests for misdemeanors and felonies differ; that it was not only the right, but the duty, of a peace officer to arrest a person who was committing a public offense in his presence; that in making such arrest the officer may use such force as is necessary to overcome the resistance, and may repel force with force and need not give back, and, if the offender put the peace officer's life in jeopardy, the officer may use sufficient force to overcome the resistance he encounters, even to the taking of life; that when

an arrest is sought to be made, though for a misdemeanor only, and the person sought to be arrested resists by the use of a deadly weapon, the officer has the right, if he believes, and has reasonable grounds to believe, that the other will kill him or inflict great bodily harm upon him, to use his own weapon, even to the taking of life; that if the jury should find from the evidence that the defendant attempted to arrest the deceased while he was in the actual commission of a public offense, and that the deceased resisted such arrest with force, and that at that time the defendant believed, and had reasonable grounds to believe, that the deceased would kill him or inflict great bodily harm upon him, and the defendant, to effect the arrest or to protect himself from death or great bodily harm, shot and killed the deceased, it was their duty to find the defendant not guilty; that, if an officer in making an arrest is driven away by a deadly weapon or by force, he is not required to flee or to refuse to return, or, having returned, to escape the impending danger by flight, in order to relieve himself from liability for killing his antagonist; that an officer may arrest any one committing a misdemeanor in his presence without a warrant; and that the officer may summon as many persons as he may deem necessary to aid him in making the arrest, and the officer in making the arrest is not bound to retreat, but may use such physical force as is apparently necessary to effect the arrest by overcoming the resistance he encounters, but in such a case he cannot take the life of one charged with the misdemeanor or even inflict upon him serious bodily harm, except to save his own life or prevent great bodily harm to himself. The court then proceeded to distinguish by illustration more fully between the rights of an officer in making an arrest in respect to felonies and misdemeanors, telling the jury that when a man has committed a felony, it being a more serious offense than a misdemeanor, and the officer is commanded by warrant to arrest him or has actually been a witness to the commission of the offense, it is the officer's duty to arrest the offender, and use such force as may be necessary to take him into custody, but, a misdemeanor being a lesser grade of crime, it is the duty of the officer while making the arrest not to inflict unnecessary bodily harm or death upon the person whom he is arresting, even though he may escape; that, to prevent an escape, the officer has no right to inflict serious bodily harm or death upon the person whom he is seeking to arrest for a misdemeanor; that to prevent an escape he may, if necessary, inflict death or bodily harm upon one whom he is seeking to arrest for a felony, but in arresting a man for a misdemeanor, such as drunken or disorderly conduct or simple assault or fighting, if the man runs away, the officer has no right even to shoot at him,

but it is his duty to get other persons to help him and later on, when he can overcome his resistance, place him under arrest that he may answer for his action; that the law makes that distinction in the two grades of offenses. Therefore, in the case before you "It was the duty of this officer, under the facts as disclosed to you, in that street, to arrest Wayne Pursley, the deceased. It was not necessarily his duty to arrest him immediately. It was his duty also not to inflict bodily harm or death upon Wayne Pursley in order to effect the arrest. It is better that Wayne Pursley should escape arrest under the law than that he should have serious bodily harm inflicted upon him or death inflicted upon him merely to accomplish his arrest for a misdemeanor. It was the duty of the officer that the arrest should be delayed. It was the duty of the officer to delay the arrest to avoid doing serious bodily harm or inflicting death upon Wayne Pursley, until he had an opportunity to arrest him with the assistance of others. That is to say, he may summon assistance to accomplish the arrest without inflicting injury or death." The instructions then went on to say that, on the other hand, if it seemed wise to the officer at the time, it was right for him to attempt the arrest immediately, and that it was the officer's privilege to make the arrest when he started to. It was entirely within his rights to use force to overcome resistance; that the difference between resisting arrest and running away should be observed. Be the offense ever so trivial, if the offender actually resists arrest and fights back against arrest, the officer may use the force necessary and summon all the assistance that the surrounding circumstances offer him to enable him to overcome that resistance, even to the infliction of bodily harm, or even, if necessary in an extremity, the infliction of death; that it is the duty of the officer to avoid the infliction of injury or death in all cases when the man seeks to avoid arrest, and it does not devolve upon him to avoid the infliction of injury or death if it be necessary to overcome resistance, but he may inflict it only if it is necessary, and he may go only so far as it is necessary to effect the arrest to overcome resistance; that, if the officer's life becomes in jeopardy during the course of an attempt to overcome resistance in making the arrest, he has the right as anybody else to protect himself from bodily harm or death. The court thereupon proceeded to instruct the jury fully with respect to when under the statute a homicide is justifiable as a matter of self-defense.

The part of the court's instructions that is complained of is the part contained within the quotation marks above. The contention of the appellant, as we understand it, is not that the law as laid down was not correctly stated by the court, but that it was not the

law applicable to the facts of the case. The claim is that from the time the appellant first came on the scene in the street until the time of the shooting the transaction was in effect a continuous one; that the deceased was defying the efforts of the peace officer to preserve the peace; that it was the duty of the peace officer to preserve the peace; that he had a right to beat into subjection a man in the act of committing a breach of the peace to prevent him from doing so, if he could not be subdued otherwise; that the offender for the instant was an outlaw; that under the circumstances of the case for the appellant to have withdrawn would have subjected the people to further disorder, and that it was the duty of the appellant to prevent the deceased from a further breach of the peace at all hazards, even to the extent of taking his life if necessary, and the complaint is that, in charging the jury that it was the duty of the officer to delay the arrest and avoid doing serious bodily harm upon Pursley; the peace officer was told that it was his duty to do exactly the opposite of what it was his duty to do, to wit, arrest the deceased then and there to restrain him from further violence. And it is also complained that the charge of the court was misleading to the jury in that there was no attempt on the part of the deceased to escape, and the jury were confused by the instructions of the court with respect to the law relating to an attempt of an offender to escape.

The defendant at the trial requested the court to charge that on the day in question the deceased was in the actual commission of a misdemeanor in the presence of the defendant. This charge the court gave, but limited it properly to the occurrences that took place in the street. The defendant, having requested the court to charge that the acts of the deceased at that time constituted a misdemeanor and not a felony, is now precluded from claiming on this appeal, as he does, that at the time the deceased was engaged in the commission of a felony rather than in the commission of a misdemeanor. The facts show that the appellant, the officer, was unsuccessful in his attempt to arrest the deceased in the street at the time of the commission of this misdemeanor, that he returned later armed to effect the arrest, and that at that time the conflict occurred in which the appellant shot the deceased. The rights of the appellant, therefore, with respect to his freedom from liability for the homicide, depend upon the circumstances surrounding the transaction at the time of the homicide rather than at the time of the commission of the misdemeanor in the street. The case was presented to the trial court upon the theory as disclosed by the defendant's requested instruction that the officer had returned to effect the arrest of a man who had committed a misdemeanor, the offense which he had committed being at the defendant's own request

defined as a misdemeanor, and the appellant cannot complain if the jury was instructed that the officer was held in making such arrest to the restrictions that the law placed upon an officer in making an arrest for a misdemeanor. It was not a question then of subduing and arresting an offender then engaged in a misdemeanor or a felony, but of arresting a person for a misdemeanor that had been committed. The trial court properly charged the jury that in making the arrest the officer had a right, if he believed and had reasonable ground to believe that the other would kill him or inflict great bodily harm upon him, to use his own weapon, even to the extent of taking his life; and gave proper instructions respecting the right of self-defense. It was also proper for the court to instruct the jury, as it did, that in arresting a man for the commission of a misdemeanor the officer was limited in the method of making such arrest as in the instruction specified, and it was not error to instruct the jury that it was not necessarily the duty of the officer to arrest the deceased immediately and that it was his duty not to inflict bodily harm or death upon the deceased in order to effect the arrest. It was clearly a case where in the time, method, and means of making the arrest the officer had to exercise a proper discretion and to employ such means as the law justifies in making an arrest for a misdemeanor. It was proper for the court to so charge the jury where, as here, such instruction was coupled with the further instruction that the officer, having decided that it was his duty to make the arrest, had the right, having embarked upon the undertaking, to carry out his purpose, and that he had the right in so doing to protect himself from assault even to the extent of taking the offender's life if necessary. It was a case of an attempted arrest for an offense theretofore committed, although committed only shortly theretofore, and of resistance to such arrest. The rights of the officer under such conditions were fully and fairly covered by the instructions of the court, and such instructions in that regard are not complained of. Instructions given by a court to a jury must be taken as a whole, and isolated sentences or paragraphs will not afford ground for reversal where the instructions as a whole cover the ground, and where the isolated sentences or paragraphs are not incorrect, or misleading to the jury. Taking the instructions before us as a whole, we think they fully cover all the questions involved in the case, and that they correctly state the law applicable to the contested facts in the case, and that the appellant was not prejudiced thereby.

We find no error in the record, and the judgment will be affirmed.

DOAN, CAMPBELL, LEWIS, and DOE, JJ., concur.

(12 Ariz. 1)

WALKER et al. v. BLAKE et al.

(Supreme Court of Arizona. Jan. 13, 1910.)

1. NEW TRIAL (§ 116*)—MOTION—TIME OF FILING.

Where the motion for new trial was filed more than five days after rendition of judgment, it was properly denied.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 238-241; Dec. Dig. § 116.*]

2. APPEAL AND ERROR (§ 281*)—PROCEEDINGS BELOW—MOTION FOR NEW TRIAL—NECESSITY.

Failure to make a timely motion for new trial waived all errors not fundamental, so that questions involved in such errors cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1650-1661; Dec. Dig. § 281.*]

Appeal from District Court, Maricopa County; before Justice Edward Kent.

Action between Thompson Walker and others and Celeste H. Blake and others. From the judgment, the first-named parties appeal. Affirmed.

Kibbey, Bennett & Bennett, for appellants. Thos. Armstrong, Jr., for appellees.

PER CURIAM. Appellees move for an affirmation of judgment in this case for the reason that no motion for a new trial was filed within the time provided by law, and that there is no assignment of error. The motion for new trial was filed more than five days after the judgment was rendered. Therefore the trial court did not err in denying it. The failure to move for a new trial waived all errors not fundamental. McDonald v. Cox, 100 Pac. 457.

Counsel for appellants do not make a formal assignment of errors, but close their brief with the statement that the trial court erred in several enumerated particulars. If this unusual method of assigning error should be treated as sufficient, we are precluded from considering the questions so presented by the fact that all are such as should have been brought to the attention of the trial court in a motion for a new trial. None of the questions so raised involve fundamental error. Therefore we must affirm the judgment of the district court.

KENT, C. J., and LEWIS, J., took no part in the determination of this case.

(18 Ariz. 74)

AITON v. BOARD OF MEDICAL EXAMINERS.

(Supreme Court of Arizona. April 2, 1910.)

APPEAL AND ERROR (§ 78*)—ORDERS APPEALABLE.

An order sustaining a demurrer to a petition for certiorari, unaccompanied by any application for leave to amend, or final order denying the petition, or any final judgment, does not determine the case, and, under Civ. Code 1901,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pars. 441, 1214, 1493, permitting appeals from final judgments, no appeal lies from the order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 465; Dec. Dig. § 78.*]

Appeal from District Court, Maricopa County; before Justice Edward Kent.

Petition for certiorari by R. A. Aiton against the Board of Medical Examiners. From an order sustaining a demurrer to the petition, plaintiff appeals. Dismissed.

Worsley & Feler, for appellant. John B. Wright, Atty. Gen., for appellee.

PER CURIAM. The record in this case discloses that the appellant filed in the court below a notice of motion for a writ of certiorari, accompanied by the affidavit of the petitioner, setting forth the facts upon which the application was based. No motion appears of record. The affidavit concludes with a prayer that a writ of certiorari be allowed. The defendant, evidently in doubt as to the view the trial court might take as to whether the application was by motion or petition, answered "In resistance of said motion and the allowance of the writ," showing "that the facts stated in the petition of said plaintiff, attached to his motion in said matter, do not state facts sufficient to entitle him to the allowance of said writ of certiorari," and prayed judgment that said motion and petition be denied. This pleading of defendant was treated as a demurrer, and was sustained. In due time the appellant in open court gave notice of appeal to this court from the order "sustaining the demurrer of the defendant," and thereafter filed his bond on appeal, wherein it is recited that he "has appealed from said order sustaining said demurrer to the Supreme Court of the territory."

The record is silent as to any application for leave to amend the petition. No final order denying the petition for the writ was entered, nor is there any final judgment in the cause. The entry in the clerk's minutes of an order sustaining a demurrer is not the equivalent of either a final order or final judgment. There must be a complete determination of the controversy before an appeal to this court will lie, unless otherwise expressly prescribed by statute. Paragraphs 441, 1493, and 1214 of the Revised Statutes of 1901.

The appeal is dismissed for want of jurisdiction. The Chief Justice not sitting.

(13 Ariz. 2)

HURLEY v. TERRITORY.

(Supreme Court of Arizona. April 2, 1910.)

1. CRIMINAL LAW (§ 1151*)—APPEAL—REVIEW—CONTINUANCE—DISCRETION.

The granting or refusal of a continuance rests in the sound discretion of the trial court,

and its ruling will not be disturbed on appeal unless the discretion was abused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3045; Dec. Dig. § 1151.*]

2. CRIMINAL LAW (§ 603*)—CONTINUANCE—APPLICATION—REFUSAL—DISCRETION OF COURT.

It is not an abuse of discretion to deny a continuance on the ground of the absence of a witness, where the facts sought to be proved by the witness are not within the personal knowledge of accused, but his knowledge of what the witness would testify to if present is hearsay only, and the source of his knowledge is not set forth, and it is not alleged that accused has any knowledge of the residence of the witness, nor was it shown why the witness' attendance was not obtained in the five days between the verification of plaintiff's affidavit and the application, nor were any facts stated tending to show that the witness could be produced if a continuance was granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1349, 1351, 1354, 1357; Dec. Dig. § 603.*]

3. HOMICIDE (§ 157*)—EVIDENCE—ADMISSIBILITY.

The fact that accused, the day before the shooting of decedent, shot at goats of decedent at or near the premises of accused, was material to establish the relations between the parties and the state of the mind of accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 288; Dec. Dig. § 157.*]

4. CRIMINAL LAW (§ 478*)—OPINION EVIDENCE—COMPETENCY OF WITNESS.

A boy 13 years of age, who had lived 8 or 10 years on the hills, and who had seen men shoot shotguns and rifles, was competent to give his opinion that shots heard by him were rifle shots; but the weight of his testimony was for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1065; Dec. Dig. § 478.*]

5. WITNESSES (§ 268*)—EXAMINATION—CROSS-EXAMINATION.

Questions put by accused on the cross-examination of a witness as to the testimony which another witness had given at a former time were not proper cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 931; Dec. Dig. § 268.*]

6. HOMICIDE (§ 167*)—EVIDENCE—THREATS OF ACCUSED—ADMISSIBILITY.

Evidence of what accused, at a period remote from the homicide, had said about pointing a gun at and threatening to shoot the children of decedent, was admissible, where, in connection with proof of other threats of accused, it might indicate a continuance of the state of mind of accused toward decedent.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 337; Dec. Dig. § 167.*]

7. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY CHARGE GIVEN.

It is not error to refuse instructions generally covered in the charge given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

8. CRIMINAL LAW (§ 762*)—INSTRUCTIONS—OPINION OF COURT.

Instructions so framed as to indicate an expression of opinion by the court on issues of fact for the jury are properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1731; Dec. Dig. § 762.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

Appeal from District Court, Yavapai County; before Justice Richard E. Sloan.

E. D. Hurley was convicted of murder in the first degree, and he appeals. Affirmed.

J. F. Wilson, for appellant. John B. Wright, Atty. Gen., for the Territory.

KENT, C. J. It is claimed that the trial court erred in refusing to grant the continuance of the trial asked for by the appellant. On November 18, 1908, the defendant entered his plea of not guilty to the offense charged in the indictment, and on that date the case was set for trial on November 30th. On November 30th, upon the application of the defendant, a subpoena was issued for one Edwards, whom the appellant claimed to be a material witness. The trial of the case was postponed until December 8th. On that day, when the case was called for trial, the appellant interposed his motion for a continuance for the term and filed his own affidavit in support thereof, which had been prepared and sworn to on December 3d, in which he alleged that the witness Edwards was material to the defendant in making his defense, in that Edwards, prior to the difficulty in which the defendant and the deceased were engaged, had frequent conversations with the deceased and knew of the animosity of the deceased toward the defendant; that the defendant had no knowledge of the threats made by decedent to Edwards until November 29th, the evening before the subpoena was issued and placed in the hands of the sheriff for service and an order for such service out of the county obtained; that service of the subpoena had not been made; that the sheriff had telegraphed that the witness was not in the employ of the mining company where he was supposed to have sought employment in Cochise county, and hence the subpoena had not been served, and the attendance of the witness could not be obtained at that term of court; but that the witness was in the county of Cochise somewhere; and that the defendant would be able to procure his attendance at the next term of court, when such testimony might be had. The affidavit further alleged that there was no other witness by whom the conversations and threats above stated could be proved, and that the application was not sought for delay.

The granting or refusal of a motion for continuance is a matter resting in the sound discretion of the trial court, and the exercise of that discretion will not be disturbed upon appeal unless abused. According to the affidavit of the appellant for continuance, and upon the record, we find that the case had been set for trial on November 30th. On that date a subpoena for the desired witness was obtained and an order for its service out of the county. The trial of the case was not had until December 8th. On that date an affidavit sworn to on De-

cember 8d was presented that the absent witness could not be found in the place designated to the sheriff by the appellant as his place of abode. That the facts sought to be proved by the witness would be testified to by the witness was not within the personal knowledge of the defendant, according to his affidavit; but the knowledge that the witness would so testify if present was hearsay only, and the source of such knowledge was not set forth by the appellant in his affidavit, nor any facts set forth in the affidavit to show that the appellant had any knowledge of the residence of the witness or his present or future place of abode. No showing was made why the attendance of the witness was not procured between the 3d and 8th of December, and no facts were set forth in the affidavit tending to show that the presence of the witness could be obtained if the postponement were granted. We do not think that the trial court erred in its exercise of the discretion vested in it in refusing the continuance. *Eyttinge v. Territory*, 100 Pac. 444.

Mrs. Conrey, a witness on the part of the prosecution, testified, over the objection of the defendant, to the action of the defendant the day before the homicide in shooting at certain goats belonging to the deceased which were then at or near the premises of the defendant. The objection to the testimony was that it was immaterial. We think the testimony given was material in the tendency it had to establish the relations between the parties and the state of mind of the defendant, and that the objection made to its materiality was properly overruled.

It is likewise assigned as error that the court erred in allowing the witness Tom Conrey to testify about the same transaction. Apart from the fact that no specific objection was made at the trial to this testimony, the same rule applies thereto.

It is claimed that the court erred in allowing George Conrey, a son of the deceased, of the age of 13 years, to testify, over the objection of the defendant, to the character of the shots fired at the time of the homicide; his testimony being that they were rifle shots. The objection to the testimony is that the boy was at a distance from the shooting, that he had never fired a gun himself or handled firearms, and was not qualified, therefore, to testify as to the character of the shots. The boy testified to hearing five shots altogether, and the intervals between them, and that they were rifle shots; that, while he had not used rifles or shotguns, he had lived 8 or 10 years out on the hills, and had seen men shoot shotguns and rifles. Upon the motion to strike out his testimony, the court ruled that, the evidence showing that the boy had some experience in the matter, his opinion might be expressed; the weight of the testimony being entirely a matter for the jury. In this view of the trial court we concur.

The fifth assignment of error is as follows: "The court erred in refusing to allow Mrs. Conrey to answer questions on cross-examination as to what she testified to at the inquest and having made statements at another time contradictory to what she tells here. See reporter's transcript of evidence, pages 150, 151, 152, and 153." An examination of the record shows that counsel are in error in assuming that the court refused to allow Mrs. Conrey to testify as alleged. The witness under examination was one George Avery, a deputy sheriff, and he was asked on cross-examination to testify as to the testimony which Mrs. Conrey had given at a former time. The court sustained the objection of the prosecution that it was not proper cross-examination.

It is alleged that the court erred in permitting the witness Ralph King to testify, over objection of the defendant, to a conversation between the defendant and the witness at a period prior and remote to the homicide, in regard to what the defendant had said about the pointing of a gun and threatening to shoot the children of the deceased. The court allowed the testimony to stand over the objection of the defendant upon the theory that, in connection with other conversations and threats of the defendant as testified to, it might have a significance as indicating a continuance of the state of mind of the defendant toward the deceased. We think the testimony was admissible; the weight to be given to it being, as the court stated, a matter for the jury to determine.

The appellant assigns as error the refusal of the trial court to give as drawn the third, fourth, fifth, and sixth instructions requested by the defendant. The matter contained in these instructions was generally covered by the court in the charge given by it; but, apart from this, we think the court properly refused the instructions requested in the language in which they were drawn, since in each instance the requested instruction was so framed as to indicate an expression of opinion by the court on matters of fact to be determined by the jury.

We find no error in the record, and the judgment of the district court is affirmed.

DOAN, CAMPBELL, LEWIS, and DOE, JJ., concur.

(13 Ariz. 7)

DUTTON v. TERRITORY.

(Supreme Court of Arizona. April 2, 1910.)

1. INDICTMENT AND INFORMATION (§ 110*)—SUFFICIENCY OF ACCUSATION—STATUTORY OFFENSES.

An indictment charging the keeping of a disorderly house, specifying the time and location of the house, and charging the offense conjunctively in the language of Pen. Code 1901, §

287, making it a misdemeanor to keep a disorderly house, or any house of public resort whereby the peace, comfort, or decency of the immediate neighborhood is habitually disturbed, is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

2. CRIMINAL LAW (§ 1153*) — WITNESSES (§ 246*) — CONDUCT OF TRIAL — DUTY OF JUDGE.

The duty of a trial judge, particularly in criminal cases, is more than that of an umpire, and he must see that justice is done to both parties, and hence when satisfied that the facts are not being elicited by questions of counsel, and witnesses show a disposition to evade direct answers, it is not only his right, but his duty, to so question a witness as to bring out the points not made clear by counsel's examination, he having in that respect a wide discretion, the exercise of which will not be reviewed in the absence of abuse, but such examination must not show bias or prejudice, or impress the jury with the belief that the judge is taking sides.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3064; Dec. Dig. § 1153; Witnesses, Cent. Dig. § 852; Dec. Dig. § 246.*]

Appeal from District Court, Yuma County; before Justice John H. Campbell.

William T. Dutton was convicted of keeping a disorderly house, and appeals. Affirmed.

Wupperman & Wupperman, for appellant. John B. Wright, Atty. Gen., for the Territory.

KENT, C. J. It is complained that the indictment is insufficient. Our statute makes it a misdemeanor to keep a disorderly house or any house of public resort whereby the peace, comfort, or decency of the immediate neighborhood is habitually disturbed. Pen. Code 1901, § 287. The indictment, specifying the time and the location of the house in the town of Yuma, charged the offense conjunctively in the language of the statute. The statute setting forth fully and without any uncertainty or ambiguity all the elements necessary to constitute the offense, an indictment so couched in the language of the statute is sufficient. *Hinds v. Territory*, 8 Ariz. 372, 76 Pac. 469; *Killman v. State*, 2 Tex. App. 222, 28 Am. Rep. 432; 14 Cyc. 495.

The only other question raised which requires notice is the alleged error of the trial judge in putting questions to the various witnesses; the contention of the appellant being that in the extent of such examination the judge invaded the province of counsel, and by such examination and its extent gave to the jury the impression that the judge believed in the appellant's guilt. The erroneous idea that the whole duty of the trial judge is performed if he sits as an umpire, as it were, to see that the contest before him, in which he takes no part, is waged according to rule, is one that unfortunately has grown rather than decreased of late in this country, fostered as it has been by many and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

often unwise restrictive legislative provisions. The duty of a trial judge, particularly in criminal proceedings, is more than that of the umpire; it is primarily his duty in such proceedings to see that justice is done both to the man accused of crime and to the people, his accusers. Therefore, when in such case the judge is satisfied that the facts or the truth are not being elicited by the questions of counsel, and the witnesses show a disposition to evade direct answers, it is not only his right, but it is his duty, to put questions to the witnesses which will bring out the points not made clear by the examination of counsel. In this regard he has a wide latitude and discretion, the exercise of which discretion will not be reviewed on appeal except in case of abuse thereof. The examination must be so conducted, however, as not to show bias or prejudice, or to impress the jury with the belief that the judge is taking sides. *Looney v. People*, 81 Ill. App. 370; *State v. Crotts*, 22 Wash. 245, 60 Pac. 403; *State v. Lee*, 80 N. C. 483; *State v. Splers*, 103 Iowa, 711, 73 N. W. 343. A careful examination of the record leads us to the conclusion that, while the trial judge participated extensively in the examination of several witnesses, and perhaps unnecessarily so in a case where the subsequent proof of the defendant's guilt seems abundant, yet the questions asked were carefully framed and free from imputation of guilt to the defendant. It seems apparent from the record that the judge felt that the questions of counsel were not well calculated to develop the material facts, and that it was incumbent upon him to supplement the questions asked by counsel in order that the jury might have before them facts which counsel had failed to elicit.

We believe that the trial judge went further in his investigation than was in some instances essential or perhaps desirable; but we cannot say, viewing the record as a whole, that in so doing he abused the discretion vested in him so as to warrant a reversal of the case.

DOAN, LEWIS, and DOE, JJ., concur.

(13 Ariz. 26)

ATKIN v. TERRITORY.

(Supreme Court of Arizona. April 2, 1910.)

1. INDICTMENT AND INFORMATION (§ 110*)—LANGUAGE OF STATUTE—SUFFICIENCY.

Where the charging part of an indictment is in the language of the statute, it is sufficient.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 292; Dec. Dig. § 110.*]

2. MALICIOUS MISCHIEF (§ 10*)—INJURY TO PIPE LINE—INSTRUCTIONS.

In a prosecution for maliciously injuring a pipe line, it was not error to refuse to charge that before the jury could convict they must find that a material injury to the pipe line was effected by the defendant, where the court in the

general charge instructed the jury that the act done by defendant must have rendered the pipe line ineffective in whole or in part, before they could convict, since to render the pipe line ineffective was to cause a material injury.

[Ed. Note.—For other cases, see *Malicious Mischief*, Cent. Dig. § 16; Dec. Dig. § 10.*]

Appeal from District Court, Yavapai County; before Justice Richard E. Sloan.

Walter Atkin was convicted of willfully and maliciously cutting, breaking, and injuring a pipe line used to supply a city with water, and he appeals. Affirmed.

A. L. Hammond, for appellant. John B. Wright, Atty. Gen., for the Territory.

PER CURIAM. The appellant seeks to raise the question of the sufficiency of the indictment by assigning error in the trial court refusing defendant's request for a peremptory instruction to return a verdict of "not guilty" for the reason that the indictment failed to allege a crime, and by assigning error in the overruling of the defendant's motion for new trial; that the court erred in permitting testimony to be introduced over the objection of defendant that the indictment failed to state acts sufficient to constitute a public offense. No demurrer was interposed to the indictment. The charging part of the indictment is in the language of the statute, which is all that is essential to sustain the rulings of which complaint is here made.

The only other assignment of error argued by the appellant is alleged error in the failure of the trial court to give defendant's fourth requested instruction: "Before you can convict you must find from the evidence that a material injury to the pipe line was effected by the defendant." An examination of the instructions given discloses that this question was fully and fairly presented in the general charge, wherein the trial court instructed the jury that the act done by the defendant must have rendered the pipe line ineffective in whole or in part before they could return a verdict of guilty. To have rendered the pipe line ineffective even in part was to cause a material injury thereto. There was no duty imposed to give an instruction in the exact language of the defendant's request.

The judgment of the trial court is affirmed.

(13 Ariz. 67)

SOUTHERN PAC. CO. v. RICHEY.

(Supreme Court of Arizona. April 2, 1910.)

1. APPEAL AND ERROR (§ 690*)—STATEMENT OF FACTS—EVIDENCE.

Where the transcript of the reporter's notes, made in accordance with Laws 1907, c. 74, § 15, does not include proceedings at trial relating to pleas in abatement, and the ruling excluding certain transcripts of judgments offered under such pleas does not otherwise appear in the rec-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ord, error in excluding such transcripts cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 690.*]

2. APPEAL AND ERROR (§ 916*)—REVIEW—PRESUMPTIONS—PLEADINGS.

Where the pleadings are sufficient to sustain the trial court's rulings upon pleas in abatement, and the evidence is not preserved in the record on appeal, it must be assumed that the rulings upon the pleas were correct.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 916.*]

3. APPEAL AND ERROR (§ 1032*)—REVIEW—BURDEN OF SHOWING ERROR.

One complaining on appeal of the rejection of evidence must show that he was injured thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.*]

4. APPEAL AND ERROR (§ 692*)—RECORD—EVIDENCE.

Exceptions to the exclusion of evidence will not be considered on appeal where the record does not contain the evidence excluded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2906-2909; Dec. Dig. § 692.*]

Appeal from District Court, Pima County; before Justice John H. Campbell.

Action by T. K. Richey against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank Cox and Francis M. Hartman, for appellant. Lovell & Richey, for appellee.

PER CURIAM. This is an appeal from a judgment against the defendant and appellant and in favor of the plaintiff and appellee for the sum of \$336.47 and costs, upon an assigned account for wages.

The first and second assignments allege error in sustaining plaintiff's objections to certified and authenticated transcripts of certain judgments rendered by a justice court of Missouri against Thomas Kelly and the Southern Pacific Railway Company, and a similarly authenticated transcript of judgment rendered by the circuit court of Jackson county, Mo., in the case of Southern Pacific Company, Plaintiff, v. Theodore Potts and R. L. Combs, Defendants, offered in evidence by the defendant in support of its plea in abatement.

There appears in the abstract of record furnished by appellant a statement of what purports to be the proceedings upon the hearing of the plea in abatement had upon December 28, 1907. An examination of the record, however, discloses that these proceedings were not made a part of the record upon appeal. Chapter 74 of the Laws of Arizona of 1907, being an act to revise and correct the procedure in the district and Supreme Courts, repealed chapter 17, pt. 2, tit. 17, of the Revised Statutes of 1901, providing for bills of exceptions. In place of the bill of exceptions, section 15 of this act provides that: "Either party to the suit may make the oral testi-

mony and proceedings in a case, together with such rulings, orders or other action of the court in the case as do not appear otherwise of record, a part of the record in the case by filing therein either a statement of facts or the transcript of the court reporter's notes as provided hereinafter." The appellant has filed a transcript of the reporter's notes in accordance with the provisions of this act, which does not include the proceedings had upon the trial of the pleas in abatement. The rulings do not otherwise appear of record. There is, therefore, no basis afforded us for a review of these rulings.

The third assignment of error relates to error in overruling the defendant's pleas in abatement. The minute entries of the clerk disclose that upon the 28th day of December, 1907, the case came on regularly to be heard upon the plea in abatement, the parties being represented by counsel, whereupon the defendant in support of said plea called witnesses who were duly sworn and cross-examined. Argument of the respective counsel being had and the matter being fully submitted to the court, the court being fully advised in the premises, overruled said plea. The pleadings are sufficient to sustain the ruling of the trial court upon the plea, and, the evidence not being preserved in the record, we must presume that the trial court's rulings upon the evidence were correct.

Assignments 11 and 12 allege error upon the trial on the merits in rejecting copies of the judgments hereinbefore referred to, offered together with an additional judgment in the case of O. M. Dart, assignee of J. H. Dunn, v. Thomas Kelly. The colloquy between counsel and the court as disclosed by the reporter's transcript follows: "The Court: I understand that you desire to make that as one offer? All these depositions and these judgments as one offer? Do I understand you so? Counsel: Only in this respect; that I think those transcripts are competent evidence taken in connection with these depositions. The Court: You offer them one in connection with the other? Counsel: Yes. The Court: Do you offer copies of the judgments? Counsel: Yes, sir. Opposing Counsel: I object to that because they are not properly certified so as to be admitted in evidence. The Court: I'll sustain the objection to the introduction of the judgments. Counsel: I want an exception to that ruling."

Counsel did not seek to have the several judgments identified and made a part of the record. After a careful search, we have found but one of the three judgments so offered amongst the papers in the case. This court has repeatedly held that a party who complains of the rejection of evidence must show that he was injured thereby, and that, when a party fails to bring up the evidence upon which such ruling is based, this court will refuse to consider the exception. Copper

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

Bell Mining Co. v. Costello (Ariz.) 95 Pac. 94; Montezuma Canal Co. v. Smithville Canal Co. (Ariz.) 89 Pac. 512; Edwards v. Simms, 8 Ariz. 261, 71 Pac. 902.

The various other errors assigned relating to the exclusion of evidence by the trial court are dependent upon the correctness of the ruling of the court in respect to the rejection of these judgments. The presumption obtaining that the ruling of the trial court rejecting such judgments was correct, there was no error.

The remaining assignments of error are not argued in appellant's brief, and will therefore not be considered. Ball v. Hartman, 9 Ariz. 321, 83 Pac. 358.

The judgment is affirmed.

CAMPBELL, J., not sitting.

(13 Ariz. 19)

STEWART v. TERRITORY.

(Supreme Court of Arizona. April 2, 1910.)

CRIMINAL LAW (§ 1182*)—APPEAL—DISPOSITION OF CAUSE—ABSENCE OF BRIEFS AND ASSIGNMENTS OF ERROR.

Where, on appeal, there is submitted a transcript of the testimony, the judgment roll, and the transcript of the record in the lower court, but no assignment of errors or briefs from either party, and the indictment is sufficient, the evidence is sufficient to support the judgment, and the court's charge correctly enunciates the law, the judgment will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3205; Dec. Dig. § 1182.*]

Appeal from District Court, Pinal County; before Justice Edward Kent.

Robert Stewart was convicted of murder in the second degree, and he appeals from the judgment and an order denying a new trial. Affirmed.

P. H. Hays, for appellant. John B. Wright, Atty. Gen., for the Territory.

DOAN, J. The appellant was convicted of murder in the second degree in the district court of Pinal county, and on April 2, 1909, was sentenced to a term of imprisonment. A motion for a new trial was denied, and an appeal taken from the judgment of the court and the order denying such motion. There is submitted to this court the reporter's transcript of the testimony, the judgment roll, and the transcript of the record in the lower court. There is no assignment of errors, nor any brief from either the appellant or respondent.

We have examined carefully the record submitted to us. We find that the indictment sufficiently charges the crime of which the defendant was convicted. The evidence is ample to support the verdict of the jury and the judgment of the court. The charge of the court correctly enunciates the law. The only instruction requested by the defendant was given by the court as requested.

No fundamental error appearing in the record, the judgment of the lower court is affirmed.

CAMPBELL, LEWIS, and DOE, JJ., concur.

(13 Ariz. 20)

SPENCE v. TERRITORY.

(Supreme Court of Arizona. April 2, 1910.)

1. CRIMINAL LAW (§ 452*)—EVIDENCE—OPINION EVIDENCE.

In a murder trial, witnesses who had hunted and killed large animals, and had observed the character of the wounds inflicted by the bullets on entering and leaving the bodies of the animals, were properly permitted to testify that from an examination of the wounds of deceased it was their opinion that the bullets entered the back of his head and came out near the eye.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1053; Dec. Dig. § 452.*]

2. HOMICIDE (§ 276*)—SELF-DEFENSE—QUESTIONS FOR JURY.

In a murder trial the weight to be given accused's statement on surrendering himself to custody that he acted in self-defense was for the jury, and the court properly left it to them to say whether in the light of the other evidence produced by the prosecution it tended to establish justification or excuse.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 569; Dec. Dig. § 276.*]

3. CRIMINAL LAW (§ 822*)—INSTRUCTIONS.

In a criminal case, the charge of the court must be considered in its entirety.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1990; Dec. Dig. § 822.*]

4. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE—EVIDENCE.

In a murder trial, where the sole issue was whether accused acted in self-defense, the court instructed that accused was presumed to be innocent until proven guilty beyond a reasonable doubt; that the burden was on the prosecution to make out all the facts constituting the crime charged beyond a reasonable doubt, and that, if doubt exists as to a material fact, accused is entitled to an acquittal; that, if the evidence leaves any reasonable doubt of guilt, the jury must acquit; and that, "if you entertain a reasonable doubt after considering all the facts and circumstances proven in this case whether defendant was justified in taking the life of deceased, then you should acquit him." Held, that accused was not prejudiced by the failure to couple such instructions with an instruction that the burden assumed by accused was only to the extent of raising in the minds of the jury a reasonable doubt as to whether he was justified in killing deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 631; Dec. Dig. § 300.*]

Appeal from District Court, Yavapai County; before Justice Richard E. Sloan.

Frank Spence was convicted of murder, and appeals. Affirmed.

R. P. Talbot and A. L. Hammond, for appellant. John B. Wright, Atty. Gen., for respondent.

CAMPBELL, J. Appellant was convicted of the crime of murder, and appeals.

The testimony on the part of the prosecu-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index

tion shows that Spence, the appellant, and Edgar R. Sullivan, lived upon a small ranch, some four miles from the city of Prescott. On October 22, 1908, Spence appeared at the sheriff's office in Prescott, and stated that he had killed Sullivan at the ranch, that he had shot him while Sullivan was attacking him with a knife, and that the killing was done in self-defense. A coroner's jury was impaneled and went to the ranch, where the body of Sullivan was found lying face downward upon the floor of the cabin in which the men had lived. His left arm was under his body and his left leg under the right. The right arm was extended, the hand closed and resting upon, but not grasping, a knife. The upper part of the face was covered with ashes, and the eyebrows and hair had been singed by fire. There was a bullet wound near the left eye and another in the back of the head. The wound in front was much the larger of the two, being sufficiently large, as described by the witnesses, to permit the insertion of three fingers. The bones surrounding it were crushed and extended outward. The wound at the back of the head is described as having been a small round hole; the flesh being drawn inward. Several persons who examined the body were permitted to describe the wounds, and, after testifying that they were sufficiently familiar with gunshot wounds to enable them intelligently to form opinions as to which of the wounds upon Sullivan's head was made by the entrance of the bullet and which by the exit, were permitted to testify that in their opinions the bullet entered at the back and came out near the eye. Before so testifying, each testified to some familiarity with the character of wounds made by the entrance and exit of bullets; that they had hunted and killed large animals, and had observed the character of the wounds inflicted by the bullets upon entering and leaving the bodies of animals.

Appellant assigns as error the ruling of the trial court permitting these witnesses so to express their opinions. It is contended that the witnesses were not experts, and should not have been permitted to testify. It is true that they were not experts in the sense that they were possessed of scientific or technical knowledge of the subject concerning which they expressed their opinions, but they were possessed of information that undoubtedly was useful to the jury. They did not testify as experts, but merely stated conclusions of fact derived from their observations. In *Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708, a witness was permitted to give his opinion as to the direction from which a blow was delivered, after he had stated that his examination of the body had enabled him to form an intelligent opinion upon that point. The court says: "The opinions of witnesses are constantly

taken as to the result of their observations on a great variety of subjects. All that is required in such cases is that the witnesses should be able to properly make the observations the result of which they give, and the confidence bestowed on their conclusions will depend upon the extent and completeness of their examination and the ability with which it is made. * * * It was a conclusion of fact which he would naturally draw from the examination of the wound. It was not expert testimony in the strict sense of the term, but a statement of a conclusion of fact such as men who use their senses constantly draw from what they see and hear in the daily concerns of life." There was no error in admitting the testimony of the witnesses in this case.

Appellant testified that Sullivan became enraged at him because he had turned some horses into a corral; that Sullivan secured a butcher knife and told him that he would kill him, and that he started towards him; that he, appellant, stepped behind a chair, but that Sullivan kept coming towards him, threatening to kill him. Thereupon appellant seized a rifle which stood near and shot Sullivan in the front of the head; that Sullivan fell into the fireplace; that appellant dragged the body out and away from the fire, and left the house.

In instructing the jury the court charged fully the law of self-defense, instructing also that it being admitted by Spence that he took the life of Sullivan, unless the evidence adduced on behalf of the prosecution established or tended to establish that the act was justifiable or excusable on the ground of self-defense, or tended to show that the killing only amounted to manslaughter, the burden was upon him to produce evidence showing that his act was justifiable or excusable, or that it only amounted to manslaughter; also, that the taking of human life is only justified on the ground of necessity or seeming necessity; and that the utmost good faith is required of a defendant who seeks to justify his act of killing another. Appellant insists that by these instructions the court ignored the testimony introduced by the prosecution, which tended to show that Spence was justified in taking Sullivan's life, since the prosecution put in evidence the statement made by Spence when he appeared at the sheriff's office, to the effect that he had acted in self-defense, but the weight to be given to this statement was for the jury, and the court properly left it to the jury to say whether, in the light of the other evidence produced by the prosecution, it tended to establish justification or excuse. If it did, the jury were told, the burden of showing justification did not devolve upon the defendant. See *Bryant v. Territory*, 100 Pac. 455.

Appellant further criticises the instructions

In that "the court utterly neglected to instruct the jury as to the degree of proof required by the statute, and any juror might properly have considered the charge to mean that Spence must prove his justification conclusively, or by a preponderance of the evidence, or even beyond a reasonable doubt, and herein was reversible error." Undoubtedly, standing alone, the instructions are open to the criticism made by appellant, and, if unqualified or unexplained, would require the reversal of the judgment in this case. *Anderson v. Territory*, 9 Ariz. 50, 76 Pac. 636. But the charge of the court must be considered in its entirety. The sole issue in this case was whether the defendant killed the deceased in the exercise of his right of self-defense. The court in charging the jury told them that the defendant was presumed to be innocent until proven guilty beyond a reasonable doubt, and that the burden was upon the prosecution to make out all the facts constituting the crime charged beyond a reasonable doubt, and that, "if doubt exists as to a fact, a material fact, he is entitled to an acquittal." Again: "If the jury entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, it is your duty to give the prisoner the benefit of such doubt and acquit him." Again: "If the evidence in this case leaves upon the minds of the jury any reasonable doubt of the defendant's guilt, the law makes it your duty to acquit him." And, finally: "If you entertain a reasonable doubt, after considering all the facts and circumstances proven in this case, whether the defendant was justified in taking the life of the deceased, then you should acquit him, and your verdict should be that of not guilty." While perhaps it would be better in giving instructions of the nature of those complained of in this case to couple them with the instruction that the burden assumed by the defendant was only to the extent of raising in the minds of the jury a reasonable doubt as to whether he was justified in taking the life of deceased, the failure to do so in this case, where the jury were so clearly and repeatedly instructed in other portions of the charge that upon the whole evidence they must find the defendant guilty beyond a reasonable doubt before they could convict him, could not have prejudiced the defendant's rights.

Appellant relies upon the case of *Anderson v. Territory*, supra. In that case the court in connection with its instruction as to the burden of proof told the jury that the defendant must establish justification by a preponderance of the evidence. Here no such instruction was given, and, as we have pointed out, the burden assumed by the defendant under the charge of the court extended no further than to raise in the minds of the jury a reasonable doubt as to whether his act was justifiable.

The judgment of the district court is affirmed.

KENT, C. J., and DOAN, LEWIS, and DOE, JJ., concur.

(13 Ariz. 70)

GRAY v. BARON.

(Supreme Court of Arizona. April 2, 1910.)

ESCROWS (§ 8*)—DELIVERY—SUFFICIENCY.

Defendant made out his note to plaintiff's order, which, with certain shares of stock, was placed in escrow, with instructions to deliver the stock to defendant on payment by defendant to the escrow holder of the amount of the note within a year, or, if defendant paid during the year for part of the stock, that part to be delivered to him, and the amount paid to be credited on the note. No payments were made by defendant within the year, nor was this contingency provided for. *Held*, that there was no delivery of the note, so that plaintiff could not sue thereon.

[Ed. Note.—For other cases, see *Escrows*, Cent. Dig. §§ 9, 10; Dec. Dig. § 8.*]

Appeal from District Court, Cochise County; before Justice F. M. Doan.

Action by August Baron against Douglas Gray. Judgment for plaintiff, and defendant appeals. Reversed, and complaint dismissed.

Cunningham & Riggs, for appellant. H. L. Pickett and Harry E. Pickett, for appellee.

KENT, C. J. This action was brought on June 25, 1908, by Baron against Gray upon a promissory note. The complaint is in the usual form for an action on a promissory note, alleging execution and delivery thereof, and prays simply for a money judgment against the defendant for the amount thereof. The answer admits the execution of the note; denies the delivery thereof or any authorization to any person to deliver the note, or that the note was ever intended to be delivered to Baron; denies that Gray ever received any consideration for the note; alleges that on the day before the execution of the note Baron and Gray entered into an agreement by the terms of which Baron agreed to sell and deliver to Gray 5,500 shares of the capital stock of a certain corporation at the agreed sum of 90 cents per share, at any time on or before two years from such date at the option of Gray, and that Baron agreed to place said shares of stock in escrow in the hands of the cashier of the First National Bank of Tombstone to abide the exercise by Gray of such option to purchase; that on the next day, to wit, the day the note was executed, Baron insisted that before he would place the stock in escrow as agreed Gray should execute a promissory note for the amount of the stock, payable in one year to Baron, and that he should place said note also in escrow with the stock aforesaid; and that thereupon Gray did execute the note sued upon and de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

posited the same with the cashier of the bank under the following escrow agreement signed by the parties, to wit: "Tombstone, Arizona, June 1st, A. D. 1907. The Cashier First National Bank, Tombstone, Arizona, Sir: This envelope contains 5,500 shares of stock of Machomich Mercantile Co., a corporation, and a promissory note from D. Gray to A. Baron, payable on or before one year from date. The stock is issued in the name of A. Baron and endorsed in blank. Now, if at any time on or before the expiration of one year, Gray shall pay you for me the amount of said note, you will deliver said stock to Gray, or if Gray pays for any portion of said stock at the rate of 90 cents per share, then you will deliver that portion to him and credit the same on said note as a partial payment thereon." The answer further alleges that neither the stock nor the note had ever been delivered either to the plaintiff or defendant, and that both were still held by the bank under the escrow agreement, and that under the agreement between Baron and Gray the latter still had a year in which to exercise his option. The case was tried before the court without a jury, and judgment was given for the plaintiff. Upon the trial of the case the plaintiff put on the stand the cashier of the bank, who testified that the note was still in his possession under the terms of the escrow agreement which was introduced in evidence; that nothing had been paid upon the note, and that the note and stock were still held by him as such cashier. Defendant at the close of plaintiff's case moved to dismiss on the ground that no delivery of the note in question to the plaintiff had been proved, which motion was denied by the court. Evidence was thereupon adduced on the part of the defendant tending to establish the allegations of fact set forth in the answer. The court found that the defendant on June 1, 1907, executed his promissory note payable to the plaintiff in the sum of \$4,950 on or before one year from date, without interest, that the sum mentioned was the purchase price of the shares of stock above referred to, and that said note was placed in escrow with the cashier of the bank subject to the escrow instructions above set forth. The court further found that no part of the note was paid prior to or after its maturity, nor were the note or certificates of stock ever delivered by the escrow holder to either plaintiff or defendant; that no instructions were given to the escrow holder for the disposition of either the note or certificates of stock unless payment was made within the year. The court made no finding that the note had ever been delivered by Gray to Baron. As conclusions of law, the court found that the transaction between the plaintiff and defend-

ant constituted an agreement for purchase; that the time for payment within the year by the defendant and delivery by the plaintiff of the stock thus paid for was at the option of the defendant; that after the expiration of one year the payment became due to the plaintiff upon delivery of the stock; that the plaintiff was entitled to a judgment for the payment of the note upon the delivery by the plaintiff to the defendant of the stock in question.

Under the terms of the escrow agreement, the stock was to be delivered to Gray if he paid for it at the rate of 90 cents a share, or if he paid the note within the year. In default of either of such happenings, no provision was made as to the disposition of either the stock or the note. At the time of the trial the note was still in the hands of the escrow holder and had never been delivered to the plaintiff, and the stock was still in the hands of the escrow holder, and had never been delivered to the defendant. The consideration that Gray was to receive was the stock, but this stock was not to be delivered until it was either paid for at 90 cents a share or until the note was fully paid. The judgment of the trial court was that the defendant should pay to the plaintiff the amount of the note, and upon such payment the plaintiff should deliver the stock to the defendant, thus clearly recognizing that the obligation of the defendant was a conditional one.

Under the terms of the escrow agreement and the facts as found by the court, we think there was no such delivery of the note in question to the plaintiff as constituted the plaintiff the owner and holder thereof, and entitled to sue thereon, and that the judgment entered by the court for the plaintiff requiring the payment of the note conditioned upon the delivery of the stock was outside of the issues set forth in the pleadings or the relief demanded by the plaintiff. The theory of the trial court seems to have been that the plaintiff had established a cause of action based upon the breach of a contract to purchase the stock. The error of the trial court was, we think, in attempting to enforce such a cause of action and give judgment therefor under the facts as they were found to exist, in an action based simply upon the promissory note, and not one based upon the breach of the contract to purchase.

We think the court should have granted the motion of the defendant to dismiss the complaint. The judgment is reversed and judgment will be entered in this court for the defendant dismissing the complaint of the plaintiff.

CAMPBELL, LEWIS, and DOE, JJ., concur.

(13 Ariz. 53)

HUGHES et al. v. CADENA DE COBRE MINING CO.

(Supreme Court of Arizona. April 2, 1910.)

1. CORPORATIONS (§ 30*) — PROMOTERS — LIABILITY.

Where promoters of a corporation secretly issue stock to themselves without consideration, their liability to the corporation and other stockholders arises, if at all, out of breach of fiduciary relations which the promoters occupy toward existing stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 98; Dec. Dig. § 30.*]

2. CORPORATIONS (§ 30*) — PROMOTERS — LIABILITY.

Promoters of a corporation occupy a fiduciary position, and they cannot obtain an undue advantage over other stockholders, and they may not obtain any profit to themselves without a full disclosure to the other stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 98; Dec. Dig. § 30.*]

3. CORPORATIONS (§ 30*) — PROMOTERS — LIABILITY.

Neither the stockholders who participate as promoters in fraudulent transactions to their profit, nor their transferees, may complain thereof, but the corporation, acting for other existing stockholders, not participating in and without knowledge of the wrong, may enforce their rights.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 98; Dec. Dig. § 30.*]

4. CORPORATIONS (§ 30*) — PROMOTERS — LIABILITY.

Promoters of a corporation who secretly issued stock to themselves without consideration cannot escape liability therefor on the ground that when the stock was issued the corporation had no assets to make the stock valuable, since shares of stock represent a right and interest in the management and profits of a corporation as well as in its assets.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 98; Dec. Dig. § 30.*]

5. CORPORATIONS (§ 30*) — PROMOTERS — LIABILITY.

The gratuitous issue of corporate stock without consideration to promoters of the corporation or to those occupying such a fiduciary relation is a fraud on existing stockholders, and is invalid where issued without their knowledge and assent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 98; Dec. Dig. § 30.*]

6. CORPORATIONS (§ 30*) — PROMOTERS — LIABILITY.

Where the question is whether promoters of a corporation while maintaining fiduciary relations to the stockholders made profits from secret dealings with the corporation, the burden is on the promoters to show that the transaction was fair, open, and conducted in the utmost good faith.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 98; Dec. Dig. § 30.*]

7. CORPORATIONS (§ 30*) — PROMOTERS — LIABILITY.

Where promoters of a corporation issued stock to themselves without consideration, pursuant to a secret agreement, the court, in the absence of evidence, could find that a stockholder, who resided in a foreign country and never attended any meeting of the corporation, had no knowledge of the fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 98; Dec. Dig. § 30.*]

8. CORPORATIONS (§ 30*) — PROMOTERS — LIABILITY.

The act of the promoters of a corporation in issuing stock to themselves without consideration pursuant to a secret agreement is a fraud on the corporation, which it can have remedied in equity, provided it did not assent thereto.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 98; Dec. Dig. § 30.*]

9. CORPORATIONS (§ 30*) — PROMOTERS — LIABILITY.

Where the promoters of a corporation procured the issuance to themselves of corporate stock without consideration under a secret agreement when there was no authority for the issuance of stock by any persons formally acting as a board of directors, and when the corporation was under the control of the promoters, the corporation did not assent to the issuance of the stock, unless all the existing stockholders assented to the transaction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 98; Dec. Dig. § 30.*]

10. CORPORATIONS (§ 30*) — PROMOTERS — LIABILITY.

The fact that one stockholder had no knowledge of the secret agreement between the promoters for the issuance to themselves of stock without consideration, and that he never assented to it, fixed the want of assent of all existing stockholders, so that the corporation could sue in equity for the fraud of the promoters, notwithstanding the transfer before suit by such stockholder of his stock to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 98; Dec. Dig. § 30.*]

11. COURTS (§ 96*) — CONTROLLING DECISIONS.

The decision of the federal Supreme Court as to the rights of future stockholders of a corporation and the liability of promoters to them fixes the law in the territory of Arizona.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 325; Dec. Dig. § 96.*]

12. APPEAL AND ERROR (§ 1054*) — HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

The error in admitting immaterial testimony in a cause tried before the court is not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4185; Dec. Dig. § 1054.*]

13. CORPORATIONS (§ 30*) — FRAUD OF PROMOTERS — ACTIONS — EVIDENCE.

Where, in a suit by a corporation against its promoters for the cancellation of stock issued to themselves without consideration, under a secret agreement, the evidence showed that the promoters never acquired any interest in specified property, or in options thereon, and that the stock was not issued in consideration of any interest that they had in the options or the property, and that all money paid for the options or transfers and for the development of the property were paid out of the proceeds of sales of stock made to the public, evidence of the value of the services of one of the promoters in examining such property was properly excluded as immaterial.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 98; Dec. Dig. § 30.*]

14. APPEAL AND ERROR (§ 1012*) — FINDINGS — CONCLUSIVENESS.

A finding supported by substantial evidence will not be disturbed on appeal, though the preponderance of the evidence is against the finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3990; Dec. Dig. § 1012.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from District Court, Pima County; before Justice John H. Campbell.

Suit by the Cadena De Cobre Mining Company against Ernest E. Hughes and others. From a decree directing the cancellation of shares of capital stock, defendants appeal. Affirmed.

Sutter & Shelley and Herring, Sorin & Ellinwood, for appellants. Ben Goodrich and George H. Neale, for appellee.

KENT, C. J. The alleged error of the trial court in denying the motion to strike certain portions of the amended complaint will first be considered. The complaint alleged, in substance, the existence of the plaintiff as an Arizona corporation, and the residence of the defendants in the territory of Arizona; that at the time of the execution and adoption of the articles of incorporation the plaintiff corporation had no assets or property whatsoever; that on December 29, 1904, the several defendants, excepting the defendant William O'Neil, agreed among themselves to organize the corporation, and were the promoters thereof, acting at all times in the complaint mentioned for and on behalf of all the defendants, except the defendant William O'Neil; that on January 5, 1905, such defendants met and purported to elect a board of directors composed of certain of the defendants, which board of directors on that date pretended to elect certain of their number as officers of the corporation, and that such directors and officers acted as such directors and officers until the 5th day of October, 1905; that on the date of such pretended election no stock of the corporation had been issued to any person whatsoever, and that by reason thereof the election was void and without authority; that on the 9th day of January, 1905, the corporation by its board of directors entered into certain agreements with the defendant William O'Neil and one Leslie Coombs, whereby the latter agreed to sell to the corporation certain mining property in the republic of Mexico for a certain amount of cash and for 125,000 shares of stock of the corporation to be issued to each, the corporation being bound by such agreement to perform the obligations of a certain other agreement between one Jacob Biebrich (not a party to this suit) and the defendant O'Neil, the rights of said O'Neil to the said agreement being transferred to the corporation under certain stipulations and provisions; that the sum to be paid to Coombs under the contract above mentioned was paid to him on January 9, 1905, by certain of the defendants contributing thereto, and a portion of the money being raised by a sale of shares of the capital stock of the corporation; that the defendants so contributing toward such purchase price were repaid from the proceeds of a subsequent sale of stock of the corporation; that the stock of the corporation provided to be issued to Coombs was issued to him on January 9,

1905, being the first stock of the corporation issued; that stock of the corporation was next issued to the said Biebrich in payment of the transfer of his rights under his contract, and that the stock to be issued to O'Neil was also on the same day issued to him; that on the 9th of January, and after the issue of such stock of the corporation to Coombs, Biebrich, and O'Neil, the various defendants (excepting O'Neil) secretly agreed among themselves to set apart and issue to themselves 550,000 shares of the capital stock of the corporation in varying amounts to each, claiming that such stock should be issued to them in consideration of services rendered and money advanced by them to the corporation up to the 29th day of December, 1904; that no notice of such secret agreement and distribution and issuance of stock was ever given to any person whatsoever or to any stockholder or director of the corporation other than the defendants themselves, and that such agreement and distribution and issuance of the stock was never authorized by the stockholders or directors of the corporation; that, in pursuance of such secret agreement, the said 550,000 shares of stock were issued to the said defendants, and thereafter certain transfers of such stock so issued to them were made by them, but that such transfers were not made upon the books of the corporation, and the several defendants now and ever since have claimed to own the same; that among the transferees of such stock was the defendant O'Neil (and for that reason he was made a party defendant); that all the defendants had knowledge of all the matters set forth in the complaint except the defendant O'Neil; that, in fact, the said defendants did not render any services to the corporation or advance any money to the corporation or give any other consideration whatever for said stock at any time either before or after its issue; that the value of the stock is 50 cents per share; that by such distribution and issuance of said 550,000 shares of the capital stock of the corporation the corporation was and is prevented from selling such stock in the market or issuing the same, and its assets were thereby depleted, wasted, and misappropriated by the defendants; that no entry or other indication of the existence of said contract in relation to the issuance of such stock was ever made on the minutes of the corporate books of the plaintiff corporation, and that said plaintiff corporation had no notice of its existence until three days before the institution of this suit; that at the time the contract was made between the defendants in relation to the issuance of the 550,000 shares of stock all the subscribers to said agreement were occupying a fiduciary relation to the said company and its other stockholders; that, after the issuance of the said stock, the corporation sold to the public 33,935 shares of the balance of its capital stock at prices between 25 cents and 50 cents

per share: that the public, the purchasers of such stock, were induced to purchase the same by reason of false representations as to the ownership by the corporation of such stock made by the defendants to such purchasers of the stock and also with relation to the title of the mining property before mentioned; that the defendants without authority and in fraud of the corporation and stockholders caused to be paid to certain of the defendants certain sums of money as salaries and compensation, and as commissions on the sale to the public of the stock of the corporation, and further caused to be issued to divers persons certain shares of the stock of the corporation for which no consideration was ever received by the corporation, and further appropriated to themselves certain sums of money, proceeds of the stock for which they have not accounted to the corporation or at all; that until the 5th of October, 1905, the defendants, the pretended board of directors and the pretended officers of the corporation, had possession and control of all the books and papers of the corporation; that after said 5th day of October, 1905, at divers times until the 1st day of January, 1906, the books and papers of the corporation came into the hands of a certain auditing committee appointed by the board of directors to investigate the affairs of the corporation, which said auditing committee made a report to said corporation on the 13th day of January, 1906, when for the first time the corporation and its stockholders, other than the defendants, were informed of the matters and things before stated as to the appropriation of the 550,000 shares of stock, and that prior to such time the corporation had no knowledge whatever of the claim of the defendants to said stock under said secret agreement, and that three days thereafter this suit was instituted; that in October, 1905, the stockholders of the corporation other than the defendants discovered that the final payment on the purchase price of the mines before mentioned provided to be paid in the contract between Biebrich and O'Neill had not been paid, and that there were not sufficient funds on hand in the treasury of the company to pay it; that certain work required to be performed on or before December 15, 1905, had not been performed, and that certain other requirements to be performed by the corporation under its contracts had not been performed; that in October certain of the defendants resigned as members of the pretended board of directors and as other officers of said corporation, and that thereupon certain stockholders other than the holders of the said 550,000 shares of stock advanced certain moneys on behalf of the corporation to make the expenditures necessary to be made; that in November, 1905, a new board of directors was elected and by the money paid in by such other stockholders, and through funds raised upon a note the new board of directors acquired

certain capital stock of a Mexican corporation formed to acquire the mining property in Mexico, which stock has been transferred to the corporation; and that such stock now constitutes the property and assets held by the corporation. The prayer of the complaint was for a decree of court canceling the 550,000 shares of stock issued to the defendants and for an accounting.

The motion of the defendants was in effect a motion to strike out all of the allegations of the complaint except the allegations in relation to the misappropriation of funds of the company by the defendants and their accountability therefor. In other words, the motion went to the striking out of all allegations in the complaint in relation to the issuance of the 550,000 shares of stock to the defendants.

The contention of the appellant in this regard is that the gravamen of the complaint is the gratuitous issue of this stock, and the alleged depreciation and misappropriation of the plaintiffs' assets thereby; that the alleged misrepresentations by the defendants to subsequent purchasers of the stock whereby they were induced to purchase the stock of the corporation contain no allegations that would justify the cancellation of the stock issued to the defendants, as such representations have no connection whatever with the acquisition of the defendants' stock; that the complaint itself alleges that at the time of the issuance of the stock and until the formation of the holding company in Mexico and the transfer of such holding stock to the plaintiff corporation the latter had no property or assets whatever, and that inasmuch as, when the 550,000 shares were issued to the defendants, such shares were without value, the company then having no assets, no wrong was done to the company by the gratuitous issue of such shares; that the theory under which plaintiff asks for the cancellation of the defendants' stock is that, by the distribution and issuance of such stock, its assets were depleted and misappropriated, and that, as unissued shares of stock are not corporate property, a gratuitous issuance of the stock could not result in depleting the assets of the corporation, and, furthermore, as it appears from the complaint that the corporation was a party to the agreement in relation to the issuance of the shares of stock, since the stock was issued by it, the corporation, having issued the stock, cannot itself attack or repudiate the transaction; that, therefore, the complaint failed to disclose any cause of action in the plaintiff corporation as to the issuance of the 550,000 shares of stock, and the allegations in that regard were irrelevant and redundant, and could not be made the basis of any relief for the plaintiff corporation. In other words, the contention of the appellants is that the allegations of the complaint amount at most to the charge that at a time when the company had no assets defendants issued to themselves, without a con-

sideration therefor, certain shares of its admittedly worthless stock, and that such issue raises no right of action in the defendant corporation.

In support of their contention the appellants cite a number of cases, and among others the case of *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104, on which latter case they greatly rely. There *Fogg*, the creditor of an insolvent railroad corporation, brought suit against *Blair*, a stockholder of the company, to compel him to pay the amount due for his stock on a judgment obtained against the corporation, alleging that the delivery and issuance of the stock to *Blair* was without any consideration, and praying that the certificate issued to *Blair* be canceled, and that he be decreed to pay to the plaintiff the full amount of his judgment against the corporation. The court sustained the demurrer to the bill because the bill failed to show that the stock, when delivered, had any substantial value; that it was entirely consistent with the allegations of the bill that the stock was absolutely without value when issued to *Blair* and up until a later time when the property of the company was sold under a decree of foreclosure; that, if the stock when issued was without value, no money was due to creditors by its issuance; that as the bill contained no allegations whatever as to the real or market value of the stock, and as there were no allegations of fact that the circumstances attending its delivery indicated bad faith, the demurrer should be sustained.

We think the appellants overlook the fundamental distinction between this complaint and such a bill as in the case of *Fogg v. Blair*. There it was a question whether a creditor could complain of a gratuitous issue of stock which had no value, and the court held that, the stock having no value, a creditor was not injured by its issuance. Here the wrong complained of is the secret issuance to promoters of stock of the corporation without consideration given therefor, and the wrong is a wrong, not to a creditor, but to the corporation and its stockholders by such secret advantage so obtained by such promoters. The liability of the defendants, if any, arises out of the breach of the confidential and fiduciary relations that the promoters of a corporation occupy towards existing stockholders. The liability of the defendants under the allegations of the complaint is not therefore to be tested by the rules that would apply in the issuance of stock to persons not similarly situated, or, as in the case of *Fogg v. Blair*, supra, to a stranger to the promotion or organization of the corporation against whom relief was sought by a creditor; nor by the rules that apply where relief is sought by a stockholder having bought his stock under misrepresentations. The allegations of the complaint before us are to be tested as to their sufficiency by the rule that applies to the duty

of the promoters of a corporation to other stockholders. Because of such fiduciary relation, the promoters may obtain no profit or advantage to themselves without a full disclosure to other existing stockholders, where the promoters of the company so act as to put themselves in a fiduciary relation to the company. The question under the allegations of the complaint is not whether the corporation had assets at the time the stock was issued. The question is whether the allegations of the complaint show that the defendants were promoters of the company and thus acting in a fiduciary relation to the company and its stockholders so as to render them liable for the alleged fraud in making, as promoters, a secret profit by the issue to them of stock for alleged service not in fact rendered, without making a full disclosure to the stockholders or the company; the rule being that such persons, because of their confidential and fiduciary relation, cannot thus obtain an undue advantage over other stockholders. While stockholders participating in the transaction cannot complain, or the transferee of a stockholder participating in the transaction cannot complain, yet the corporation, acting for existing stockholders not participating or having knowledge thereof, may, in a proper case, enforce the rights of such stockholders and remedy the wrong. *Cook on Corporations* (5th Ed.) §§ 28-48, 651; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423; *Chandler v. Bacon* (C. C.) 30 Fed. 539; *Densmore Oil Co. v. Densmore*, 64 Pa. 43. Nor is the liability of the promoters for such want of fair dealing relieved because at the time of the issuance of the stock the corporation had no assets to make such stock valuable. Shares of stock represent a right and interest in the management and profits of a corporation as well as in its assets. The gratuitous issue of stock without consideration to promoters or those occupying such a fiduciary relation is a fraud upon existing stockholders, and is invalid if issued without their knowledge and assent. *Wills v. Nehamen Coal Co.*, 52 Or. 70, 96 Pac. 528; *Hayward v. Leeson*, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725. We think the allegations of the complaint in their charge of fraud on the part of the defendants as promoters of the corporation were sufficient to constitute a cause of action against such defendants, and that the motion to strike was therefore properly denied.

Our conclusion as to the sufficiency of the complaint disposes of the assignment of error that the court erred in overruling the defendants' objection to the introduction of any evidence respecting the issuance of the 550,000 shares of stock, and also the alleged error of the district court in holding the complaint good as against a general demurrer.

The trial court found that the only existing stockholders at the time of the execution of the agreement between the corporation and the seven defendants against whom

the fraud is alleged, and at the time when the 550,000 shares of stock were issued, were Coombs and Biebrich and the defendant O'Neil. The court found that Coombs and O'Neil were present at the incorporators' meeting and the first annual meeting of the stockholders on January 5th, at which meetings the issuance of the 550,000 shares of stock to the seven defendants was agreed upon. The court also found that Coombs and O'Neil knew of the making of the agreement of January 9th between the corporation and the seven defendants and of the actual issuance of the 550,000 shares of stock, and made no objection thereto. The appellants contend that, as Coombs and O'Neil acquiesced in the issuance of the stock, they are entitled to no equitable relief which the corporation can enforce; that the plaintiff corporation seeking equitable relief for and on behalf of its stockholders, if it can maintain this proceeding at all, can maintain it solely because of the rights of existing stockholders, and that it is apparent, therefore, that if Biebrich, the only other existing stockholder, was so circumstanced that he could not attack the transaction, the plaintiff corporation cannot maintain the action. This is the position taken by appellant, and we think that under the doctrine of the *Lewishon Case*, to which we shall hereafter refer, it is a sound one. The amended complaint alleged the issuance of the stock to Biebrich prior to the issuance of the defendants' stock. The court found that Biebrich did not know of the making of the agreement or the issuing of the stock in pursuance thereof until three days before the commencement of this suit, and that Biebrich has been continuously a stockholder owning 25,000 shares. This finding of the court that Biebrich did not know of the making of the agreement or the issuing of the stock to the defendants is assigned as error by the appellants. The finding is as follows: "That there is no evidence to show that said Jacob Biebrich knew of the making of said agreement or the issuing of said stock in pursuance thereof until the 13th day of January, 1906, and therefore the court finds that the said Jacob Biebrich did not know of the making of said agreement or the issuing of said stock in pursuance thereof until the 13th day of January, 1906." The appellants' position is that the court erred in finding that Biebrich did not know of the making of the agreement because there was no evidence to show that he did not know; the contention being that as the complaint alleges that the agreement was secret, and that the corporation and its stockholders had no knowledge whatever of the claim of the defendants to the stock, such facts are essential to the plaintiff's recovery, and, in the absence of any direct evidence of Biebrich's want of knowledge, the fact must be found against the plaintiff, upon whom the burden of proof should be cast; that when proof of negative matter is essential to the successful maintenance

of a cause of action this necessitates a negative averment, which the plaintiff has the burden of proving. This general rule does not apply to transactions between directors, promoters, or those maintaining fiduciary relations to the stockholders of a corporation, where the question is as to the profit obtained by persons in such fiduciary relation from their dealings with the corporation. The burden is upon the persons occupying such fiduciary relations to show that the transaction has been fair, open, and conducted in the utmost good faith. *Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1; *Barker v. Montana Mining Co.*, 35 Mont. 351, 89 Pac. 66; *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513. Under the facts in the case, it appeared that Biebrich had never been within the United States. He was a resident of the Republic of Mexico. He had never attended any meeting of the corporation, and there was no evidence that he ever had any knowledge of the transaction in question. We think, under the circumstances in the case, the burden was on the defendants to show knowledge on the part of Biebrich, and, in the absence of such proof, the court's finding that he did not have such knowledge was justified.

It is further claimed that the trial court erred in excluding evidence offered by the defendants, to the effect that Biebrich had parted with his stock to the corporation prior to the commencement of the suit. The evidence was excluded as immaterial. The contention of the appellant is that, since Biebrich was the only existing stockholder who had no knowledge of the transaction complained of, the corporation can only sue as Biebrich's representative, and there is an identity of interest between Biebrich and the corporation; that if Biebrich, by reason of the fact that he had no knowledge of the agreement or the issuing of the stock, did have a right of action to have the transaction set aside, this right of action lasted so long only as Biebrich remained a stockholder, so that if Biebrich had parted with his stock before suit was brought, and his status was not that of a stockholder, there was no one on whose behalf the plaintiff could on any theory maintain the action. In support of this contention, counsel cite a number of cases to the effect that, in order that a person may maintain suit as a stockholder to set aside or enjoin an ultra vires transaction, he must be a stockholder, in fact, when such suit is brought. The cases are not in point. The basis of this suit is the alleged fraudulent action of these seven promoters in their dealings with the corporation. The issue was whether they had by a secret agreement obtained stock of the corporation for which they gave no consideration. The first question is: Was the issue without consideration? If so, it was a fraud upon the corporation which the corporation can have remedied in a court of equity, provided the corporation did not assent thereto. The issuance of the

stock by the corporation is not determinative of that assent, first, because, as the court found, there was no authorization of the issuance of such stock by any person formally acting as a board of directors, and, second, because the corporation at the time was under the control and domination of the very persons alleged to have committed the fraud. If, however, all the existing stockholders knew of and assented to the transaction, the corporate assent at the time would have been given, and the corporation, under the doctrine of the *Lewishon Case*, could not be heard to complain. The next question, then, is: Was the agreement secret or was it known to all the constituent parts of the corporation, namely, all of its existing stockholders. The proof showed that it was not, that Biebrich had no knowledge of it, and never assented to it. That fact fixed the want of assent. The subsequent transfer before suit of Biebrich's stock to the corporation itself, which was the fact sought to be proved, could in no way alter the fact of the nonassent or the right of the corporation to have the secret transaction set aside as fraudulent. The evidence, therefore, was properly rejected as immaterial.

The court allowed evidence to be given of statements made to stockholders who purchased their stock subsequent to the transaction complained of, and this ruling is assigned as error. This case was tried prior to the decision of the Supreme Court of the United States in the case of *Old Dominion Copper Mining & Smelting Company v. Lewishon*, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025. That decision is determinative of the law in this jurisdiction as respects the rights of future stockholders and the liability of promoters to them. The nonassent or want of knowledge of future stockholders or injury to them cannot affect the liability of the defendants in this case under the decision in the *Lewishon Case*. The court was therefore in error in receiving the testimony complained of. The case was tried, however, before the court, and the testimony received was immaterial. Its reception was not therefore error upon which a reversal of the decision may be predicated.

The defendants attempted to prove by the defendant Fitzgerald the value of his services in examining the mining property referred to in the complaint. The evidence was excluded as immaterial, and the ruling is assigned as error. The trial court found that these defendants, prior to the organization of the corporation, had associated themselves together for the purpose of acquiring desirable mining property, and sent Fitzgerald to examine the property in question; but that they never acquired any interest in the property or in the options thereon, and that the 550,000 shares of stock in the cor-

poration was not issued to them in consideration of any interest that these defendants had in the options, contracts, or property, and that all money paid for such options or transfers and for the development of the property and all other expenses of every kind of said corporation were paid out of the proceeds of sales of stock made to the public, and that none of these defendants ever paid any part of the same or any money whatsoever for or on behalf of the corporation. In view of these facts which were supported by evidence, the immateriality of the evidence as to the value of Fitzgerald's services for the examination made by him is apparent.

It is assigned as error that certain findings of fact are against the weight of the evidence. There being substantial evidence in the record to support the findings complained of, we will not disturb them even if we should agree with the appellants' view, upon which we express no opinion, that the preponderance of the evidence is against the finding. There being conflicting testimony as to the facts found, we shall not disturb the trial court's ruling in that respect.

There are certain other assignments of error as to the insufficiency of the evidence to sustain certain of the findings of fact. We do not consider it necessary to consider these assignments in detail, as, in the view we take of the law, there is sufficient evidence in each case to sustain the finding made.

Under the facts as found by the trial court upon evidence which sustains such findings, the defendants in question caused stock of the corporation to be issued to remunerate themselves for services claimed to have been rendered by them, without disclosing the transaction to all of the then existing stockholders. The court found upon the evidence that these defendants paid nothing to the corporation, rendered no services, and gave no consideration whatsoever for the stock so issued to them. The transaction being a secret transaction, and not having been disclosed to a then existing stockholder, the corporation may maintain such a suit as has been here instituted to set aside the transaction as illegal and fraudulent, and to recover the stock issued. The wrong being a wrong done by promoters to the corporation whereby the promoters have derived in secret an advantage not disclosed to existing members of the corporation, the corporation was the proper person to bring the suit to remedy the wrong. *Cook on Corp.* par. 644.

We find no reversible error in the record, and the judgment of the district court is affirmed.

LEWIS and DOE, JJ., concur. DOAN, J., not sitting.

(13 Ariz. 47)

LEE KIM FONG v. UNITED STATES.

(Supreme Court of Arizona. April 2, 1910.)

ALIENS (§ 32*)—EXPULSION—CHINESE EXCLUSION ACTS—"DISTRICT."

Under Act Cong. May 28, 1896, c. 252, §§ 7, 9, 29 Stat. 180, 181 (U. S. Comp. St. 1901, pp. 611, 613), the territory of Arizona, though divided for the administration of law and for the holding of district courts with powers of the District and Circuit Courts of the United States into five judicial districts, with boundaries as established by the justices, is one "district," within Act Cong. March 3, 1901, c. 845, 31 Stat. 1093 (U. S. Comp. St. 1901, p. 1327), authorizing the district attorney of the district in which any Chinese person may be arrested for being found unlawfully within the United States to designate the commissioner within such district before whom such person shall be taken for hearing, and the district attorney of the territory may designate a commissioner within the First judicial district of the territory as the commissioner before whom a Chinese person arrested in the second judicial district shall be taken for hearing.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2136-2138; vol. 8, pp. 7639, 7640.]

Appeal from District Court, First District; before Justice John H. Campbell.

Petition for writ of prohibition by Lee Kim Fong to restrain a commissioner from proceeding against petitioner, arrested for being unlawfully in the United States. From a judgment dismissing the petition, rendered after sustaining a demurrer to the petition, petitioner appeals. Affirmed.

The appellant was arrested in the county of Santa Cruz in the Second judicial district of Arizona, upon a complaint charging him with being a Chinese person unlawfully in the United States. Upon a certificate of the United States attorney for Arizona, a commissioner at Tucson within the First judicial district of the territory of Arizona was designated as the commissioner before whom the appellant should be taken for hearing and trial. Appellant filed a petition in the district court in the First judicial district asking for a writ of prohibition against the commissioner from proceeding. A demurrer to the petition was sustained by the district court, and, from the order entered dismissing the petition for the writ, an appeal has been taken to this court.

Edwin F. Jones, for appellant. J. L. B. Alexander, U. S. Atty., and George D. Christy, Asst. U. S. Atty.

KENT, C. J. The question involved in the case is whether, under the statute, the United States attorney for the territory of Arizona may designate any United States commissioner within the territory as the officer before whom the Chinese person charged with being unlawfully in the United States may be taken, or whether the commissioner so designated must be a commissioner residing

within the specific district in which the person is found. The statute in question is the act of Congress of March 3, 1901, c. 845 (31 Stat. 1093 [U. S. Comp. St. 1901, p. 1327]), and reads as follows: "That it shall be lawful for the district attorney of the district in which any Chinese person may be arrested for being found unlawfully within the United States, or having unlawfully entered the United States, to designate the commissioner within such district before whom such Chinese person shall be taken for hearing."

There are no United States District Judges in the territory of Arizona. An act of Congress provides that the territory shall be divided into five judicial districts, and provision has been made by Congress that a district court shall be held in each district of the territory by one of the justices of the Supreme Court of the territory, and the district court presided over by such justice of the Supreme Court as district judge exercises the same jurisdiction as the Circuit and District Courts of the United States. The boundaries of these districts are not defined by Congress, but the territory is divided under the law into five districts by the justices of the Supreme Court of the territory, and these justices assign a justice to each district, to preside over the district court therein as district judge. Each justice so sitting as a district judge appoints United States commissioners to act within his own district. There is appointed for the whole territory but one attorney of the United States for the territory, and but one marshal for the territory. The jurisdiction of the United States attorney and of the marshal covers the whole territory. The jurisdiction of the justices of the Supreme Court covers the whole territory. The jurisdiction of such justices sitting and acting as district judges covers only the district to which each is assigned. The contention of the appellant is that though under the statute the United States attorney may designate a commissioner before whom the Chinese person may be taken, such designation must be of a commissioner within the particular one of these five judicial districts in which the person is found, and not, as here, a commissioner residing in another of these judicial districts within the territory.

We do not think the contention of the appellant is well founded. The act in question provides that the district attorney of the district in which the Chinese person may be arrested shall designate a United States commissioner within such district. We think for judicial purposes the territory of Arizona is to be considered as but one district. The territory as a whole is attached to the Ninth judicial circuit, and Congress in its enactments in relation to the appointment and salaries of United States district attorneys and United States marshals recognizes the territory as a judicial district. Act of Congress

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

approved May 28, 1898, c. 252, §§ 7, 9, 29 Stat. 180, 181 (U. S. Comp. St. 1901, pp. 611, 613).

It is true that for the administration of the law in the territory and for the holding of the district courts having the powers of the District and Circuit Courts of the United States, the territory has by law been divided into five judicial districts, the boundaries of which are established by the justices, and changed by them from time to time. This division of the territory into districts by congressional enactment does not, however, in our opinion, divide the territory for general judicial purposes, if we may use the expression. Into five districts, but rather into five divisions of one district, for which one district but one United States attorney and one United States marshal are appointed. By the Revised Statutes of the United States, dividing the various states into judicial districts, the states of California, Connecticut, Delaware, and 17 others, by section 531 (U. S. Comp. St. 1901, p. 316) were divided into districts, each state constituting one district. By section 546 the state of South Carolina was divided into two districts, called the "Eastern" and "Western" districts of South Carolina, but one judge only and one marshal and one district attorney were provided for the state of South Carolina. The Supreme Court of the United States in the case of *Barrett v. United States*, 169 U. S. 218, 18 Sup. Ct. 327, 42 L. Ed. 723, held upon a review of the various statutes that, although Congress had divided South Carolina into two districts, there were not two judicial districts in the state of South Carolina to the territorial limits of each of which the jurisdiction of the Circuit Court was confined, but that the whole state comprised but one judicial district. Similarly in Arizona there are not five judicial districts to the limits of each of which the jurisdiction and power of the United States attorney is confined, but there is but one judicial district, although five actual districts or subdivisions thereof. The statute providing that the district attorney of the district may designate a United States commissioner within such district, we think such district can only mean the district of Arizona and not the First or Second district of Arizona. The designation of the commissioner in the first district was therefore within the powers conferred on the United States attorney by the statute in question, and the district court did not err in sustaining the demurrer to the petition.

We do not find it necessary to determine whether in any event the appellant could avail himself of a writ of prohibition.

The judgment of the district court is affirmed.

DOAN, LEWIS, and DOE, JJ., concur.

(13 Ariz. 43)

WARNEKROS et al. v. COWAN.

(Supreme Court of Arizona. April 2, 1910.)

1. PUBLIC LANDS (§ 96*)—PATENTS—JURISDICTION OF LAND OFFICE.

The Land Office is a quasi judicial tribunal, and in the absence of specific provisions to the contrary it has exclusive jurisdiction of the questions involved on an application for a patent to public lands.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 285, 307; Dec. Dig. § 96.*]

2. PUBLIC LANDS (§ 103*)—PATENTS—JURISDICTION OF LAND OFFICE.

Pending final action by the Land Office as to title to public lands, neither the state nor federal courts will entertain actions relating thereto, except where there exists a necessity of preserving peace, or of determining controversies arising out of temporary rights in public lands.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 307; Dec. Dig. § 103.*]

3. MINES AND MINERALS (§ 40*)—PATENT TO MINING CLAIM—JURISDICTION OF LAND OFFICE.

The jurisdiction of the Land Office on the filing of an application for patent to public mineral lands is exclusive, and can be stayed only by the filing of an adverse claim, as provided by Rev. St. § 2326 (U. S. Comp. St. 1901, p. 1430).

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 115; Dec. Dig. § 40.*]

4. MINES AND MINERALS (§ 38*)—LOCATION AND ACQUISITION OF CLAIMS—COMPLAINT OR BILL.

Rev. St. § 2326 (U. S. Comp. St. 1901, p. 1430), providing for the filing of an adverse claim, and requiring the adverse claimant to sue to determine the right of possession, etc., creates a statutory exception to the exclusive jurisdiction of the Land Department, and courts hear and determine such suits in the exercise of their general jurisdiction. *Held*, a complaint affirmatively showing the filing by defendant of an application for patent, there being no allegation that the plaintiff had filed an adverse claim, is subject to a special demurrer to the jurisdiction of the trial court; the subject-matter of the action being within the exclusive jurisdiction of the Land Office.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 90, 93; Dec. Dig. § 38.*]

Appeal from District Court, Second District; before Justice Fletcher M. Doan.

Action by Paul B. Warnekros and another against Thomas P. Cowan. From a judgment dismissing the complaint after sustaining a special demurrer thereto, plaintiffs appeal. Affirmed.

Allen R. English, for appellants. Pickett & Bowman, for appellee.

LEWIS, J. The appellants, plaintiffs in the court below, filed their complaint, which is sufficient in the facts alleged to free it from attack, considered as a suit to quiet title to the Queen of the Hill mining claim. There, however, appears therein, in substance, the following additional allegations: That the defendant made or attempted to make a mineral location called the Sadle No. 2 lode mining claim, of a part of the said Queen of the Hill mine, and that the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said Sadie No. 2 claim conflicts therewith; that the defendant on the 26th day of October, 1907, made his application for patent for the whole of the said Sadie No. 2 lode mining claim to the United States Land Office, in which he claims all of the surface within the confines of his said location and including the south part of the said Queen of the Hill mine in conflict, and the plaintiffs aver that defendant is asserting title thereto, and will receive title therefor from the government of the United States unless prevented from so doing by the judgment of this court. The defendant demurred specially upon the ground that the complaint did not state facts sufficient to give the court jurisdiction of the subject-matter of the action, in this: That the complaint does not allege that the plaintiffs or either of them filed in the said Land Office any adverse claim to the Sadie No. 2 mining claims during the 60-days period of publication of the notice of application for a patent thereto. The special demurrer was sustained, and, the plaintiffs declining to amend, judgment was entered dismissing the complaint, from which judgment the plaintiffs appealed.

The question here presented involves the necessity of examining the source of the jurisdiction of the courts of this territory in an action in aid of an adverse to an application for patent to mining ground and the sufficiency of the allegations of the complaint herein to authorize the trial court to hear and determine the cause of action set forth in the complaint. When an application is made for a patent to public land, all questions involved in the determination of the right of the applicant to such patent are cognizable by the Land Office. The Land Office is a quasi judicial tribunal, and has exclusive jurisdiction in the absence of specific provision to the contrary. *Bishop of Nesqually v. Gibbon*, 158 U. S. 155-167, 15 Sup. Ct. 779, 39 L. Ed. 931; 32 Cyc. 1000. Generally pending final action by the Land Office with respect to title to public lands, neither the state nor federal courts will interfere, nor will they entertain actions relating thereto. *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301-308, 23 Sup. Ct. 692, 47 L. Ed. 1064; *Marquez v. Frisbee*, 101 U. S. 473, 25 L. Ed. 800; *U. S. v. Schurz*, 102 U. S. 378-395, 26 L. Ed. 167; *McHenry v. Nygaard*, 72 Minn. 2, 74 N. W. 1106; *Tiernan v. Miller*, 69 Neb. 764, 96 N. W. 661. In certain cases, where there exists the necessity of preserving peace or of determining controversies arising out of temporary rights in public lands, courts exercise jurisdiction pending the final action of the Land Office. *Phoenix & Eastern R. R. Co. v. Arizona & Eastern R. R. Co.*, 9 Ariz. 434, 84 Pac. 1097; *Mathews v. O'Brien*, 84 Minn. 505, 88 N. W. 12; *Sproat v. Durland*, 2 Okl. 24, 35 Pac. 682, 886; *Wood v. Murray*, 85 Iowa, 505, 52 N. W. 356.

Upon the filing of an application for patent to public mineral land, the jurisdiction of

the Land Office becomes exclusive as to all questions affecting the title to the lands therein applied for, and so remains until the final determination of the application. The exercise of its jurisdiction may be stayed only by the filing of an adverse claim as provided by section 2326 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1430). Without the filing of such adverse claim, neither the state nor federal courts will exercise jurisdiction in actions affecting the title to lands included within the application. It is by virtue of the provisions therein contained that courts assume jurisdiction of a question as to the right of possession to the ground in controversy after an application for patent is filed. Section 2326 of the Revised Statutes of the United States provides: "Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim." The authorities are not agreed as to whether or not this statute vests jurisdiction in the courts. There are expressions in the decisions of the Supreme Court of the United States and of other courts construing this statute as so vesting jurisdiction. *Wolverton v. Nichols*, 119 U. S. 485, 7 Sup. Ct. 289, 30 L. Ed. 474; *Tonopah Fraction Co. v. Douglass* (C. C.) 123 Fed. 936; *Lily Mining Co. v. Kellogg*, 27 Utah, 111, 74 Pac. 518; *Healey v. Rupp*, 37 Colo. 25, 86 Pac. 1015; *Murray v. Polglase*, 23 Mont. 401, 59 Pac. 439.

The Supreme Court of California, speaking through Temple, J., in the case of *Altoona Quicksilver Mining Co. v. Integral Mining Co.*, 114 Cal. 100, 45 Pac. 1047, has held that Congress could not confer upon the state courts jurisdiction which was lacking, and, to avoid the apparent necessity of admitting that jurisdiction was so conferred, held an action, which from the allegations of the complaint would ordinarily be denominated an action in aid of an adverse, an action to quiet title. The Supreme Court of Montana, in the case of *Hopkins v. Butte Copper Co.*, 28 Mont. 380, 74 Pac. 1081, held upon similar reasoning that jurisdiction is not conferred by the statute. No court has considered this statute as creating a statutory exception to the exclusive jurisdiction of the Land Department over all matters affecting title upon the filing of an application for patent to

public mineral lands. An examination of the opinions of the Supreme Court of the United States discloses that in no case to which attention has been called has the interpretation of the statute as vesting jurisdiction been directly involved. The weight of authority in the mining states supports the view that the allegation of the filing of an adverse is essential to the sufficiency of the complaint. The various opinions are not uniformly predicated upon the ground that it is essential to jurisdiction. Those courts which have interpreted section 2326, supra, as vesting jurisdiction, generally hold that the allegation is jurisdictional. The Supreme Court of California in the *Altoona Case*, supra, and in the later case of *Gruwell v. Rocco*, 141 Cal. 417, 74 Pac. 1028, has indicated, though it has not expressly decided, that the allegation is unnecessary. The Supreme Court of Montana, in the case of *Hopkins v. Butte Copper Co.*, supra, has held that its presence in the pleading is necessary to state a cause of action, but is not a jurisdictional fact. See generally *Lindley on Mines* (2d Ed.) §§ 754-755, and cases there collected.

The question being open to determination in this territory, we adopt the view that this section creates a statutory exception to the exclusive jurisdiction of the Land Office, and that our courts hear and determine suits in aid of an adverse in the exercise of their general jurisdiction. The complaint affirmatively shows the filing by the defendant of an application for patent in the United States Land Office. There is no allegation that the plaintiffs or either of them have filed an adverse claim therein. It appearing that the subject-matter of the action is within the exclusive jurisdiction of the Land Office, the demurrer to the jurisdiction of the trial court was properly sustained.

The judgment is affirmed.

KENT, C. J., and CAMPBELL and DOE, JJ., concur.

(13 Ariz. 34)

SOUTHERN PAC. CO. v. HOGAN.

(Supreme Court of Arizona. April 2, 1910.)

1. CARRIERS (§ 280*)—PASSENGERS—CARE REQUIRED.

A railroad company must exercise the highest degree of care practicable in carrying passengers.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1085, 1087; Dec. Dig. § 280.*]

2. CARRIERS (§ 316*)—PASSENGERS—INJURIES—ACTION—PRESUMPTION—NEGLIGENCE.

Where a passenger is injured by derailment or collision of a train, there is a presumption of negligence by the company, requiring evidence to rebut it.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1287, 1288; Dec. Dig. § 316.*]

3. CARRIERS (§ 314*)—PASSENGERS—INJURIES—ALLEGATIONS OF NEGLIGENCE—SUFFICIENCY.

An allegation that, while plaintiff was a passenger on defendant's train, the car in which

she was was thrown from the track and dragged along on its side, averred facts raising a presumption of negligence by the company.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1275½; Dec. Dig. § 314.*]

4. CARRIERS (§ 321*)—PASSENGERS—INJURIES—INSTRUCTIONS—REQUESTS—BURDEN OF PROOF.

In an action for injuries to a railroad passenger by the derailment of a coach, it is not reversible error to refuse to instruct that negligence was the gist of the action, and plaintiff had the burden of proving it by a preponderance of the evidence, where the court charged that defendant was not required to show want of negligence, but plaintiff must establish her case by a preponderance of the evidence, and, unless she showed by a preponderance that she was injured by defendant's negligence, the verdict should be for it.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1334; Dec. Dig. § 321.*]

5. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

It is not prejudicial error to refuse an instruction, where the court has elsewhere correctly instructed substantially as requested.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 651; Dec. Dig. § 260.*]

6. TRIAL (§ 296*)—INSTRUCTIONS—ERROR CAUSED BY SUBSEQUENT INSTRUCTIONS.

In a passenger's action for injuries, the court charged that, in considering its instruction "that the plaintiff must establish her case by a preponderance of the evidence, you should keep in mind that rule I have given you of the presumption of negligence from the evidence showing that an accident occurred," and further instructed that the jury must put the facts and circumstances proved by defendant into the scale against the presumption of negligence, and in determining the weight to be given the facts proved should apply the rule that the burden is upon plaintiff, and if, on the whole, the scale does not preponderate against defendant's proof, plaintiff has not made out her case. *Held*, that defendant could not have been prejudiced by the quoted part of the charge in view of that following.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 711; Dec. Dig. § 296.*]

7. TRIAL (§ 194*)—INSTRUCTIONS—PROVINCE OF JURY—WEIGHT OF EVIDENCE.

The court cannot instruct as to the weight the jury should give to any part of the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 439; Dec. Dig. § 194.*]

8. APPEAL AND ERROR (§ 1001*)—VERDICT—CONCLUSIVENESS.

If there is substantial evidence to support jury findings, the Supreme Court will not pass upon the weight of the evidence or the credibility of the witnesses.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3928; Dec. Dig. § 1001.*]

Appeal from District Court, Pima County; before Justice John H. Campbell.

Action by Katherine Hogan against the Southern Pacific Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Frank Cox and Francis M. Hartman, for appellant. Owen T. Rouse, for appellee.

DOAN, J. This is an appeal from a judgment for \$3,250 rendered upon a verdict of a jury for that amount in a suit brought in the district court of Pima county by the appel-

lee herein against the appellant. On June 14, 1905, Katherine Hogan was a passenger in a car that was part of a train on a railroad of the defendant company, en route from Tucson, Ariz., to Kansas City, Mo. While a passenger on that train, the car in which Miss Hogan was riding was (with some others of the train) derailed at a switch about 35 miles east of Tucson. The plaintiff was bruised on the left hip, and otherwise injured. She brought an action for damages because of these injuries against the appellant company in May, 1906. The action was tried to a jury, and a verdict for \$3,000 was set aside by the judge of the trial court, and a new trial granted. The case was again tried to a jury on the 8th day of June, 1908, and a verdict returned against the company for \$3,250, on which judgment was rendered, and a motion by the defendant for a new trial was denied. From this judgment and the denial of the motion for a new trial, the defendant has prosecuted this appeal.

The defendant filed a general demurrer to the complaint of the plaintiff, and, while the record does not clearly disclose whether this demurrer was urged by the defendant, the same legal question is presented under objection by defendant to testimony being admitted under the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action. It is urged by the appellant that the complaint does not state a cause of action, and is therefore insufficient to authorize the introduction of testimony because of its failure to charge negligence on the part of the company. The only part of the complaint that alleges or tends to allege negligence reads as follows: "That while plaintiff was such a passenger on the said train, in the said car on the day aforesaid, at a point in said Arizona, * * * the said car of the said train in which plaintiff was then seated was thrown from the track; and thrown onto its side, and dragged along on its side a great distance; that by reason of said throwing of said car, and the dragging along on the ground as aforesaid, plaintiff was thrown about said car, and against the sides thereof, and was greatly bruised and injured." As a common carrier of passengers, the railroad is bound to exercise the highest degree of care practicable under the circumstances. *Clerc v. Morgan La. R. R.*, 107 La. 370, 31 South. 886, 90 Am. St. Rep. 319; *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115; *Railroad v. Pollard*, 22 Wall. 341, 22 L. Ed. 877; *Bonneau v. North Shore R. Co.*, 152 Cal. 406, 93 Pac. 106, 125 Am. St. Rep. 68. The authorities nearly all agree that when a passenger is injured by the derailling of a train, or by its wreck, or by a collision with some other train or agency, there is a presumption of negligence on the part of the road operating said train that requires an introduction of evidence on the part of defendant to overcome or rebut. *Denver Railroad Co. v. Woodward*, 4 Colo. 1; *Peoria R. R. Co.*

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v. Reynolds, 88 Ill. 418; *Pittsburgh R. R. Co. v. Williams*, 74 Ind. 462; *Seybolt v. N. Y. R. R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Bergen R. R. Co. v. Demarest*, 62 N. J. Law, 755, 42 Atl. 729, 72 Am. St. Rep. 685. Numerous authorities supporting the above rule are collated in a valuable note to *Overcash v. C. E. R. L. Co.*, 144 N. C. 572, 57 S. E. 377, 12 Am. & Eng. Ann. Cas. 1040.

Under this general rule, it would appear that, if the allegations in the complaint in this case are equivalent to an allegation of derailment or wreck, they would be sufficient to raise the presumption of negligence, which, with the other allegations in the complaint, would be sufficient to constitute a cause of action. In line with these authorities, the United States Supreme Court in the case of *Stokes v. Saltonstall*, supra, held with reference to a stage coach, a common carrier of passengers at that time, that the fact that the coach was upset was prima facie evidence of negligence and carelessness. This case was afterwards approved and followed by the same court in *Railroad v. Pollard*, supra, and the court there applied the same rule to a railroad train. The above rule is predicated upon the theory that "when a railway car is thrown from the track, and a passenger is thereby injured, the presumption is that the accident resulted either from the fact that the track was out of order, or the train badly managed, or both combined, and the burden is on the company to show that it was not negligent in any respect." The complaint in the case at bar has charged facts that raise a presumption of negligence, which would suffice to put the defendant upon answer and proof, and are therefore sufficient to bring it within the foregoing rule. The appellant cites the case of *Valente v. Sierra Ry. Co.*, 151 Cal. 534, 91 Pac. 481, in support of this assignment. This is an interesting case, but does not sustain the position of the appellant on this issue. The court in that case cites the rule set forth in *Shearman & Redfield on Negligence*, par. 59, "When a thing which causes injury is shown to be under the management of the defendant and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care"; and says: "In accord with this doctrine, it is the rule in this state that when such an accident is shown by the plaintiff, or admitted by the pleadings, for there can be no difference in effect between the establishment of the fact by evidence on the trial and the admission of that fact by the pleadings, a prima facie case of negligence on the part of the defendant is made, which is sufficient to call upon the defendant to show the exercise of the requisite care, and thus offset the presumption of negligence arising from the happening of the accident." This case is cited and ap-

proved by the same court in *Bonneau v. North Shore Co.*, 152 Cal. 406, 93 Pac. 106, 125 Am. St. Rep. 68.

The appellant urges that "the court erred in refusing to set aside the verdict of the jury for the reason that the said verdict was contrary to the evidence and not sustained thereby, for the reason that there was no proof of negligence on the part of the defendant, and the presumption of negligence was rebutted by the defendant." The record discloses no proof of negligence by the plaintiff other than the proof of the derailment and wreck. The testimony of several witnesses was introduced by the defendant to establish the good condition of the track, and the careful handling of the train, but whether the testimony of these witnesses was sufficient to rebut the presumption of negligence arising from the facts proven was a question of fact for the jury, and would depend upon the weight given by the jury to the testimony of the witnesses, the effect, as considered by the jury, of facts and circumstances surrounding or attending the derailment of the train, and on this issue the jury has found against the appellant.

It is next urged by the appellant that "the court erred in refusing to set aside the verdict of the jury for the reason that the amount of damages assessed by the jury was and is excessive; that the amount of damages awarded to the plaintiff was not warranted by the evidence in the case, and indicates that the same was rendered by the jury under the influence of passion or prejudice." We would from the evidence feel inclined to that view of the case were it not that the record discloses that the trial court set aside on this ground a verdict for \$3,000 rendered one year prior thereto, and that on this occasion the same judge presided, heard the testimony, saw the plaintiff, had an opportunity to form an opinion as to the probable permanent result of the injury, took the motion for a new trial on these grounds under advisement, and, after a careful consideration of the case, denied the motion. We think that he was thoroughly advised in the premises, and had opportunities for arriving at a proper conclusion of which we cannot avail ourselves, and we therefore decline to overrule his determination of this question.

It is next argued that the court erred in refusing to instruct the jury, at the request of the defendant, as follows: "You are instructed that negligence is the gist of the plaintiff's action in this case, and that the plaintiff has a burden on her part of proving negligence by the preponderance of the evidence." The refusal to so instruct the jury in this case would be reversible error if the same, or an equivalent, instruction had not been elsewhere given, but the court elsewhere charged the jury "the jury is instructed, as a matter of law, that the defendant is not required to show want of negligence by a preponderance of evidence. * * * The

plaintiff must establish her case by a preponderance of the evidence, and, unless the plaintiff has shown by a preponderance of the evidence that she was injured by the negligence of the defendant, then your verdict should be for the defendant." It is not prejudicial error to refuse a requested instruction when the court has elsewhere correctly given substantially the declaration of the law thus requested. *Title Guaranty & Surety Co. v. Nichols*, 100 Pac. 825.

It is next urged that the court erred in adding to its instruction on the preponderance of evidence the following: "In considering the last sentence, that the plaintiff must establish her case by a preponderance of the evidence, you should, of course, keep in mind that rule that I have given you of the presumption of negligence from the evidence showing that an accident occurred." We find that the court followed the language cited with the words: "The jury are bound to put the facts and circumstances proved by the defendant into the scale against the presumption upon which the plaintiff relies, and, in determining the weight to be given to the former as against the latter, you are bound to apply the rules as a matter of law that the burden of proof is upon the plaintiff, and if, on the whole, the scale does not preponderate in favor of the presumption, and against the defendant's proof, the plaintiff has not made out her case, and your verdict should be for the defendant." This language in the connection in which it was used seems to protect the defendant against any prejudicial effect of the language complained of.

The instructions in the case, taken as a whole, appear to present the law correctly to the jury, and to have been as favorable to the defendant as it could require. This is apparent from the last assignment of error, wherein it is urged that "the court erred in refusing to set aside the verdict and to grant the defendant a new trial for the reason that said verdict was contrary to the instructions of the court." This position could only be maintained by conceding the construction placed by the appellant upon the evidence in the case. The court properly instructed the jury relative to the manner of considering the evidence, but it could not instruct the jury in regard to the weight they should give any part of the evidence offered by the witnesses for either the plaintiff or the defendant, and it was because of the difference between the jurors and the defendant in regard to the weight of certain testimony or the legitimate effect of certain facts or circumstances established by undisputed testimony that a verdict was found by the jury that was unsatisfactory to the appellant. The jury returned a verdict that they had evidently agreed upon because they either failed to credit entirely the oral testimony of the witnesses or declined to believe the effect of the facts established by such testimony to be such as witnesses or appellant claimed. This was their province, and, while

the court may differ with the jury as to the relative weight or effect of conflicting evidence, it will never set aside a verdict of a jury when there is any substantial evidence in the record to support the jury's findings. There being substantial evidence in the record to support the finding of the jury, this court will not pass upon the weight of the evidence, or the credibility of the witnesses.

There appears in the record no reversible error, and the judgment of the lower court is affirmed.

KENT, C. J., and LEWIS and DOE, JJ., concur.

(13 Ariz. 27)

WILLIAMS v. TERRITORY.

(Supreme Court of Arizona. April 2, 1910.)

1. STATUTES (§ 241*)—CONSTRUCTION—PENAL STATUTES.

The rule of strict construction of penal statutes does not obtain in Arizona, and the provisions of the Penal Code are to be construed according to the fair import of their terms, with a view to effect their object and promote justice, under the express provision of Pen. Code 1901, § 5.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 322; Dec. Dig. § 241.*]

2. FALSE PRETENSES (§ 7*)—CHEAT—OBTAINING MONEY BY WORTHLESS CHECK.

The obtaining of money or property by means of a check on a bank in which the maker keeps no account was not a cheat at common law prior to 30 Geo. II, c. 24, § 1, making criminal the obtaining of money or property by false pretenses, but after the enactment thereof was indictable as a false pretense.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 5; Dec. Dig. § 7.*]

3. FALSE PRETENSES (§ 7*)—OBTAINING MONEY BY WORTHLESS CHECK.

The offense of obtaining money or property by means of a worthless check may be punished under Pen. Code 1901, § 481, making the obtaining of money under false pretenses a misdemeanor.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 5; Dec. Dig. § 7.*]

4. WORDS AND PHRASES—"FALSE."

"False" means erroneous, untrue, the opposite of correct or true, and, as often used, does not necessarily involve turpitude of mind, but in the more important uses in jurisprudence, and even in its popular application, the word implies something more than a mere untruth, but is an untruth coupled with a lying intent, or intent to deceive, or to perpetrate some treachery or fraud.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2654, 2655.]

5. FALSE PRETENSES (§ 7*)—OBTAINING MONEY BY "FALSE CHECK."

A check is "false" within Pen. Code 1901, § 489, making it a felony to obtain money or property by a false or bogus check, when it is a willfully untrue written order directing a bank to pay money on demand.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 5; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 3, p. 2656.]

6. WORDS AND PHRASES—"BOGUS."

The word "bogus" is defined as spurious, fictitious, sham.

7. WORDS AND PHRASES—"SHAM."

"Sham," the adjective, is defined as false, counterfeit, pretended, feigned, unreal; and the noun is given the primary meaning of that which deceives expectation, any trick or fraudulent device that disappoints, a make-believe, imposition, humbug.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6472, 6473.]

8. FALSE PRETENSES (§ 7*)—OBTAINING MONEY BY "BOGUS CHECK."

A check given by a person upon a bank in which he has no funds, and which he has no reason to suppose will be honored, is a "bogus check" within Pen. Code 1901, § 489, making it a felony to obtain, or attempt to obtain, with intent to cheat, any money or property by a false or bogus check.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 5; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 1, p. 821.]

Appeal from District Court, Cochise County; before Justice Fletcher M. Doan.

S. J. Williams was convicted of obtaining money by a false and bogus check, and appeals. Affirmed.

Harry L. Pickett, for appellant. John B. Wright, Atty. Gen., for the Territory.

LEWIS, J. The argument of counsel is addressed to the sole question: Is a check signed by the maker thereof, he never having had funds in the bank upon which such check was drawn, nor reason to believe that such check would be honored, a false and bogus check within the meaning of section 489 of the Penal Code of the Revised Statutes of 1901, providing: "Every person who, with intent to cheat and defraud, shall obtain, or attempt to obtain from any other person or persons, any money, property, or valuable thing whatever, by means or by use of any trick or deception, or false or fraudulent representation, or statement of [or] pretense, or by any other means or instruments, or device, commonly called the 'confidence game' or by means or by use of any false or bogus check, or by any other printed, written or engraved instrument, or spurious coin or metal, shall be deemed guilty of a felony. * * *" In this territory the rule of strict construction of penal statutes does not obtain. The provisions of the Penal Code are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice. Section 5, Pen. Code, Rev. St. 1901. "Words and phrases must be construed according to the context and to the approved usage of the language." Section 7, subd. 16, Pen. Code; Miller v. Territory, 9 Ariz. 123, 80 Pac. 321. Section 489, under consideration, is one of a series of statutes embraced in chapter 8, tit. 18, of the Penal Code, denouncing certain false personations and frauds as crimes. At common law, and until the enactment of 30 Geo. II, c. 24, § 1, making criminal the obtaining of money or

property by means of false pretenses, offenses somewhat analogous to these were prosecuted under the general denomination of cheats. However, the obtaining of money or property by means of a worthless check was not a cheat. "If a man induces another to part with goods by drawing and delivering in payment his check on a bank in which he keeps no account, he thus merely puts a falsehood in writing. The check is no token and he is not indictable (for a cheat) at common law." Bishop, Crim. Law, § 147. "Under the subsequent statutes against obtaining money by false pretenses it has been held that the obtaining of money or property by means of a worthless check was a false pretense, and was indictable as such." 2 Bish. Crim. Law, § 421. "The representation is inferred from the act, and the pretense may be made by implication as well as by verbal declaration. In the case at bar the defendant presented his own checks on a bank with which he had an account. What did this imply? Not necessarily that he had funds there. Overdrafts are too frequent to be classed with false pretenses. A check, like an order on an individual, is a mere request to pay. And the most that can be inferred from passing it is that it will be paid when presented, or, in other words, that the drawer has in the hands of the drawee either funds or credit. If the drawer passed a check to a third person, the language of the act is that it is good and will be duly honored. And in such case, if he knew that he had neither funds nor credit, it would probably be holden to be a false pretense." Commonwealth v. Drew, 19 Pick. (Mass.) 179-186. "Forgery at common law was but a common-law cheat, or attempt to cheat, set off from the rest and called by a separate name because of its special heinousness." 2 Bish. Crim. Law, § 148.

Under the authorities the offense of obtaining money or property by means of a worthless check might be punished under section 481 of our Penal Code, declaring the obtaining of money under false pretenses a crime. This statute, however, makes the crime a mere misdemeanor. It is apparent from a consideration of the growth of the law of cheats that it was early deemed advisable to distinguish cheats by means of forged instruments as an independent crime, more heavily punishable as such. With the increasing use of checks, as a substitute for currency, the frequency and facility with which frauds were successfully perpetrated by means of the use of worthless paper attracted the attention of legislators. The mischief resulting from its issuance was hardly less than the evil ensuing from the utterance of forged paper. So long as the crime was a misdemeanor, the temptation to its commission was great. It, therefore, became desirable to place a heavier penalty upon crimes so perpetrated than upon those

committed by means of other false pretenses. Section 489 is one of the class of statutes enacted for the purpose of meeting this evil. It fixes the penalty therefor somewhat less than that for forgery, but greater than that for obtaining money by other false pretenses.

In determining whether or not the statute accomplishes the intent of the Legislature we have to consider the meaning of the words "false" and "bogus." These words are not used in the conjunctive in the statute, and the meaning of each will be examined.

False: "Erroneous, untrue; the opposite of correct, or true; and often the term, as used, does not necessarily involve turpitude of mind. In the more important uses in jurisprudence, and even in its popular application, the word implies something more than a mere untruth; it is an untruth coupled with a lying intent, or an intent to deceive or to perpetrate some treachery or fraud. The true meaning of the term must, as in other instances, often be determined by the context." 19 Cyc. 314. Am. & Eng. Encyc. of Law, 681; Abbott's Law Dictionary; Webster's New International; Century Dictionary.

A wide range of meaning has been given by the courts to this word.

False affidavit: "Includes one false in recitals of fact, though sworn to by a person really existent, under a statute making the presentation of an affidavit in support of a claim against the government a felony, where presented 'with intent to defraud by one knowing the same to be false, altered, forged, or counterfeit.'" U. S. v. Staats, 8 How. 41, 12 L. Ed. 979.

False affidavit: "Relates to the form of the paper, and is false though the officer administering the oath was not qualified nor the oath administered, nor the paper forged." United States v. Ingraham (C. C.) 49 Fed. 155.

False bank note: A forged paper in the similitude of a bank note or which on its face appears to be such a note. U. S. v. Howell, 11 Wall. 432, 20 L. Ed. 195.

False brand: Erroneous through intention or culpable negligence. Hatcher v. Dunn, 102 Iowa, 411, 71 N. W. 843, 36 L. R. A. 689.

False certificate of acknowledgment: Erroneous through intentional dereliction of duty. Commonwealth v. Haines, 97 Pa. 228, 39 Am. Rep. 805.

False certificate of citizenship: "Within the meaning of a statute which makes it criminal to use any false, forged, antedated, or counterfeited certificate of citizenship, is not limited to one which is forged, but includes one which is false in its recitals of facts." Dolan v. U. S., 133 Fed. 440, 69 C. C. A. 274.

False document: "A document purporting to be made by a person who did not make

the same or a document purporting to be made by some person who did not in fact exist." 19 Cyc. 315.

False entry: "An entry knowingly and purposely made on the books of the bank with intent to deceive or defraud as charged which represents as an actual transaction one which does not and did not exist, or an entry knowingly and purposely made with intent to deceive and defraud, as charged, which in a material part falsely and untruly represents an actual and existing transaction." *Coffin v. U. S.*, 162 U. S. 664, 683, 16 Sup. Ct. 943, 40 L. Ed. 1109.

"It would be an unnatural and strained construction of the statute to hold that the words 'false entry' mean forged entry, fictitious entry, or any other entry made by any person not authorized to make the report, or at least who did not make it. The context of the statute shows that the word 'false' is used in contradistinction to the word 'correct.'" *U. S. v. Potter (C. C.)* 56 Fed. 83-94.

False instrument: Counterfeit; not genuine (under forgery statute). *State v. Willson*, 28 Minn. 52, 9 N. W. 28.

False pretense: False to the knowledge of the maker, as well as untrue in fact. *Wharton, Crim. Law* (8th Ed.) § 1185.

False return: It must appear, if not a design to mislead and deceive, at least such culpable negligence in the making of a return as carries with it the consequences of intentional default. *Ratterman v. Ingalls*, 48 Ohio St. 468, 28 N. E. 168, 171.

False swearing: An intentional statement under oath of a fact known to be untrue. *State v. Smith*, 63 Vt. 201, 22 Atl. 604.

False token: "A bank check may be a false token, and would be such under the statute, if the drawer knew when he gave it, payable to a person other than himself, that he had neither funds to meet it nor credit at the bank upon which he drew it." *People v. Donaldson*, 70 Cal. 116, 118, 11 Pac. 681.

The word is thus seen to be of broad meaning. We shall not limit it as used in the statute by a definition which may exclude crimes properly cognizable thereunder. It is sufficient for the purposes of this case to hold that a check is "false" within the statute when it is a willfully untrue written order, directing a bank to pay money on demand.

The word "bogus" has not been the subject of frequent judicial interpretation. In fact no case has been cited to us, nor have we found one, which clearly defines the meaning of the word. Bogus is defined as "spurious, fictitious, sham."

"Sham," the adjective, is defined as "false, counterfeit, pretended, feigned, unreal."

"Sham," the noun, is given the primary meaning of "that which deceives expectation; any

trick or fraudulent device that disappoints, a make-believe, imposition, humbug." *Webster's New International Dictionary*.

Under these definitions, and again without limiting the use of the word, we hold that a check given by a person upon a bank in which he has no funds, and which he has no reason to suppose will be honored, is bogus within the statute.

Our attention has been directed to the case of *Pierce v. People*, 81 Ill. 98, in which the meaning of the expression "false and bogus checks" as used in a similar statute was considered. Mr. Justice Schofield, delivering the opinion, says: "The position that the note and orders given by the defendant come within the meaning of the words 'false and bogus checks' as used in this section cannot be maintained. Had they contained forged or fictitious indorsements, there would be reason for calling them false or bogus, but they contain no indorsements whatever, and it is not disputed the defendant's signature to them was genuine. Any one taking them, therefore, would necessarily do so upon the faith of the defendant's signature alone; and, of however little value they were, this was solely because of the defendant's insolvency, and not because of any false or bogus character of the instruments. Nor can it be said the money or property was obtained by the use of the note or orders. Money and property were obtained by the defendant on the belief which he had inspired by his ability and disposition to pay, and the note and orders were given by him and received by the party from whom the money and property were obtained as an evidence of the indebtedness, and when and how it was agreed to be paid and nothing more."

A careful reading of the entire opinion discloses that this language is used in view of the fact that the money and property had been obtained, not solely by means of these notes and orders, but by a number of prior and independent false representations, which gave the defendant a credit to which he was not entitled. It does not clearly appear that the orders mentioned were checks. The notes clearly are not. If these notes and orders were mere evidences of indebtedness, given subsequent to the obtaining of the money and property, as indicated by the court, the language is clearly dicta. If the word "check" may be extended to include notes and orders payable at a future time, there exist sound reasons for the limitation here placed upon the meaning of the words "false" and "bogus." As to this, however, we express no opinion.

The judgment of the trial court is affirmed.

KENT, C. J., and CAMPBELL and DOE, JJ., concur.

(13 Ariz. 77)

TERRITORY v. SCHMIDT.

(Supreme Court of Arizona. April 2, 1910.)

1. GAMING (§ 75*)—OFFENSES—GAMES PROHIBITED IN GAMBLING HOUSES.

Acts 1909, c. 92, § 1, prohibits certain games for money by professional gamblers, and section 2 provides that if any proprietor, owner, or part owner, lessee, manager, or any person having management, supervision, or control, temporary or permanent, of any gambling house or other resort, maintained for gambling, or of any saloon, or of any building in which a saloon may be situate, shall permit any of such games to be played in such place, he shall be guilty of a misdemeanor, etc. *Held*, that the persons to whom section 2 applied were not limited to professional gamblers of the classes enumerated in section 1, but that the prohibition therein applied to all persons in control of the places referred to therein.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 75.*]

2. GAMING (§ 75*)—MAINTAINING PLACE FOR GAMING—"GAMBLING HOUSE."

The words "gambling house," or other resort maintained for gambling," in Acts 1909, c. 92, § 2, mean any place where games are played, and not solely a place where games are carried on in the manner prohibited in section 1.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 200; Dec. Dig. § 75.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3032, 3033.]

3. GAMING (§ 98*)—MAINTAINING PLACE FOR GAMING—EVIDENCE.

Evidence *held* to show defendant was a proprietor of a saloon in which games were permitted in violation of Acts 1909, c. 92, § 2.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 295; Dec. Dig. § 98.*]

4. CRIMINAL LAW (§ 824*)—TRIAL—REQUESTS FOR INSTRUCTIONS—DEFINITION OF TERMS.

If, in a prosecution under Acts 1909, c. 92, § 2, defendant's counsel desired the words "gambling house, or other resort maintained for gambling," defined to the jury, they should have presented a request therefor in proper form.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1996; Dec. Dig. § 824.*]

5. GAMING (§ 98*)—MAINTAINING PLACE FOR GAMING—EVIDENCE OF GAMBLING.

In a prosecution under Acts 1909, c. 92, § 2, substantial evidence, tending to show that money changed hands among players as the result of a game, shows something won or lost therein, in absence of evidence that the change of possession was not intended to be permanent.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 292; Dec. Dig. § 98.*]

Appeal from District Court, Cochise County; before Justice Fletcher M. Doan.

Frank Schmidt was convicted of permitting gambling in his place of business, and he appeals. Affirmed.

Appellant was indicted for a violation of section 2, c. 92, Acts of the Twenty-Fifth Legislative Assembly, entitled: "An act to prohibit gambling in the territory of Arizona," in that he permitted to be played in a room maintained for gambling a game of poker with cards for money.

E. G. Strickler and Neale & Sutter, for appellant. John B. Wright, Atty. Gen., for the Territory.

DOE, J. Counsel for appellant discuss their several assignments of error under four heads or propositions, the first being: "That section 2 of the act is not violated by merely permitting the playing of the game, but that such game must be carried on in the manner prohibited by section 1."

Sections 1 and 2 of the statute are as follows:

"Section 1. Every person who shall deal, carry on, or open, or cause to be opened, or who shall conduct, either as owner, proprietor, or employee, whether for hire or not, any game of faro, monte, roulette, lasquet, rouge et noir, rondo, vingt-un or twenty-one, poker, draw poker, stud poker, bluff, fan tan, thaw, seven and one half, chuck-a-luck, black jack, or any similar game whatsoever played with cards, dice, or any other device, whether the same be played for money, checks, credits, or any other representative of value, within the territory of Arizona, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, nor more than three hundred dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment."

"Sec. 2. If any proprietor, owner or part owner, lessee, manager or any person having management, supervision or control, temporary or permanent of any gambling house or other resort maintained for gambling or of any saloon or of any building in which a saloon may be situate shall permit any of the games mentioned in the preceding section to be played in such place, he shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in the preceding section."

It is insisted that these two sections must be construed together, and that, as section 1 is only directed against the carrying on or conducting certain games by enumerated classes of persons, section 2 should be construed as a prohibition against permitting any of the games in question to be played by the classes named in section 1 only, and not to prohibit the permitting of their being played by persons not of the enumerated classes. In support of this view the argument is made that the so-called "Duffy Act" was more comprehensive in its restriction than was desired, in that it prohibited almost all kinds of games "in nearly every place where such games are usually played," and that taking into consideration the history of the times when the act was passed, and the evil sought to be remedied, the statute as a whole must be construed as directed solely against the carrying on of such games by professional gamblers; but the rules of con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

struction invoked' are only applicable where the statute itself is ambiguous, and we see no ambiguity in those provisions under consideration. The Legislature, having by section 1 prohibited the carrying on or dealing of certain games for money by professional gamblers, may well have thought that it was equally contrary to public policy and good morals to permit the playing of such games by any one in saloons and gambling houses, and section 2 seems well adapted to effectually accomplish such purposes by prohibiting those having the control of such places from permitting any person to play such games therein. The legislative power in the premises is unquestioned.

Appellant's second proposition is: "That the words 'gambling house, or other resort maintained for gambling,' in section 2, do not mean any place where games are merely played, but a place where the games are carried on in the manner prohibited by section 1." This proposition is necessarily involved in the first, and has already been considered.

Appellant for his third proposition says that there was "no evidence that defendant was proprietor, owner, part owner, lessee, manager, or had management, supervision, or control of the room." There was, however, ample evidence tending to establish the case of the prosecution upon this point. The testimony showed that appellant was one of the proprietors of the saloon; that the club-room adjoined said saloon, and was conducted with it, and entered from the saloon, and that there was a slide or window in the wall connecting the saloon; that there was a signal operated from the bar to the clubroom; that members of the club received their cards entitling them to play from the appellant, and over his bar; that he sold checks to players, and received the money and cashed them, and that on August 10th he had the bank roll.

The further objection is made under this proposition that the court, in its instructions, assumed that the room in question was "a gambling house, or other resort maintained for gambling." The instructions, however, do not warrant this inference, but, we think, fairly submits this, as well as every other issue, to the jury. Had counsel for appellant desired the words in question defined to the jury, they should have presented a request therefor in proper form, and the only instruction requested by them was objectionable as limiting the effect of section 2 to the classes enumerated in section 1.

The fourth proposition advanced is that there was "no evidence that the players contemplated that anything should be won or lost in the game." There was substantial evidence tending to show that money changed hands among the players at the time, as a result of the game. If such change of possession was not intended to be permanent, it

would at most be defensive matter, of which no suggestion appears in the evidence.

The record discloses no error, and the judgment is affirmed.

KENT, C. J., and CAMPBELL and LEWIS, JJ., concur.

(13 Ariz. 80)

PHOENIX RY. CO. v. LANDIS.

(Supreme Court of Arizona. April 2, 1910.)

1. APPEAL AND ERROR (§ 926*)—RECORD—PRESUMPTIONS—OBJECTIONS.

Where the record on appeal merely recites that answers of witnesses were received "over the objections of counsel for the defendant," without disclosing the grounds, if there were any, upon which the objections were based, it will be assumed that the objections were general ones.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3741; Dec. Dig. § 926.*]

2. APPEAL AND ERROR (§ 231*)—RESERVATION OF GROUNDS OF REVIEW—SUFFICIENCY OF OBJECTIONS.

General objections to long hypothetical questions to physicians as witnesses, which questions purport to recite facts in evidence upon which the opinions of the witnesses are sought, are insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 231; * Trial, Cent. Dig. § 215.]

3. APPEAL AND ERROR (§ 639*)—ABSTRACTS OF RECORD—NECESSITY FOR RESORT TO TRANSCRIPT.

Under Sup. Ct. Rule 1, subd. 6 (8 Ariz. iv, 71 Pac. vi), providing that the abstracts of record as filed will be treated by the court as containing such portions of the record as the parties deem sufficient upon which to try the assignments of error, the court will not resort to the transcript to ascertain the form of objections made to testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2787; Dec. Dig. § 639.*]

4. TRIAL (§ 296*)—INSTRUCTIONS.

In a death action, tried throughout on the theory that the damages, if any, were such as were suffered by decedent's estate, where there was no testimony as to the existence of any one dependent upon decedent, nor that any one had suffered pecuniary injury from his death, and the jury were plainly charged that the damages to be awarded were those suffered by the estate, a charge that it was not necessary for plaintiff to show the precise money value of decedent's life, or the exact damages suffered by the beneficiaries, to sustain a recovery of substantial damages, was not misleading through the use of the word "beneficiaries," though inappropriate, as allowing a recovery by those dependent upon decedent who had suffered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

5. WORDS AND PHRASES—"BENEFICIARY."

The word "beneficiary" does not appear to be recognized by lexicographers as having the precise meaning usually given it when employed in actions to recover damages by wrongful death, but to designate the person beneficially interested in a trust, being so defined by statute in some states, and the word is also used to designate a person to whom a policy of insurance is payable (citing 1 Words and Phrases, 750).

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. DEATH (§ 99*)—DAMAGES—EXCESSIVENESS.

Decedent was 62 years of age at his death, and by profession a mining engineer. There was evidence tending to show that prior to the injuries resulting in his death he was in robust health, and was, and for some time had been, in the employment of a mining company at a salary of \$100 a month, with a house and provisions for himself and wife. His life expectancy was 12.86 years. *Held*, that a recovery of \$5,000 for his death was not excessive.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

Appeal from District Court, Yavapai County; before Justice Richard E. Sloan.

Action by Lee H. Landis, administrator of George W. Sanders, against the Phoenix Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Chalmers & Wilkinson and Paul Burks, for appellant. J. M. Jamison (Norris & Ross, of counsel), for appellee.

CAMPBELL, J. Appellee, as administrator of the estate of George W. Sanders, recovered a judgment of \$5,000 against appellant, as damages resulting to the estate of Sanders from his death, alleged to have been caused by the negligence of appellant.

The first assignment of error challenges the sufficiency of the complaint, inasmuch as it "failed wholly to show that any one beneficially interested in the estate of George W. Sanders had been peculiarly damaged by reason of the alleged death of the deceased." This contention of appellant has been disposed of by us in *Southern Pacific Company v. Wilson*, 10 Ariz. 162, 85 Pac. 401, and again in *De Amado v. Friedman*, 89 Pac. 588; and we see no reason, in the light of appellant's discussion, to recede from the views we have heretofore expressed.

The second and third assignments of error are directed to the trial court's ruling in permitting certain hypothetical questions to be answered by physicians. The abstract of record sets forth the questions in full. They are lengthy and purport to recite facts in evidence upon which the opinions of the witnesses are sought. The record merely recites that the answers were received in evidence "over the objections of counsel for the defendant," without in any wise disclosing the grounds, if any there were, upon which the objections were based. We must assume from this record that the objections were general ones. General objections to such questions are wholly unavailing. *Rush v. French*, 1 Ariz. 99, 25 Pac. 816. Counsel on either side, in their briefs, differ as to the form of the objections as actually made, and invite us to scrutinize several pages of the reporter's transcript. This we must decline to do. Our rules provide: "The abstracts of record, as filed, will be treated by the court as containing such portions of the record as the parties deem sufficient upon which to try the assignments of error." Subdivision 6, Rule 1 (8 Ariz.

iv, 71 Pac. vi). We have so frequently commented upon the necessity of compliance with the requirements of our rules in this respect that there would seem to be no excuse for failure to do so. *Liberty Mining & Smelting Co. v. Geddes*, 90 Pac. 332; *Donohoe v. El Paso & S. W. R. R. Co.*, 94 Pac. 1091; *Title Guaranty & Surety Co. v. Nichols*, 100 Pac. 825. However, should we assume that counsel for appellant in their briefs have correctly set forth the grounds of the objections as made to the trial court, we perceive no error in the rulings complained of.

Appellant contends that the instructions of the court are contradictory and misleading. The court clearly instructed the jury that, should they find for the plaintiff, they should award such damages as would fairly compensate the estate of the deceased for the loss sustained by reason of his death. Thereafter, in another instruction, the court said to the jury: "I charge you, however, that it is not necessary on the part of the plaintiff to show the precise money value of the life of the deceased, or the exact amount of damages suffered by the beneficiaries, in order to sustain a recovery for substantial damages." In the succeeding instruction the jury were again told that the damages to be allowed were such "as the estate has suffered, all of the circumstances considered, by reason of the death of the deceased." Appellant contends that these instructions are conflicting and contradictory; that they gave the jury to understand that such damages as the estate suffered might be awarded, and also such as those dependent upon the deceased had suffered. The term "beneficiary" does not appear to be recognized by lexicographers as having the precise meaning which is usually given it when employed in actions to recover damages for death by wrongful act. It seems to have come into use as a legal term following the suggestion of Judge Story, in his work on *Equity Jurisprudence*, that "to escape from the awkwardness of a barbarous foreign idiom" the person beneficially interested in a trust should be called the beneficiary, rather than the cestui que trust. Section 321, *Story's Equity Jurisprudence*. It has been so defined by statute in some states. 1 *Words and Phrases*, 750. It is also used to designate a person to whom a policy of insurance is payable. In an action to recover damages for death by wrongful act, where the damages to be recovered by a representative are those suffered by certain individuals indicated in the statute giving the right of action, those for whose benefit the recovery is sought are usually designated as beneficiaries. It is not wholly inapt to refer to the estate as the beneficiary, where, as in this territory, the damages to be recovered by an administrator are such as the estate has suffered. But conceding, as we do, that the term "beneficiaries" as here used is technically in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

appropriate, it does not follow that the verdict should be set aside. Instructions to juries must be so framed as clearly to define the law, and must not be contradictory; but the error involved in the use of an inappropriate word, where it does not serve to confuse or mislead the jury, is harmless. This action was tried throughout upon the theory that the damages to be awarded, if any, were such as were suffered by the estate of the deceased. There was no testimony concerning the existence of any one dependent upon Sanders, nor that any one had suffered pecuniary injury by reason of his death. The jury were plainly instructed, just prior to the giving of the instruction complained of, that the damages to be awarded were those suffered by the estate, and in the instruction next following were again so charged. We are unable to perceive that the term complained of, in the connection in which it was employed, and under the circumstances appearing from the record, could have confused or misled the jury.

Appellant insists that the verdict is excessive. The deceased was 62 years of age at the time of his death. He was by profession a mining engineer, and there was testimony tending to show that prior to receiving the injuries which resulted in his death he was in robust health; that he was, and for some time had been, in the employment of a mining company, at a salary of \$100 per month, and in addition was furnished a house and provisions for himself and wife. His life expectancy is shown to have been 12.86 years. Under this testimony, we cannot say that the verdict is excessive.

The remaining assignments of error are without merit, and do not require discussion.

We find no reversible error in the record, and therefore affirm the judgment of the district court.

DOAN, LEWIS, and DOE, JJ., concur. KENT, C. J., took no part in the determination of this case.

(13 Ariz. 87)

RANDALL v. FOX.

(Supreme Court of Arizona. April 2, 1910.)

1. PLEADING (§ 345*)—JUDGMENT ON PLEADINGS.

Where, in an action against a corporation on a note, the corporation confessed judgment, and, on application of a stockholder therein, the judgment was vacated and he allowed to intervene and defend by answer, he occupied the same position as the corporation would have occupied had it intervened or as the stockholder would have occupied had he originally appeared and answered, and, if the stockholder's answer was insufficient as a defense to the complaint, plaintiff could move for judgment upon the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.*]

2. PLEADING (§ 343*)—MOTIONS—JUDGMENT ON PLEADINGS.

Judgment on the pleadings is a practice recognized in Arizona.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1048-1051; Dec. Dig. § 343.*]

3. CORPORATIONS (§ 460*) — LIABILITY FOR CORPORATE DEBTS.

Where a note is given by a corporation for money actually advanced to the corporation by the payee, and paid out by the corporation in discharge of its debts, that the need of the corporation for the money was brought about by mismanagement, dishonest acts, or conspiracy is no defense to an action on the note.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1818; Dec. Dig. § 460.*]

Appeal from District Court, Gila County; before Justice Frederick S. Nave.

Action by P. R. Fox against the El Globo Mining & Milling Company, in which Joshua O. Lee intervened, obtaining the vacation of a judgment against defendant, which vacation was subsequently set aside, and Laura Lee Randall, substituted for intervener upon his death, appeals. Affirmed.

J. M. O'Connell and C. I. McReynolds, for appellant. Richardson & Doan, for appellee.

KENT, C. J. A statement of the proceedings in the case is necessary. The action was brought by P. R. Fox, the appellee, against the El Globo Mining & Milling Company, a corporation, to recover upon a promissory note of the corporation for \$15,000, which had been assigned to Fox by Charles P. Romadka, the payee. The note in question was executed by Charles A. Romadka, the president of the corporation, who was the son of Charles P. Romadka, the payee. The note was payable on September 15, 1907. On May 2, 1908, default having been made by the company in the payment of the note, this suit was filed by Fox, assignee of the payee, in the district court, the complaint being the ordinary complaint on a promissory note alleging the making, execution, and delivery of the note for a valuable consideration, and its assignment to the plaintiff in the case before maturity for a valuable consideration. On May 4, 1908, the company, by its president, C. A. Romadka, appeared and filed a document confessing judgment, and thereupon on the same day judgment was entered in favor of Fox against the company for the amount of the note and interest. On May 21, 1908, Joshua O. Lee, a stockholder of the company, filed a motion to have the judgment vacated and for leave to intervene and defend. On June 22, 1908, an order was entered vacating the judgment theretofore entered, and allowing any stockholder to enter an appearance and file an answer in defense. Thereafter Lee, as such stockholder, and one Boardman, also a stockholder, each filed separate answers in the action. A general demurrer to the Boardman answer was sustained by the court and leave to amend denied. The case was thereafter

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

set by the court for trial on the issues raised by the complaint and the Lee answer, and thereafter, on motion of the attorneys for Lee, the trial order was vacated, and the case continued to the 18th of November, 1908, for trial. On the 16th of November the plaintiff filed a motion to reinstate the judgment theretofore entered and vacated, which motion was set for hearing on the 18th of November, and the intervener, Lee, was given notice of such hearing. Upon the hearing of the motion the court sustained the motion, and rendered judgment as follows: "This cause having come on for trial before me sitting in the district court of the Second judicial district in and for the county of Cochise on the 4th day of May, 1908, and judgment on said day having been rendered by me in favor of the plaintiff, and said judgment having thereafter been set aside by my direction upon the application of Joshua O. Lee for leave to interpose a defense to the complaint therein, and the said cause thereafter having been transferred by consent of the parties from the said district court unto this court, it appearing to this court that the answer of Joshua O. Lee presented with his application for leave to intervene as a defendant, is insufficient in law as a defense to the action of the plaintiff, and it further appearing that the answer of Frank S. Boardman filed herein as a defense to the said complaint does not state facts sufficient to constitute a defense, and no sufficient defense to said complaint having been filed on behalf of any party to this action, plaintiff now moving for reinstatement of the judgment heretofore rendered and for judgment on the record filed and pleadings herein, the court now being fully advised in the premises and having reconsidered the evidence offered on behalf of the plaintiff at the time of the former rendition of judgment herein and having considered all of the pleadings in the record, it is ordered, adjudged, and decreed that the plaintiff, P. R. Fox, do have and recover from the El Globo Mining & Milling Company, a corporation, defendant, the sum of fifteen thousand, nine hundred and nineteen dollars," etc. An appeal from the judgment so entered was taken to this court by Joshua O. Lee, but, he having shortly thereafter died, the appeal was prosecuted by Laura Lee Randall, heir of said Joshua O. Lee, deceased, the intervener.

The appellant's contention seems to be twofold: First, that the court had no authority or power to enter the judgment appealed from at the time it was so entered and under the conditions then existing; and, second, that, if such power existed, the court erred in holding that the answer of Lee was insufficient to raise a defense.

As to the first contention, the appellant cites the case of Arizona Mining & Trading Company v. Benton, decided by this court (100 Pac. 952), as authority. We held there that such an answer as originally filed here

by this corporation was not in effect an answer, but a confession of judgment, and that such a confession of judgment could not be made by the president of the corporation in the absence of express authority granted either by the corporation or by statute, except where authority may be implied from the nature of the corporate business or his duties. We therefore held in that case that upon a proper showing by the corporation, a judgment entered on such a confession should be set aside and the corporation allowed to defend, when it was shown that it had a substantial defense upon the merits, and that in refusing the corporation an opportunity so to defend the trial court in that case was in error; but, in the case at bar, the corporation had evidenced no desire to contest the judgment entered, and the trial court in this case, upon the application of the stockholder here appealing, did set aside the judgment entered and allowed the defense to be interposed. The Benton Case is therefore no authority for the position taken by the appellant here, since the appellant has obtained in this case the very relief that we held in the Benton Case the corporation was entitled to have.

The stockholder Lee, having obtained the right he sought—the judgment formerly entered having been set aside by the trial court and the stockholder having been allowed to intervene and file his answer, and having filed such answer—is thereafter in precisely the same position as if such intervention had been by the corporation, or as if he had originally appeared and answered as a defendant in the case. If, therefore, the answer interposed by the intervener, Lee, was insufficient to constitute a defense to the matters set forth in the complaint of the plaintiff, the plaintiff was entitled upon a motion duly made to have judgment upon the pleadings if such pleadings warranted judgment being entered. Judgment on the pleadings is a practice recognized by this court. *Miles v. McCallan*, 1 Ariz. 491, 3 Pac. 610; *Finley v. City of Tucson*, 7 Ariz. 108, 60 Pac. 872. In this case judgment was rendered by the court according to the recital of the judgment as follows: "Plaintiff now moving for reinstatement of the judgment heretofore rendered and for judgment on the record, files, and pleadings herein, the court now being fully advised in the premises, and having reconsidered the evidence offered on behalf of the plaintiff at the time of the former rendition of the judgment herein, and having considered all of the pleadings in the record, it is," etc. Upon the record in the case we think the court was justified in entering the judgment for the plaintiff and against the intervener, Lee, provided the answer of the intervener, Lee, as held by the trial court, did not set forth facts sufficient to constitute a defense to the cause of action set forth in the complaint.

The complaint was an ordinary one upon a

promissory note. The answer admitted the making, execution, and delivery of the note by the corporation to the payee. It excepted from such admission that the note was executed for a good and valuable consideration, or for any consideration whatsoever. There is no denial, however, in the answer that it was executed for a valuable consideration. The answer denies the assignment by Chas. P. Romadka to Fox of the note for a valuable consideration. It alleges affirmatively that Lee was a stockholder; that Romadka, the president of the corporation, and Romadka, the payee of the note, were son and father, respectively; that other stockholders holding with the Romadkas a majority of the stock were related or closely identified with each other; that from the sale of the treasury stock the sum of \$166,500 was realized, and had been sent to Charles A. Romadka, the president and active manager of the company, for disbursement by him on behalf of the company, and that Charles A. Romadka had been practically continuously from the inception down to the institution of the action in question in sole charge of the disbursement, expenditure, and outlay of the funds of the corporation and of the affairs of the corporation; that two directors friendly to the interests of the minority had been ousted from the board of directors by the Romadkas and their associates because of their desire to investigate the doings of Romadka; that Romadka, the president and manager, was incompetent for his position; that the business of the company had been conducted by him in an unskillful, wasteful, and extravagant manner; that the directors and majority stockholders had refused to remove Romadka although they knew of his incompetency; that Romadka issued a report to the stockholders, which was inaccurate, false, and untrue, and knowingly so to Romadka, and that the report was made to defraud and deceive the stockholders and to cover up misappropriations on the part of Romadka; that a subsequent statement made to the stockholders by Romadka was unsatisfactory; that an expert examination of the books of the company showed they were not properly kept; that large sums had been disbursed which were not explained or accounted for, and that, by reason of such funds being unaccounted for, Romadka had misappropriated the sum of \$30,000 and over to his own use in fraud of the stockholders; that Romadka and his associates had entered into a combination and conspiracy to force out the minority stockholders, and in furtherance thereof had issued a circular letter relating to the issuance of stock, the statements of which circular letter were untrue; that a proposition made by the minority stockholders to do their part toward paying off the lawful indebtedness of the corporation and arranging for its continuance in business was refused by the majority stockholders; that the fraudulent transactions among the direct-

ors and majority stockholders will result in serious injuries to the company and minority stockholders unless corrected and restrained; that certain action proposed to be taken by the majority stockholders should be restrained for the reason set forth in the answer, and other allegations in general terms of fraud and mismanagement by Romadka and his associates are also made. The answer further alleges that, on account of the mismanagement of the affairs by Romadka the funds of the corporation became exhausted by July, 1907, and that on account of such mismanagement and misappropriation of funds, and in furtherance of a conspiracy and combination between Romadka and the majority stockholders to force out the minority stockholders, the note in question was executed by Romadka in favor of his father, and that thereafter the payee made a nominal transfer of the note to Fox, who, with full knowledge of the fraud alleged, instituted this suit for the purpose of obtaining judgment on the note and levying upon certain assets of the corporation, and with a purpose of defrauding the intervener and remaining minority stockholders of their rights; that the transfer of the note was made to Fox that there might be apparently a bona fide transfer to an innocent purchaser, and that Fox was in full knowledge of the alleged fraudulent transactions at the time of the transfer, and that Fox was not the real owner or holder of the note nor the real party in the action, but that the payee was still the real owner thereof. The answer alleges affirmatively sufficient funds to pay the indebtedness of the corporation had been forwarded to Romadka, the president, but that Romadka had failed to account for the same or apply the same to the benefit of the corporation, and that, on account of his failure so to apply the funds or account for the same, the company was required to execute the note sued on in order to obtain funds; that this condition was within the knowledge of Charles P. Romadka in whose favor the note was executed, "who by advancing said sum of money covered up the misappropriations on the part of his son." The answer prays judgment simply that the plaintiff take nothing by his action.

The allegations of the answer are sufficient to show that whatever defense the company or the minority stockholders might have as against Charles P. Romadka, the payee of the note, is available against Fox, the assignee, but that such defense, if not available against the payee, is not available against the assignee. Assuming the allegations of fraud and dishonest management in the affairs of the corporation to be sufficiently alleged in the answer, and that as a direct result of such dishonesty the corporation had to borrow money to meet its indebtedness, and that such dishonesty was known to the person who loaned the money, nevertheless such a state of affairs is no defense in an action at law by the person loaning the money

upon the note given by the corporation for such loan. The allegations of the answer affirmatively show that the note was given for funds actually advanced to the corporation by Romadka, and that the money so advanced by Romadka to the corporation was actually disbursed by the corporation in payment of debts of the corporation. That the need of the corporation for this money was brought about by reason of mismanagement, dishonest acts, or the alleged conspiracy affords no defense to the corporation or to the minority stockholders in this action upon the note of the company given for the money so advanced to the company. The money having been given to the company and expended by the company in the payment of its debts, the company is liable for the repayment thereof, and must meet the obligation of the note given for such repayment. The relief sought for the alleged fraud, mismanagement, and conspiracy must be obtained in some other suit or proceeding.

Upon the allegations of the answer, therefore, and upon the proofs and the record before it, and upon the pleadings, we think the trial court was correct in the judgment entered by it; and it will therefore be affirmed.

LEWIS, J., concurs in the result. DOE, J., concurs. CAMPBELL and DOAN, JJ., not sitting.

(13 Ariz. 167)

VAN VEEN v. GRAHAM COUNTY.

(Supreme Court of Arizona. April 2, 1910.)

1. STATUTES (§ 219*)—CONSTRUCTION—PRACTICAL CONSTRUCTION.

In the absence of judicial construction of a statute, a long-continued practical construction given to it by officers required to act under it is entitled to great, if not controlling, weight.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 296; Dec. Dig. § 219.*]

2. STATUTES (§ 225½*)—CONSTRUCTION—RE-ENACTMENT OF STATUTE AFTER PRACTICAL CONSTRUCTION.

Where the Legislature re-enacts a statute after uniform construction by the officers required to act under it, the presumption is that the Legislature knew of such construction, and adopted it in re-enacting the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 306; Dec. Dig. § 225½.*]

3. COURTS (§ 57*)—ALLOWANCE—COURT REPORTER—"TRAVELING EXPENSES."

Laws 1907, c. 74, § 15, par. 14, allowing the court reporter his "actual traveling expenses" in attending the district court away from his official residence, authorizes, in view of a uniform practical construction to that effect of a prior similar statute, an allowance for his board and lodging at the place where the court is held.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 200; Dec. Dig. § 57.*]

Doan, J., dissenting.

Appeal from District Court, Graham County; before Justice Frederick S. Nave.

Action by E. B. Van Veen against Graham

County. From a judgment for defendant, plaintiff appeals. Reversed and rendered.

The appellant, as court reporter for the Fifth judicial district, incurred certain expenses in attending sessions of the district court in Graham county, away from his official residence, his accounts for which were approved by the district judge, and allowed by the board of supervisors of Graham county, except as to such portions as were for board and lodging at the place of holding court, which was disallowed. Appellant refused to accept the allowed portions of his claims, and within the time provided by law brought suit for the recovery of the whole amount, viz., the sum of \$101.75. A general demurrer was interposed to the complaint, which was by the court sustained. Appellant refusing to amend, judgment for costs was thereupon entered in favor of defendant, from which judgment this appeal is taken.

W. C. McFarland and John W. Murphy, for appellant. Lee N. Stratton, Dist. Atty., for appellee.

DOE, J. The complaint unquestionably states a valid cause of action, provided the disallowed items were properly chargeable to the county. Paragraph 14, § 15, c. 74, Laws 1907, provides: "The court reporter shall be allowed his actual traveling expenses in attending the district court away from his official residence, his account for which, when approved by the presiding judge shall be allowed and paid as other claims against the county wherein said court is held." And the only question raised by this appeal is whether appellant's board and lodging at the place where court was held are a proper charge under this provision of the statute.

Our attention has not been called to any case in which the expressions "actual traveling expenses" or "traveling expenses" have been defined. The statutory provision above quoted is substantially the same as that contained in paragraph 1488, c. 19, of the Revised Statutes of 1901, which provides that he shall receive "his actual traveling expenses in attending any district court." Ever since the enactment of the 1901 provision, we are advised that it has been the uniform practice of district attorneys and boards of supervisors throughout the territory to construe the words "actual traveling expenses" as including the board and lodging of the reporter during his attendance upon terms of court away from his home. In the absence of judicial construction of this or any similar statutory provision, the long-continued practical construction given to it by these officers is entitled to great, if not controlling, weight. Avery v. Pima County, 7 Ariz. 26, 60 Pac. 702; Copper Queen, etc., Mining Co. v. Territorial Board, 9 Ariz. 383,

*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

84 Pac. 511; U. S. v. Johnston, 124 U. S. 236, 8 Sup. Ct. 446, 31 L. Ed. 389; U. S. v. Finnell, 185 U. S. 236, 22 Sup. Ct. 638, 46 L. Ed. 890. Presumptively the Legislature which enacted the statute of 1907 was aware of the construction theretofore uniformly given the statute of 1901, and was satisfied therewith, or it would have changed it in the enactment of 1907, and the use by it of the words "actual traveling expenses" may fairly be deemed an adoption of such construction. Copper Queen, etc., Mining Co. v. Territory, supra; U. S. v. Finnell, supra. We think the demurrer should have been overruled, and judgment rendered for the amount prayed upon the stipulated facts.

The judgment of the district court is reversed, and judgment entered in this court in favor of the appellant, E. B. Van Veen, and against the appellee, the county of Graham, for the sum of \$101.75, and for the costs of appellant both in this court and the court below.

CAMPBELL and LEWIS, JJ., concur. KENT, C. J., concurs in the result. DOAN, J., dissents.

(13 Ariz. 102)

MAYHEW v. BRISLIN.

(Supreme Court of Arizona. April 2, 1910.)

1. EVIDENCE (§ 472*)—CONCLUSION OF WITNESS—MATTER DIRECTLY IN ISSUE—SALE OF REAL ESTATE.

In an action for services as a middleman in effecting an option contract of sale of mining property, it was not error to allow plaintiff to testify, in answer to a question as to what he understood defendant to mean by saying that he would make it all right, that he understood that he was to get the usual commission on the purchase price of the property, since it was proper that the private understanding of the promisee be placed before the jury, not for the purpose of enforcing such understanding, but to aid the jury in determining the sense in which the words were used, and in finding whether the parties came to an agreement in accord with the private understanding of the plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

2. BROKERS (§ 85*)—EXHIBITS—CONTRACTS ATTACHED TO COMPLAINT—MATERIALITY.

Where the complaint alleged the performance of a contract by plaintiff, and that a "deal" was effected in the manner and form set forth in certain contracts, copies of which were attached as exhibits thereto, the contracts were material evidence to show an essential element of the plaintiff's case, namely, that a "deal" was effected.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 85.*]

3. BROKERS (§ 85*)—MIDDLEMAN—OPTIONAL SALE—EVIDENCE.

In an action for services as a middleman in effecting an optional contract of sale of mining property, evidence that certain amounts of money had been paid on the purchase price of the mining claims subsequent to the giving of the option and to the commencement of the action

was properly admitted as tending to afford a basis for determining the amount of plaintiff's compensation.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 85.*]

4. BROKERS (§ 57*)—COMPENSATION—WHEN ENTITLED—OPTIONAL CONTRACT.

A real estate broker's contract is completed, and he is entitled to compensation, even though he be employed for the purpose of sale, when he has introduced a purchaser and his principal chooses to waive that requirement and enters into an optional contract. In such cases the courts allow him compensation upon the basis of the amount paid.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57.*]

5. BROKERS (§ 69*)—COMPENSATION—HOW MEASURED.

The compensation to be made to a real estate broker is by the ordinary judgment of business men measured by the results shown, and is not limited by the time occupied or the labor bestowed.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 55; Dec. Dig. § 69.*]

6. APPEAL AND ERROR (§ 1078*)—ASSIGNMENT NOT ARGUED IN BRIEF—REVIEW.

An assignment of error not argued in the brief will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

7. EVIDENCE (§ 558*)—HYPOTHETICAL QUESTIONS—CROSS-EXAMINATION.

There must be evidence of the material facts assumed in a hypothetical question before an answer thereto may be permitted, and this rule applies to cross-examination, where the question purports to relate to the specific facts of the case, and is asked for the purpose of eliciting an answer as to the value of services rendered.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 558.*]

8. APPEAL AND ERROR (§ 301*)—RECORD—MOTION FOR NEW TRIAL—REVIEW.

Where the record shows that the motion for new trial failed to allege error in ruling on instruction, assignments of error based thereon cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743-1755; Dec. Dig. § 301.*]

9. APPEAL AND ERROR (§ 1001*)—NEW TRIAL—EVIDENCE.

The Supreme Court will not grant new trial upon the grounds that the evidence does not sustain the verdict, where there is any substantial evidence in the record to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922-3934; Dec. Dig. § 1001.*]

Appeal from District Court, Yuma County; before Justice Edward Kent.

Action by D. J. Brislin against Felix Mayhew. Judgment for plaintiff, and defendant appeals. Affirmed.

Peter T. Robertson, Eugene S. Ives, and S. L. Pattee, for appellant. Ross & O'Sullivan and Timmons & Baxter, for appellee.

LEWIS, J. This was an action commenced by the plaintiff and appellee, D. J. Brislin, against the defendant and appellant,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Felix Mayhew, to recover for services rendered by the plaintiff as middleman in effecting an optional contract of sale of certain mining properties in Yuma county, Ariz. A verdict in the sum of \$2,000 was rendered against the defendant, upon which verdict judgment was duly entered. A motion for new trial was made, which was denied, and thereupon this appeal was taken.

The first and second assignments of error criticize the following rulings of the trial court: "Q. Now, Mr. Brislin, * * * what did you understand by his (the defendant's) remark to you at that time and place as you have testified to 'that he would make it all right with you?' (The defendant objects to the question as irrelevant and immaterial.) The Court: I think it would be competent for the witness to state what he understood by it. It would be a matter for the jury to determine what the meaning was. I overrule the objection. Counsel: The defendant excepts to the ruling of the court. My objection is that it asks for a conclusion, and that it is incompetent and immaterial. A. My understanding was that I was to get the usual commission on the purchase price of the property. (The defendant moves the court to strike out the answer of the witness to the preceding question.) The Court: I deny the motion." The rulings of the trial court are correct. Wigmore says: "Nevertheless, for two reasons it is usually necessary to inquire what the 'understanding' of each party was: First, because it may appear that both gave the same sense to the words, and thus no conflict will exist and the common sense may be accepted and enforced; and, secondly, because, if there is a conflict, the different senses must be examined. It thus appears that we must discriminate between enforcing the private 'understanding' of one party, and receiving evidence of such a private 'understanding.' Rulings of exclusions will usually or often mean in reality, not that the evidence should not be listened to, but that the private 'understanding' will not be enforced." Wigmore on Evidence (1904) § 1971, subd. "a." This statement is applicable to the rulings here presented. The record disclosed that the appellant and appellee were friends, and that the appellee was not engaged regularly in the brokerage business. The expression used by the appellant "that he would make it all right with him" was not free from ambiguity. It might be a mere expression of generous intent or a definite promise of payment for services rendered. Hence it was proper that the private understanding of the promisee should be placed before the jury, not for the purpose of enforcing such understanding, but for the purpose of aiding the jury in determining the sense in which the words were used, and in finding whether the parties came to an agreement in accord with the private understanding of the appellee.

The third assignment of error is as to the ruling of the trial court admitting in evidence the complaint, together with the contracts annexed thereto. It is argued by appellant that the plaintiff had fulfilled his contract of employment prior to the making of said contracts and that they were incompetent and immaterial. The complaint alleges that the contract of employment required the plaintiff to act as a middleman for the purpose of negotiating a mining deal between the said defendant and R. K. Humphrey and Charles H. Fay upon terms and conditions to be fixed by said defendant, and that said defendant agreed to pay the plaintiff a reasonable compensation for said services. It further alleges the performance of the contract by the plaintiff, and that a "deal" was effected in the manner and form set forth in certain contracts, copies of which were attached as exhibits thereto. The record shows an expressed exclusion of the objection that the proffered evidence was incompetent; the sole objection being that the evidence was immaterial. These contracts were material to show an essential element of the plaintiff's case, namely, that a "deal" was effected. They related to the same deal, and the later contracts were but modifications of the earlier and informal memoranda of the agreement.

The fourth assignment of error relates to alleged error in admitting evidence that certain amounts of money had been paid on the purchase price of the mining claims subsequent to the giving of the option and to the commencement of the action. The rulings of the trial court upon the admission of the evidence complained of were made while the plaintiff was on his main case. The complaint, in addition to the contract of employment and the various optional contracts hereinabove referred to, alleged that under the said contracts the purchasers had paid \$227,500 upon the purchase price of \$300,000, and were able, ready, and willing to pay the remainder as the same became due, and that the full purchase price would be paid in accordance with the contract. The only direct evidence as to the contract of employment was that of the plaintiff who stated "that he was to get the usual commission on the purchase price of the property; that his understanding was that, if the deal fell through, he was not expecting anything." Without regard to the doctrine of multiple admissibility, which might be determinative of the question, we will consider the evidence as bearing, not upon the right of the plaintiff and appellee to compensation, but as tending to afford a basis for determining the amount of the compensation. This latter is the ground of objection argued by the appellant, who contends that the contract was fully performed when the appellee had brought the parties together, and they had made a deal, and that the admission of evidence of payments to appellant of large sums after

the completion of the deal and the commencement of the suit had an injurious effect and inevitable tendency to swell the amount which might otherwise have been awarded to the appellee. The appellant endeavors to distinguish between the rules which should govern the admissibility of evidence as to the reasonable value of a broker's and middleman's services. He calls attention to the fact that a broker is only entitled to compensation upon effecting a sale, and that the purchase price is a proper basis for determining the value of his services because of the nature of the duty required. He urges that it is not so with the middleman, who has only occasion to introduce the parties, and whose compensation is nowise contingent upon the completion of a sale. This does not place the broker and middleman in different categories with respect to their compensation. A broker's employment may be to negotiate a contract other than that of sale, and in such case he is entitled to his compensation upon a showing that he is the efficient cause of the formation of a contract in accordance with the terms of his employment. He may be employed as well to effect a conditional or optional sale of a property as to effect a sale absolute, and would in either event be entitled to his commission. So with the middleman. He may be employed for divers purposes. His right to compensation accrues when he has performed his contract. The compensation of the middleman, like that of the broker, is usually contingent upon success. The results sought by the employer may differ, and the test of the admissibility of evidence may vary with the results sought. The amount of compensation to be allowed a broker may differ from that to be allowed a middleman, for the service demanded of the first may be, and generally is, greater than that demanded of the second. But we are now concerned not with the amount of compensation, but with the evidence admissible to afford a basis for the determination of such amount. In this case the employment of the middleman was for the purpose of introducing certain parties with whom the principal might effect a deal. Such deal was effected. The middleman's contract was thus consummated. So far the proof of the making of the optional contracts establishes one element of appellee's case. It does not, however, necessarily furnish the measure of appellee's compensation. That may be an independent element. Under appellee's testimony, the compensation was contingent, not upon the effecting of a deal, but of a deal resulting in substantial benefit to appellant. This was not an unreasonable construction of the language used by the parties as applied to the facts in the case. *Hammond v. Crawford*, 66 Fed. 425, 14 C. C. A. 109.

No authority is cited by appellant holding the evidence inadmissible of which complaint

is here made. We find no authority directly in point as to middlemen. The reasoning adopted in the more usual cases of the real estate broker is applicable. His contract is completed, and he is entitled to compensation, even though he be employed for the purposes of sale when he has introduced a purchaser and his principal chooses to waive that requirement, and enters into an optional contract. The broker in such case is permitted to show that subsequent thereto the option has been exercised, and the courts allow him compensation upon the basis of the amount paid thereon. *Glider v. Davis*, 137 N. Y. 504, 33 N. E. 599, 20 L. R. A. 398. "The compensation to be made in such cases is by the ordinary judgment of business men measured by the results attained. It is not limited by the time occupied or the labor bestowed." *Forsyth v. Doolittle*, 120 U. S. 73-78, 7 Sup. Ct. 408, 30 L. Ed. 586; *Boardman v. Hanks* (1904) 185 Mass. 555, 70 N. E. 1012; *Black v. Stump et al.*, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 103. There was no error in the rulings of the trial court in admitting the evidence complained of in this assignment.

The fifth assignment of error is not argued in appellant's brief, and we therefore give it no consideration. *Bail v. Hartman*, 9 Ariz. 321, 83 Pac. 358.

The sixth assignment of error relates to alleged error in the sustaining of an objection to a hypothetical question upon cross-examination addressed to a witness who had testified as to the value of the services rendered by appellee. The ruling was based upon the ground that there was no testimony tending to support the facts assumed in the question. There is a suggestion in the brief of appellants that the latitude allowed in the cross-examination of an expert witness should have permitted an answer because it would bear upon the witness' qualification to testify. This point is not seriously urged, and examination of the record discloses that the question was not asked for that purpose. The question occurs at the conclusion of a rigorous cross-examination, and the sole value of an answer thereto would be to give an estimate of the value of the appellee's services if rendered under the facts assumed in the question. Without setting forth the question, it being somewhat long, it is sufficient to say that it contains elements of fact which were not in evidence. There must be evidence tending to prove the material facts assumed in a hypothetical question before an answer thereto may be permitted. This rule is not changed upon cross-examination where the question purports to relate to the specific facts of the case, and is asked for the purpose of eliciting an answer as to the value of the services rendered. *Nichols v. Oregon Short Line Ry. Co.*, 25 Utah, 240, 70 Pac. 996.

Assignments of error Nos. 7 to 13, inclu-

ive, relate to the giving and refusing of instructions to the jury. The record discloses that the motion for new trial fails to allege error in the giving or the refusing of instructions. We therefore cannot consider these assignments. *Pickthall v. Steinfeld* (1909) 100 Pac. 779; *Steinfeld v. Pickthall, Id.*; *Pringle v. King*, 9 Ariz. 76, 78 Pac. 367.

The fourteenth and fifteenth assignments of error relate to error in the overruling of motion for new trial, and raise questions already considered and disposed of under the other assignments of error.

Assignments 16 and 17 allege error in overruling the defendant's motion for new trial upon the grounds that the evidence does not sustain the verdict, and that the evidence does not sustain the judgment. We have examined the record, and find that there is some evidence in support of every allegation of the complaint essential to the verdict and judgment. This court will not grant a new trial upon the grounds alleged where there is any substantial evidence in the record to support the verdict and judgment. *Goldman v. Sotelo*, 7 Ariz. 23, 23 Pac. 696; *U. S. v. Copper Queen M. Co.*, 7 Ariz. 80, 60 Pac. 885; *Maricopa, etc., Ry. Co. v. Dean*, 7 Ariz. 104, 60 Pac. 871; *Old Dominion, etc., Co. v. Andrews*, 6 Ariz. 205, 56 Pac. 969; *McGowan v. Sullivan*, 5 Ariz. 334, 52 Pac. 986; *United States v. Chung Sing*, 4 Ariz. 217, 36 Pac. 205; *Miller v. Green*, 3 Ariz. 205, 73 Pac. 399; *Barter v. County of Pima*, 2 Ariz. 88, 11 Pac. 62; *Copper Queen M. Co. v. Arizona, etc., Co.*, 2 Ariz. 10, 7 Pac. 718; *O'Toole v. Melander*, 2 Ariz. 392, 17 Pac. 564; *Tweed v. Lowe*, 1 Ariz. 488, 2 Pac. 757.

The judgment of the trial court is affirmed.

CAMPBELL and DOE, JJ., concur.
DOAN, J., not sitting.

(13 Ariz. 96)

SANTA FÉ, P. & P. RY. CO. v. ARIZONA
SMELTING CO. et al.

(Supreme Court of Arizona. April 2, 1910.)

CARRIERS (§ 197*)—FREIGHT—RIGHT TO LIEN
—CARRYING ON MILL.

Civ. Code 1901, par. 2906, gives persons who labor or furnish material for carrying on of a mill a lien on the same for the amount due them therefor. *Held*, that a carrier is not entitled to a lien thereunder for freight charges in transporting ore belonging to another to an ore mill as for labor for the carrying on of the mill; its labor being incidental to the furnishing of the material rather than to the carrying on of the mill after the material was received.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 197.*]

Appeal from District Court, Yavapai County; before Justice Richard E. Sloan.

Action by the Arizona Smelting Company and another against the Santa Fé, Prescott & Phoenix Railway Company, which filed a cross-complaint. A demurrer to the cross-

complaint was sustained, and defendant appeals. Affirmed.

The Santa Fé, Prescott & Phoenix Railway Company filed a cross-complaint in this suit in the district court, seeking to have its lien established for charges for transportation of ore to the smelting company. A general demurrer to the complaint was sustained, and from judgment entered thereon the railway company has appealed.

T. J. Norton, E. W. Camp, and Paul Burks, for appellant; Vyne & Lamson, Crocker & Wickes, Norris & Ross, and Henry L. Hooker, for appellees.

KENT, C. J. This appeal involves the construction of paragraph 2906 of the Revised Statutes of 1901, which reads as follows: "All, foundrymen, boiler makers, and all persons who labor or furnish machinery, boilers, castings, or other material for the construction, alteration, repairs, or carrying on of any mill, manufactory, or hoisting works at the request of the owner thereof, or his agent, shall have a lien on the same for the amount due him or them therefor." It is the contention of the appellant that, under this statute, it is entitled to have established a lien for freight charges for ore transported by it to the smelting company. It is not claimed by the appellant that it is entitled to a lien by virtue of the provision that all persons who furnish material for the carrying on of a mill are entitled thereto, because the ore transported was not the property of the railroad company, but was transported by it merely as a carrier. The contention is that, by reason of such transportation, the railroad company has labored for the carrying on of the mill. It has been held under a statute giving a lien to any person who performs labor or furnishes material in the erection of a house that a person who hauls lumber to be used in such construction was as much entitled to the benefit of the lien as the materialman who furnished the lumber and the laborers who actually erected the building. *Fowler & Guy v. Pompelly* (Ky.) 76 S. W. 173. It has also been held that under a statute giving a lien for all persons performing labor in the erection of a mill, manufactory, etc., a teamster hauling material to and from a ditch in a public street was entitled to a lien for services incidentally necessary to the erection of a steam heating plant. *Wells v. Christian*, 165 Ind. 662, 76 N. E. 518. Other cases are also cited where the courts have held that persons hauling materials at the request of the owner and contractor are entitled to the benefits of the statute giving a lien for work in the erection of buildings. In *Re Hope Mining Company*, 1 Sawy. 710, Fed. Cas. No. 6,691, 9 Morrison, Mining Reports, 364, the United States District Court for the District of Nevada held

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that under a similar statute to the one in question a teamster hauling quartz to the mill was a person performing labor in carrying on the mill, and entitled to the benefit of the lien law. This ruling was afterwards followed by the Supreme Court of Nevada in the case of Gould v. Wise, 18 Nev. 253, 3 Pac. 30.

The appellant contends that there is no distinction in principle between the position of a private carrier thus allowed a lien and that of a railroad company, a public carrier; that the fact that a railroad corporation, as such public carrier, has a lien for freight, which lien ceases with the delivery of the goods, does not debar it from the enjoyment of the lien under the statute in question, which attaches upon delivery and after the extinguishment of the former lien. It is argued with some plausibility that the labor of transportation of materials and supplies is as essential to the operation and carrying on of the mill as are the materials furnished; that such labor in many cases is of far more value than the material and supplies transported; that such labor enters into and constitutes part of the value of the material and supplies, without which the mill could not be operated or carried on; that this territory is from a manufacturing point of view a new country; that its policy is and has been to develop its mines and manufactures of all kinds; that its laws have been enacted with that end in view, and for that purpose a liberal policy was established to favor the building of railroads and other public enterprises; that here, as in all new countries, the greatest single difficulty is the absence of large capital with which to install and carry on manufacturing enterprises; that it is the policy of the law to so provide that the greatest amount of business may be done with the limited capital available; that, for these reasons, shippers of ores were allowed a lien upon the smelter in order to induce them to extend credit, and not to require the payments for ore to be made in advance; that there is no reason why railroad companies should not be given the same inducement to deliver the ore without requiring payment in advance of the freight charges; that freight charges on ore are uniformly based on the value of the ore per ton, and it is only after the smelting of the ore that the value of it and the consequent freight charges are accurately known; that this method of making freight rates is of long standing through the United States and was well known to the Legislature when it enacted the lien laws in question; that the nature of the smelting business and the conditions prevailing in this part of the country make it necessary that railroads be allowed the same lien as that allowed to those furnishing the materials transported; that the statute is a remedial one, and should be construed liberally, not only with respect to the remedy, but also with respect to the right.

We find no difficulty in determining that a corporation may labor, within the meaning of the statute, nor do we think that the fact that the railroad company may have a lien for freight would operate to prevent its claiming a lien under this statute if the language of the statute permits. We have to determine, if we can, from the language of the statute and the conditions existing at the time of its passage, the intent of the Legislature. The law applies to two classes of persons: First, those who furnish material for the carrying on of the mill; second, those who labor for the carrying on of the mill. The appellant does not claim to come within the first of these classes, but within the second. The distinction between the two classes of liens, we think, has not always been observed by the courts. For instance, in the Hope Mining Case, supra, upon which the appellant especially relies, the court held that the lien attached because "the labor of hauling the quartz to a mill of this character is indispensable to carrying it on"; or, in other words, that, as the ore transported was indispensable to carrying on the mill, therefore in such carriage the teamster was "performing labor in carrying on the mill." The materials being essential, their transportation to the mill was, of course, essential to the carrying on of the mill, just as furnishing the material was essential to the carrying on of the mill; but, because the material was essential in carrying on the mill, it does not follow that the carrier thereof to the mill labors in the carrying on of the mill, any more than the producer of the material from the ground labors in the carrying on of the mill. The carrier labors it is true, but his labor is in the transportation and carriage, and therefore labor incidental to the furnishing of the material rather than incidental to the carrying on of the mill after the material is received. In the Fowler & Guy Case, supra, the court held that, as the person furnishing the material had a lien and the person erecting the building had a lien, the teamster whose work was just as important to the erection of the building ought also to have a lien. That is the argument urged here—the man who furnishes the ore has a lien, the man who stokes the ore has a lien, if they have liens the carrier, whose work is as important to the carrying on of the mill as either, ought also to have a lien. The answer is that, conceding that he ought to have it, the statute, while giving it to the man who furnishes it and to the man who stokes it, does not give it to the carrier. We are not concerned here whether one furnishing supplies may not also have a lien for the cost of transporting such supplies as an incident to his lien for furnishing. What we do decide is that under this statute as it exists no such lien for carriage is in terms given, and that, if such lien exists, it exists as an incident only to the lien for furnishing, and cannot be availed of by a

common carrier under the guise of work for the carrying on of the mill, any more than it could be availed of by the producer and furnisher of the ore as work done in carrying on the mill, if the statute did not give the latter a specific lien for such furnishing. The effect of the construction contended for is to read into the statute a lien for transportation so as to make the statute read, in effect, "all persons who furnish or transport materials necessary for the carrying on," etc.; but this the Legislature has not in terms done, but has limited the lien to persons furnishing the materials and to persons laboring in the carrying on of the mill. Whatever may be the effect of the law with respect to the rights thereunder of teamsters or private carriers serving the millowner, as to which we express no opinion, we do not think it was the intent of the Legislature in providing a lien for those who labor in the carrying on of a mill to give by this statute a lien to a railroad company for transportation by it of supplies. We are strengthened in our belief that this was not the intention of the Legislature by the fact that such carrier has, without the statute, a lien for its freight which can be asserted; that, though the actual amount of such freight charges cannot, perhaps, be ascertained until after the smelting of the ore, the difference between the probable and the actual amount due is negligible in quantity, and the railroad company may, if it chooses, collect before delivery substantially all of its freight charges, and therefore its common-law lien is to all intents and purposes effective; and, further, that if the Legislature had intended to give a lien for such transportation, it would have been easy to include such lien in express terms in the statute; and, further, because the operation of similar lien laws has not only never been extended by any court to apply to freight charges due to a railroad corporation as a common carrier, but respectable authority is to be found holding that it does not so apply. *Seventh National Bank v. Iron Co. (C. C.) 35 Fed. 436; Fidelity Insurance Co. v. Iron Co. (C. C.) 81 Fed. 439; American Surety Co. v. Cement Co. (C. C.) 110 Fed. 717; Wilson v. Whitcomb, 100 Pa. 547.*

We think the trial court was right in sustaining the demurrer to the complaint; and its judgment is affirmed.

DOAN, CAMPBELL, LEWIS, and DOE, JJ., concur.

(13 Ariz. 135)

MARQUEZ v. TERRITORY.

(Supreme Court of Arizona. April 2, 1910.)

1. HOMICIDE (§ 135*)—MURDER—INDICTMENT—MEANS AND MANNER OF DEATH—FAILURE TO SHOW—EFFECT.

Pen. Code 1901, § 172, defines murder as the unlawful killing of a human being with mal-

ice aforethought, etc. Section 173 defines murder in the first and second degrees. Section 824 provides what the indictment must contain. Section 826 provides that the indictment must be direct and certain as to the party and offense charged and the circumstances, when necessary to constitute a complete offense. Section 833 provides in what cases the indictment is deemed sufficient. Section 834 provides that an indictment shall not be insufficient because of formal defects or imperfections which do not prejudice a substantial right of the defendant upon its merits. *Held*, that it is unnecessary to set forth in an indictment for murder the means and manner of death.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 215, 216; Dec. Dig. § 135.*]

2. JURY (§ 133*)—EXAMINATION OF JURORS—QUALIFICATION.

Though a portion of the testimony of certain jurors when examined on their voir dire would have warranted the court in excusing them, if the testimony of each of such jurors taken as a whole justified the court in overruling challenges to them there was no error.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 586-598; Dec. Dig. § 133.*]

3. JURY (§ 108*)—EXAMINATION OF JURORS—DEATH PENALTY—SCRUPLES AGAINST—DISQUALIFICATION.

The court properly sustained a challenge to a juror and excused another, without challenge, where their examination on voir dire showed that they possessed such conscientious scruples against the death penalty as to disqualify them.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 491, 496; Dec. Dig. § 108.*]

4. HOMICIDE (§ 290*)—INSTRUCTIONS—VARIANCE—EFFECT.

Where the indictment in a prosecution for murder did not allege that deceased had been shot, but during the trial it was conceded that defendant had shot deceased, the use of the word "shot" in a charge on murder in the second degree was not error.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 595; Dec. Dig. § 290.*]

Appeal from District Court, Yuma County; before Justice John H. Campbell.

Francisco Marquez was convicted of murder in the first degree, and he appeals. Affirmed.

H. Wupperman and Fred L. Ingraham, for appellant. John B. Wright, Atty. Gen., for the Territory.

DOE, J. The appellant was convicted of the crime of murder in the first degree, and appeals from the judgment and sentence of the court imposing the death penalty.

Under the first assignment of error it is urged that the demurrer to the indictment should have been sustained for the reason that the latter fails to state the means by which the death was occasioned. At common law great particularity in setting forth the manner of the death and the means by which it was inflicted was required in an indictment for murder; but the frequency with which miscarriages of justice occurred through variances between the allegations and proof and the consequent tendency to bring the administration of justice into disrepute have

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

led to a marked relaxation in the rigidity of the requirements of a valid indictment, both by judicial decisions and statutory enactments. The requirement that the means and manner of death should be set forth with particularity in the indictment was based upon the theory that such information was an essential right of the defendant and necessary to the preparation of his defense. In *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, the court sustained an allegation that the homicide was committed "in some way and manner, and by some means, instruments, and weapons, to the jury unknown." This form of allegation is now generally regarded as sufficient, even though it appears at the trial that by proper diligence the grand jury might have learned the nature of the instrument. Wharton on Homicide (3d Ed.) 852. If it be conceded that such information constitutes a substantial right of the defendant and is necessary to his defense, it is difficult to see upon what theory he may be deprived of it. If, however, information of the means and manner of death does not constitute a substantial right of the defendant, any reference to the matter in the indictment would seem unnecessary.

The provisions of our Penal Code of 1901 affecting the questions under consideration are as follows:

"Par. 172. Murder is the unlawful killing of a human being with malice aforethought. Such malice is express or implied. It is express when there is manifested or deliberate intention unlawfully to take away the life of a fellow creature. It is implied where no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

"Par. 173. All murder which is perpetrated by means of poison or lying in wait, or by any other kind of wilful deliberate and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary or mayhem, is murder of the first degree, and all other kinds of murder are of the second degree."

"Par. 824. The indictment must contain: (1) The title of the action, specifying the name of the court to which the same is presented and the names of the parties. (2) A statement of the acts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended."

"Par. 826. The indictment must be direct and certain as it regards: (1) The party charged. (2) The offense charged. (3) The particular circumstances of the offense charged when they are necessary to constitute a complete offense."

"Par. 833. The indictment is sufficient, if it can be understood therefrom: (1) That it is entitled in a court having authority to receive it, though the name of the court be not stated. (2) That it was found by a grand jury of the county in which the court was

held. (3) That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the jury unknown. (4) That the offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein. (5) That the offense was committed at some time prior to the time of the finding the indictment. (6) That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. (7) That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case.

"Par. 834. No indictment is insufficient, nor can the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits."

These provisions, having been adopted from California, there was adopted with them, by necessary implication, the settled construction given them by the Supreme Court of California prior thereto. That court had repeatedly and uniformly construed these provisions of the Penal Code and held that it was unnecessary to set forth in the indictment the means and manner of death, and that the failure so to do deprived the defendant of no substantial right. In *Molina v. Territory*, 95 Pac. 102, the only case in which the question has heretofore been before this court, this construction was adopted; the California cases being cited in the opinion.

Of the remaining 10 assignments of error, 7 are based upon the overruling by the court of challenges of defendant to that number of jurors. No showing is made as to whether the defendant exhausted his peremptory challenges; but it appears from the record that only three of such jurors were finally selected, and while the portions of the testimony of such jurors, which were presented in appellant's brief, taken alone, might give rise to a different inference, the testimony of each of such jurors as a whole fully justifies the rulings complained of. The principles applied by the court in reaching this conclusion have been discussed at length by Chief Justice Kent, speaking for the court, in *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948.

Two assignments of error are based upon the sustaining of a challenge to the juror P. D. Sargent, and the excusing by the court, without challenge, of the juror George W. Sells. The examination of these jurors upon their voir dire clearly shows that each of them was possessed of such conscientious scruples against the infliction of the death penalty as to disqualify them.

The remaining assignment is directed to

the following portion of the charge of the court: "If you believe from the evidence beyond a reasonable doubt that the said P. B. Hodges was unlawfully, feloniously, and unjustifiably shot and killed by the defendant as charged in the indictment, * * * then it is your duty to find the defendant guilty of murder of the second degree"—for the reason that the deceased is not alleged in the indictment to have been shot; but during the trial it seems to have been conceded that the defendant had shot the deceased, and we can conceive of no possible theory upon which the defendant could have been injured by the inadvertent use of the word in the portion of the charge complained of.

No error appearing from the record, the judgment of the district court is affirmed.

KENT, C. J., and DOAN and LEWIS, JJ., concur.

(13 Ariz. 259)

CONCHIN v. EL PASO & S. W. R. CO.

(Supreme Court of Arizona. April 2, 1910.)

1. MASTER AND SERVANT (§ 302*)—INJURIES TO THIRD PERSON—ACTS WITHIN SCOPE OF EMPLOYMENT.

Before the master can be held liable for the negligence or wrongful act of his servant, it must appear that the servant was engaged at the time in the performance of the duties of his employment, and if so engaged, and the wrongful act was performed in connection with such duties and in apparent furtherance of their accomplishment, the master is liable, though the act be in excess of the authority conferred by him or in violation of his express directions, provided it was not done in furtherance alone of the servant's personal ends.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1219, 1225; Dec. Dig. § 302.*]

2. MASTER AND SERVANT (§ 302*)—INJURIES TO THIRD PERSON—ACTS WITHIN SCOPE OF EMPLOYMENT.

A servant employed as a watchman to protect railroad property and to eject trespassers has implied authority to use force when necessary, and hence in shooting a trespasser on the property such servant acted within the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1219, 1225; Dec. Dig. § 302.*]

3. RAILROADS (§ 280*)—INJURY TO TRESPASSER.

A railroad is liable to a trespasser on its grounds only for willful or wanton injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 902; Dec. Dig. § 280.*]

4. NEGLIGENCE (§ 11*)—"WILLFUL"—"WANTON."

An act is "willful" where the resulting injury is intentional or the natural and probable consequence of the act. The word "wanton" is, however, more comprehensive, and to constitute "wantonness" it is not essential that the injury should have been intentional or the probable consequence of the wrongful act; it sufficing that the act indicates a reckless disregard of the rights of others, a reckless indifference to re-

sults, or that the injury is the likely and not improbable result of the wrongful act.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 13; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7468-7481, 7835, 7886, 7384, 7385.]

5. MASTER AND SERVANT (§ 306*)—INJURY TO THIRD PERSON—WANTONNESS.

A railroad watchman employed to guard the railroad property and keep off trespassers, and who, on a trespasser's failing to halt when commanded so to do, fired on and shot the trespasser, was guilty of conduct constituting wantonness.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1230; Dec. Dig. § 306.*]

6. RAILROADS (§ 278*)—INJURY TO TRESPASSER—CONTRIBUTORY NEGLIGENCE.

A trespasser on railroad property, who was shot by a railroad watchman, was not guilty of contributory negligence in failing to halt when called on so to do by the watchman.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 278.*]

Appeal from District Court, Cochise County; before Justice Doan.

Action by John Conchin against the El Paso & Southwestern Railroad Company, a corporation. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

W. B. Cleary, for appellant. Herring, Sorin & Ellinwood, for appellee.

DOE, J. The plaintiff (here appellant) brought his action seeking to recover damages from the defendant for injuries inflicted by a watchman in its employ. In the first cause of action plaintiff, in substance, alleges: That the defendant employed one Stafford as watchman of all its property at certain railroad yards on its line of road, to guard its said property from depredations, to apprehend and turn over to a peace officer for arrest all persons who he believed had committed or attempted to commit any depredation upon its said property, to ascertain the identity of and to keep off and frighten away from said premises and property all persons acting in a suspicious manner, and armed him with a revolver to carry out his said employment. That plaintiff, about 3 o'clock in the morning, while passing the place where Stafford was stationed as such watchman in a peaceable manner, and without having committed or intending to commit any depredation upon its property, was fired upon by Stafford, who called to him to halt, but that plaintiff, being frightened, ran. That Stafford continued to fire towards him and hit him in the knee, but that Stafford did not intend to hit, but only to frighten him. For a second cause of action, in addition to the foregoing matters, plaintiff alleges that Stafford was, at the time, a deputy sheriff, but does not allege that he was acting in such a capacity at the time of the acts complained of. Defendant filed general demurrers which were sustained, and, plaintiff declining to amend, judgment was re-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dered for defendant, and from said judgment plaintiff prosecutes this appeal. His only assignment of error is predicated upon the action of the court in sustaining the demurrers.

The question presented by this appeal may most conveniently be determined by a consideration of the propositions advanced by appellee in support of its demurrers and in the order stated; the same being: First. That the acts complained of were without the scope of the watchman's employment. Second. That the complaint was fatally defective in failing to negative that the plaintiff was a trespasser; the injuries having been inflicted upon the premises of the defendant and the action based upon mere negligence. Third. That the plaintiff, being a trespasser to whom the defendant owed no duty except not to wantonly or willfully inflict injury upon him, the complaint is defective, in that it fails to charge wanton or willful injury and alleges mere negligence on the part of the defendant. Fourth. That by running away instead of stopping when challenged plaintiff was guilty of such contributory negligence as to prevent recovery.

While plaintiff's allegations that the acts complained of were within the scope of Stafford's employment are mere conclusions and to be treated as surplusage, yet all allegations of fact contained in the complaint which are properly pleaded must, for the purpose of this case, be treated as true. It is alleged in the complaint that Stafford was employed as a watchman to protect the defendant's premises and property from depredation, to ascertain the identity of persons who might commit or attempt to commit such depredation, "to apprehend and turn over to a peace officer for arrest all persons who he had reason to believe or did believe had committed or attempted to commit any crime against the property," to keep off and frighten away from the property all persons acting in a suspicious manner, and "that said Stafford was armed by defendant with a revolver to carry out his said employment."

The words "within the scope of his employment," as applied to the liability of a master for the wrongful acts of his servant, are probably not susceptible of any satisfactory definition of general application; each case must be determined by the particular facts and circumstances surrounding it. Before the master can be held liable for the negligence or wrongful act of his servant, it must appear that the servant was engaged at the time in the performance of the duties of his employment, and if so engaged, and the wrongful act was performed in connection with such duties and in apparent furtherance of their accomplishment, the master will be liable, even though the act be in excess of the authority conferred by him or in violation of his express directions, provided, however, that it is not done in fur-

therance alone of the personal desires or ends of the servant.

The intent with which an act is done affords a more reliable test as to whether it is within the scope of the servant's employment than do the methods of its accomplishment. The nature of Stafford's employment carries with it an implied authority to use force when necessary. "And even where the master owes no duty to the person injured, the authority to use force may be implied from the nature of the employment so as to render the master liable, even though the servant goes beyond the necessity of the situation and uses more force than necessary. For instance, the authority to use force is ordinarily implied where the employé is a watchman or doorkeeper." 28 Cyc. 1541. In *Rogahn v. Moore Manufacturing & Foundry Co.*, 79 Wis. 573, 48 N. W. 669, the court says: "Where the servant is authorized to use force against another when necessary in executing his master's orders or in conducting the business intrusted to him, the master commits it to him to decide what degree of force he shall use, and if through misjudgment or violence of temper the servant goes beyond the necessity of the occasion, and gives a right of action to another, he cannot be said, as to third persons, to have been acting beyond the line of his duty, or to have departed from his master's business." The New York Court of Appeals has said: "It is in general sufficient to make the master responsible that he gave to the servant authority, or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders." *Rounds v. Railroad Co.*, 64 N. Y. 129, 21 Am. Rep. 597.

Applying the foregoing tests to the facts alleged in the complaint, it seems clear that Stafford was not acting independently, but strictly within the scope of his employment.

Counsel for appellee, in his second proposition, assumes that the complaint is based upon simple negligence. If this assumption be true, the complaint is fatally defective in failing to show any right or license for plaintiff's presence upon the defendant's premises, for clearly the defendant would not be liable to a trespasser for injuries due to its mere negligence. The plaintiff, however, could, at most, have been a trespasser to whom the defendant would be liable for willful or wanton injury, which brings us to a consideration of appellee's third proposition.

In many cases the words "willful" and "wanton" are treated as synonymous, and in

those cases where an attempt has been made to distinguish them it has usually been with reference only to the facts of the particular case. An act is "willful" where the resulting injury is intentional or the natural and probable consequence of the act. The word "wanton" is, we think, more comprehensive than "willful." To constitute "wantonness" it is not essential that the injury should have been intentional or the probable consequence of the wrongful act; it is sufficient that the act indicates a reckless disregard of the rights of others, a reckless indifference to results, or that the injury is the likely and not improbable result of the wrongful act. The word "likely" is here used in the sense of something more than possible and less than probable. "Wantonly. Done in a licentious spirit, perversely, recklessly, without regard to propriety or the rights of others; careless of consequences, and yet without settled malice." 2 Bouvier, 1207.

The complaint expressly negatives any intent to inflict injury, and consequently eliminates the element of willfulness from our consideration. It only remains to consider whether the pleader has negatived wantonness as well. We think he has fallen a little short of so doing. Stafford had no right to arrest the plaintiff under the circumstances alleged in the complaint. Chapter 3, tit. 5, Cr. Code (Rev. St. 1901). The injury is alleged to have been inflicted in the night while the plaintiff was, at most, a mere technical trespasser upon defendant's right of way and was guiltless of the commission or intent to commit any crime, and while he was retreating to avoid apprehension or arrest, or, as he may well have thought, a felonious assault. In firing towards and near the plaintiff while he was running, and in the nighttime, though without intending to hit him, but only intending to try to halt or frighten him away, Stafford must have known that injury was the not improbable but likely result of his wrongful act, and displayed a reckless disregard of the rights of plaintiff and a disregard of and indifference to results constituting wantonness.

Appellee's fourth proposition is obviously without merit. There is nothing in the complaint from which a duty on the part of plaintiff to halt may be implied.

Plaintiff, in his second cause of action, alleges that Stafford was a deputy sheriff; but the facts stated do not indicate that he acted in such capacity, but clearly show that at the time of the injury he was acting in the capacity of watchman.

For the foregoing reasons, the judgment of the district court is reversed, and the cause remanded for further proceedings.

KENT, C. J., and CAMPBELL and LEWIS, JJ., concur.

(13 Ariz. 111)

SOUTHERN PAC. R. CO. v. SVENSDEN.
(Supreme Court of Arizona. April 2, 1910.)

1. RAILROADS (§ 282*)—EJECTION FROM TRAIN—ACTIONS—PLEADING—PRESUMPTIONS.

If one suing a railroad for injuries through being ejected from a freight train was on the train by virtue of any contractual relation, either express or implied, it was incumbent on him to set it up in his complaint, and, in the absence of such averment, he will be assumed to have been a trespasser whom defendant's trainmen might lawfully eject, using a reasonable degree of force.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 282.*]

2. RAILROADS (§ 282*)—INJURIES TO TRESPASSER—PRESUMPTIONS.

In an action against a railroad for damages to plaintiff by his ejection from a freight train, defendant's trainmen, in the absence of a contrary showing, will be presumed to have acted within the scope of their employment.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 912; Dec. Dig. § 282.*]

3. RAILROADS (§ 281*)—EJECTION OF TRESPASSER—WANTON AND WILLFUL INJURY.

A railroad is liable where its trainmen, in ejecting a trespasser from a freight train, exceeded their rights and inflicted wanton and willful injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 906; Dec. Dig. § 281.*]

4. RAILROADS (§ 282*)—EJECTION FROM TRAIN—COMPLAINT—SUFFICIENCY.

A complaint, alleging that while plaintiff was riding on defendant's freight train, which was moving at a high rate of speed, one of defendant's brakemen, without cause and acting under defendant's instructions, assaulted plaintiff and by threats, etc., compelled plaintiff to jump from the train to the ground, whereupon plaintiff was injured, sufficiently stated a cause of action.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 910; Dec. Dig. § 282.*]

5. RAILROADS (§ 282*)—EJECTION FROM TRAIN—PLEADING.

In an action against a railroad for injuries to plaintiff through being ejected from a moving freight train by defendant's trainmen, it was unnecessary for plaintiff to allege or prove youth or inexperience in jumping from moving trains, and, in the absence of specific allegations with respect thereto, plaintiff would be presumed to have been possessed of only ordinary skill and experience.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.*]

6. RAILROADS (§ 281*)—EJECTION FROM TRAIN—WANTON AND WILLFUL INJURY.

That defendant railroad's trainmen, while the train was moving rapidly, forced plaintiff to jump from the train, constituted wanton and willful misconduct.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 906; Dec. Dig. § 281.*]

7. RAILROADS (§ 282*)—EJECTION FROM TRAIN—INSTRUCTIONS—"VOLUNTARILY."

In an action against a railroad for injuries to plaintiff by being forced to jump from a moving freight train, the use of the word "voluntarily" in an instruction that, if plaintiff voluntarily jumped from the train on the direction of the brakeman, he was guilty of contributory negligence, etc., was liable to mislead the jury.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

8. RAILROADS (§ 282*)—EJECTION OF TRESPASSER—INSTRUCTIONS—"WANTON."

In an action against a railroad for injuries to one ejected from a moving freight train, the definition of the word "wanton," in an instruction that "by wanton or willful injury is meant an injury deliberately and intentionally inflicted, or that the person or persons inflicting the injury acted with such utter disregard of plaintiff's safety that such an intention to injure him may be inferred therefrom," was too narrow in its scope.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.*]

For other definitions, see Words and Phrases, vol. 8, p. 7384.]

9. TRIAL (§ 260*)—INSTRUCTIONS—INSTRUCTIONS COVERED.

The refusal of instructions covered by the given charge is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-656; Dec. Dig. § 260.*]

10. RAILROADS (§ 282*)—EJECTION OF TRESPASSER—INSTRUCTIONS.

In an action against a railroad for injuries to one ejected from a moving freight train, the jury could not have been misled, by the use of the words "and use ordinary care," in an instruction that, if trainmen in removing a trespasser use no more force than is reasonably necessary and use ordinary care, the railroad is not liable, into believing that defendant would necessarily be liable for want of ordinary care, where the court further charged that plaintiff was a trespasser, and that defendant owed him no duty except not to wantonly or willfully injure him.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.*]

11. NEGLIGENCE (§ 100*)—CONTRIBUTORY NEGLIGENCE—AGGRESSIVE ACTS.

The doctrine of contributory negligence has no application in cases of aggressive acts resulting in wanton or willful injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 85; Dec. Dig. § 100.*]

12. RAILROADS (§ 278*)—EJECTION OF TRESPASSER—CONTRIBUTORY NEGLIGENCE—FEAR.

When, by the negligence or misconduct of one, another is suddenly put in peril, and while under an apparently well-grounded fear seeks to escape and suffers injury from another source, the author of the original peril is answerable for resulting consequences, provided that in attempting to escape the injured person exhibited such conduct as might reasonably have been expected from an ordinarily prudent person under similar circumstances, and hence, to entitle a trespasser on a moving freight train to recover for damages through being ejected therefrom, it is not necessary that the conduct of the trainmen was such as to cause plaintiff to lose his judgment and self-control to the point of automatic action.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 278.*]

Appeal from District Court, Pima County; before Justice Campbell.

Action by Hans Svensden against the Southern Pacific Railroad Company. From a judgment for plaintiff and from an order overruling a motion for new trial, defendant appeals. Affirmed.

Frank Cox (Alfred Franklin, of counsel), for appellant. A. A. Worsley, for appellee.

DOE, J. This is an action brought to recover damages for injuries resulting to plaintiff through his forcible ejection from a moving freight train of defendant, by its train crew. To which defendant interposed a general demurrer, a general denial, and a plea of contributory negligence. The general demurrer being overruled, the cause was tried by a jury, which returned a verdict for plaintiff in the sum of \$2,000, in accordance with which verdict judgment was rendered. From the order overruling a motion for a new trial, and from the judgment, defendant prosecutes this appeal.

The overruling of the demurrer, the overruling of defendant's objections to the introduction of evidence on the grounds set up by the demurrer, the refusal of the court to give certain instructions asked by defendant, the giving of others, that the verdict is unsupported by and contrary to the evidence, and the overruling of the motion, constitute the assignments of error.

Had plaintiff been upon the cars of the defendant by virtue of any contractual relation, either express or implied, it was incumbent on him to set it up in his complaint, and, in the absence of such averment, he must be assumed to have been a trespasser whom defendant's conductor and brakeman might lawfully eject, using a reasonable degree of force to accomplish such purpose. In the absence of any contrary showing, the conductor and brakeman will be presumed to have acted within the scope of their employment, and, if they are shown to have exceeded their right to the extent of inflicting wanton or willful injury, the defendant is liable therefor.

While counsel for appellant, in their opening brief, apparently assert that the complaint is insufficient, in that it fails to allege in express terms that the injury complained of was wantonly or willfully inflicted, yet in their reply brief they concede that it is sufficient if facts are pleaded from which wantonness or willfulness is necessarily implied, but insist that the allegations of the complaint are insufficient to show either wantonness or willfulness. The allegations of the complaint in this regard are as follows: "That while plaintiff was riding on said train, and while said train was moving at a high rate of speed, Ben Finn, one of the brakemen on said train, without cause or provocation, acting under orders and instructions from the said conductor of said train, and acting under orders and instructions from said defendant company, assaulted plaintiff, and by threats, intimidations, and force compelled plaintiff to jump from said train to the ground. That when the plaintiff struck the ground he was thrown violently off his feet, striking the ground with his face and then rolled and tumbled with great force." And that in said fall plaintiff was thrown under

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

the wheels of said train while it was in rapid motion, and one of his legs was cut off between the knee and the hip, and various other injuries named inflicted.

This, we think, constitutes a sufficient allegation of ultimate facts to state a cause of action. It was unnecessary for plaintiff to allege or prove youth or inexperience in jumping from moving trains. In the absence of specific allegations with respect thereto, the plaintiff must be presumed to have been a person possessed of neither more nor less than ordinary skill and experience. It is a matter of common knowledge of which the brakeman, by reason of his occupation, could not have been ignorant, that for a person possessed of ordinary skill and experience to jump from a rapidly moving train will naturally and probably result in injury. The alleged acts of the brakeman show, at the least, a reckless disregard for the safety of the plaintiff and an indifference to results such as to establish wantonness and were clearly wanton and willful, as we have defined those words in *Conchin v. El Paso & Southwestern Railroad Co.* (decided at the present term) 108 Pac. 260.

The fourth and fifth assignments of error are based upon the refusal of the court to give the following instructions asked by appellant:

"I further instruct you, gentlemen, as a matter of law, that from the fact that this plaintiff boarded the moving train of defendant, without any right or authority whatever, he was a trespasser, and that fact alone was contributory negligence. The plaintiff, having wrongfully boarded the defendant company's train, defendant owed him no duty except not to willfully and wantonly injure him; and I instruct you as a matter of law that, if he voluntarily jumped from said train on the direction of the brakeman that he would have to get off, he was guilty of contributory negligence, and, if you believe from the evidence that this is the fact, you will find for the defendant.

"By wanton or willful injury is meant an injury deliberately and intentionally inflicted, or that the person or persons inflicting the injury acted with such utter disregard of the plaintiff's safety that such an intention to injure him may be inferred therefrom."

And the sixth and seventh assignments upon the giving of the following instructions:

"If the jury believe from the evidence that the plaintiff was ordered to jump from said train by the brakeman, and was threatened with violence if he did not so jump, while the train was in motion, and the appearance at the time was such as to lead an ordinarily prudent and careful man to the conclusion that violence would be used by said brakeman of said company on said train, and the brakeman was acting within the general scope of his duties, then the plaintiff was not required to wait until actually forced from said train by violence, and it can make no

difference, under this set of circumstances, whether he was ejected by actual force or by threats, if he jumped from said train at the command of an employé of said company, when he saw a brakeman coming towards him, and threatening to throw him off, if he did believe that force would immediately be used to eject him.

"It is the right of the employés of a railroad company, in charge of a train, on discovering a trespasser thereon, to remove him from the train, and if, in doing so, they use no more force than is reasonably necessary to effect such removal, and use ordinary care, the railroad company is not liable to the trespasser for any injuries resulting from such removal."

The word "voluntarily," as used in the first of these requested instructions, was liable to mislead the jury, and the definition of the word "wanton" in the second is too narrow in its scope. In any event, the law on the point attempted to be covered by these requested instructions is fully and correctly stated by the court in other portions of its charge. The first instruction given that is complained of is unobjectionable, and while the second, standing alone, might be subject to the criticism that, by the use of the words "and use ordinary care," the jury might have been led to believe that the defendant would necessarily be liable for the want of ordinary care, the jury could not have been misled by the language complained of because the court further charged that the plaintiff was a trespasser upon the train, and that the defendant owed him no duty except not to wantonly or willfully injure him.

The court further charged in defendant's behalf that:

"If the jury believe from the evidence that the plaintiff was directed by one or more of the employés of the defendant in charge of the train to get off the train, and in response to such direction alone, without fearing force, and having reasonable ground to fear that force would be immediately used to eject him, the plaintiff attempted to get off the train, and in so doing was injured, the plaintiff cannot recover.

"If the jury believe from the evidence that the plaintiff jumped from the moving train, not in consequence of any force or threats used by the employés in charge of the train, but in response to a direction to get off the train and from his own consciousness of his fault in attempting to steal a ride, the plaintiff cannot recover; or, if such consciousness of wrongdoing was one of the causes which induced him to jump from the train, he cannot recover."

Counsel for appellant urge that the plaintiff is shown to have been guilty of contributory negligence sufficient to prevent a recovery. The doctrine of contributory negligence, however, has no application in cases of aggressive acts resulting in wanton or willful injury. "The doctrine that contributory

negligence will defeat recovery has no application where the injury is the result of the willful, wanton, reckless conduct of defendant." 29 Cyc. 509.

In *L. S. & M. S. Ry. Co. v. Bodemer*, 139 Ill. 607, 29 N. E. 695 (32 Am. St. Rep. 218), the court says: "Contributory negligence, such as that of a trespasser upon a railroad track, cannot be relied on 'in any case where the action of the defendant is wanton, willful or reckless in the premises, and injury ensues as the result.' *Bouwmeester v. G. R. & I. R. R. Co.*, 63 Mich. 557 [30 N. W. 337]; *Central R. R. Co. v. Denson*, 84 Ga. 774 [11 S. E. 1039]."

In *Birmingham Railway & Electric Co. v. Pinckard*, 124 Ala. 372, 26 South. 880, the court says: "The seventh charge requested by the defendant and refused by the court was not limited to the first count, which charged simple negligence. If the defendant was guilty under the second count, which charged wanton or intentional wrong, then there was an absence of negligence, and there could be no such thing as contributory negligence. Contributory negligence presupposes negligence. The charge under the second count was clearly bad, and, as it was not confined to the first count, was properly refused."

In *Indianapolis Union Ry. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. 551, the Supreme Court of Indiana, referring to *Pennsylvania Co. v. Sinclair*, 62 Ind. 301, 30 Am. Rep. 185, says: "In this latter case it is held that where an intent, either actual or constructive, to commit an injury, exists at the time of its commission, such injury ceases to be a merely negligent act, and becomes one of violence and aggression; and that when the injury sued for is alleged, either in terms or in substance, to have been willfully or purposefully committed, contributory negligence ceases to be a defense."

The Supreme Court of Missouri, in *Holwerston v. St. L. & Sub. Ry.*, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850, said: "This exception proceeds, not upon the theory that the defendant has been guilty of another and independent act of negligence which is the sole cause of the injury and which must be charged as a separate and independent cause of action, but upon the ground that the negligence he was then in the very act of perpetrating was characterized by such recklessness, willfulness, or wantonness as that he shall not be heard to say that the plaintiff was also guilty of contributory negligence. This doctrine, that contributory negligence is no defense to an injury wantonly inflicted, is also stated in *Shearman & Redfield on Negligence* (5th Ed.) § 64, as follows: "The rule excluding a recovery in cases of contributory negligence is, of course, only applicable to actions founded upon negligence. It is universally conceded that the greatest contributory fault, including a willful trespass, is no defense to an action for willful injuries.

Thus a trespasser upon a railroad train, or street car, who is pushed off, or forced, or frightened, into jumping off, while the train is in motion, is not debarred from recovery by his own fault, either in originally entering the car, or in quitting it while in motion."

* * * The same rule is laid down in *Beach on Contributory Negligence* (3d Ed.) § 64, where the author says: "When the wrongdoing of the defendant is merely negligence, the contributory negligence of the plaintiff may, as is well understood, operate as a defense; but, when the defendant's conduct is willful, it is no longer negligence, and, when the injury sustained by the plaintiff is the result of the wanton and willful act of the defendant, the question of the plaintiff's contributory negligence as a defense cannot arise. In order to constitute contributory negligence on the part of the plaintiff, there must be negligence on the part of the defendant. It is, accordingly, the settled rule that when the defendant's conduct amounts to willfulness, and when the mischief is occasioned by his intentional and wanton wrongdoing, the plaintiff's negligence is no defense."

It is further contended by counsel for appellant: "The law is that fright is not enough to justify a trespasser in jumping from a train in the face of obvious danger, but that the conduct of the trainmen must be such as to cause the trespasser to lose his judgment and self-control to the point of automatic action, and that the action of the plaintiff in jumping was wholly involuntary." This statement would seem to constitute its own refutation, for, if correct, a trespasser threatened with instant death by an armed brakeman unless he jumped from a moving train, who so jumped, under the reasonable and well-grounded apprehension that his death was otherwise certain, and deliberately chose the probability of a lesser injury, could not recover.

The correct rule is stated in *Woolery, Adm'r, v. L. N. A. & O. Ry. Co.*, 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114, as follows: "When, by the negligence or misconduct of one, another is suddenly put in peril, if the person so imperiled, while under the impulse of an apparently well-grounded fear, seeks to escape, and suffers injury from another source, the author of the original peril is answerable for all the consequences which ensued, provided that in attempting to make his escape the injured person exhibited such conduct as might reasonably have been expected from an ordinarily prudent person under similar circumstances. The inquiry in such a case always is: Did the negligence of the defendant put the injured person to the choice of adopting the alternative of an attempt to escape, or to remain under an apparent well-grounded apprehension of serious personal injury? Did he act with ordinary prudence, considering all the circumstances which surrounded him, or was his injury the

result of a rash apprehension of danger which did not exist?"

We find substantial evidence tending to support every essential allegation of the complaint, and, no error appearing in the record, the judgment of the district court is affirmed.

KENT, C. J., and DOAN and LEWIS, JJ., concur.

(157 Cal. 410)

WELDON v. ROGERS. (L. A. 2,447.)

(Supreme Court of California. March 24, 1910.)

1. APPEAL AND ERROR (§ 843*)—REVIEW—SCOPE—MATTERS NOT NECESSARY TO DECISION—VENDITIONI EXPONAS.

On appeal from an order requiring the sheriff to sell property on which an execution had been levied, entered after the return, the matter of the correctness of the return is collateral, the title of the purchaser at a sheriff's sale not depending on the return.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

2. EXECUTION (§ 146*)—LEVY—ABANDONMENT.

A levy under an execution on an original judgment is not abandoned by the subsequent issuance of an execution on a judgment on the bond given by the judgment debtor on his appeal from an order refusing to vacate an order for an execution on the original judgment, though the judgment creditor at one time mistook his remedy.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 381, 382, 389, 391-393; Dec. Dig. § 146.*]

3. EXECUTION (§ 146*)—ALIAS EXECUTION—IRREGULARITY.

The issue of an alias execution while a levy on a prior execution remains undisposed of is an irregularity which may be corrected by the vacation of the alias, and, unless the circumstances establish the abandonment of the levy under the prior writ, abandonment will not be inferred merely from the irregular issue of the alias.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 381, 382, 389, 391-393; Dec. Dig. § 146.*]

4. EXECUTION (§ 146*)—DELAY IN SALE—EFFECT.

Mere delay in making a sale under an execution does not operate as an abandonment of the levy, the time within which the sale may be had being under the control of the court.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 381, 382, 386; Dec. Dig. § 146.*]

5. EXECUTION (§ 351*)—ORDER OF SALE—AMOUNT TO BE COLLECTED.

Where there could properly be no credit on an original judgment by reason of a sale under an execution on a judgment on a bond given by the judgment debtor on appeal from an order refusing to vacate an order for an execution on the original judgment because the execution was void, the purchaser at that sale being therefore entitled to a return of his money, the court, in ordering a sale under the execution on the original judgment, properly ordered a sale for the full amount of the original judgment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1074½; Dec. Dig. § 351.*]

6. EXECUTION (§ 98*)—SALES—POWER OF COURT.

Under Code Civ. Proc. § 187, providing that, where jurisdiction is conferred on a court,

all the means necessary to carry it into effect are also given, and in the exercise thereof any suitable mode may be adopted, etc., the court has complete authority over its records and the power to pursue any suitable method for effectuating its judgment which appears most conformable to the Code, and it may permit a sheriff to withdraw from the files a returned writ of execution for his use in making a sale of property levied on.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 195-202; Dec. Dig. § 98.*]

7. SHERIFFS AND CONSTABLES (§ 84*)—AUTHORITY OF SUCCESSOR AS TO PENDING PROCEEDINGS.

Under Pol. Code, § 4171, providing that, when any process remains with the sheriff unexecuted at the expiration of his term, it shall be executed by his successor, the successor of a sheriff who made a levy of personality under an execution, and who made a return before the termination of his office may complete the sale.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 111; Dec. Dig. § 84.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Sophie B. Weldon, as executrix of T. J. Weldon, deceased, against Ralph Rogers. From an order requiring the sheriff to sell property levied on under an execution and from the part of the order which authorized the sheriff to withdraw the execution from the files of the court, defendant appeals. Affirmed.

See 154 Cal. 632, 98 Pac. 1070.

McNutt & Hannon, for appellant. J. W. McKinley and Louis Luckel, for respondent.

MELVIN, J. This is an appeal from an order of the superior court of Los Angeles county made and filed on the 8th day of March, 1909, requiring the sheriff of that county to sell the real and personal property upon which levy had been made under and pursuant to a writ of execution issued on the 10th day of April, 1905. Defendant also appeals from that part of the order which authorized the sheriff to withdraw the execution from the files of the court for the purposes stated in the order.

The original execution in this case was issued on the date last mentioned under the provisions of section 685 of the Code of Civil Procedure which had been amended during the first five years of the life of the judgment. Under this execution levy was made upon certain real and personal property of the defendant, and then an appeal was taken from an order refusing to set aside the order enforcing the judgment. An undertaking on appeal was given, appellant claiming and respondent denying that this bond was potent to stay the execution. In order that this question might be authoritatively determined, defendant, on July 18, 1905, gave notice of motion for a writ of supersedeas. Pending the hearing thereon, all proceedings were stayed by order of this court from September 14, 1905, to October 16th of the same year when the motion for the writ of super-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sedeas was denied. The sheriff, however, without any suggestion from the respondent had returned the writ showing the levy, upon certain property. The date of this return was August 11, 1905. This is the writ contemplated in the order from which the present appeal is taken. Subsequent to the denial by this court of the writ of supersedeas, the defendant filed an undertaking in double the amount of the judgment, conditioned that if the order appealed from or any part thereof should be affirmed, or the appeal dismissed, appellant would pay to respondent the amount involved. On July 23, 1907, this court affirmed the order of April 10, 1905, enforcing the judgment. *Weldon v. Rogers*, 151 Cal. 432, 90 Pac. 1062. Supposing that the undertaking in double the amount of the judgment had operated as a stay, respondent had not directed anything to be done by the sheriff under the original levy. Instead, a judgment on the bond was entered against the sureties and the appellant, and execution thereon was issued. On appeal this judgment was held void with respect to defendant because it was entered *ex parte* as to him, and this court also determined that, under section 942 of the Code of Civil Procedure, the bond did not operate as a stay, and that, therefore, neither the sureties nor the appellant were liable. *Weldon v. Rogers*, 154 Cal. 632, 98 Pac. 1070. On February 23, 1909, plaintiff gave notice of motion for an order directing the clerk to issue a writ of venditioni exponas, or an order commanding the sheriff to sell the property upon which levy had been made under the original writ, and, as we have seen, this appeal is from the order granting that motion.

Appellant's first contention is that there never was any valid levy on his personal property, owing to the fact that the sheriff's return shows that he transposed the notices of attachment so that the cashier of the Pacific Savings Bank was notified of a levy on the stock of defendant in the Ralph Rogers Company, while the secretary of the last-named corporation was apprised of a similar attachment on defendant's stock in the Pacific Savings Bank. *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441, is cited as authority to the effect that such mistake is fatal to the validity of the levy. That case, however, is authority against appellant's contention, for it is there held, as to the sheriff, "that his power to sell comes from the judgment and execution, and is not to be measured by his proceedings under the writ; * * * that the performance of the acts described in the statute as a levying of the execution is material only in reference to the intervening rights of third persons, or persons who are not parties to the writ; that it is, undoubtedly, the duty of the officer to proceed strictly according to the statute, and if he does not do so, the sale may be set aside, upon motion, or he may be made to respond in damages to any one who has been injured by his

neglect; but it would be gross injustice to hold that by proof of such neglect, made, perhaps, years after the sale, the purchasers' title shall be defeated." It has been frequently held that the title of the purchaser at sheriff's sale does not depend on the return to the writ. *Hibberd v. Smith*, 67 Cal. 584, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726; *McFall v. Buckeye Grangers' Warehouse Ass'n*, 122 Cal. 471, 55 Pac. 263, 68 Am. St. Rep. 47. It is therefore clear that the matter of the correctness of the sheriff's return is one collateral to this appeal.

The next and principal point made by the appellant is that the levy of April 10, 1905, under the writ of execution of that date, was abandoned and could not be revived thereafter. The only authority cited in this behalf is *Freeman on Executions*, § 271, where it is said, among other things, that "the only proper object of a levy is to compel satisfaction of the writ out of the property seized; and if the plaintiff, by his long delay in following his levy by a sale, or by directions to return the writ unsatisfied, or by any other course of action, indicates that his employment of the writ is not to coerce the prompt payment of his debt, then the levy is abandoned. When property levied upon is not sold before the return day, the proper writ to enforce a sale thereof is a venditioni exponas; while the proper writ to authorize a new levy is an alias fieri facias. Hence, the suing out of the latter instead of the former writ has sometimes been held to be conclusive, and sometimes to be prima facie evidence that the plaintiff had abandoned his levy." We are asked to hold here that the execution of January 14, 1908, constituted practically an alias writ, and that whether we consider the issuance of such writ as conclusive or prima facie evidence of abandonment, the order reviewed in this appeal, based, as it was, upon the records alone, is void because made without jurisdiction. We fail to see, however, how the later execution, purporting to be based upon the undertaking on appeal, must be taken as an alias to the execution on the judgment; or how the mistaken resort of respondent to that void process was evidence of an abandonment of the original levy. *Freeman*, in the very section cited by appellant, observes that "the issue of an alias or second execution, while a levy on a prior writ remains undisposed of, is an irregularity which might very properly be corrected by the vacation of the second writ. It indicates misguided zeal in attempting to obtain satisfaction rather more than a desire to permit the first writ to become dormant, or to abandon any advantage gained by it. Unless other circumstances tend to establish the abandonment of a levy, we do not understand how it can be inferred merely from the mistaken and irregular issue of an alias writ. Nor is an abandonment of a regular and adequate levy inferable from a subsequent irregular levy."

While we do not question the fact that respondent at one time mistook her remedy, and that the pursuit of appellant's property under the original execution was postponed on account of the appeal disposed of by the decision in 154 Cal., 98 Pac., we do not see that her course of action indicated an intention to forego any advantage which she may have theretofore obtained by reason of the existence of the writ issued in 1905. That the issuance of a second writ is not necessarily an abandonment of the first one has been held in *Dunham v. Bentley*, 103 Iowa, 140, 72 N. W. 437; *Bouton v. Lord & Hatheway et al.*, 10 Ohio St. 458; *Mason v. Hull*, 55 Ohio St. 272, 45 N. E. 632; *West v. St. John*, 63 Iowa, 202, 19 N. W. 238; *Menge v. Wiley*, 100 Pa. 619. Nor does mere delay in making the sale operate as an abandonment of the levy, as was said by this court in *Southern California Lumber Co. v. Ocean Beach Hotel Co.*, 94 Cal. 224, 29 Pac. 629 (28 Am. St. Rep. 115) speaking of the validity of a sale by the sheriff after the return day of the writ: "Having the right to subject the property to a sale for the satisfaction of the judgment, the time within which it may be done is but directory, and under the control of the court." The court did not err in ordering a sale for the full amount of the judgment. Although under the void execution of January 14, 1908, there was, according to the return thereon, a sale made by the sheriff of Orange county, the purchaser under that writ was entitled to a return of his money, and there could properly be no credit upon the original judgment by reason of such sale. The withdrawal of the writ from the files for the sheriff's use was proper, the court having complete authority over its records, and having power, also, to pursue any suitable method for effectuating its judgments and orders, which may appear most conformable to the spirit of the Code. Code Civ. Proc. § 187.

Appellant is of the opinion that as far as the personal property is concerned, any sale thereof should have been made by the sheriff making the levy and not by his successor in office. In this behalf he cites section 62 of *Freeman on Executions* (3d Ed.). Although the general rule in the absence of statutory mandate to the contrary was that the officer who made the levy under a writ of execution on personal property must complete the sale, we have in this state section 4171 of the Political Code, which is but a re-enactment of a law that has existed in California since 1893. See section 107 of the county government act (St. 1893, p. 322). This section provides that "when any process remains with the sheriff unexecuted, in whole or in part, at the time of his death, resignation of office, or at the expiration of his term of office, said process shall be executed by his successor or successors in office." Appellant would have us make the distinction

that the rule above announced does not apply to process which did not remain with the sheriff unexecuted, but which, before his term expired, had been returned. The very order of the court, however, withdrawing the writ from the files for the sheriff's use, was in effect a finding that the process was returned without proper authority, and that, therefore, the writ had, in contemplation of law, remained with the sheriff unexecuted.

The order from which this appeal is taken is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(157 Cal. 406)

McKELVEY v. WAGY et al. (L. A. 2,439.)
(Supreme Court of California. March 22, 1910.)

1. MORTGAGES (§ 453*)—FORECLOSURE—COMPLAINT.

The complaint in mortgage foreclosure, making part thereof, by attachment as an exhibit, the mortgage, providing for reimbursement of the mortgagee for expenditures in payment of taxes and in searching the title, and praying for general relief, need contain no further allegations to authorize inclusion of such items in the judgment.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 453.*]

2. TRIAL (§ 394*)—TRIAL BY COURT—FINDINGS OF FACT.

The mere fact that a finding of fact is not set off by itself and marked as such does not prevent its consideration.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 924; Dec. Dig. § 394.*]

3. TRIAL (§ 394*)—TRIAL BY COURT—FINDINGS OF FACT.

The statute requiring that findings of fact and conclusions of law shall be separately stated is directory.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 924-926; Dec. Dig. § 394.*]

4. TRIAL (§ 395*)—TRIAL BY COURT—FINDINGS OF FACT.

A general finding that all the allegations of the complaint are true is sufficient.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 929; Dec. Dig. § 395.*]

5. TRIAL (§ 388*)—TRIAL BY COURT—FINDINGS OF FACT.

Findings of fact are unnecessary where no evidence is introduced in support of an affirmative defense.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 388.*]

6. COSTS (§ 260*)—FRIVOLOUS APPEAL—PENALTY.

In case of a frivolous appeal, a penalty will be imposed.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 983-996, 1002, 1003; Dec. Dig. § 260.*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe Judge.

Action by Barry McKelvey against James I. Waggy and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Woodruff & McClure, for appellants. E. S. Janes, for respondent.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

MELVIN, J. Appeal from a judgment of foreclosure. Defendants James I. Wagy and Julia I. Wagy on July 2, 1908, gave their note for \$7,000, payable on or before one year after date, with interest at the rate of 7 per cent. per annum. This note was secured by a mortgage on certain real property in Los Angeles county. Mrs. Jane Johnson was sued as one claiming some interest in the property by purchase from the Wagys.

In the answer the defendants James I. and Julia I. Wagy did not deny the due execution of the note and mortgage, and defendant Johnson merely made denial on information and belief. The defendants pleaded payment of all interest to September 1, 1908, except \$130, and averred that plaintiff extended time on said payment for 90 days. They also alleged that about July 1, 1908, plaintiff agreed, in consideration of the payment of interest at the rate of 8 per cent. instead of 7 per cent. per annum, to extend the time of settlement of the note and interest until January 1, 1909.

Plaintiff introduced in evidence the note and mortgage and certain receipts for the taxes which he had paid, and another voucher showing the payment by him of \$10 for searching the title to the property. On the witness stand plaintiff stated that having prepared to institute foreclosure proceedings in August, 1907, he was induced by James I. Wagy to forego suit at that time in consideration of the payment to him by the Wagys of \$50, together with the interest due on the note July 2, 1907, and the promise that the note and interest at the rate of 8 per cent. per annum (instead of the 7 per cent. mentioned in the note) would be fully paid on January 2, 1908. In January, 1908, according to plaintiff's testimony, defendant James I. Wagy paid him \$280, being interest on the note from July 2, 1907, to July 2, 1908, at 8 per cent. In September, 1908, another payment of \$150 was made by the Wagys and duly credited. Shortly afterwards Wagy asked for an extension of the time of payment to January 2, 1909, promising to pay, in consideration thereof, the interest then due and 8 per cent. interest. McKelvey, the plaintiff, said that he would accept this offer if the accrued interest would be paid within one week, but no further sum was paid to plaintiff as a result of this offer, and in October, 1908, this suit was commenced. This testimony was not contradicted by any one, the defendants offering no evidence at all. Yet in spite of this plain, uncontroverted statement of fact, appellants' counsel in their brief insist that an extension of the time to January 2, 1909, for payment of the note had been proven, and that the suit was therefore prematurely commenced.

Appellants object to the items in the judgment of \$154.08 for taxes and \$10 for searching of title, on the ground that the complaint

contained no averments upon which to base said motions; but the mortgage itself which, by copy attached as an exhibit, is made a part of the complaint, provides for the reimbursement of the mortgagee for all sums expended in the payment of taxes and in searching the title; and the prayer of the complaint asks, among other things, for general relief.

Findings were not waived, and appellants' claim of error is predicated upon failure to file formal findings. In the decree and order of sale, however, the court did find that "all the allegations in said plaintiff's complaint contained are true." The mere fact that this finding was not set off by itself and marked as such does not prevent us from considering it. The statute requiring that findings of fact and conclusions of law shall be separately stated is directory. *Reiner v. Shroeder*, 146 Cal. 411, 80 Pac. 517; *Butler v. Agnew*, 9 Cal. App. 327, 99 Pac. 395; *Spencer v. Duncan*, 107 Cal. 426, 40 Pac. 549. A general finding that all of the allegations of a complaint are true has been repeatedly upheld by this court. *Gale v. Bradbury*, 116 Cal. 39, 47 Pac. 778; *Johnson v. Klein*, 70 Cal. 186, 11 Pac. 606. And it has been decided here that findings are unnecessary where no evidence is introduced in support of an affirmative defense. *Robinson v. Muir*, 151 Cal. 118, 90 Pac. 521; *People v. McCue*, 150 Cal. 195, 88 Pac. 899; *Roberts v. Hall*, 147 Cal. 434, 82 Pac. 66.

This is a frivolous appeal. Defendants, who offered no evidence on their own account, are appealing upon matters which were so plain as to be almost axiomatic. That appellants had any faith in any of the questions involved in the appeal I greatly doubt. They must have had some motive for instituting this appeal other than a belief that serious error had occurred. Perhaps the suit was brought for delay, but, whatever the impelling reason, the practice of appealing upon frivolous matters should be discouraged. A penalty of \$50 damages to plaintiff is therefore imposed, and the judgment from which the appeal was taken is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(157 Cal. 298)

FICKERT v. ZEMANSKY et al., Board of Election Commissioners. (S. F. 5,362.)

(Supreme Court of California. March 19, 1910.)

ELECTIONS (§ 126*)—NOMINATIONS AND PRIMARY ELECTIONS—CANDIDATES.

Primary Law 1909 (St. 1909, c. 405) § 12, subd. 4, provides for the leaving of a blank space under each group of names of candidates, in which the elector may vote for any person whose name is not printed on the ballot by writing his name therein, and by section 23 the person receiving the highest number of votes is the nominee of the party, although his name was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not printed on the ballot. Section 12, subd. 8, restricts a voter's right in voting for delegates to his party convention to qualified electors of his party. Pol. Code, § 1366a, provides that the elector shall not be permitted to vote on behalf of any party or for delegates to the convention of any party other than the party designated in the registration. *Held*, that where, on a primary election, no person was named for the candidate of the Union Labor party for the office of district attorney, but a blank space left where the elector might write the name of the person he desired to vote for, and plaintiff's name was written in by the greatest number of electors of that party, he was entitled to have his name placed on the printed ballots as the candidate of the Union Labor party for the office of district attorney at the general election, although he was also the candidate of the Republican party for the same office.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

In Bank. Application for writ of mandate by Charles M. Fickert to compel J. H. Zemansky and others, composing the Board of Election Commissioners of the City and County of San Francisco, to print plaintiff's name upon the ballot for the general election as a nominee of the Union Labor party for the office of district attorney. Writ granted.

George Hewlett and Ira S. Lillick, for petitioner. Thomas V. Cator and Hugh J. McIsaac, for respondents.

PER CURIAM. This was an application for a writ of mandate to compel the board of election commissioners of the city and county of San Francisco, when it prepared the ballots to be used by voters at the general city and county election to be held on November 2, 1909, to print the plaintiff's name upon said ballots as the nominee and candidate of the Union Labor party for the office of district attorney of the said city and county. Upon the hearing, the writ was issued as prayed, but we deem it proper for guidance in future cases that the reasons for the decision should be given.

At the primary election previously held, under the primary law of 1909 (St. 1909, p. 691), for the nomination of party candidates to be voted for at the November election, no nomination papers had been filed proposing any person as the candidate of the Union Labor party for district attorney. On the primary ballot of that party the name of no person was printed as candidate for that office, but a blank line was left thereon as the law directs, whereon a Union Labor voter could write the name of the person whom he desired to nominate as the candidate of his party for that office. At said primary election divers persons were voted for as the Union Labor candidate for district attorney by thus writing the name on said blank line, and the plaintiff had received the highest number of such votes, and was thereby made the candidate of that party for that office.

The board placed its refusal to print plaintiff's name on the general election ballot as

candidate of the Union Labor party upon the admitted fact that plaintiff was a member of the Republican party and not a member of the Union Labor party and upon the fact that he had been, at said primary election, duly nominated as the candidate of the Republican party for the same office. The theory was that one party cannot, at a primary election, nominate as its own candidate a member of another party, and that the voter of a party, in writing on the blank line placed on the primary ballot for that purpose, the name of some person as his nominee for an office, must confine himself to members of his own party.

There is nothing in the primary act or in any other law of this state that purports to preclude the nomination as a candidate for office by the electors of one party of a member of another party. The primary act provides for the leaving of a blank space under each group of printed names of candidates, in which the elector may vote for any person whose name is not printed on the ballot by writing his name thereon (section 12, subd. 4), and the person receiving the highest number of votes for the nomination is the nominee of the party, although his name was not printed on the ballot. Section 23. Nowhere is it intimated that the elector is to be restricted in thus voting to members of his party; a clear distinction in this regard being made as to his right in voting for candidates for nomination for public office, and his right in voting for delegates to his party convention, he being restricted in the latter case to "qualified electors of his party." Subdivision 8 of section 12. Section 1366a of the Political Code has no application. The provision therein "nor shall he (the elector) be permitted to vote on behalf of any party or for delegates to the convention of any party other than the party so designated in the registration," simply means that the elector registered as a member of a particular party cannot participate at the primary in the selection of the candidates for any other party. For instance, if he be registered as belonging to the Union Labor party, he cannot cast any vote upon the question who shall be the Republican or Democratic nominee for any office, or who shall be the delegates to the Republican or Democratic convention, but is confined to the selection of candidates and delegates for his own party. This is the whole effect of the provision. Its whole object is to confine the control of a party to the electors thereof, and to prevent electors of another party from interfering with such control.

The question we have here discussed was not involved in *Socialist Party v. Uhl*, 155 Cal. 776, 103 Pac. 181. Nothing said in the opinion in that case warrants the conclusion that an elector voting at his party primary may not write in the blank space placed on

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the ballot for each office the name of any person he wishes to have made the nominee of "his" party for that office, regardless of the political affiliations of such person, or that if a person whose name is thus written in receives the highest number of votes therefor at the hands of the electors of that party, he is not the nominee thereof simply because he belongs to another party or is an avowed candidate for a nomination for the same office at the hands of another party. Such a conclusion would find no support in the law.

Therefore petitioner, who, from the showing made here, received the highest number of votes for the Union Labor nomination for district attorney of the city and county of San Francisco, was the nominee of that party for that office, and was entitled to have his name printed on the ballot for the general election as such nominee, notwithstanding that he was a member of the Republican party and was registered as such, and notwithstanding he was a regular candidate at the primary election for the Republican nomination.

(157 Cal. 336)

PAULEY v. BRODNAX et al. (L. A. 2,325.)

(Supreme Court of California. March 19, 1910.

Rehearing Denied April 18, 1910.)

1. EJECTMENT (§ 94*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In ejectment for a tract claimed by plaintiff to be located within a half section owned by him, evidence held to sustain a finding that the land claimed was not so located.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 94.*]

2. BOUNDARIES (§ 35*)—EVIDENCE.

In ejectment for land claimed to be located in a half section owned by plaintiff, in which the original survey stakes were shown to have been destroyed and other stakes set up in their place, a stake found many miles from the land claimed, but in the territory originally surveyed by those who surveyed plaintiff's land, was properly excluded from evidence; it not appearing that such evidence could have assisted the jury in determining the boundaries of the land claimed.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 35.*]

3. BOUNDARIES (§ 35*) — ADMISSION OF EVIDENCE.

In ejectment to recover land claimed by plaintiff to be located in a half section owned by him, a diagram drawn by a witness to illustrate his testimony as to location of boundary stakes, etc., was properly admitted in evidence, where the court instructed that it was only admitted to illustrate witness' testimony, and should not be considered as evidence of the location of the boundaries; not being objectionable as tending to confuse the jury.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 35.*]

4. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

An instruction in ejectment that defendants had reclaimed and tilled land occupied by them was harmless to plaintiff, if erroneous, where most of the facts regarding the improvements

and cultivation were brought out by plaintiff's counsel.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

5. EJECTMENT (§ 110*)—ACTIONS—INSTRUCTIONS.

In ejectment for a tract claimed by plaintiff to be located in a half section owned by him, an instruction that defendants had reclaimed the lands occupied by them and tilled the soil, etc., preceding a statement of defendants' contention that the land occupied by them was not in the section owned by plaintiff, was proper, being merely a recital of the manner of defendants' possession; the court having also instructed that the action could not be defeated by showing that defendants made improvements on the land.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 110.*]

6. BOUNDARIES (§ 41*)—ACTIONS—INSTRUCTIONS.

In ejectment for a tract claimed by plaintiff to be located in a half section owned by him, in which the evidence showed that the original stakes had been lost, an instruction that if stakes or monuments were found which plaintiff claimed fixed the location of the boundaries of the tract in question, or of the quarter corners of the original official survey, the burden was upon plaintiff to show by a preponderance of the evidence that such stakes were those of the original official survey, and establish or locate particular or designated boundaries of such original survey, and, unless he did so, they should be disregarded as evidence of the boundaries of the tract claimed. Held that, while the words "establish and locate," etc., might seem to place too great a burden upon the stakes and monuments in establishing the boundaries, in that they should be considered in their relation with each other and with natural objects in fixing the boundaries, the instruction, construed as a whole, merely meant that the stakes and monuments must be shown to be official, and so identified that the tract sought to be bounded from them could be ascertained, and was proper.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 41.*]

7. EJECTMENT (§ 110*)—ACTIONS—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

In ejectment for a tract claimed to be located within a half section owned by plaintiff, where the stakes of the original official survey were lost, the court charged the language of the Revised Statutes of the United States, requiring public lands to be divided by north and south meridian lines, crossed at right angles so as to form townships six miles square, and further, charged that when the field notes of a government surveyor show that section corners were established on such straight lines between the township corners and fix their location by courses and distances, they are presumptively correct and can only be overcome by a preponderance of the evidence that the surveyor actually established corner monuments at points other than shown by the field notes, and that the fixed monuments would control courses and distances only where the boundaries are fixed and known, otherwise the courses and distances shown by the field notes of the original survey being considered. Held, that the part of the instruction quoting the federal statutes was not erroneous as tending to impress the jury that the particular township in which the land claimed was located was six miles square, being simply explanatory of the rest of the charge.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 110.*]

*For other cases, see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Witness Ward stated that these stakes were practically in alignment, the deviation being but a matter of a few feet. Witness Van Horn testified that he was present when Mr. Ward examined the stake which is alleged to have been at the northwest corner of section 36. The location of these stakes 500 feet east of the Dahlia canal was described at the trial by other witnesses who had been in that locality as early as 1901. Alverson, a surveyor, testified that in 1904 he ran south from the locality of the most northerly of these three stakes and found the other two. He gave it as his professional opinion that the most southerly of these stakes, marked "35" on one side and "36" on the other was set by Mathewson to mark the corners on the fourth standard parallel of sections 35 and 36.

But appellant contends that, even if the three stakes near the Dahlia canal be rejected, his right to the greater portion of the land occupied by defendants is established by reference to other monuments. He asserts that his witnesses have discovered and identified the following monuments mentioned in Mathewson's field notes: A tree common to the corners of sections 10, 11, 14, and 15; a bearing tree south 15° W. 170 links from the corner common to sections 14, 15, 22, and 23; and a palo verde tree at a quarter section corner between sections 33 and 34. According to the measurements of witness Caines the three stakes were 867 feet further east of the palo verde tree than the 2 miles indicated in Mathewson's field notes. Ignoring the stakes, this appellant urges, would move the western line of section 36 867 feet west. As fixing the northern boundary of the section, appellant calls attention to the testimony of respondents' witness Henderson that he found the distance from the tree (claimed by appellant as being at the corner of sections 10, 11, 14, and 15), to a line running east to the white stake set by Mr. Ward to be 16,470 feet south—an excess of 630 feet. Readjusting the lines according to these measurements, and allowing nothing for errors in Mathewson's work, still, so appellant contends, the N. $\frac{1}{2}$ of section 36 would include more than two-thirds of the lands of respondents. But it is earnestly contended that the distances between Mathewson's monuments were always greater than the field notes indicated, and that this discrepancy accounts for the excess found in measuring from the trees, claimed as monuments, to the stakes on the alleged western boundary of section 36. In measuring from the trees near the center of township 15 S., range 13 E., to the tree indicated by appellant as the corner of sections 10, 11, 14, and 15 in township 16, Messrs. Ward and Alverson found an excess of 200 or 300 feet in a mile not shown in Mathewson's field notes. All of the surveyors who testified for plaintiff said that such excess existed. Witnesses for appellant

testified to the finding of the original stake marking the corner of sections 15, 16, 21, and 22 of township 15 S., range 13 E. This they accomplished by running lines from the trees known as the "Imperial Bearing Trees," near the present city of Imperial, and mentioned as appellant's witnesses assert in Mathewson's notes. Respondents' witness Mr. Henderson said, referring to these trees, that he would not accept them as bearing trees without other evidence than the markings which he saw upon them. Mr. Bates also testified that he would consider it questionable if these trees were what appellant's theory would make them. Mr. Butler, another surveyor, was similarly in doubt. But appellant's counsel argue that mere doubts are of no value when opposed to the positive testimony of their witnesses with reference to the location and markings of the alleged monuments. Appellant's counsel call our attention to the relation between the "bearing trees" in township 15 and the palo verde tree at the quarter section corner on the line between sections 33 and 34 in township 16. The evidence, they say, establishes these bearing trees and the palo verde tree almost in the same line north and south although they are nine miles apart, and this correspondence in alignment, they argue, can hardly be merely accidental. Counsel warn us against giving great weight to the failure of their witnesses to find the water courses corresponding with any degree of accuracy to those mentioned and described by Mathewson in his field notes, as there have been numerous overflows and floods in the valley during the half century since the government surveys were made. We have thus followed carefully the arguments of appellant's counsel based upon the essential matters of proof in order that we might fully test the assertion that there was no material impeachment of the evidence adduced by them and that the verdict against plaintiff was clearly contrary to the evidence. Let us now examine the evidence offered on behalf of respondents.

The first criticism of respondents is directed to the great excess of measurements over the calls of the field notes which must be made in order to tie the alleged fixed monuments to the stakes on the purported east line of section 36 in township 16. Commencing their survey at the two trees near Imperial, designated by them as the bearing trees marking the corner common to sections 15, 16, 21, and 22 in township 15, these surveyors found the purported section 36, to use the phrase of respondents' counsel, "more than a half mile too far south, and nearly a mile and a quarter too far east to be identified as plaintiff's land." Upon this point Mr. Alverson, one of the witnesses for plaintiff, testified as follows: "We found that instead of counting two miles from the corner common to 15, 16, 21, and 22, running two miles east in order to bring us exactly north of the

southwest corner of section 36, we had to run an additional 1,122 feet; in other words, before we got directly north of the southwest corner of 36, as shown on this diagram (Exhibit G), in running from the old corner common to sections 15, 16, 21, and 22, township 15 south, we had to run two miles and 1,128 feet. We assume that those monuments found were corners, no matter what the excess. The southwest corner of section 36 is 2,876 feet in excess of the nine miles called for from the Imperial bearing trees in township 15. The excess called for in the field notes is 228 feet. The excess not called for in the field notes is 2,648 feet. There is practically a half mile excess in measuring from this northerly corner to the southerly line in this township 16 and practically 1,128 feet excess in the easterly."

Next our attention is called to the fact that the jurors saw the northerly stake which was found on the supposed western line of section 36, and were the best judges of its genuineness or spuriousness as one of the markings of the original survey. We are also reminded that witness Van Horn swore that he saw no stakes when visiting that immediate locality in 1901. Another evidence of the falsity of appellant's conclusions with reference to the three stakes, according to respondents' counsel, is the fact that Mathewson described the land on the west boundary of section 36 as perfectly level, while the land along the line of the stakes was said by witnesses at the trial to be rough and full of hummocks. The field notes describe the north line of section 36 as level, while the north line of that section as plaintiff claims its location crosses an arroyo which has evidently been many years in existence because it contains good sized trees, one of the largest being about 16 inches in diameter. All these circumstances tend to prove, say respondents' counsel, that appellant's surveyors were mistaken in their efforts to locate section 36.

The jury was also given an opportunity to note the intersection with the north boundary line of township 15 of a line run due north from the so-called "Imperial Bearing Trees." This intersection is at a point 403 feet west of the old channel of New river, whereas a line drawn from the corner common to sections 15, 16, 21, and 22, as shown on the official map, would meet the north boundary line of the township at a point more than a mile and a half west of New river. Respondents' criticism is also leveled at the markings on the bearing trees which it is claimed were too distinct and fresh to have existed more than half a century. Respondents called Mr. Henderson, the surveyor, who under contract and with written instructions from the government of the United States made a survey of the exterior boundaries of these townships in Imperial valley. In doing this work he was required to fix the fourth standard parallel. According to his testimony, the

fourth standard parallel which forms the southern line of section 36 passes to the north of some of the property in question and his location of this line would place all of the land of the defendants outside of the north half of section 36, township 16. Although certain testimony of Henderson with reference to alleged stone monuments was stricken out, one means whereby he assured himself that he was on the fourth standard parallel was an observation on Signal mountain agreeing with that of Derby taken from section corners 3 and 4, range 12 E., township 17 S. He also testified that he ran north to the third standard parallel and found it. From the foregoing discussion it will be seen that there was a substantial conflict of evidence both as to the authenticity of alleged monuments and the courses and distances. So sharp has been this conflict that we cannot say there was no material contradiction of plaintiff's evidence. There was testimony ample, if believed, to justify the jurors in finding in favor of the defendants and the court in denying the motion for a new trial.

Appellant assigns as error the court's refusal to admit in evidence a certain stake found by witness Alverson many miles away from the land in dispute. It was with a number of other stakes, and its relevancy, if it be relevant at all, would depend upon the fact that it was found in territory originally surveyed by Derby and Mathewson. There was nothing of greater authenticity respecting its origin than there was with reference to the stakes found near the land claimed by plaintiff. We cannot see how its introduction in evidence could have assisted the jury. Clearly the ruling rejecting it was correct.

The court permitted defendants to introduce the diagram drawn by witness Henderson to illustrate his testimony, and appellant assigns this as error upon the theory that it tended to confuse the jury and was not founded upon any monuments. The court was careful, however, to explain to the jury that the drawing was merely admitted in evidence "for illustrating the witness' testimony so far as it was applicable, not as evidence any further than illustrating the testimony of the witness." In the instructions the jury was again warned that the diagrams were not to be considered "any evidence at all of the location on the ground of the boundaries of said section or of said fourth standard parallel south."

Nor was there error in the court's instruction that defendants had reclaimed the land occupied by them, tilled the soil, etc. Most of the facts regarding the improvements and tilling of the soil were brought out by plaintiff's counsel in establishing the rental value of the land. This part of the instruction, therefore, could have done no harm even if it were erroneous; but as it was merely a recital of the manner of the possession by defendants of the property, followed by a statement of their claim that the land so oc-

cupied by them is not in section 36, we can see that it has a logical place in the court's directions to the jury. The court was careful to limit the effect of this instruction, for the jury was told that "plaintiff's suit cannot be defeated by a showing that the defendants placed improvements upon the land or any part of it."

Objection is made to an instruction which was as follows: "If you find from the evidence that stakes or monuments have been found which are claimed by plaintiff to indicate and fix the location of the boundaries of the land in question, or of sectional or quarter corners of the original official government survey of said land, or of land in the vicinity, or surrounding territory, then you are instructed that the burden is upon the plaintiff to show by a preponderance of evidence, that such stakes or monuments are those of the original, official government survey, and, also, that such original stakes or monuments establish and locate particular and designated boundaries, section, or quarter corner of such original survey; and unless such stakes or monuments are of such official and designated character as above specified, and shown to be such by a preponderance of evidence, then they should be disregarded by you as evidence of the boundaries of the land in question, or of section or quarter corners of said official government survey." This instruction in effect admonished the jury that, unless the supposed monuments were what they purported to be, they must be disregarded. Perhaps the words "establish and locate," taken in their strongest sense, might seem to impose, as appellant says, too great a burden upon the stakes and monuments, because the stakes and monuments are to be considered in connection with their relation to one another and to natural objects described in the field notes. Read as a whole the instruction clearly means that the stakes and monuments must be shown to be official in their character, and so identified that the tract of land sought to be delimited by them or by measurements from them may be correctly ascertained.

The court gave as an instruction a part of section 2395 of the Revised Statutes of the United States,¹ as follows: "The public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, unless where the lines of an Indian reservation, or of tracts of land heretofore surveyed or patented, or the courses of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require." This instruction would not have a tendency to impress the jury, as appellant seems to fear, with the idea that this particular township was six miles square. It is

simply explanatory of the method of running surveyors' lines, and makes clearer the rest of the instruction, which is as follows: "Therefore, when a government surveyor, in the field notes returned by him to the government, shows that such section and quarter section corners are established on such straight lines between the township corners, and fixes their locations by courses and distances, these field notes are to be accepted as presumptively correct, and can only be overcome by a preponderance of evidence that such surveyor actually established such corner monuments at points other than those indicated by the government field notes. The rule that fixed monuments shall control courses and distances only prevails when the boundaries are fixed and known, and monuments exist. And where the boundaries are not fixed and known, and the location of the monuments themselves is uncertain, or left in doubt by the evidence, then courses and distances as shown by field notes and maps of the original survey will be considered in fixing the boundaries." This is merely another way of saying: "The survey as made in the field and the lines actually run on the surface of the earth * * * must control." *Kaiser v. Dalto*, 140 Cal. 172, 73 Pac. 830. When the monuments are known of course they prevail: "When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles or surfaces, the boundaries or monuments are paramount." Code Civ. Proc. § 2077, subd. 2. But when the monuments themselves are unknown, the presumption in favor of the correctness of the field notes must prevail.

The instruction to the effect that the fourth standard parallel, if established in part, must be deemed to extend in the same general direction unless diverted by some fixed monument would be above criticism if the instruction did not contain the following language: "And if you further find from the evidence that two or more visible, permanent, identified, and undisputed stakes or monuments of the survey of said line have been found on said standard line, and which indicate and fix the location, course, and direction thereof." Doubtless the court overlooked the fact that the testimony of Mr. Henderson with reference to monuments on this line claimed by him to be the fourth standard parallel had been stricken out. However, there was evidence that Henderson fixed this line by reference to natural monuments such as Signal mountain and certain points on New river; and respondents maintain that the language with reference to stakes or monuments that might have been found on the standard line is immaterial. The jury of course knew that all testimony with reference to monuments on this line had gone out, but the gist of the instruction was not the effect of monuments on the line,

¹ U. S. Comp. St. 1901, p. 1471.

but the rule that such a line once established in part is presumed to extend in the same general direction. The error therefore was harmless.

No other alleged errors require particular notice.

The judgment and order are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(157 Cal. 405)

CHRISTENSON LUMBER CO. v. SEAWELL, Judge. (S. F. 5,505.)

(Supreme Court of California. March 21, 1910.
Rehearing Denied April 20, 1910.)

APPEAL AND ERROR (§ 612*)—TRANSCRIPT OF RECORD—CERTIFICATION BY JUDGE—NECESSITY.

On appeals under Code Civ. Proc. §§ 953a, 953b, 953c, the judge is not required to certify the transcript which the clerk may certify, but is only required to correct, approve, and certify in lieu of a bill of exceptions the stenographic notes of the trial containing the proceedings and evidence which would form no part of the record, unless authenticated as the statute provides.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694-2701; Dec. Dig. § 612.*]

In Bank. Mandamus by the Christenson Lumber Company against James M. Seawell, as judge of the superior court of the city and county of San Francisco. Writ denied.

Charles M. Bufford, for plaintiff.

PER OURIAM. Petition for writ of mandate.

The petitioner was allowed to intervene in an action between other parties. Subsequently demurrers of the defendants in the action to the third amended complaint of the plaintiffs, and to the complaint in intervention, were sustained and the action, including the intervention, dismissed. Separate appeals from the judgment were taken by the defendants and the petitioner, following the procedure prescribed by sections 953a, 953b, and 953c of the Code of Civil Procedure, and they have presented to the defendant a transcript on appeal with a request that he certify it. His refusal to do so is based upon the fact that the transcript so presented contains nothing but the pleadings and orders constituting the judgment roll in the action. We think the defendant correctly construes the statute as not applying to a transcript which the clerk may certify. What a judge is required to correct, approve, and certify under the new practice in lieu of a bill of exceptions is the stenographic notes of the trial containing the proceedings and evidence which would form no part of the record unless authenticated as the statute provides.

Writ denied.

(157 Cal. 401)

SPARKS v. CALDWELL et al. (L. A. 2,386.)
(Supreme Court of California. March 21, 1910.)

PLEDGES (§ 58*)—ENFORCEMENT—RIGHT OF ACTION PLEDGED.

Defendants, who were the payees of a negotiable note, indorsed thereon, "For value received, I hereby guarantee the payment of the within note, waiving demand," etc., and signed the same, and transferred the note as collateral security. Civ. Code, § 2888, provides that, "notwithstanding an agreement to the contrary, a lien or a contract for a lien transfers no title to the property subject to the lien." Held, that an answer of defendants in a suit on the note setting up such transfer stated a good defense, and it was error to strike the same as frivolous, although the answer failed to allege that the full amount of the note was not due; the amount due not being important, and the pledgee of the note not having the right to sue the pledgor.

[Ed. Note.—For other cases, see Pledges, Dec. Dig. § 58.*]

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by H. S. Sparks against H. J. Caldwell and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Watkins & Blodget, for appellants. John W. Kemp and Keefer & Bowers, for respondent.

MELVIN, J. This is an appeal from a judgment in favor of plaintiff. The suit was on a promissory note for the principal sum of \$2,100 made by one Frank R. Bear in favor of the appellants Caldwell and Tungate. The note was indorsed as follows: "For value received, I hereby guarantee the payment of the within note, waiving demand, presentment for payment, protest and notice of protest. H. J. Caldwell, D. W. Tungate." In their answer appellants admitted delivery of the note to respondent, but alleged that it was transferred as collateral security for the payment of a note for \$2,000 previously made by them and payable to Sparks, the respondent. Upon motion their answer was stricken out as frivolous, and judgment on the pleadings was given according to plaintiff's prayer.

The one question presented is whether or not a pledgee can sue a pledgor as guarantor of a collateral security in the nature of a negotiable instrument.

Respondent contends (1) that there is nothing to prevent the pledgee of a negotiable note from suing upon the pledged security without bringing an action on the principal obligation; and (2) that, even if the rule be otherwise when the pledge is transferred by mere indorsement and delivery, nevertheless in cases like his where a distinct contract of guaranty is made in favor of the pledgee, he may sue upon the pledged note and recover upon it even when the amount of the note and interest is in excess of the indebtedness

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which the collateral note was intended to secure. Both of these positions are met, we think, by two Californian cases. In *Haber v. Brown*, 101 Cal. 452, 35 Pac. 1038, this court said: "The case has been discussed thus far upon the theory of the complaint that the original transfer of the note in suit to Dinkelspiel & Co. was an absolute transfer thereof by indorsement in the ordinary course of business. But the answer, proofs, and findings show that the transfer was by way of pledge, or collateral security, to secure the indebtedness of John H. Carter and of the firm of Carter & Barker to Dinkelspiel & Co. The Civil Code expressly provides that, 'notwithstanding an agreement to the contrary, a lien or a contract for a lien transfers no title to the property subject to the lien.' Civ. Code, § 2888. It is settled in this state that, as between the pledgor and pledgee, the general property in a pledge remains in the pledgor, notwithstanding an apparent transfer of legal title to the pledgee. *Cross v. Eureka Lake, etc., Canal Co.* 73 Cal. 306 [74 Pac. 885, 2 Am. St. Rep. 808], and cases cited. The pledgee is but a trustee for the pledgor (*Wheeler v. Neubould*, 16 N. Y. 398; *Hawks v. Hinchcliff*, 17 Barb. [N. Y.] 492), and is accountable to the pledgor for any surplus realized above the amount of indebtedness existing at the date of enforcement of the pledge. Civ. Code, § 3008. The transfer of a pledged note and mortgage to the pledgee does not transfer the title any farther than to enable the pledgee to collect the note and mortgage from the maker thereof. *Ponce v. McElvy*, 47 Cal. 159. In no event, even under the law merchant, could an indorsement of negotiable paper by way of collateral security authorize any recovery against the pledgor beyond the amount remaining due upon the principal debt. *Williams v. Smith*, 2 Hill [N. Y.] 301. It is unnecessary to decide whether, under the code rule respecting the retention of title in the creator of any lien, regardless of the form of the transaction, the indorser of negotiable paper by way of pledge is liable to the pledgee as an indorser under the law merchant. But it seems clear, in view of the code provision, that a mere indorsement of nonnegotiable paper by way of pledge should be restricted in effect to an authority from the pledgor to the pledgee to enforce the obligation in his own name as trustee and agent for the pledgor, and to apply the proceeds in payment of the debt secured, accounting to the pledgor for any surplus collected. It could not operate as an assignment of the general title so long as the pledge subsists, and could only operate as such in case of an agreement that the pledge should be extinguished, and the amount of the collateral security applied as a payment upon the debt

secured, or in case of a transfer of the collateral security by the pledgee to third parties." And in the case of *Ponce v. McElvy*, cited in the foregoing quotation, this language was used: "The note and mortgage made to Ponce by Le Coat was received by the defendant Powell merely as collateral to secure the payment of the note of Ponce, as given by the latter to George. It was, as between these parties, a pledge. The assignment which Ponce made was not intended to transfer the title any further than to enable the assignee to obtain satisfaction of the debt from Le Coat. To give it any effect other than this would be to do violence to the obvious intention of the parties, which was to create a security for the protection of the note to George—nothing more." Respondent, while admitting the apparent force of these decisions, seeks to differentiate them from the case at bar. For example, our attention is called to the fact that in *Haber v. Brown*, supra, the pledge was nonnegotiable paper, the pledgor merely indorsed the collateral, and the pledgee did not take the steps necessary to charge the pledgor as an indorser, while in the case at bar the pledge was a negotiable note, there was a contract of guaranty as well as an indorsement, and the pledgee took the necessary steps to charge the pledgors as indorsers and guarantors. These differences, in view of the allegations of the answer, would be immaterial. It is alleged in the answer that the note was transferred as collateral security for the payment of another note for \$2,000 given by appellants to Sparks on July 30, 1906, due 60 days later, and still owned by Sparks. In view of section 2888, Civ. Code, we fail to see how the form of the contract indorsed upon the collateral note affects the matter at all, nor do we see how this case differs in principle from *Ponce v. McElvy*, supra.

But the answer fails to allege that the full amount given by the judgment is not due. Therefore, according to respondent, no legitimate defense is presented, and the order striking out the answer must have been correct. But we think the amount due is not the important point. The title to the note is the all-significant matter. According to the answer the title remained in the appellants, and the respondent was clothed only with the power as their agent to collect the amount due from the maker of the note and to apply such sum to the payment of his debt. It follows that the order striking out the answer as frivolous and as surplusage was erroneous.

The judgment is reversed, and the cause remanded.

We concur: HENSHAW, J.; LORIGAN, J.

(157 Cal. 331)

GRAY v. WALKER. (S. F. 5,324.)

(Supreme Court of California. March 19, 1910.)

1. **TRUSTS (§§ 17, 18*)—NECESSITY OF WRITING.**
In the absence of a confidential relation, or facts raising a trust by operation of law, a trust in lands cannot be imposed on the grantee under an absolute deed, unless it is declared by a writing.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 15-24; Dec. Dig. §§ 17, 18.*]

2. **QUIETING TITLE (§ 44*)—TITLE OF PLAINTIFF—EQUITY.**

A finding of ownership in a plaintiff suing to quiet title is not sustained by proof that the defendant owns the legal title, subject to an equity in favor of plaintiff.

[Ed. Note.—For other cases, see Quietting Title, Cent. Dig. § 91; Dec. Dig. § 44.*]

3. **QUIETING TITLE (§ 34*)—PLEADING—ELEMENTS OF ACTION.**

A complaint, alleging that plaintiff is the owner and in possession of certain land, that defendant claims an interest therein, adverse to plaintiff, and that such claim is without right, contains every element of a complaint to quiet title.

[Ed. Note.—For other cases, see Quietting Title, Cent. Dig. §§ 69-77; Dec. Dig. § 34.*]

4. **QUIETING TITLE (§ 35*)—SUFFICIENCY OF COMPLAINT—SHOWING TITLE IN ANOTHER.**

A complaint, alleging all the essentials of a complaint to quiet title, is not defeated by an allegation that plaintiff had given an absolute deed to the land, where the deed was given long enough before suit to have enabled plaintiff to re-acquire title by adverse possession.

[Ed. Note.—For other cases, see Quietting Title, Dec. Dig. § 35.*]

5. **TRIAL (§ 396*)—PLEADING—APPLICATION OF FINDINGS.**

Where an action is tried on a fifth amended complaint, and the court makes a general finding that all the allegations of plaintiff's complaint are true, an objection that the finding refers to the original complaint is hypercritical.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 396.*]

6. **ADVERSE POSSESSION (§ 16*)—CONSTRUCTION OF STATUTE—"USUALLY CULTIVATED OR IMPROVED."**

Code Civ. Proc. § 325, providing that adverse possession, not based on a written instrument, judgment, or decree, may be established by showing that the land was "usually cultivated or improved," means that the land should be cultivated or improved in the manner and to the extent usual in the case of similar property.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 16.*]

7. **ADVERSE POSSESSION (§ 20*)—IMPROVEMENT OF LAND—STATUTES.**

Under Code Civ. Proc. § 325, providing that the elements of adverse possession, not based on a written instrument, judgment, or decree, are either, first, that the land be protected by substantial inclosures, or, second, usually cultivated or improved, improvements alone are sufficient if they are improved in the manner or to the extent usual in the case of similar property.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 106-108; Dec. Dig. § 20.*]

8. **EVIDENCE (§ 471*)—CONCLUSION OF WITNESS—ADVERSE POSSESSION.**

On an issue of adverse possession not based on a written instrument or judgment, testimony of plaintiff that he held actual possession of all the property for the requisite time is not

inadmissible as a conclusion, since it tended to prove actual occupancy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2171, 2172; Dec. Dig. § 471.*]

9. **APPEAL AND ERROR (§ 1011*)—REVIEW—CONFLICTING EVIDENCE.**

A conflict of testimony presents a question which is to be answered finally in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3963-3969; Dec. Dig. § 1011.*]

10. **ADVERSE POSSESSION (§ 95*)—PAYMENT OF TAXES—EVIDENCE.**

On an issue of adverse possession, evidence held to show that the taxes had been paid by the one claiming adversely.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 95.*]

11. **ADVERSE POSSESSION (§ 93*)—PAYMENT OF TAXES—REDEMPTION FROM TAX SALE.**

Where payment of taxes is relied on to establish adverse possession, the fact that in one year the land was sold for delinquent taxes and redeemed by the one claiming adversely would not prevent the acquisition of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 525-527; Dec. Dig. § 93.*]

12. **APPEAL AND ERROR (§ 761*)—REVIEW—BRIEFS—WAIVER OF ERROR.**

Errors in rulings on evidence, specified in briefs, but without any citation of authority or argument to sustain them, will not be noticed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8096; Dec. Dig. § 761.*]

Department 1. Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

Suit by John Gray against William Walker. From a judgment for plaintiff, defendant appeals. Affirmed.

R. E. Hewitt, for appellant. E. Huffaker, for respondent.

SLOSS, J. Appeal by defendant from a judgment quieting plaintiff's title to three parcels of land in Alameda county. The evidence is incorporated in a bill of exceptions.

The fifth amended complaint, upon which, with the answer thereto, the action was tried, alleged that on December 23, 1896, plaintiff was seized and possessed of, and ever since has been and now is the owner in fee simple absolute of, the lots in controversy; that on December 23, 1896, plaintiff executed and delivered a deed of said land to the defendant, his uncle, with the understanding that said defendant would reconvey the same upon request; that said conveyance was made at the request of defendant, "and for the further reason that the plaintiff at said time was suffering mentally and physically from injuries received some two years prior to said time by a horse falling upon him." It was further alleged that there was no consideration for the deed; that ever since its execution plaintiff had held possession of said lands against the defendant and the whole world, and for five years had paid all taxes levied and assessed upon said lands, and had "im-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

proved and treated said real estate as his own, without a suggestion or an objection from any one in the world." The refusal of the defendant to reconvey on request is averred, as is the fact that he claims an interest in the property adverse to plaintiff; such claim being, as is alleged, without right. A demurrer to this complaint was overruled. Of the various grounds of demurrer specified, but one—i. e., the want of facts sufficient to constitute a cause of action—is here argued. The contention of appellant is that the plaintiff cannot, by the mere averment of an oral agreement that the title conveyed should be held in trust for him, or be reconveyed to him, overcome the effect of his deed of December, 1896. In the absence of a confidential relation or of facts raising a trust by operation of law—and it is plain that this complaint sets up no such case—a trust cannot be imposed upon the grantee under an absolute deed, unless it be declared by a writing. *Feeney v. Howard*, 79 Cal. 526, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; *Babcock v. Chase*, 111 Cal. 351, 43 Pac. 1105; *Sheehan v. Sullivan*, 126 Cal. 189, 58 Pac. 543. The language of this complaint would seem to indicate clearly that there was no intent to rely upon a writing, and that the alleged agreement to reconvey was verbal. In any event, there was no proof of a writing, and the decree cannot, if the complaint may, be sustained on the theory that the title to the property was held by the defendant subject to a trust in favor of plaintiff. Furthermore, a finding of ownership in a plaintiff suing to quiet title is not sustained by proof that the defendant owns the legal title, subject to an equity in favor of plaintiff. *Buchner v. Malloy*, 155 Cal. 253, 100 Pac. 687, and cases cited.

But, independently of every allegation concerning the deed, the complaint contains a statement of all the facts necessary to constitute a cause of action. It avers that plaintiff is the owner and in possession of certain land, that defendant claims an interest therein adverse to plaintiff, and that such claim is without right. Here we have every element of a complaint to quiet title. Code Civ. Proc. § 738. Furthermore, if we read with these facts the averment that plaintiff made a deed to defendant in 1896, the cause of action is not destroyed. The plaintiff may have acquired a perfect title by adverse possession after the execution of the deed, and, in fact, the complaint undertakes, by separate averments, to set up such acquisition of title.

The court found, in general terms, that "all the allegations and averments of plaintiff's complaint are true." It is objected that this is a finding in favor of the facts alleged in the original, rather than in the fifth amended, complaint. We think this suggestion hypercritical. Each of the pleadings in question was a complaint, and the finding should be taken as intended to refer to the complaint on which the case was tried. The answer,

mentioned in the same finding, was the answer to that complaint.

There are various specifications of insufficiency of evidence to support findings; but, in view of what we have said concerning the complaint, it will appear to be unnecessary to do more than to examine the evidence on the question whether plaintiff acquired a title by adverse possession. As he was not claiming under a written instrument, a judgment, or a decree, the elements necessary to constitute adverse possession are those set out in section 325 of the Code of Civil Procedure. Under that section the land must be either (1) protected by a substantial inclosure; or (2) usually cultivated or improved. There is no showing in the record that any of the three lots in question was either inclosed or cultivated. On the other hand, there was evidence tending to show that, for more than the statutory period, improvements had been maintained by plaintiff on each of the three lots. The requirement of the statute that the land be "usually cultivated or improved" means that it should be cultivated or improved in the manner or to the extent usual in the case of similar property. *Allen v. McKay*, 120 Cal. 332, 52 Pac. 828. If so improved, it is not necessary that it should be either cultivated or inclosed. *Daniels v. Gualala M. Co.*, 77 Cal. 300, 19 Pac. 519. While the evidence on the point is not very full, there is nothing in the record to indicate that the plaintiff's improvements on the lots in question were not such as to comply with the statute. The plaintiff testified that he had, from December 23, 1896, to the date of the trial, held actual possession of all the property. This testimony was proper, as tending to prove actual occupancy (*Nathan v. Dierssen*, 146 Cal. 63, 79 Pac. 739), and, in the absence of a clear showing that the improvements relied on were inadequate, is sufficient to support the finding under consideration. The plaintiff's further evidence, if true, showed that his possession was both hostile and exclusive. It was contradicted by the defendant's witnesses; but, as we have so often said, a conflict of testimony presents a question which is to be answered finally in the trial court.

It is urged that the other requirement of section 325, viz., payment of taxes for five years, was not shown. But the evidence was ample on this point. The plaintiff introduced tax receipts showing the payment of all taxes assessed on two of the lots for more than the statutory period. On the third lot the taxes had been paid by Mary Walker, a witness for defendant. But plaintiff testified that he had given her the money to pay these taxes, and that she had kept the receipts, for the reason that she owned an adjoining lot, which was assessed with the one claimed by plaintiff. This was, in effect a payment by plaintiff.

The fact that in one year the land was sold

for delinquent taxes, and subsequently redeemed by plaintiff, did not prevent the acquisition of title by adverse possession. *Owsley v. Matson*, 104 Pac. 983.

Certain errors in admitting or excluding evidence are specified. The objections, rulings, and exceptions are merely stated in appellant's brief, without any citation of authority or any argument beyond the bald declaration that "in deciding these objections against the defendant the court erred." We do not feel called upon to consider points so presented. *Duncan v. Ramish*, 142 Cal. 689, 78 Pac. 661; *Bell v. S. P. Co.*, 144 Cal. 573, 77 Pac. 1124; *Bird v. Potter*, 146 Cal. 286, 79 Pac. 970.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

(157 Cal. 517)

In re KENNEDY'S ESTATE. (S. F. 5,133.) (Supreme Court of California. April 1, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 181*)—SETTING OFF HOMESTEAD—ALLOWANCE OF SUPPORT—RELATION TO TESTAMENTARY DISPOSITION.

The power of testamentary disposition of property as conferred and defined by statute is not paramount, but is subordinate to the authority conferred on the probate court to appropriate the property for the support of the family of the testator, and to set apart a homestead for the widow and minor children, as well as for the payment of debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 681-685; Dec. Dig. § 181.*]

2. EXECUTORS AND ADMINISTRATORS (§ 181*)—SETTING APART HOMESTEAD—DEFEATING DEVISE.

Though property be specifically devised by will, the probate court may set apart such property as a homestead to the family, and thus defeat the devise.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 681-685; Dec. Dig. § 181.*]

3. EXECUTORS AND ADMINISTRATORS (§ 195*)—SETTING ASIDE HOMESTEAD—TITLE GIVEN.

Where a homestead is set apart absolutely by order of the probate court, the title of the person to whom it is so set apart is in no way derived by will, even though such person was the devisee, but comes solely from the homestead order, and money paid from the funds of the estate by order of the court for the maintenance of the widow and children is on the same basis.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 724; Dec. Dig. § 195.*]

4. TAXATION (§ 860*)—INHERITANCE TAX—CONSTRUCTION OF STATUTE.

The provision of Inheritance Tax Law (St. 1905, c. 314) § 1, that all property "which shall pass by will or by the intestate laws" shall be subject to the tax, means to pass by virtue and force of the law governing testate or intestate succession.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1675; Dec. Dig. § 860.*]

5. TAXATION (§ 856*)—"INHERITANCE TAX"—NATURE OF TAX.

An inheritance tax is not a tax on property as such, but one on the right of succession, a tax on one for the privilege of succeeding to property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1673; Dec. Dig. § 856.*]

For other definitions, see Words and Phrases, vol. 4, p. 3600.]

6. TAXATION (§ 866*)—INHERITANCE TAX—SETTING APART HOMESTEAD—ALLOWANCE FOR SUPPORT—WHAT COVERED—"PASS BY WILL."

St. 1905, c. 314, authorizing an inheritance tax, provides in sections 1, 2, 7, 9 and 28 that all property which shall pass by will shall be subject to a tax, and provides for the rate of tax and method of collection, and also by section 12 provides that, when any debt shall be proven against the estate after the tax has been paid, etc., a refund of a proportion of the tax shall be made. Code Civ. Proc. § 1465, provides that during the administration the probate court may set apart a homestead for the surviving spouse and minor children. Code Civ. Proc. §§ 1466, 1467, provides that the probate court may make a reasonable allowance for maintenance of the family, which shall be paid in preference to all debts, except funeral charges and expenses of administration. Held, that the homestead set apart by the probate court and the allowance as well did not pass under the will, but by the order of the probate court, especially in view of section 12, and hence the words in the taxing act, shall "pass by will," did not cover such property, and a tax on their value was erroneous.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 866.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceedings to collect an inheritance tax from the Estate of John F. Kennedy. From an order fixing the amount of the tax, the county treasurer of the city and county of San Francisco and Alice Kennedy, the widow, separately appeal. Modified and affirmed.

Campbell, Metson, Drew, Oatman & Mackenzie, for appellant Kennedy. Hartley F. Peart, for appellant Treasurer.

ANGELLOTTI, J. These are separate appeals by the treasurer of the city and county of San Francisco and Alice Kennedy, surviving wife of deceased, from an order fixing the amount of inheritance tax to be paid by Mrs. Kennedy under the provisions of the act of March 20, 1905 (St. 1905, p. 341), and directing payment thereof.

Deceased died testate, giving by his will all his property to his wife. The value of all his property was \$82,752.50. The debts of deceased and the expenses and charges of administration, exclusive of family allowance, aggregated in amount \$9,975.93. Under an order for family allowance duly made in accord with the provisions of section 1466, Code Civ. Proc., there was paid to the widow during administration the sum of \$4,600. Under the provisions of section 1465, Code Civ. Proc., there was also regularly selected, designated

and set apart to her absolutely by the court in probate as a homestead certain real property of the deceased of the value of \$14,000. In fixing the amount upon which the tax should be calculated, the superior court deducted from the whole value of the estate the debts, expenses, and charges of administration (\$9,975.93), and the family allowance paid (\$4,600), but refused to deduct the value of the property set apart as a probate homestead, thus leaving \$68,176.57 as the amount upon which the tax was to be calculated. The property going to the widow in this case, and the act in terms exempting from the tax in favor of the widow "property of the clear value of ten thousand (10,000) dollars transferred to the widow" of a decedent, the court deducted the further sum of \$10,000, fixing the amount of \$58,176.57 as the amount upon which the tax against the widow must be calculated, resulting in a tax of \$888.53. The treasurer's claim is that the \$4,600 family allowance should have been included in fixing the amount upon which the tax was to be paid, and the widow claims that the value of the property set apart as a homestead should have been excluded.

We are of the opinion that there is no question of "exemption" presented by these appeals, but that the real question is whether the act purports to impose any tax as to property of a decedent disposed of in the course of administration as was this property. The only exemptions provided for by the act are those specified in section 4 thereof, being of property "transferred" for charitable, etc., purposes, "property of the clear value" of certain designated amounts to various classes of relatives of the deceased, and "property of the clear value" of \$500 to more distant relatives and strangers in blood. There is absolutely nothing in the act purporting to "exempt" even the amount of charges of administration or debts of the deceased from any tax imposed by the act; section 12 relied on as implying such an intent as to debts to our minds implying an entirely different intent.

The all-important section of the act in this controversy is the section imposing the tax, the section declaring the property that shall be subject to the tax. That is section 1. So far as material here, it provides: "All property which shall pass, by will or by the intestate laws of this state, from any person who may die seised or possessed of the same while a resident of this state, * * * to any person or persons, or to any body politic or corporate, in trust or otherwise, * * * shall be and is subject to a tax hereinafter provided for * * *; and such tax shall be and remain a lien upon the property passed or transferred until paid and the person to whom the property passes or is transferred * * * shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed." Section 2 prescribes the rates to be paid by different classes of persons "entitled to any beneficial interest in

such property" when the property or interest "so passed or transferred" exceeds in value the exemption specified in section 4, and does not exceed in value \$25,000, while section 3 prescribes the rates for amounts in excess of \$25,000. Section 4 provides for exemptions as already stated. Section 7 makes all taxes "due and payable" at the death of decedent, and provides that they may be paid "within eighteen months" thereafter without any charge for interest. Section 9 provides that any administrator, etc., having in charge any legacy or property for distribution, "shall deduct the tax therefrom," or, if it be not money, shall collect the tax from the legatee or person entitled to the property, and that he shall not deliver any specific legacy or property until he shall have collected the tax thereon. Section 12 provides: "Whenever any debts shall be proven against the estate of a decedent after the payment of legacies or distribution of property from which the said tax has been deducted or upon which it has been paid, and a refund is made by the legatee, devisee, heir or next of kin, a proportion of the tax so deducted or paid shall be repaid to him by the executor, administrator or trustee, if the said tax has not been paid to the county treasurer or to the state controller, or by them, if it has been so paid." Section 28 provides that the words "estate" and "property" as used in the act "shall be taken to mean the real and personal property or interest therein of the testator, intestate * * * passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees, vendees, or successors." The act is entitled "An act to establish a tax on gifts, legacies, inheritances, bequests, devises, successions and transfers, to provide for its collection, and to direct the disposition of its proceeds," etc.

Section 1465, Code Civ. Proc., provides that at any time during the administration of the estate subsequent to the return of the inventory the court, if no homestead has already been selected, must select, designate, and set apart and cause to be recorded a homestead for the use of the surviving husband or wife and the minor children, and the effect of an order under this section setting apart absolutely certain real property as a homestead is to vest such property in the surviving husband or wife, if there be no minor child, and to relieve it from administration as a part of the estate. Section 1468, Code Civ. Proc.; Estate of Moore, 96 Cal. 531, 31 Pac. 584. Section 1466, Code Civ. Proc., provides that if the property set apart is insufficient for the support of the widow and children, or either, the court or judge in probate must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate, and by section 1467, Code Civ. Proc., it is provided that any such allowance must be paid in preference to all other charges except

funeral charges and expenses of administration. By its terms the taxing act is limited to such property as "shall pass, by will or by the intestate laws of this state," from the deceased to some other person. It must be borne in mind that we are speaking regardless of other provisions applicable to grants, etc., made by a deceased in contemplation of death or intended to take effect in possession or enjoyment after death, for these provisions can have no application here.

In one sense of the word all of the property of deceased of which he died seised did "pass, by will," to his sole devisee at the moment of his death—that is, she, by reason of the will, at once became vested with the title to the full property (*Brenham v. Story*, 39 Cal. 188)—but she took under the will "subject to certain burdens, as the payment of the debts of the deceased, and the right of the court to appropriate some portion of the estate for the support of the family of the deceased" (Id. p. 185). It is thoroughly settled that, as was said in *Sulzberger v. Sulzberger*, 50 Cal. 385, "the power of testamentary disposition of property, as conferred and defined by the statute, is not paramount, but is subordinate to the authority conferred upon the probate court to appropriate the property for the support of the family of the testator, and for a homestead for the widow and minor child or children, as well as for the payment of debts." And to the extent that this power is exercised by the probate court in any estate the devisees and legatees take no beneficial interest at all. Although real property be specifically devised by a will, the probate court may set apart such property as a homestead to the family, and thus defeat the devise. *Sulzberger v. Sulzberger*, supra; In re *Davis*, 69 Cal. 458, 10 Pac. 671; *Estate of Huelsman*, 127 Cal. 275, 59 Pac. 776; *Estate of Firth*, 145 Cal. 236, 78 Pac. 643. Where it is so set apart absolutely as a homestead, the title of the person to whom it is so set apart is in no way derived by will, even though she was the devisee, but comes solely from the homestead order. Of a similar situation it was said in *Estate of Huelsman*, supra, "notwithstanding, then, the specific devise of one-half of the farm to the widow, her title to all of it is deraigned from the homestead order." Money paid from the funds of the estate by order of the court for the maintenance of the widow and children, if any, is on the same basis. It is paid regardless of and even in opposition to the terms of the will and those receiving it take it not "by will," but solely by reason of the order of the court diverting it from the purposes to which it was appropriated by the will. It is clear, therefore, that the widow did not receive any beneficial interest in the real property set apart as a homestead or in the \$4,600 paid her as family allowance by reason of the will. That she would have received it as sole devisee and legatee had there been no

order for homestead or family allowance is absolutely immaterial. The rule applicable is necessarily the same here as it would be if the legatee or devisee were another person. What the widow takes under such orders of the probate court she does not take by will. It is equally clear that she does not take property so set apart by the probate court "by the intestate laws of this state." The language "pass, by will or by the intestate laws of this state," means to pass by virtue and force of the law of this state governing testate or intestate succession. In re *Joyslin's Estate*, 76 Vt. 88, 56 Atl. 281. "The term 'intestate laws' is intended to cover the statute of descents which relates to the descent of real estate, and the statute of distribution which provides for the distribution of the personal property of decedent after the payment of his debts, * * * and after the setting apart to the widow and minor children of the exemptions specified. * * * These exempt articles are in no way governed by the statute of distribution." *Estate of Page*, 39 Misc. Rep. 223, 79 N. Y. Supp. 384. "A homestead right, or a right to have a homestead, is not a right which vests under the law by succession. It is a right bestowed by the beneficence of the law of this state for the benefit of his family. Upon the death of an intestate, his property goes by succession to his heirs, subject to administration. * * * Setting apart a homestead is a part of the probate proceeding, as much as is a family allowance." *Estate of Moore*, 57 Cal. 442.

If, then, the widow is liable at all for a tax as to the property set apart as a homestead and the money paid as family allowance, it must be upon the theory that within the meaning of the inheritance tax statute such property passed to her as sole devisee and legatee at the moment of the testator's death, and must be regarded as having so passed, although subsequently diverted and removed from administration by the probate court in due course of administration, and thus not constituting any part of the distributable assets of the estate. This theory, however, not only appears to us to be inconsistent with the provisions of the tax act, but is absolutely opposed to the decisions rendered by the courts of other states in cases involving similar questions. It is recognized by this court and by the courts generally that a tax of this character is not a tax on property as such, but one upon the right of succession, a tax upon one for the privilege of succeeding to property. See In re *Wilmerding*, 117 Cal. 284, 49 Pac. 181, and cases cited. It was said in the case just cited: "The same authority which confers this privilege may attach to it the condition that a portion of the estate so received shall be contributed to the state." The act construed by the Supreme Court of Connecticut in *Appeal of Gallup*, 76 Conn. 617, 57 Atl. 699, was materially the same as our tax act;

the description of property being "any property * * * which shall pass by will or by the inheritance laws of this state," etc. The court said that the design of this act was a tax based on the distribution of the net proceeds of the decedent's property, after payment of his debts and costs and charges of administration and after deduction of amounts and articles exempted, to the persons upon whom it devolves. The New York Court of Appeals said of a similar statute in *Estate of Gihon*, 169 N. Y. 443, 62 N. E. 561: "The collateral inheritance tax does not attach to the very articles of property of which the deceased died possessed. It is imposed only on what remains for distribution after expenses of administration, debts, and rightful claims of third parties are paid or provided for. It is on the net successions to the beneficiaries." In that case a deduction of certain fees and disbursements in a will contest was upheld. The court said that this was an expense of administration, and therefore chargeable to the estate, and not to the legatees or devisees. In *Pepper's Estate*, 159 Pa. 508, 23 Atl. 353, the Supreme Court of Pennsylvania, construing a similar act, in holding that there should be deducted from the amount upon which the tax was calculated a sum paid in compromise of a claim, said that the legatees were not liable thereon for the reason that the amount paid was never received by them, and that "under the act it is only so much of the estate which actually passes to them by virtue of the will that is liable to the tax." Of a similar act the Supreme Court of Iowa said in *Estate of Stone*, 132 Iowa, 140, 109 N. W. 457: "The collateral inheritance tax is on the right to succession to property, and not on the property itself, and it is collectible out of each specific share or interest, not out of the general property of the estate." And in *Morrow v. Durant*, 140 Iowa, 437, 118 N. W. 781, 784, the same court held that money properly devoted by the executor to the erection of a monument to the deceased and thus taken from legatees was not to be included, because the tax is only on the property that passes to the legatees, and that in such cases the money so used does not pass to the beneficiary. In *Wolfe's Estate*, 89 App. Div. 349, 353, 85 N. Y. Supp. 949, 953, it is said: "If no transfer is effected, because it turns out that there is no property to transfer, no tax can be collected." In *Estate of Thomas*, 39 Misc. Rep. 223, 79 N. Y. Supp. 571, in fixing the amount of inheritance tax, the court said: "Where the legal representative makes a proper payment in the course of administration, the transfer from the estate is subordinate and subject thereto"—citing *Estate of Gihon*, supra. In the *Matter of Page*, 39 Misc. Rep. 223, 79 N. Y. Supp. 382, it was held that, in view of a statute providing in effect that certain enumerated articles should go to the widow and minor child or children

and not be considered as assets for the purposes of administration, such articles did not "pass" by will or by the intestate laws of the state, but that the beneficiaries took absolutely by the express terms of the statute, and whether the decedent died testate or intestate, and that such property was not subject to the tax. In the *Matter of Maresi*, 74 App. Div. 76, 77 N. Y. Supp. 76, it was held, following *Estate of Gihon*, supra, that the costs and expenses of an action instituted by the executor of the will to obtain a judicial construction of the will and instructions as to distribution must be deducted as a necessary expense of administration in estimating the amount of tax. No case cited or discovered by us hints at any different doctrine than that declared by these decisions, except, perhaps, the case of *Estate of Millward*, 6 Misc. Rep. 425, 27 N. Y. Supp. 287, where there is some language of the surrogate that may be construed as supporting a contrary view. But, if so construed, it is but the expression of a single judge plainly in conflict with the views later expressed by both the Supreme Court of New York and the Court of Appeals of that state. All these cases are based not on the theory that there is any express or implied exemption provided by the tax act under consideration, but upon the theory that the act does not purport to impose the tax as to such property, being confined by its terms to such property as actually passed to the beneficiary; that is, to his distributable interest. No substantial distinction can be found in any matter material to the question involved here between any of the acts so considered and our own act. The decision of this court in *Estate of Moffitt*, 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. (N. S.) 207, that the surviving wife's share of the community property is subject to this inheritance tax was based solely on the proposition, established in this state by several prior decisions, that the wife takes such property solely by succession as an heir of the husband, and therefore "by the intestate laws of this state."

The provisions of our tax act clearly show that the tax imposed thereby is one solely upon the devisee, legatee, or heir, and one upon him only as to such property as he actually takes on distribution as devisee, legatee, or heir. It would appear to be a most absurd and inequitable provision that imposed a tax on one for the privilege of succeeding as heir, devisee, or legatee to certain property of the decedent, where the very property to which he is so held to succeed is lawfully diverted by the probate court to other purposes and never can be distributed to him. Suppose in this very case the real property set apart as a homestead had been devised by the will to another person than the wife. Suppose, also, that the money paid as family allowance exhausted the property

available to pay a legacy given to still another person. Under the treasurer's theory that the property had passed to the devisee and the legatee, within the meaning of the act, at the moment of the death of deceased, the devisee and legatee would be liable for the whole tax thereon although both devisee and legacy had been wholly defeated, so far as any practical effect is concerned, by the orders of the probate court. As we have seen, the fact that the wife was here the devisee and legatee is of no consequence in determining the proper construction of this act. Happily no such conclusion appears to be warranted by the act. Section 12, relied on as implying an "exemption" as to debts due from a deceased, is rather a clear recognition that no tax was intended to be imposed as to property that was lawfully diverted by the probate court from the purposes declared by the will or by the laws of succession; the object thereof being simply to provide a method for the repayment to the legatee, devisee, heir, or next of kin of a proper proportion of the money theretofore paid by him as a tax where the property already delivered is diminished by the subsequent proving of debts against the decedent.

In view of what we have said, it is apparent that such cases as *Trippet v. State*, 149 Cal. 526, 86 Pac. 1084, 8 L. R. A. (N. S.) 1210, *Estate of Martin*, 153 Cal. 225, 94 Pac. 1053, and *Estate of Stanford*, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788, are in no way pertinent to the question here involved. The doctrine of those cases is simply that the right of the state to the tax imposed by the act vests upon the death of the testator or intestate, and cannot be surrendered or limited by any subsequent act of the Legislature. For instance, in *Estate of Stanford*, supra, in the act in force at the death of the testator, there was no exemption as to legacies or devises to nephews, nieces, or educational institutions. By an act enacted subsequent to his death, the original act was amended by providing for such exemptions, and it was specially provided that the amendment should apply to the estates of persons who had died prior to the amending act. It was very properly held that this could not be done and that the right of the state was determined by the act in force at the time of the death of the testator. This doctrine was affirmed in *Trippet v. State*, supra, where it was held that the act in force at the death of the testator gave to the state a right which vested immediately upon such death, and which could not be surrendered by subsequent legislative act or by a repeal of the law under which the right became vested, as such a surrender would be a gift or donation from the state in violation of section 31 of article 4 of the Constitution. *Estate of Martin* is practically to the same effect. While undoubtedly correct, these decisions do not touch the point here

under discussion. Whatever tax was imposed by the act in force at the death of the deceased, the right thereto vested in the state at the moment of his death, and could not be legally divested by any department of the state, executive, legislative, or judicial. But it was only as to the tax imposed by such act that the right so vested, and, when it is determined that the act imposed no tax as to property lawfully diverted by the court in probate with the consequence that it could never be distributed to the devisee, legatee, or heir, it is apparent that no vested right of the state is impaired.

To summarize: Under the tax act of March 20, 1905, property of a decedent set apart absolutely as a homestead by the court in probate under the provisions of section 1465, Code Civ. Proc., and moneys paid under order of the probate court under section 1466, Code Civ. Proc., do not pass by will or by the intestate laws of the state, and the persons taking under such orders are not liable for any tax under such act; and the devisees, legatees, and heirs to whom said property would have been distributed under the will or the succession laws of this state if such property had not been so diverted by the court in probate are not liable for any tax on account thereof, for such property never passed to them within the meaning of the act.

It follows that the learned judge of the trial court was correct in his conclusion as to the family allowance, but erred as to the real property set apart as a homestead. The tax fixed by the order was excessive therefore by \$280.

It is ordered that the order of the superior court be, and the same is hereby, modified by reducing the amount of tax fixed thereby from \$888.53 to \$608.53, and as so modified the order is affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

(157 Cal. 488)

LEGG & SHAW CO. et al. v. WORTHINGTON et al. (Sac. 1,739.)

(Supreme Court of California. March 30, 1910.
Rehearing Denied April 28, 1910.)

1. ATTACHMENT (§ 316*)—CARING FOR GOODS—COMPENSATION—ORDER ALLOWING.

Under Code Civ. Proc. § 1206, providing that in cases of attachment, etc., any person having a claim against the defendant for labor done may give notice thereof, and that, unless the claim is disputed, it must be paid out of the proceeds of the sale, and, if disputed, an action must be begun within 10 days for the recovery thereof, etc., where the court, subsequent to the filing of claims under section 1206, made an order allowing compensation to the sheriff for caring for the attached property, the compensation was properly allowed as part of the costs in the judgment, since the rights acquired under section 1206, are purely statutory, and there

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

could therefore be no trust fund created in the hands of the sheriff which could not be subjected to any lawful order of the court with reference to fees.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 316.*]

2. ATTACHMENT (§ 316*)—CARING FOR GOODS—ORDER ALLOWING COMPENSATION—COSTS.

Under Code Civ. Proc. § 1206, an order, made subsequent to the filing of a claim, under that section, allowing compensation to the sheriff for caring for attached goods, and taxing them as costs in the judgment, is as effective as if made within the time required by law; the court having jurisdiction to amend its process in furtherance of justice, and no opposition being made to such amendment by those having notice and being entitled to object.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 316.*]

3. MOTIONS (§ 61*)—COLLATERAL ATTACK ON ORDER.

Where no appeal was taken from an order fixing the amount of compensation for keeping attached goods, where the sheriff acted under the attachment proceedings, and served due notice upon all interested counsel, who were all present and participated in the proceedings, the order became final.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 83; Dec. Dig. § 61.*]

4. ATTACHMENT (§ 286*)—INTERVENER RIGHTS—EXTENT.

Under Code Civ. Proc. § 1206, providing that in cases of attachment, etc., any person having a claim against the defendant for labor done may give notice thereof, and, unless the claim is disputed, it must be paid out of the proceeds of the sale, etc., the right of the interveners is a mere priority, entitling them to enjoy the fruits of the attachment and sale in preference to the plaintiff, but otherwise they have no superior rights to plaintiff.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 286.*]

In Bank. Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by the Legg & Shaw Company and others against the Morning Star Gold Mining Company, in which W. A. Worthington and others intervened. From an order denying a motion to require the sheriff to pay the interveners the proceeds of an attachment sale, they appeal. Affirmed.

Thomas S. Ford, for appellants. Nilon & Arbogast and Fred Searls, for respondents.

MELVIN, J. This is an appeal by certain intervening lien claimants from an order made after final judgment. In November, 1905, Legg & Shaw Company, a corporation, filed a complaint against the Morning Star Gold Mining Company, a corporation, praying judgment for \$677.31 on account of goods sold and delivered. Attachment issued on the same day on which the complaint was filed. On December 2, 1905, the sheriff made return of said writ, certifying that he had attached certain of the property of the defendant corporation by taking said property into his custody and placing a keeper in charge of it. On June 8, 1906, judgment for plaintiff by default was entered, and on the

same day plaintiff filed its cost bill, which included, among other items \$416 keeper's fees. On June 17, 1906, appellants presented their claims in accordance with section 1206 of the Code of Civil Procedure, and on June 18th the property which had been held under attachment was sold at public auction for \$295. Thereafter the lien claimants gave notice of a motion to have the sheriff pay over to them the proceeds of the sale minus \$15.70 admittedly due the sheriff as costs. This motion coming on regularly to be heard was duly argued on August 6, 1906. It appeared that no order had ever been made by the court allowing the sheriff to have a keeper or fixing the keeper's compensation. It was further shown that the amount paid to the keeper and mentioned in the cost bill had been advanced by the plaintiff. On August 13, 1906, the court made an order, which was entered in its minutes, to the effect that the sheriff might be permitted to withdraw his return of sale under the writ of execution for the purpose of amendment, and in the meantime plaintiff was to be permitted to move to have the court fix the amount of keeper's fees. To this order the counsel for the preferred creditors duly excepted. The sheriff did not then amend his return, however, and nothing was done, either by the plaintiff or by the lien claimants, until January 5, 1909, when the preferred creditors gave notice of a motion to set aside the order submitting their motion of August 6, 1906, and to resubmit the said motion in which they asked the court to order the payment to them of the money realized from the sale under execution. The hearing of this matter was duly and by consent continued to January 26, 1909. On January 20, 1909, the sheriff gave notice of a motion to have the court fix the amount of keeper's fees. On January 26, 1909, both motions were heard and submitted. On February 15, 1909, the court made a formal order permitting the sheriff to amend his return. It was also ordered, adjudged, and decreed that the compensation of the sheriff for the keeping of and caring for the property under attachment and execution was fixed at \$525, and that item was allowed as a part of the costs in the judgment for plaintiff. On February 23, 1909, the sheriff filed his amended return. In this he accounted for a bar of gold bullion valued at \$66.38 and omitted from the former return. He also certified that the sum of \$361.38, the entire amount realized from the sale, plus the value of the bullion, had been applied upon his fees, costs, commissions, and compensation of keeper, leaving unsatisfied, not only the judgment, but also \$173.32 of the costs. On March 15, 1909, the court formally denied the motion of the lienholders that the sheriff be required to pay them the proceeds of the sale. ex-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cepting the small amount of costs which they conceded to be payable to the sheriff from that fund. It is from this last order that the present appeal is prosecuted.

Section 1206 of the Code of Civil Procedure as it stood in 1906 was as follows: "In cases of execution, attachments, and writs of a similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks and laborers or any other person who renders services or performs work, who have claims against the defendant for labor done or work performed, may give notice of their claims and the amount thereof, sworn to by the person making the claim, to the creditor and the officer executing either of such writs, at any time before the actual sale of property levied on, or, in the event of a levy upon money, at any time before the transfer of such money under execution; and, unless such claim is disputed by the debtor or a creditor, such officer must pay to such person, out of the proceeds of the sale, or in the event of a levy upon money, out of such money, the amount each is entitled to receive for services rendered within the sixty days next preceding the levy of the writ, not exceeding one hundred dollars. If any or all of the claims so presented and claiming preference under this section are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten days for the recovery thereof, and must prosecute his action with due diligence, or be forever barred from any claim or priority of payment thereof; and the officer shall retain possession of so much of the proceeds of the sale or money as may be necessary to satisfy such claim until the determination of such action; and in case judgment be had for the claim, or any part thereof, carrying costs, the costs taxable therein shall likewise be a preferred claim with the same rank as the original claim."

Appellants' first contention is that, inasmuch as the keeper's fees can only properly be due after allowance by the court, and as no such order of court was made prior to the filing of their claims, therefore the money in the sheriff's hands when their demands were made, in accordance with the provisions of section 1206 of the Code of Civil Procedure, became subject to their liens, and could not thereafter be exhausted by a *nunc pro tunc* order of court made long subsequent to the intervention of appellants, whereby the compensation, to be paid the keeper was sought to be fixed. We think this position is untenable, because the rights of appellants are purely of statutory origin, and there could therefore be no trust fund created in the hands of the sheriff in this action which could not be subjected to any lawful order of the court with reference to fees. But we are cited to *Galindo v. Roach*, 130 Cal. 389, 62 Pac. 597, as holding that a cost bill can-

not be amended after the time limited by section 1083 of the Code of Civil Procedure, and that no additional items may be adjudged due after the passing of the period set by section 473 of the Code of Civil Procedure. Respondents admit that the item \$416, due to the keeper, which was included in the sheriff's first return, had no place there until after the court had fixed the amount of such fees. *St. 1889, p. 269*. But they point to the fact that in *Galindo v. Roach*, *supra*, there was objection to the correction of the cost bill, while here no opposition was made to the court's permitting an amendment to the sheriff's return on the writ and to a similar change in the cost bill. The court having jurisdiction to amend its process in furtherance of justice, and no opposition being made to such amendment by those having notice and being entitled to object, the order of the court is as effective as if made within the period of the limiting statute.

But appellants deny the court's jurisdiction to amend the cost bill on the ground that this was not done in the attachment proceeding. The answer to this contention is that the sheriff did act under the attachment proceeding, and served due notice upon the attorneys for the appellants, as well as upon those who represented plaintiff (defendant being in default), and when the matter was regularly heard all interested counsel were present and participated. No appeal has been taken from the order fixing the amount of the keeper's compensation, and it has become final.

But the appellants argue that, if the court had jurisdiction to make the order allowing the keeper's fees after the expiration of six months, there was an abuse of discretion in the present case. Respondents' answer to this is that no appeal was taken from that order, and that the order from which an appeal was taken does not involve the exercise of discretion. We think this position is correct. The order fixing the amount of the keeper's compensation having become final, the refusal of the court to order the payment to the interveners of the proceeds of the sale follows as a matter of course, and the latter is the only order involved in this appeal. The entire argument of the appellants seems to be based on the theory that by serving the notices prescribed in section 1206 of the Code of Civil Procedure their rights attached to the property in the sheriff's hands, and upon sale to the fund realized therefrom. But their right under section 1206 of the Code of Civil Procedure is a mere priority, entitling them, under certain circumstances, to enjoy the fruits of the attachment and sale in preference to the plaintiffs. They are treated as interveners, and surely they would have no superior rights to those of the plaintiffs, except that of first recourse to the moneys realized from the sale. If

they had not appeared at all, the plaintiffs could not complain of the proceedings taken after due notice, and without objection in correction of the sheriff's return and in amendment of the bill of costs. Surely these appellants, who are the beneficiaries of a special statutory privilege which must be strictly followed, are not given rights which will permit them to wait until such action of the court as would bind the other parties to the suit becomes final, and then review the whole case upon an appeal from an order which is merely the logical result of the previous action of the court, from which no appeal has been taken.

The order of the superior court from which this appeal was taken was proper, and it is therefore affirmed.

We concur: LORIGAN, J.; HENSHAW, J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.

(157 Cal. 448)

In re BLAKE'S ESTATE.

In re SOULE.

(S. F. 5,087, 5,088.)

(Supreme Court of California. March 28, 1910.
Rehearing Denied April 27, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 315*)—DISTRIBUTION OF ESTATE—DECREE—SUFFICIENCY.

Where the decree of distribution of the estate of a testator omitted a clause in the will as to a devise over, but by reference to the will embodied the entire will in it, the omission was of no consequence.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1299; Dec. Dig. § 315.*]

2. TRIAL (§ 404*)—FINDINGS OF FACT—CONCLUSIONS OF LAW.

Where the only question, that of the proper construction of a testamentary trust, was determined by the court from the face of the will and a decree, the conclusion of the court that testator failed to make any distribution of the corpus of the trust property on the termination of the trust in a specified event was a conclusion of law, and was not a finding of fact, though inserted among the findings of fact.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 404.*]

3. TRUSTS (§ 331*)—SETTLEMENT OF ACCOUNT—EFFECT.

A decree in proceedings under Code Civ. Proc. § 1699, for the settlement of an account of a testamentary trust, rendered without appearance or contest, which settles the account and approves of payments made by the trustee to a beneficiary, operates as a bar to any subsequent attempt to recover such payments; but, in a subsequent suit involving other property of the trust estate, it is not res judicata of the nature of the interest of the beneficiary in the trust, though the payment passed involved that question.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 404; Dec. Dig. § 331.*]

4. JUDGMENT (§ 812*)—RES JUDICATA.

A judgment in a proceeding in rem, where there has been no contest or litigation, is res judicata as to the matter actually involved and as to any fact affecting the particular matter

involved, but no further, and the judgment cannot be invoked as res judicata in a subsequent proceeding affecting other property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1435-1442; Dec. Dig. § 812.*]

5. WILLS (§ 629*)—CONSTRUCTION—RULES OF CONSTRUCTION.

The rules for ascertaining whether a remainder is contingent or vested are subordinate rules of construction of a will and are applied only in the absence of all other indications in the will to the contrary, and in support of an intention of testator to create a vested remainder.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.*]

6. WILLS (§ 440*)—CONSTRUCTION—INTENTION OF TESTATOR.

The court, in construing a will, must, if possible, arrive at the intention of the testator sought for in the language of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.*]

7. WILLS (§ 440*)—CONSTRUCTION—INTENTION OF TESTATOR.

Where the terms of a will are free from ambiguity, the language thereof must be interpreted according to its ordinary meaning and legal import, and the intention of testator ascertained thereby.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.*]

8. WILLS (§ 439*)—CONSTRUCTION—INTENTION OF TESTATOR.

The presumption against intestacy and the presumption created by Civ. Code, § 1341, that testamentary devises are presumed to vest at testator's death, are subject to the cardinal rule of construction that a will must, as required by section 1317, be construed according to the intention of testator.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 439.*]

9. WILLS (§ 630*)—CONSTRUCTION—VESTING OF GIFT.

A legacy or devise given to one to be paid at a future time vests immediately in the legatee or devisee, while a legacy or devise not given until a future time is contingent and does not vest until that time occurs.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464-1480; Dec. Dig. § 630.*]

10. WILLS (§§ 634, 671*)—CONSTRUCTION—ESTATES DEVISED—TIME OF VESTING.

Testator gave his residuary estate to a trustee to pay enumerated bequests and to convert the residue into money and invest the same in real estate and pay the net income to his two daughters and granddaughter until they reached the age of 30, directing that, as each arrived at that age, she could demand and receive a third as her distributive share to hold the same to her and her heirs forever, and, if either of the daughters or granddaughter died without issue and before receiving her distributive share, her share should go to the surviving daughters or granddaughter, share and share alike. Held, that testator made two gifts, first, a devise to the trustee to pay the income to the daughters and granddaughter, and, secondly, a devise of the corpus both in title and possession to them on their attaining the age of 30; but their attainment of that age was a condition precedent to the vesting of the corpus, and where the grandchild did not reach that age she did not acquire any vested interest in the trust property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510, 1577, 1578, 1586; Dec. Dig. §§ 634, 671.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

11. WILLS (§ 678*)—TRUSTS—VALIDITY.

An express testamentary trust to be exercised for the purpose of conveying title to the beneficiaries is void, and an implied trust for the same purpose is also void.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 678.*]

12. WILLS (§ 630*)—CONSTRUCTION—CONTINGENT GIFT.

Where there is no separate and antecedent gift, independent of the direction and time for payment, the legacy is contingent, and, where a gift is only implied from a direction to pay, it is necessarily inseparable from the direction, and must partake of its quality.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464-1480; Dec. Dig. § 630.*]

13. WILLS (§ 597*)—CONSTRUCTION—CONTINGENT GIFT.

The purpose of an habendum clause in a will, creating a trust and providing that each beneficiary as he attains a specified age may demand and receive a share of the trust property to have and to hold the same to him and his heirs forever, is to limit, define, and make clear the estate granted, and the clause shows testator's intention to give the beneficiaries a fee-simple estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1319; Dec. Dig. § 597.*]

14. WILLS (§ 634*)—CONSTRUCTION—"DISTRIBUTIVE SHARE."

Where testator gave his residuary estate to a trustee to pay enumerated bequests and convert the residue into money and invest the same in real estate and pay the net income to his two daughters and granddaughter until they reached the age of 30, and further provided that, as each arrived at that age, she could demand and receive a third as her "distributive share" to hold the same to her and her heirs forever, and, if either of the daughters or granddaughter died without issue and before receiving her distributive share, her share should go to the surviving daughters or granddaughter, the words "distributive share" merely referred to the quantum of the estate which the beneficiaries were to take if they took at all, and the words could not be considered as terms of devise.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2135, 2136.]

15. WILLS (§ 634*)—CONSTRUCTION—GIFT OVER.

A devise over must be construed as indicating an intention of the testator not to make a vested devise.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

16. WILLS (§ 630*)—CONSTRUCTION—MEANING OF WORDS—"AS."

The word "as," in a will creating a trust to pay the income to beneficiaries until they have respectively reached a specified age, and providing that "as" each arrived at that age he should have his share, imports contingency, though the word may not be directly conditional.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464-1480; Dec. Dig. § 630.*]

For other definitions, see Words and Phrases, vol. 1, pp. 518-521.]

17. WILLS (§ 634*)—CONSTRUCTION—CONTINGENT ESTATES.

The rule that where the only gift is in a direction to pay and deliver at a future time, and the entire interim income is given to the beneficiary, a present gift of title to him is presumed, is a rule of presumption to be indulged

in only when there is no other language employed by testator showing a contrary intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

18. WILLS (§ 595*)—BEQUESTS BY IMPLICATION.

Bequests by implication are sustained where no direct language in a will supports them, and, where from uniformity of language such reasonable construction can be placed thereon as implies an intention to make a bequest, the court will raise an estate by implication in favor of a surviving child on slight indication of an intention to that effect.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1300; Dec. Dig. § 595.*]

19. WILLS (§ 448*)—BEQUESTS BY IMPLICATION.

The court in construing a will must indulge in the presumption that testator intended to dispose of his entire estate, and, if possible, the will must be construed to prevent intestacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 964; Dec. Dig. § 448.*]

20. WILLS (§ 440*)—CONSTRUCTION—INTENTION OF TESTATOR.

The court in construing a will must aim to reach the intention of testator from what he has said, which includes not only a determination of what he meant by the explicit use of language, but also the necessary implication arising from the language employed, though less explicit.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.*]

21. WILLS (§ 634*)—CONSTRUCTION—ESTATES ACQUIRED—"ISSUE."

Testator gave his estate to trustees to invest the same in real estate and pay the income to his two daughters and granddaughter until they respectively reached the age of 30, and provided that, as each reached that age, she could demand and receive a third of the estate as her distributive share, and, if either died without issue and before receiving her distributive share, her share should go to the survivors. By a codicil he provided that lapsed legacies should revert to the estate. *Held*, that the provision for a devise over, in the event of the death of a beneficiary without issue and before receiving her distributive share, raised a devise by implication in favor of the children of the granddaughter dying before attaining the age of 30; the word "issue" in the devise over being a word of purchase and implying a devise to the issue, who thereby took as purchasers under the will.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 634.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3778-3782; vol. 8, p. 7693.]

In Bank. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Petition by Alice S. Blake, sole trustee under the will of Francis Blake, deceased, for distribution of the trust property in which the guardian of the minor children of Ethel Pomroy Soule, deceased, and her administrator answered. From a decree of distribution, the minor children and administrator separately appeal. *Reversed*.

Edward C. Sessions, Jr., pro se. Samuel Poorman, Jr., for other appellants. Charles S. Wheeler and J. F. Bowie, for respondents.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

LORIGAN, J. Francis Blake died in 1888, leaving his widow, Mary C. Blake, two daughters, Alice S. Blake and Helen F. Witcher, and a granddaughter, Ethel Pomroy, then nine years of age, a child of a deceased daughter, as his heirs at law. He left a large estate and an olographic will, by which, having made certain bequests, he then devised the rest and residue of his estate to trustees in trust, first, to pay a large number of bequests, and then: "After the payments of the bequests enumerated in article 3, I direct my said executrix, executors and trustees to convert the rest and residue of my personal estate, if any there be, into money, and to invest the same in improved real property, and to hold all the rest and residue of my estate and pay over the net income therefrom in equal proportions quarterly to my said daughters, Alice S. Blake and Nellie F. Witcher, and my granddaughter, Ethel Pomroy, until they shall respectively arrive at the age of thirty years, and as each of my said daughters and granddaughter arrives at the age of thirty years she shall have the right to demand and receive one-third of the rest and residue of my said estate as her distributive share thereof, and to have and hold the same to her and her heirs forever, *and if either of my said daughters or granddaughter shall die without issue and before she receives her distributive share of my estate, it is my desire that her share of my said estate shall go to the surviving daughter, daughters or granddaughter as the case may be, share and share alike.*" The portion of the trust we have italicized above was omitted from the decree of distribution which in due course was made in the estate. That decree, after setting forth the trust clause, omitting the italicized portion, then distributed the residue of the estate (the beneficiary Alice S. Blake having attained the age of 30 years) as follows: "To the said Mary C. Blake (the widow) in her individual right an undivided one-half thereof, being her half of the community property. To the said Alice S. Blake in her own individual right an undivided one-sixth thereof. To the said Mary C. Blake, James Moffitt, and Charles L. Taylor, as trustees under the said last will and testament, and upon the trusts therein mentioned, in trust for the said Nellie F. Witcher under and in accordance with the provisions of the said last will and testament, an undivided one-sixth thereof. To the said Mary C. Blake, James Moffitt, and Charles L. Taylor, as trustees under the said last will and testament, and upon the trusts therein mentioned, in trust for the said Ethel Pomroy under and in accordance with the provisions of the said last will and testament, an undivided one-sixth thereof."

Subsequent to the decree of distribution, Helen F. Witcher attained the age of 30 years, and the property distributed to the

trustees in trust for her was turned over by them to her. Thereafter the beneficiary Ethel Pomroy married Beach C. Soule, and two children were born to them. In 1905 she died intestate at the age of 27 years, leaving as her sole heirs at law her husband and their two minor children. After her death, Alice S. Blake, who had become sole trustee of the trust, filed in the superior court an account of her administration of the trust, and a petition for distribution of the trust property, stating in the latter that she was in doubt as to whom the corpus of the trust property should be distributed, and asked the court to judicially determine the question. Answers to the petition were filed respectively by the guardian of the minor children of Ethel Pomroy Soule, deceased, and by the administrator of her estate, in which they joined with the trustee in a request for such judicial determination. Answers were also filed by said Alice S. Blake and Helen F. Witcher, asserting that they were each individually entitled to one-third of the corpus of the trust property. On the hearing the court judicially construed the trust provisions and found and decreed that Francis Blake failed to provide in his will, creating the trust, for the disposition of the corpus of the trust property upon the termination of the trust, in the event of the death of Ethel Pomroy Soule under the age of 30 years, and the said event had occurred, and hence that the said corpus of the trust property "is vested, * * * one-third * * * in Alice S. Blake, individually; one-third * * * in Helen F. Witcher, * * * individually; and one-third * * * in the heirs at law of Ethel Pomroy Soule, deceased"—as the heirs at law of said Francis Blake, deceased. A decree in accordance with this construction of the trust provisions was made.

While separate appeals are taken by the minor children and the administrator of the estate of Mrs. Soule from those portions of the decree immediately referred to, and taken upon separate records, they involve the construction of the same trust provisions. They are presented here—except as to one point—in identically the same briefs, and the questions presented on both appeals can be readily and consistently disposed of in the same opinion.

The only question on this appeal calling for serious consideration is the legal soundness of the construction given by the superior court to the trust provisions contained in the will and embodied in the decree of distribution in favor of the beneficiary Ethel Pomroy.

On the part of respondents, Alice S. Blake and Mrs. Nellie F. Witcher, the contention below was, and here is, that, under the will of Francis Blake, Ethel Pomroy was given a contingent remainder only in the corpus of the trust property; that neither the title

nor right of possession to said corpus was to vest in her until she reached the age of 30 years; that as she never attained that age the remainder never vested; that no provision was made in the will for the disposition of the corpus of the trust property in the event which actually occurred, namely, the death of the beneficiary "with issue and before she received her distributive share" of the estate of testator, and, hence, the testator died intestate as to such property, and it descended and should be distributed to his heirs at law. This was the construction given to the provisions of the will by the trial court and the accuracy of which is questioned by the appellants.

As far as the appellant the administrator of the estate of Ethel Pomroy Soule is concerned, it is insisted that under the will and decree devising and distributing the trust property to the trustees there was vested immediately in Ethel Pomroy on the death of the testator a remainder in fee in said property (possession only being deferred) defeasible only upon a condition subsequent, namely, her death "without issue and before she received her distributive share" (attaining the age of 30 years), the happening of which has now become impossible, and that on her death the corpus of the trust property passed to her heirs in fee simple.

On behalf of the surviving minor children it is insisted that even if the contingency by which their mother was to take the corpus of the estate—the attainment of the age of 30 years—did not happen, and the fee of the property therefore never vested in her, still the testator did not fail to dispose of the trust property, but, on the contrary, they insist that the trust clause providing for a devise over on the death of their mother "without issue and before she received her distributive share" was a devise by implication to them of such corpus as her issue; that, even, if the devise failed to vest in fee in their mother, they took the property as donees or purchasers under the will itself as a devise in their favor. In the event, however, that their contention in this respect be by the court deemed untenable, they then stand with the administrator, and insist that the devise to their mother was of a vested remainder defeasible only on condition, subsequent, the happening of which has now become impossible.

Some preliminary matters require attention before approaching the real merits of the appeals, though they will be considered but briefly.

It will be observed that the clause in the will as to the devise over was omitted in the trust provisions set forth in the decree of distribution. In our opinion, however, such apt reference is made to the will in the decree as to embody the entire will in it so that this omission is of no consequence. In fact, we do not understand any point to be

made on the omission; all parties relying on the devise over in support of their particular positions as to the construction to be placed upon the entire trust provisions.

It is, however, contended by respondents that the court found as a fact that Alice Blake and Mrs. Witcher were respectively vested with a one-third interest in the corpus of the trust property, and they assert that as there is no specification in the bill of exceptions attacking the sufficiency of this finding, and as it supports the decree, the latter must for that reason be affirmed. We do not, however, consider this a finding of fact, but rather a conclusion of law. It is true that it is found among the findings of fact—19 and 20—but is evidently misplaced. While the court made findings of fact, there was really no question of fact at issue under the pleadings, and none was tried. What are embodied in the findings of the court are simply matters appearing in the decree of distribution, or in the petition of the trustee for a judicial construction of the trust provisions and of the truth of which there were no question made. The only question that was presented to the court—purely a legal question—was: What was the proper construction of the terms of the trust? This was determined by the court from the face of the will and decree, and its conclusion that the testator, Francis Blake, failed to "make any disposition of the corpus of the trust property upon the termination of the trust in the event of the death of Ethel Pomroy Soule under the age of 30 years," was the basis for the further immediate conclusion of law that one-third of the corpus was vested respectively in Alice Blake, Mrs. Witcher, and the heirs of Mrs. Soule. Though these are inserted among the findings of fact, they are really conclusions of law which the court made from the sole matter which was before it for consideration, namely, the construction of the trust provisions of the will.

It is insisted by appellants that it was *res adjudicata* in the superior court prior to the inauguration of this proceeding for the construction of the trust provisions that Ethel Pomroy Soule took a vested estate in remainder in the corpus of the trust property. This claim is predicated upon the settlement of an account of a former trustee of the trust in which the court approved the payment by him to Mrs. Soule, absolutely, of certain moneys derived from a portion of the corpus of the trust property; the argument being that this approval of such account necessarily involved a determination by the court that the devise made of the corpus of the trust property was a vested one.

We do not think, however, that the principle of *res adjudicata* has any application here. There was no actual controversy over the settlement of the account referred to. Proceedings towards its settlement were under section 1699 of the Code of Civil Procedure, and jurisdiction was acquired by post-

ing of notice of the hearing. While the decree settling the account would operate as a bar to any subsequent attempt to recover that portion of the proceeds of the corpus of the trust property, payment of which to the beneficiary was approved by the court, it is only to the extent that the payment was sanctioned that the decree can be deemed *res adjudicata*. Evidently the payment to her was improperly made and approved, under any view of the trust provisions. But the decree did not operate as a bar to the remaindermen or beneficiaries to maintain this proceeding affecting other and different property. The rule of the authorities is that a judgment in a proceeding in *rem* where there has been no contest or litigation is *res adjudicata* with respect to the matter or *res* actually involved in the proceeding and is *res adjudicata* as to any fact which affected the particular matter or *res* involved in it, and this is as far as it operates. The judgment cannot be invoked as *res adjudicata* in a subsequent proceeding which affects other property. *Cromwell v. County of Sac.*, 94 U. S. 351, 24 L. Ed. 185; *Overby v. Gordon*, 177 U. S. 214, 20 Sup. Ct. 603, 44 L. Ed. 741; *Freeman on Judgments*, vol. 1, § 253.

Mr. Freeman, in discussing the effect of a judgment in one proceeding when invoked as *res judicata* in another proceeding involving a different though similar subject-matter, says: "In order to successfully invoke this rule (*res judicata*) it must be shown that in the former action the issue was in fact litigated and decided. It is not sufficient that it was there so involved that it might have been litigated. * * * In a subsequent action involving a different subject-matter the former adjudication cannot be relied on unless it appears, not that the issue presented was presented and ought to have been litigated in the prior action, but further that it was litigated and decided, as well as involved." Under this rule the judgment settling the account on the proceeding, had without appearance or contest on their part, did not operate as a bar to the remaindermen or beneficiaries to maintain this proceeding.

This brings us to a consideration of the appeal on its merits—the nature of the remainder devised to Ethel Pomroy—whether it is to be considered as a contingent or vested remainder, and, if the former, was there still a devise to the issue of the beneficiary by implication?

Counsel on both sides in support of their respective positions have brought to their aid much of the abstruse learning which has been devoted to the subject of remainders. There is no subject in the law to which more refinement of learning has been applied, nor one where, particularly in ascertaining whether a remainder is a contingent or vested one, more nice, technical, and shadowy rules of construction have been formulated. Counsel for appellants more particularly in-

voke the aid of these rules, upon the theory that the language of the will is so uncertain as to the nature of the remainder devised as to make them applicable to the proper determination of the intent of the testator in that respect. As to these rules, however, it may be said that there are none of them which may be taken as an unvarying standard by which the meaning or intent of all testamentary devises in remainder may be construed. They have not been harmoniously applied in jurisdictions where they obtain, and whether they are applicable at all must depend upon the particular provisions of each will which is under consideration. They are simply subordinate rules of construction which are applied only in the absence of all other indications in the will to the contrary and in support of an intention on the part of the testator to create a vested remainder.

While appreciating the earnestness with which counsel for appellants insist that the language of the will is so indefinite in its terms respecting the devise to the beneficiaries as to make these rules applicable in ascertaining the intent of the testator regarding it, we are not inclined to agree with him that there is any such indefiniteness. On the contrary, it appears to us quite apparent from a consideration of the trust provisions that the testator plainly and definitely fixed the time when the corpus of the trust property should vest, both in title and in possession, in the beneficiaries, and hence there is no necessity of applying any technical or arbitrary rules of construction in aid of discovering that intent.

The cardinal rule in the interpretation of a will is that "it is to be construed according to the intention of the testator." Civ. Code, § 1317. As said in *Estate of Young*, 123 Cal. 337, 55 Pac. 1011: "The purpose of construction as applied to wills is unquestionably to arrive, if possible, at the intention of the testator; but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will." It is not the business of the court to say, in examining the terms of a will, what the testator intended, but what is the meaning to be given to the language which he used. Where the terms of a will are free from ambiguity, the language used must be interpreted according to its ordinary meaning and legal import, and the intention of the testator ascertained thereby. It is true that presumptions are to be indulged in which will prevent intestacy (*Le Breton v. Cook*, 107 Cal. 410, 40 Pac. 552), and that testamentary devises are presumed to vest at the death of the testator (Civ. Code, § 1341); but these presumptions, like the auxiliary rules of construction relied on by appellant, are subordinate to the cardinal rule just stated.

Now, coming to a consideration of the terms of the trust, itself, we think that the

language of the testator, given its legal import, clearly shows that only a contingent remainder was devised to Ethel Pomroy, and that as far as that question is concerned the trial court properly so held.

There can be no question as to the rule relative to contingent and vested remainders and the difference between them. The difficulties which have filled the books with dissertations on the subject have arisen in an endeavor to determine from indefinite terms of devise to which class the remainder belongs. The general rule is that, where the legacy or devise is given to a person to be paid at a future time, it vests immediately. When, however, it is not given until a future time, it is contingent and does not vest until that time occurs. As said in the note to *Goebel v. Wolf*, 10 Am. St. Rep. 470, 113 N. Y. 405, 21 N. E. 388, quoted approvingly by this court in *In re Rogers*, 94 Cal. 526, 530, 29 Pac. 962: "The leading inquiry upon which the question of vesting or not vesting turns is whether the gift is immediate, and the time of payment or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving of age, or surviving some other person, or the like. * * * According to the prevailing doctrine, a postponement of the time of payment will not of itself make a legacy contingent unless it be annexed to the substance of the gift; or, as it is sometimes put, unless it be upon an event of such a nature that it is to be presumed that the testator meant to make no gift unless that event happened. Thus, where the legacy is given, payable or to be paid when the legatee attains the age of 21 years, the legacy vests immediately upon the death of the testator. It is a present gift, the time of payment only being postponed; but where the time is annexed, not to the payment only, but to the gift itself—as when the legacy is given to the legatee at 21, or 'if' or 'when' he attains the age of 21—the legacy does not vest until the legatee attains that age. His attaining the age specified is a condition precedent; and, if the condition be not fulfilled, the legacy never vests."

Examining the trust provisions of the will under this clear distinction between vested and contingent remainders, and giving to the language used by the testator its proper legal import, we perceive no room for question but that the attainment of the age of 30 years by the beneficiary, Ethel Pomroy, was made a condition precedent to the vesting of the corpus of the trust property in her, both in title and possession, and, hence, the devise was of a contingent remainder.

This conclusion reasonably follows, whether we look at the provisions of the trust separately or view them collectively. The testator had devised the legal title in the trust property to his trustees and in the first portion of the trust clause, as far as the beneficiaries, including Ethel Pomroy, are con-

cerned, provided only for the payment to them of the net income of the estate in equal proportions "until they shall respectively arrive at the age of thirty years." The meaning of this provision is plain. The trustees simply took the legal title to the trust property to the extent that it was necessary for the fulfillment of their trust duties. There is nothing in it whereby any title was passed to the beneficiaries. An express trust to be exercised for the purpose of conveying title to the beneficiaries would have been void (*Estate of Fair*, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; *Estate of Dunphy*, 147 Cal. 95, 81 Pac. 315), and an implied trust would have been equally illegal, as what the testator could not do directly he could not do indirectly or effect by implication, so that, unless the other provisions of the will give it, it is quite apparent that none of the beneficiaries would have taken any interest in the corpus of the trust property. Now the only language in the will which can be insisted upon as giving them any interest in the trust property is found immediately following the provision as to the payment of the interim income, namely: "And as each of my said daughters and granddaughter arrives at the age of thirty years she shall have the right to demand and receive the rest and residue of my said estate as her distributive share thereof, to have and to hold the same to her and her heirs forever." This is the only clause in the will wherein the testator attempted to make a gift of the corpus of the trust property to the beneficiaries, and the gift springs from the right given "to demand and receive" one-third of the residue "as each arrives at the age of thirty years." Reading this entire provision, aside from any artificial rules of construction, we think it is clear that to whatever the right "to demand and receive" applied, whether to the title or possession of the corpus of the trust property, it was subject to a condition precedent that, before the beneficiaries would have the right "to demand and receive" anything, each must have attained the age of 30 years. While it is insisted by appellants that this right "to demand and receive" applied only to the possession, we do not see how any reasonable construction of the testator's language can support this claim. Of course, it is conceded that the right "to demand and receive" may apply to either a right to demand and receive possession or to the vesting of title, or to both; but under the trust provisions of the will the right "to demand and receive" cannot apply alone to possession because, if it applied simply to possession—the right on attaining the age of 30 to receive the possession of the trust property, title to which had already vested—where can there be found any provision in the will conferring title or vesting the devise? If possession only is to be implied from the right "to demand and receive" the corpus on attaining the age of 30 years, then there must be some other lan-

guage in the will from which a gift or vesting of title to the trust property at the testator's death may be implied. But clearly there is no other provision in the will except the one under consideration which makes any gift to the beneficiaries at all except save of income, and, if the right "to demand and receive" applies only to possession, there is no gift of title at all. In fact, if it were not for the right "to demand and receive," no estate, either contingent or vested, would be given to the beneficiaries under the will. Undoubtedly, however, the testator intended that the beneficiaries should receive both title and possession, and, if the right "to demand and receive" applies only to the gift of possession, the gift of title, as there are no other words in the will which expressly provide for it, must be implied from this gift of possession. But as the gift of possession is certainly future and contingent on the beneficiary attaining the age of 30 years, it is the rule of authorities that the gift of title implied from this gift of possession is likewise future and contingent. *Moore v. Smith*, 9 Watts (Pa.) 403; *Leake v. Robinson*, 2 Merrivale, 363; *Stead v. Platt*, 18 Beav. 50; *Merry v. Hill*, L. R. 8 Eq. 619; *Gifford v. Thorn*, 9 N. J. Eq. 702.

The rule of these authorities is announced in *Moore v. Smith*, 9 Watts (Pa.) 407: "The ruling principle of a case like this is that, where there is no separate and antecedent gift which is independent of the direction and time for payment, the legacy is contingent; and it seems to be as well founded in reason as rules of interpretation usually are. Where a gift is only implied from a direction to pay, it is necessarily inseparable from the direction, and must partake of its quality; inasmuch that, if the one is future and contingent, so must the other be."

But that the gift of the title or the vesting in right of the corpus of the trust property, as also the right of possession, was what the testator intended the beneficiaries should take under the right "to demand and receive" on the contingency that they attained the age of 30 years, is further apparent from a consideration of the trust provision. As the testator says, each beneficiary as she attains that age is "to demand and receive" a portion of his estate as her distributive share to "have and to hold the same to her and her heirs forever." Now this latter portion of the provision—the habendum clause—clearly defines the nature of the interest in the devised property which each beneficiary was "to demand and receive" on attaining the age of 30 years; she was to receive the property "to have and to hold the same to her and her heirs forever." The purpose of a habendum clause is to limit, define, and make clear the estate granted or conveyed. It has a technical meaning, and applies, as used here, to the passage of title in fee. As the only words in the will under which title can pass are those giving the right "to demand and receive," it is quite apparent that in using

the language of the habendum clause, which is employed when title in fee is to pass, it was such title which the beneficiaries had a right "to demand and receive" as they attained the prescribed age. As said in *Wheeler v. Wayne Co.*, 132 Ill. 599, 24 N. E. 625, "to have and to hold," etc., is but a habendum clause, the purpose of which is merely to define the estate which the grantee is to take in the property conveyed." As used in this will it defined the estate which the beneficiaries were to take under their right "to demand and receive," and, as they could only take it on attaining the required age, no title was passed or could pass to them until that period arrived.

It is true, as asserted by appellants, that an habendum clause is not necessary to be used to pass title under the law of this state. But this is beside the question. Here the testator has used it. He made his own will and undoubtedly gave importance to this language as defining the estate which on attaining the required age he intended the beneficiaries should take. If he had not deemed it important, he would not have employed it. It cannot be rejected, but on the contrary, must be considered and given effect, as must all the language of a will. It has a well-recognized meaning as defining the estate the testator intended the beneficiaries were to take—a fee simple—and it must be construed, to be given any effect at all, as having been employed by him to indicate that intention. Nor is there anything in the use of the term "distributive share" used in the devise, or considering here the use of the words "distributive share" and "share" found in the devise over, militating against the view that but a contingent remainder was devised to the beneficiaries. These are not terms of devise, nor were they attempted to be used as such by the testator. The devise is in the words giving the right "to demand and receive," and a devise to the beneficiaries is found nowhere else in the will. The words "distributive share" in the devise itself simply refer to the quantum of the estate which the beneficiary is to take, if she takes at all, and which is explicitly mentioned by the testator to be one-third of the residue of his estate, and as used in the devise over the words "distributive share" or "share" under no construction can be considered as terms of devise but are used in specifying the contingency upon which the devise over shall be operative.

Aside from these considerations addressed particularly to the devising clause of the will which, of itself, satisfies us that the devise to Ethel Pomroy was of a contingent remainder, this conclusion is further supported by the devise over. While there is a conflict in the authorities elsewhere as to the effect of a devise over in determining whether a remainder which is not fixed by direct words of devise is contingent or vested, the matter in this state is settled.

In the case of *In re Rogers*, heretofore referred to, the testator had bequeathed to his grandson a legacy of \$10,000 to be paid in certain proportions and as he attained certain years of age; the first payment to be made when he attained 15, the final payment when he reached 25. The clause in the will making this bequest provided further that: "If my said grandson die before arriving at the ages herein named, then the remaining or unpaid amounts of said bequests, together with the income thereon, I direct shall be distributed * * * to the brother and sisters of myself and wife * * * share and share alike." During the administration of the estate the grandson died at the age of six or seven years and before any of the bequests were payable to him. On distribution of the estate his mother applied for payment of the legacy to her as his heir at law under the claim that the bequests to her son vested in him on the death of the testator, asserting that a bequest "payable" or "to be paid" to a person "at" or "when" he shall attain the age, etc., vests the estate immediately in him, and his interest is transmissible to his representatives. The question squarely before the court in that case was whether the legacy was vested or contingent. It was held to be contingent, and in reaching that conclusion the court took into consideration the devise over, and said: "If the last clause (the devise over) had been omitted, it might no doubt be successfully claimed that there was a present and absolute bequest, the times of payment only being deferred, and that it vested in the legatee on the death of the testator. That clause, however, makes it clear, we think, that the intention was not to make an absolute bequest, but a conditional one to take effect only if the legatee should reach the ages named for its payment." Hence, in this state the rule is that a devise over is to be construed as indicating an intention on the part of the testator not to make a vested devise, and, applied to the devise here in question, imparts additional force to the conclusion which we think apparent from the language of the devise itself that only a contingent devise was made to Ethel Pomroy; that it was only to take effect in title and possession on the condition of her attaining the age of 30.

While it is insisted by appellants that the word "as," employed in the provision, "and as each of my said daughters and granddaughter arrives at the age of thirty years she shall have the right to demand and receive," etc., is not conditional, and, hence, the provision quoted in which it is used did not operate to create a condition precedent to the vesting of the corpus but operated to give an absolute interest in fee in it to the beneficiaries and denoted only the time when the remainder should take effect in possession, we perceive no room for discussion on this point, as we are of the opinion that rea-

sonably construed the right "to demand and receive" the corpus of the trust property applies to both title and possession. It appears to us that if there is any one intention clearly disclosed by the will itself it is that the beneficiaries are "to demand and receive" nothing until they attain the age of 30. Futurity is annexed as of the very substance of the gift. And while the word "as" may not be directly conditional, still it imports contingency and is generally so construed. *Colt v. Hubbard*, 33 Conn. 281; *Selbert's Appeal*, 13 Pa. 501; *Fearne on Remainders*, vol. 2, p. 145.

We are mindful, too, of the rule particularly insisted upon by appellants that where the only gift is in a direction to pay and deliver at a future time, or what is asserted to be the equivalent here, the "right to demand and receive" at a future time, and the entire interim income is given to the beneficiary, a present gift of title to him is presumed to have been intended by the testator. Under this rule appellants insist that from the gift of the entire interim income to the beneficiaries here it is to be inferred that the testator intended a present gift of the corpus to them, and that the right "to demand and receive" as used by him only applied to the possession of the corpus, and, therefore, the devise became vested on the death of the testator subject to become divested should any beneficiary die without issue and before obtaining possession of her share of the corpus. The general rule at common law is as asserted by appellants; but, without considering other objections which respondents urge against its application to this particular devise, it is at best but a rule of presumption to be indulged in only when there is no other language employed by the testator showing a contrary intention. But, as we have heretofore pointed out, the language actually used by the testator in connection with the right "to demand and receive," and the other matters in the will to which we have called attention, defines the estate which is to be taken by the beneficiaries in the future under this right as being both title and possession. Futurity applies to both by the express language of the testator so there is no room for indulging in any presumption.

We perceive no reason for pursuing this branch of the inquiry further. In our opinion, taking the trust provisions of the will in their entirety, it was the intention of the testator to make two gifts—a devise to the trustees to pay the income to the beneficiaries, and a devise of the corpus both in title and possession to them on attaining the age of 30 years—that the attainment of this age was a condition precedent to the vesting of the devise at all, and that, as the beneficiary Mrs. Soule did not reach the required age, she never acquired any vested interest whatever in the trust property.

This brings us to a consideration of the claim asserted by the appellants the minor children of Mrs. Soule that, though the devise to their mother was a contingent remainder and the condition under which she was to take, or the devise over was to become effectual, never occurred, still the testator did not fail to dispose of the corpus of the trust property, but the minor appellants took directly as purchasers under the will of Francis Blake the share which would have vested in their mother had she attained the age of 30 years.

In this regard it is insisted that the provision for a devise over in the event of the death of a beneficiary "without issue and before she receives her distributive share" raises a devise by implication in favor of the minor appellants as the issue of their mother. We think this position is sound and sustained in reason and by the authorities. Bequests by implication have from remote times been sustained where no direct language in a will is found to support them, but where from informal language used such reasonable construction can be placed on it as implies an intention to make a bequest. As said in the American and English Encyclopedia of Law (1st Ed., vol. 29, p. 382): "Implication may arise under a recital, reference of elliptical expression which necessarily implies something else as contemplated by the testator; from the form of the gift; or from a direction to do something which cannot be carried into effect without of necessity involving something else as a necessary consequence."

While, of course, conjecture and speculation cannot be indulged in to import into the will of a testator something which no language used by him warrants simply because he seems to have omitted something which it is reasonable to assume should have been provided for, still, when he has used language which can be reasonably interpreted to raise a devise, it should be so construed. Looking at this devise over, it would appear to be absurd to say that while the testator provided that in the event of death "without issue" of a contingent devisee a remainder over is to take effect, yet if the contingent devisee leave issue the devise over shall be defeated and without benefit to either the parent or child. To defeat attributing to the phrase such a purposeless effect, courts, as said in 1 Jarman on Wills, "will lay hold of slight circumstances to raise a gift in the child and thereby avoid imputing to the testator so extraordinary an intention as that the devisee or legatee over is to become entitled if the first taker have no child, but that the property is not to go to the child, if there be one, or its parents." And, as said in Underhill on Wills, § 468: "The court accordingly will raise an estate by implication in favor of a surviving child upon slight indication of an intention to that effect."

The presumption must be indulged in that the testator intended by his will to dispose of his entire estate, and, if possible, its provisions must be construed to prevent intestacy. It is apparent under our view of the trust provision that as the devise to the mother of these minors was of a contingent remainder, and neither the contingency upon which she was to take nor upon which the devise over was to pass occurred, the testator, unless a devise by implication was made to the issue of Mrs. Soule, died intestate as to the share which would have gone to her of the corpus of the property.

While the intention of the testator is to be reached from what he has said, this includes not only a determination of what he meant by the explicit use of language, but also the necessary implication arising from language which he has employed, though less explicit. This necessary implication when employed in raising a devise thereby "is called necessary because the court finds it so in order to answer the intention of the testator." *Coryton v. Helyar*, 2 Cox, 340, 348; *Weed v. Scofield*, 73 Conn. 670, 49 Atl. 22. A strong probable implication of a devise arising from the will is sufficient (*Coale v. Smith*, 4 Pa. 376), and the tendency of modern cases is rather to extend than narrow the rule of raising devises by implication (2 Powell on Devises, 211).

Now, if we assume that the words of limitation over on death "without issue" are insufficient of themselves to raise a gift by implication to the issue (though in *Burton v. Black*, 30 Ga. 638, the inference, it is said, may arise from the phrase itself in the limitation over), yet the rule is that this implication may be drawn from slight circumstances appearing from the will. Now as to the circumstances and considerations indicative of such intention: In article 3 of the will referred to in the trust provision of article 4 the testator provided for the payment of a number of legacies to relatives and friends, mainly the latter, and specified that, except in two instances, if any of the legatees should die before the testator, the legacies should go to the lineal descendants of such legatees. Subsequently in a codicil he provided that lapsed legacies should revert to his estate. It appears, therefore, that the testator knew exactly what language to apply when he wanted the legacies not to lapse on the death of the legatees and when he intended they should lapse and revert. It is to be assumed that the testator would be more solicitous for the welfare of his lineal descendants, as the issue of these beneficiaries would be, than for the lineal descendants of his friends, and as he provided in the first instance that the descendants of his friends should take so as to prevent a lapse of legacies, and knew how to change the provision so as to provide for a reversion of such legacies to his estate, it is a fair and just inference that in providing for the limitation over on the death of a bene-

fiary "without issue" that he intended the issue should take the share of a parent rather than that such share should revert to his estate, which would be the effect unless the phrase is to be construed as an implied devise to such issue. Aside from this we may look at the possible consequences which would result from a construction of the provisions of a will, for the purpose of determining whether, where the language is not explicit but open to construction, it was the intention of the testator that they should follow. All the beneficiaries were the lineal descendants of testator, and by the trust devise they are all treated with equal favor. Is it at all reasonable to say that, when the testator provided that a beneficiary should take an absolute estate on attaining the age of 30, in providing for a devise over if she should die "without issue," he had no devising purpose when referring to issue, but that such issue were only to take by right of representation a share in the portion of the trust property devised to their mother, as estate of which the testator had died intestate, and along with the surviving beneficiaries who might have actually attained the required age and already received their two-thirds of the entire trust estate, as is exactly the situation here? Or to take one of the illustrations of counsel for the minor appellants: If one of the daughters of testator had died before attaining the age of 30, leaving a numerous family, and the two other beneficiaries had attained 30, married, and died, never having had issue, but leaving their respective husbands surviving them, this situation would be presented: The children of the deceased beneficiary would divide $\frac{2}{27}$ of the trust fund among their number; their father would take $\frac{1}{27}$ thereof; and the remaining $\frac{1}{9}$ might pass forever away from the line of Francis Blake. Of course, it is insisted by respondents that this only presents a situation which the testator should have provided against but has omitted to do. But he has met this situation and provided against such consequences if a devise can be implied from the elliptical expression as to issue, and these circumstances and consequences afford circumstances which naturally support this as the implied intention of the testator.

In making his will the testator recognized that his daughters and grandchildren were the natural objects of his bounty, and he devised his estate to them, contingent, however, on their reaching a designated age. Having bequeathed the interest which they should severally take in his estate and designated when it should vest, he then proceeded to provide for its disposition over should the contingency upon which they should take not be met. In making such provision it naturally suggested itself to him that a beneficiary might die before attaining the age when she would be entitled to her share of his estate, but might leave children. It is to be assumed that the testator would have the same natu-

al solicitude for the issue of the child as for the child herself, and, contemplating the possibility of issue, he provided that in the event of issue the share of the deceased beneficiary should not go over. This was a natural provision. Such issue would be his lineal descendants and naturally entitled to the same consideration from him as their parent. He recognized that in the event of issue their welfare would be a matter of solicitude on the part of their mother, and, having this in view, he provided that the share which would be hers if she attained the age of 30 years should go over only in the event of her dying without issue before she received her share of the estate. He had the possibility of issue in his mind, and, as he intended that the parent should not take unless she attained the age of 30 and intended that the devise over should not be effective if issue survived her, it seems the only reasonable inference to be deduced from the mention of issue at all that they were to take the share which otherwise their mother would have taken. As the devise over was to be ineffectual if the beneficiary died with issue, and the testator intended to dispose of all his estate, this is the only effect which can be given to the mention of issue, if any effect is to be given at all.

That this is the construction to be given to the mention of issue is well supported by the authorities where the effect of such mention was involved when found in the limitation over of a devise. *Ex parte Rogers*, 2 Madd. 449; *Burton v. Black*, 30 Ga. 638; *Myrick v. Heard* (C. C.) 31 Fed. 241; *Wetter v. United Hydraulic Cotton Press Co.*, 75 Ga. 540; *Sturges v. Cargill*, 1 Sandf. Ch. (N. Y.) 318; 1 *Jarman on Wills*, 500; *Bentley v. Kaufman*, 12 Phila. (Pa.) 435; *Still v. Spear*, 3 Grant, Cas. (Pa.) 307; *Kay v. Scates*, 37 Pa. 31, 78 Am. Dec. 399; *Beilstein v. Beilstein*, 194 Pa. 152, 45 Atl. 73, 75 Am. St. Rep. 692; *Kinsella v. Caffrey*, 11 Ir. Chan. 154; *Hauser v. Craft*, 134 N. C. 319, 46 S. E. 756; *Luthleullier v. Tracy*, 3 Atk. 796.

Quotations from an English and a couple of American cases will suffice, as all the other authorities harmonize with them. In *Ex parte Rogers*, supra, the executor was directed by the will to place £1,000 in a funds, in trust to pay the interest thereof to a niece during her life, "and at her decease without child or children the principal sum, with all interest due thereon, to go and be divided between her surviving sisters equally." The court held that there was a devise by implication of the thousand pounds to the children of the niece, saying: "The residuary legatees cannot take because the residue only after payment of this legacy was given to them. It could not go to Hester Chambers, because she was only to take if M. D. Rogers died without children. As the testator did not mean to give it to the residuary legatees, and as he did not mean to die intestate as to any part of his property, to whom could it go but to

M. D. Rogers or her children? Why mention children if he did not mean them to take? The existence of children was considered as material; so much so that, if there were any, the legacy was not to go over. By necessary implication the children must be considered as entitled to the \$1,000." In *Bellstein v. Bellstein*, 194 Pa. 152, 45 Atl. 73, 75 Am. St. Rep. 692, the devise over was in the event that the first taker died without family. It was held that there was a devise to her family by implication, if she left one; the court saying: "The devise over in case Gertie should 'die leaving no family' is an implied devise to the family if she should leave one. It is only if she does not that the devise over is to be effectual, and there is a necessary implication that in the unexpressed contingency of her leaving a family the estate is to go to them." In *Burton v. Black*, 30 Ga. 638, the rule is recognized that persons may take by inference, and that: "This inference is generally associated with a limitation over; the inference itself being that those are intended to take the property who are designated to prevent its going over. * * * If property is given to A. for life, and if he shall die without issue, then over to B., the issue of A. are the persons whose existence is to prevent the property from going over to B.; and the just inference is that the 'issue,' without further description, are intended to take." The case first quoted from (*Ex parte Rogers*) is commented on in *Ranelagh v. Ranelagh*, 12 Beav. 200, but we do not understand it to be there overruled. If it were, there are still other ample authorities cited by us to sustain our conclusion as to a devise by implication. In this latter case the judge deciding it declared his inability to answer the query contained in *Ex parte Rogers*, "Why mention children, if he (testator) did not mean them to take?"

While there are some authorities—we are only referred to three or four—holding that in a devise over "without issue" the word "issue" is a word of limitation, still the great weight of authority is to the contrary, and that as employed in the devise over under consideration here it is a word of purchase and implies a devise to the issue who thereby take as donees or purchasers under the will.

Those portions of the order appealed from are reversed, with instructions to the trial court upon the findings as made (eliminating therefrom what are inserted as findings 19 and 20, but which are conclusions of law as pointed out in the early part of this opinion) to enter a decree distributing directly to the appellants, the children of Ethel Pomroy Soule, as purchasers under the last will of Francis Blake, deceased, the corpus of the trust property involved in this controversy.

We concur: SHAW, J.; HENSHAW, J.; MELVIN, J.

(157 Cal. 503)

LOWE v. YOLO COUNTY CONSOL. WATER CO. (Sac. 1,684.)

(Supreme Court of California. March 30, 1910. Rehearing Denied April 28, 1910.)

1. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Though a water company is not liable for failure to deliver water to an applicant where there are prior applicants for all its water, refusal to allow it to show there were prior applicants, who were supplied, is harmless; the uncontradicted evidence showing that, after supplying them, there was sufficient water running to waste to supply the later applicant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1066.*]

2. EMINENT DOMAIN (§ 243*)—ESTOPPEL BY JUDGMENT.

The judgment for a water company in a proceeding by it to condemn a right of way for a ditch estops it, in an action against it for failure to deliver water on demand to one over whose land a strip for the right of way was condemned, to deny it was exercising purely a public use for the benefit of the landowners along the line of the ditch, it being only on the theory that it was exercising a public use that it could maintain such proceeding and recover such judgment; its complaint therein describing the public use for which the right of way was sought, as one for the supplying of the farming neighborhood with water for irrigation purposes; and issue on such matter having been joined and determined in such proceeding.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 627-629, 700; Dec. Dig. § 243.* Judgment, Cent. Dig. § 1806.]

3. WATERS AND WATER COURSES (§ 263*)—TO GROWING CROPS—ALFALFA.

As land prepared for alfalfa will produce several crops each year for several years without further care, except in the way of irrigation, the measure of damages of one who just after preparing his land for alfalfa, and cutting the first crop, was wrongfully denied water for irrigation by a water company, whereby he lost the two additional crops, which, with irrigation, the land would have produced that year, and a reseeded was necessary, is the value of the two crops lost, less cost of irrigation and cutting, plus cost of reseeding.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 263.*]

4. CORPORATIONS (§ 498*)—LIABILITY FOR EXEMPLARY DAMAGES—ACTS OF OFFICERS.

A corporation may, because of the acts of those whom it has placed in charge of its affairs, be held guilty of malice or oppression, making it liable, under Civ. Code, § 3294, for exemplary damages.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1909; Dec. Dig. § 498.*]

5. WATERS AND WATER COURSES (§ 263*)—EXEMPLARY DAMAGES—MALICE AND OPPRESSION—EVIDENCE.

The conclusion that defendant water company was guilty of malice and oppression in failing to furnish water to plaintiff for irrigation, making it liable for exemplary damages, is authorized by evidence that its general manager told him not to put in a side gate to receive water from its ditch; that its directors had notified him to tell plaintiff that they would not give him any water for that land, and that plaintiff knew why; that its president told him its directors were bitter towards him because of the condemnation proceeding for its right of way, and that it would furnish him no water till plaintiff paid back the damages he received

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index—

in that proceeding, and while he was occupying with his ditch a portion of its right of way; and that no attention was paid to his written demand for water which he left with the person in charge of its office, at the same time making tender of water rates, as defendant had, and must have known it had, no right to insist on such matters as a condition precedent to furnishing water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 263.*]

6. EVIDENCE (§ 244*)—STATEMENTS OF OFFICERS OF CORPORATION.

Statements of the general manager and the president of a water company to an applicant for water, as to the reasons for refusing him water, made in connection with such refusal, are admissible to show the motive of the company, on the question of exemplary damages; as such officers are to be presumed, *prima facie* at least, to have been acting in accord with the desire of its board of directors.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 916-936; Dec. Dig. § 244.*]

7. TRIAL (§ 96*) — MOTION TO STRIKE EVIDENCE.

The motion to strike out, being directed to the whole statement introduced in evidence, which included unobjectionable matter, was properly denied.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 248; Dec. Dig. § 96.*]

8. WATERS AND WATER COURSES (§ 254*)—IRRIGATION COMPANIES—DEMAND FOR WATER.

The leaving of a written demand for water at the office of a water company, during office hours, with the person in charge thereof, is a sufficient compliance with Act March 12, 1885 (St. 1885, c. 115) § 10, as to demand for water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 254.*]

9. WATERS AND WATER COURSES (§ 263*)—WATER COMPANIES—REFUSAL OF WATER—SUFFICIENCY OF DEMAND—RIGHT TO QUESTION.

The avowed position of a water company, expressed through its manager and president, to an applicant for water, being that it would not supply him, even if he paid the charges, and his subsequent demand left at its office, describing with certainty land planted in alfalfa, for irrigation of which water was demanded, and offering to pay, in addition to the amount therewith tendered, any further sum necessary, having been simply ignored, the company, in an action against it for damages for not furnishing the water, may not object to the sufficiency of demand or tender.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 263.*]

10. TRIAL (§ 252*)—WATER COMPANIES—DUTY TO FURNISH WATER—INSTRUCTIONS.

An instruction, in an action against a water company for refusal to furnish an applicant with water, that before it was required to deliver water to an applicant he must make necessary provision for receiving it is properly refused; its refusal to furnish water not having been based on any such ground, and it appearing that the applicant was about to put in his side gate for diversion of the water when notified by defendant's general manager not to put it in, because it would not furnish him water.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

11. WATERS AND WATER COURSES (§ 263*)—WATER COMPANIES—REFUSAL TO FURNISH WATER FOR IRRIGATION—DEFENSES.

It is no defense to an action against a water company for refusal to furnish an ap-

plicant water for irrigation, that his ditch for taking water from its ditch be in part on its right of way, if it be there with its consent, or if its refusal was not based on such ground.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 263.*]

In Bank. Appeal from Superior Court, Yolo County; H. M. Alberty, Judge.

Action by O. A. Lowe against the Yolo County Consolidated Water Company. Judgment for plaintiff, and new trial denied. Defendant appeals. Affirmed.

A. L. Shinn and N. A. Hawkins, for appellant. A. C. Huston, for respondent.

ANGELLOTTI, J. This is an appeal from an order denying defendant's motion for a new trial in an action for damages for failure on the part of defendant to deliver to plaintiff water for the irrigation of 42 acres of land in Yolo county for the season of 1906. There was a trial by jury, and plaintiff had verdict and judgment for \$1,099, consisting of \$599 actual damages and \$500 exemplary damages. There was an appeal by defendant from the judgment on the judgment roll alone. On that appeal the judgment was affirmed by the District Court of Appeal of the Third appellate district, and an application for rehearing in this court was denied. See *Lowe v. Yolo County, etc., Co.*, 8 Cal. App. 167, 96 Pac. 379.

There appears to be some difference between counsel as to the effect of the decision on the appeal from the judgment. The only questions involved on that appeal related to the sufficiency of the complaint and the right of the plaintiff, in view of those allegations, to exemplary damages. It was held that the complaint sufficiently stated a cause of action for damages against one who had appropriated waters for sale, rental, and distribution to the general public, and that the allegations of the complaint were in accord with the theory that defendant was such an appropriator, and governed by the provisions of the act to regulate and control the sale, rental, and distribution of appropriated waters in this state, approved March 12, 1885, St. 1885, p. 95. It was further held that section 3294 of the Civil Code, providing for the recovery of punitive or exemplary damages in an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, is applicable in an action for damages for failure on the part of such an appropriator to furnish water when demanded in accord with the provisions of said act, and that the allegations of the complaint in this respect were sufficient to bring the case within the provisions of such section. These were the only questions decided on such appeal, as we read the opinion of the District Court of Appeal.

1. We shall accept the admission of learned counsel for defendant, contained in their

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

closing brief, that defendant "never seriously contended that it did not exercise a public use, or that it was not amenable to the act of 1885." So far as this plaintiff is concerned, defendant would appear to be estopped to claim otherwise, in view of the condemnation proceedings on its behalf against plaintiff, whereby, upon the theory that it was exercising such a use for the benefit of a specified district including plaintiff's land, it obtained a decree of condemnation of a strip of said land of plaintiff for the very ditch from which he seeks to be served with water.

Section 10 of said act of 1885 requires every such appropriator for sale, rental, or distribution, "upon demand therefor, and tender in money, of such established rates, * * * to sell, rent, or distribute such water to such inhabitants at the established rates to the extent of the actual supply of such appropriated waters, * * * for such purposes," and provides that, if such appropriator, "having water for such use," refuses for five days to comply with the demand "to the extent of his or its reasonable ability so to do," he or it shall be liable in damages to the extent of the actual injury sustained by the party making such demand.

Defendant's real claim now is that it was not obligated to comply with plaintiff's demand for water if all the water available was needed for the purpose of supplying prior users, in other words, that plaintiff could be entitled to water from this ditch only in the contingency that there was water enough to supply both him and all others whom defendant had previously been and was then serving with water for the irrigation of their lands. Although by two of its instructions the trial court apparently adopted this theory of defendant, instructing the jury substantially that the law gives to the first user of water a preferred right as against those subsequently demanding water, and that the defendant was under no obligation to deliver water to plaintiff unless it had sufficient to supply all previous takers and also an excess which was available for plaintiff's use, it sustained objections to all evidence offered by defendant for the purpose of showing that there were prior users of the water for irrigation purposes, who applied for the water for the year 1906.

This contention is rendered immaterial by the uncontradicted evidence in the case. It was shown that at the time plaintiff demanded the water from the defendant, and for a sufficient time thereafter to have satisfied that demand, sufficient water to irrigate plaintiff's land was flowing in the defendant's ditch at plaintiff's intake therefrom to have fully irrigated plaintiff's lands, and that this water was not used by other customers of defendant, but was allowed by the defendant to run into Putah creek at the lower end of its ditch, and thus go to waste. There is no substantial evidence in contradiction of

these facts. There was never any pretense that all those claiming to have preferential rights were not supplied with the water to which they were entitled. The offers of evidence made in this behalf included the offer to show not only that they had made application for the water, but also that they had received it. Notwithstanding such use by all such parties, the evidence shows without conflict, as we read the record, that there was still sufficient water running to waste to have satisfied the demands of plaintiff. To this surplus, after the demands of the prior users had been satisfied, plaintiff was certainly entitled. The refusal to admit the evidence offered was, therefore, harmless error, if error at all.

2. We are satisfied that the judgment in the condemnation proceeding brought by defendant against plaintiff was admissible in evidence, and that its effect was to estop defendant from denying that, so far as plaintiff was concerned, it was exercising purely a public use for the benefit of the landowners along the line of the ditch constructed in part over plaintiff's land. It was only upon the theory that it was exercising a public use that defendant could maintain the action and recover such judgment, and the particular public use for which the right of way for the ditch was sought was described in the complaint in such action as being one for the supplying of the farming neighborhood of Winters, which includes plaintiff's land, with water for irrigation purposes. Issue was joined upon both these matters, and those issues were litigated and determined in that case. In his complaint in this action, plaintiff alleged this estoppel by judgment. In view of the estoppel created by this judgment, if the court erred in refusing to admit in evidence defendant's articles of incorporation, the error was without prejudice.

3. We find no error in the rulings of the court in the admission of evidence relative to the amount of actual damage suffered by plaintiff by reason of the refusal to furnish water, nor any force in the claim that the evidence was insufficient to sustain the conclusion of the jury that the amount of this actual damage was \$590. According to plaintiff's evidence the facts were as follows: He had seeded his 42-acre tract to alfalfa, and at the time he needed and demanded water—July 6, 1906—had just cut his first crop therefrom. The first crop ran about one ton to the acre. The cost of putting the land in alfalfa was \$10 per acre. This is what plaintiff meant by saying that the "stand of clover" with the first crop thus cut was worth \$10 per acre, as is shown by his cross-examination. It would have produced two more crops of hay during the season of 1906 if properly irrigated. Hay was worth a minimum of \$5 per ton, cut and in the field. It would not cost to exceed \$1 an acre for each cutting, and \$25 for each watering of the whole land. By reason of the failure to

obtain water, no crop was obtained during the year 1906, except the crop that was cut prior to the demand. Three-fourths of the alfalfa died for want of water, and the evidence was such as to warrant the conclusion that a reseedling of the whole piece would be necessary to put it in the condition it was in at the time water was refused. There was a conflict of evidence as to some of these matters, especially as to the probable yield of the alfalfa stand per acre, and also as to the cost of reseeding the land, but we must here look at the evidence in the light most favorable to plaintiff. Upon these facts the jury would have been warranted in concluding that the cost of reseeding the 42 acres would be \$420, and that the net profits of the alfalfa stand for the season of 1906, exclusive of the first crop, would have been \$286, of all of which plaintiff was deprived by the failure of defendant to furnish water as demanded. This would make an aggregate of \$706, actual damages, and the verdict was for \$599 actual damages. We are of the opinion that these elements constitute the proper measure of damages in a case of this character. Land prepared for alfalfa will produce several crops each year for several years, without further care except in the way of irrigation. At the time of the refusal to furnish water this land had just been so prepared, and with the requisite water would have produced crops for several years to come. Its capacity in this regard was wholly destroyed by reason of defendant's wrongful act. The case is practically that of the destruction of a meadow. In *Bradley v. Iowa Central Ry. Co.*, 111 Iowa, 562, 82 N. W. 996, the question of the proper measure of damages in such a case was discussed, and the court held that the measure of damages is the cost of reseeding and the rental value until restored, finding a clear distinction between such case and that of the destruction of growing trees. As was substantially said, the purpose of the law where one has been injured by the tort of another is to reimburse the sufferer for his loss, and the cost of restoration together with the value of the use of the meadow during the time lost can be accurately ascertained in the case of a meadow, and shows the amount of loss occasioned by the wrongful act as clearly and correctly as any method of which we can conceive. The cost of restoration, together with the value of the use of the meadow during the time lost, in this case the value of the profits plaintiff would have made from the crop during the season of 1906, in our opinion constitute the damage he must be held to have suffered. See, also, 4 *Sutherland on Damages* (4th Ed.) p. 3001. Clearly such a rule as to the measure of damage does not result in awarding double damages. All of the evidence introduced by plaintiff as to the amount of damage was directed to these two elements, and was properly admitted on the issue of damages.

4. As we have said, the decision on the appeal from the judgment establishes that section 3294 of the Civil Code, relative to exemplary damages, is applicable in a case of this character. It is urged that the evidence was insufficient to warrant the recovery of such damages in this case. It is not disputed, of course, that a corporation may be held guilty of malice or oppression by reason of acts of those whom it has placed in charge of its affairs and who "constitute, to all purposes of dealing with others, the corporation." See *Maynard v. F. F. Ins. Co.*, 34 Cal. 54, 91 Am. Dec. 672. The claim of defendant in this behalf is necessarily based on the further claim that certain evidence given of declarations made to plaintiff by both the general manager and the president of defendant must be disregarded, for that evidence, taken in connection with the absolute refusal and failure to furnish any water, amply warrants a conclusion of malice and oppression. Plaintiff had prepared his field, and was making his preparations to receive the water therefor. He had spoken to defendant's general manager several times about the water, and had been given no reason to doubt that it would be ready for him when needed. He was about to put a side gate in the ditch for the purpose of receiving the water, when defendant's general manager told him not to put it in; that the board of directors had notified him to notify plaintiff that they would not give him any water for that particular piece of land. Plaintiff asked Mr. Gregory, the manager, for the reason, and Gregory replied that plaintiff knew the reason, and, when asked if he thought that was right, said: "I don't know anything about it; I was notified to notify you you couldn't have any water." Plaintiff then asked the president of the corporation why water would not be furnished, and was informed by him that some of the directors were bitter towards him on account of "that lawsuit," and that the directors had decided not to give him any water until he had paid back the money paid him under the condemnation decree as damages. Within two or three days thereafter, viz., on July 6, 1906, he went with his attorney to the office of the defendant company, and presented to the person in charge thereof, one L. H. Stephens, the accountant of defendant, a written demand for water for irrigation of the land. He then made a tender of \$100 for the water, and offered to pay such other sums as might be necessary. No objection was made to the sufficiency of either written demand or tender. They were simply ignored and no water was ever furnished. It must be assumed that the fact of demand and tender were made known to the directors of defendant. The evidence of the general manager and the president in regard to the reasons assigned for the refusal of water did not present a materially different situation. The testimony of the president and general manager

Introduced by defendant showed that it was claimed that plaintiff was occupying a portion of the defendant's right of way with his own ditch, and that they told plaintiff that they would give him no water while he had that ditch there. The president further testified that he told plaintiff that it would be right and proper for him to pay back to the company the cost he had put them to in the matter of procuring the right of way. There was not prior to this action any pretense that defendant did not have sufficient water to supply plaintiff, and the defendant failed to furnish the water when subsequently formally demanded without giving any reasons for such refusal. It is obvious that defendant had no right whatever to insist upon a compliance by plaintiff with either of the conditions stated as a condition precedent to furnishing him with water, and must have known that it had no such right. If he was trespassing upon the right of way, appropriate proceedings would lie therefor, and the money that he had been awarded in the condemnation proceedings was his own, awarded him by judicial decree. As said before, there was in all this clearly sufficient support for the conclusion that the defendant was guilty of malice and oppression.

It is urged, however, that the declarations of the general manager and president to plaintiff were not admissible. We think that there can be no question that the statements of these officers as to the reason for refusing water, made in connection with such refusal, were admissible for the purpose of showing the motive of the corporation. As has often been said, and as is necessarily obvious, a corporation can speak only through the acts and conduct of those whom the persons composing it have put in charge of its business. Such officers of the corporation as the president and general manager, when dealing with members of the public in matters pertaining to the ordinary business of the corporation, and acting within the apparent scope of their authority, must necessarily be presumed, *prima facie* at least, to be acting in accord with the desire of the board of directors, who as said in *Maynard v. F. F. Ins. Co.*, *supra*, are deemed to be the mind and soul of the corporation entity, and whose motives and intentions are to be imputed to the corporation itself. Bolled down, the statement attributed by plaintiff to the president was simply that the defendant would not furnish plaintiff with water unless he paid back to defendant an amount that he had received from it as damages for the right of way, those managing the corporation believing that it was inequitable and unfair for him to retain it. Here was simply a statement by the official head of defendant to an applicant for water as to the condition upon which it would be furnished to him by defendant. It is only fair to assume that it was authorized by the defendant. See 4 *Thompson on Corp.* § 4656; *Bullock v. Consumers'*, etc., Co., 31

Pac. 367, 370; 1 *Clark & Marshall, Pri. Corp.* § 239. The statement attributed to the general manager was no more than an absolute refusal by the officer in charge of the business of defendant to furnish water, professedly made by authority of the directors. It may be that the portion of the statement attributed to the president, to the effect that "Uncle Larry and Uncle Joe are very bitter towards you on account of that lawsuit" was objectionable, but the motion to strike out was directed to the whole statement, which included unobjectionable matter, and the motion was therefore properly denied. There was no serious pretense on the trial that either the president or general manager was not acting in accord with the wish of the board of directors. It must be assumed that the formal written application of plaintiff for water, which had been left at the office of the company with the person in charge thereof, was brought to the attention of the board of directors, and that they were made fully aware by the president of his refusal to furnish water except upon the condition stated. See *Balfour v. Fresno Canal, etc., Co.*, 123 *Cal.* 397, 55 *Pac.* 1062.

5. Numerous other points for reversal are made by counsel for defendant. Many of them are substantially disposed of by what we have already said, and it will be unnecessary to enumerate them here. Others are not so disposed of, and we will briefly refer to the most important of them.

We cannot doubt that the leaving of the written demand for water at the office of the defendant corporation during office hours, with the person in charge thereof, was a sufficient compliance with the requirements of section 10 of the act of 1885 as to demand. There was never prior to this action any claim that the demand was in any way uncertain or insufficient, or that the tender of money for water was in any way insufficient. The avowed position of the defendant expressed through both its general manager and president was that it would not furnish plaintiff with any water, even if he paid the amount legally chargeable therefor. The written notice subsequently presented described with certainty land that had been "planted in alfalfa," and for the irrigation of which water was thereby demanded. In it, plaintiff further offered to pay, in addition to the \$100 tendered, such further and other sums as might be necessary. As said before, this demand and tender were simply ignored, without further objection or reason of any nature ever being given. We are satisfied that defendant cannot now be heard to object to the sufficiency of either demand or tender.

We do not read the record as indicating that defendant offered or attempted to show that its ditch was not completed to an extent sufficient to enable it to furnish water therefrom. There is, therefore, nothing in its con-

tention that it should have been allowed to show this.

Under the circumstances of this case, the court did not err in refusing to instruct the jury that, before the defendant was required to deliver water to a customer, such customer must make all necessary provision for receiving it, including a suitable method of diverting water from the main canal. Defendant's refusal to furnish was not based on any such ground. It was established without conflict that plaintiff was about to put in his side gate for the diversion of the water when he was notified by defendant's general manager that he need not put it in, for the defendant would not furnish him with water.

We find no error in the modification by the court of defendant's requested instruction 10. The fact that plaintiff's ditch for the taking of water from defendant's ditch may have been in part on defendant's right of way certainly constituted no defense to this action if it was there with the consent of defendant, or if defendant's refusal to furnish water was not based on that ground. The instruction, as modified, left these questions with the jury, and was certainly as favorable to defendant as the law warranted.

We have been unable to find in the evidence contained in the record any foundation for defendant's requested instruction 12.

There is no other point made that, in our opinion, requires notice.

The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

(157 Cal. 416)

NICHOLL v. KOSTER, Auditor. (S. F. 5,326.)

(Supreme Court of California. March 28, 1910.)

1. STATUTES (§ 94*)—"MUNICIPAL AFFAIRS"—POLICE POWER—GENERAL LAWS.

Act March 8, 1909 (St. 1909, c. 133), providing for the care and custody of children who are likely to develop criminal tendencies, and giving additional powers to the superior courts in respect thereof, provides for an exercise of the police powers of the state through the judicial department, and its subject-matter is not embraced within "municipal affairs" as used in Const. art. 11, § 6, providing that charters of cities and towns except in municipal affairs shall be subject to and controlled by general laws, though the functions of the particular extension of the system may be exercised exclusively within incorporated cities having a freeholders' charter.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 94.*]

For other definitions, see Words and Phrases, vol. 5, p. 4619; vol. 8, p. 7726.]

2. INFANTS (§ 18*)—JURISDICTION OF COURTS—POWER OF LEGISLATURE.

Const. art. 6, § 1, provides that the judicial power of the state is vested in various courts, including the superior court and such other inferior courts as the Legislature may establish in any city or town or city and county. Section

5 provides that the superior court shall have jurisdiction of all such special cases and proceedings as are not otherwise provided for. *Held*, that the Legislature has sole authority over the jurisdiction and powers of the superior and inferior courts of the state, with the exception of the police courts of cities which under Const. art. 11, § 8½, may be established by freeholders' charters of cities; and hence the freeholders' charter of San Francisco does not control Act March 8, 1909 (St. 1909, c. 133), providing for the custody of children who have shown, or who from lack of care are likely to develop, criminal tendencies, and giving additional jurisdiction to the superior court in respect thereof, prescribing the necessary procedure, and providing the means of exercising and enforcing that jurisdiction.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 18.*]

3. MUNICIPAL CORPORATIONS (§ 79*)—SPECIAL CHARTERS—CONSTITUTIONAL PROVISIONS.

Const. art. 11, § 6, providing that municipal charters prevail over general laws in municipal affairs, relates only to cities and towns and not to San Francisco, which is a consolidated city and county, partaking of the nature of both, except in so far as that subdivision of the state possesses and exercises municipal functions and constitutes a city as distinguished from a county; the power of the Legislature to enact general laws for the government of counties, including San Francisco, remaining unaffected by the section.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 79.*]

4. INFANTS (§ 17*)—JURISDICTION OF COURTS—POWER OF LEGISLATURE.

Const. art. 11, § 8½, provides that, where a city and county government has been merged and consolidated into one municipal government, it shall also be competent in any charter framed by it, under section 8, providing for freeholders' charters, to provide for the manner in which, the time at which, and the terms for which, the several county officers shall be elected or appointed, for their compensation, and the number and compensation of their deputies. *Held*, that the freeholders' charter of the consolidated city and county of San Francisco, not providing for compensation of probation officers of the juvenile court and their assistants, provided for by Act March 8, 1909 (St. 1909, c. 133), who are a part of the machinery of the judicial system of the state, and officers of the superior court provided to enable the court to effectually exercise the special jurisdiction given by the act, the city and county are bound by the provisions of that general act, making such officers' compensation payable from the county treasury.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 17.*]

5. INFANTS (§ 17*)—OFFICERS—POWER OF LEGISLATURE.

Even if the probation officers and assistants be considered deputy sheriffs, yet, under Const. art. 11, § 5, conferring upon the Legislature plenary power to prescribe the duties of sheriffs and other county officers and to create other county offices and provide for the appointment of persons thereto as public convenience may require, in addition to the other officers specifically named therein, and in view of section 8½, which does not provide that the duties of the county officers may be fixed by the charter of the consolidated city and county, the Legislature could create a new county office for performance of the duties of the probation officers, which are different from those usually imposed on sheriffs, and provide for the appointment of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

persons to perform the duties thereof who would be county officers, and, in the absence of any provision in the charter creating such an office or providing compensation therefor, could require such officers' compensation to be paid out of the county treasury.

[Ed. Note.—For other cases, see *Infants*, Dec. Dig. § 17.*]

6. CONSTITUTIONAL LAW (§ 74*)—DISTRIBUTION OF GOVERNMENTAL FUNCTIONS—CONSTRUCTION OF CONSTITUTION.

Const. art. 3, providing that no person charged with the exercise of powers properly belonging to the executive, judicial, or legislative department shall exercise any functions appertaining to either of the others, except as expressly permitted by the Constitution, refers to the respective departments of the state government and not to local, county, and municipal governments which the Legislature might establish; and a superior judge, though he be classed as a person charged with the exercise of powers belonging to the judicial department of the state, in appointing probation officers, as expressly provided by Act March 8, 1909 (St. 1909, c. 133), which officers are not officers of the state government, but minor officers of the local county government, does not exercise functions intended to be described in the Constitution as appertaining to the executive department of the state.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 124; Dec. Dig. § 74.*]

7. COURTS (§ 55*)—JURISDICTION—INCIDENTAL POWERS.

The appointment of persons to discharge acts necessary to be done to enable a court to transact its judicial work in an orderly and expeditious manner, or necessary or even merely convenient to the exercise of its jurisdiction, has always been recognized as a power incidental to the judicial office; and if the Legislature or the Constitution should fail to provide such persons, the court, invested with jurisdiction, would have power to appoint such assistants as might be required.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 55.*]

In Bank. Mandamus by William H. Nicholl against John A. Koster, Auditor of the City and County of San Francisco. Writ granted.

Garret W. McEnerney and J. R. Pringle, for petitioner. Francis V. Keesling, for respondent auditor. Percy V. Long, City Atty., and Jesse H. Steinhart, Asst. City Atty., for respondent city and county of San Francisco.

SHAW, J. This is an original action in this court in mandamus, to compel the defendant, as auditor of the city and county of San Francisco, to approve and allow the demand of the plaintiff for \$125, alleged to be due and payable to him out of the treasury of said city and county, for his salary for the month of April, 1909, as assistant probation officer, under the act approved March 8, 1909. St. 1909, p. 213. This act provides for the care, custody, and maintenance of dependent and delinquent children, defines such children, gives to the superior court of the county jurisdiction to determine whether or not a child is "delinquent or dependent" as de-

fined therein, and to commit such children to a detention home, or to the custody of some reputable person, establishes the office of "probation officer" in every county, and of "assistant probation officers" in some counties, nine being allowed in San Francisco, authorizes the judge of the superior court exercising such jurisdiction to appoint such officers, and fixes the salary of an assistant probation officer in San Francisco at \$125 per month, declaring that the same shall "be paid out of the county treasury of the county for which they are appointed, respectively, in the same manner as the salaries of county officers."

The defendant claims that the provision making the salaries of the probation officers and their assistants payable out of the county treasury is invalid when applied to the consolidated city and county of San Francisco. This claim is based on two propositions: First. That the compensation of the officers of the city and county is a municipal affair, which, by section 6, art. 11, of the Constitution, is governed exclusively by the charter of the city and county, and that the charter has provided fully for such compensation; wherefore the act is not operative upon that point with respect to probation officers in San Francisco. Second, that under the last clause of subdivision 4, § 8½, art. 11, of the Constitution, a special city charter may provide for the election, appointment, and compensation of all officers and deputies, and that, as the charter has made such provision, the general law cannot apply to San Francisco. It is also claimed that the part of the act giving power to the judge of the superior court to appoint the probation officers is void, as giving executive power to a member of the judicial department of the state.

The main purpose of the act is to provide for the care and custody of children who have shown, or who from lack of care are likely to develop, criminal tendencies, in order to have them trained to good habits and correct principles. To accomplish this it gives additional jurisdiction and power to the superior courts of the state and provides the officers necessary for the execution of that jurisdiction and power. It is an exercise of the police powers of the state, through the judicial department. It is a matter which concerns the whole state as much as any other extension of the judicial system. These have been held to be matters of state policy and not "municipal affairs," within the meaning of that term in the Constitution, although the functions of the particular extension of the system may be exercised exclusively within incorporated cities having a freeholders' charter. *Graham v. Fresno*, 151 Cal. 470, 91 Pac. 147; *Fleming v. Hance*, 153 Cal. 165, 94 Pac. 620; *Robert v. Police Court*, 148 Cal. 136, 82 Pac. 838; *Jackson v. Baehr*, 138 Cal. 270, 71

*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

Pac. 167. Under section 1, art. 6, of the Constitution, the judicial power of the state is vested in the various courts there named, and such other inferior courts as the Legislature may establish in any city or town or city and county. By section 5 of the same article, it is declared that the superior courts shall have jurisdiction of all such special cases and proceedings as are not otherwise provided for. The effect of the decisions last cited is that the Legislature has sole authority over the matter of the jurisdiction and powers of the superior and inferior courts of the state, with the single exception of the police courts of cities, which, under section 8½ of article 11, may be established by the freeholders' charter of such cities. It is perfectly obvious, therefore, that the San Francisco charter does not control the provisions of this general law, so far as the law gives additional jurisdiction to the superior court, prescribes the necessary procedure and provides the means of exercising and enforcing that jurisdiction.

The superior courts are established in each of the counties of the state. The consolidated city and county of San Francisco partakes of the nature of a city and a county. It has the powers and performs the functions of both. The section of the Constitution declaring that municipal charters prevail over general laws in municipal affairs relates solely to cities and towns. It has no application to San Francisco, except in so far as that subdivision of the state possesses and exercises municipal functions and constitutes a city, as distinguished from a county. With respect to the powers and functions of a county exercised by San Francisco, as in any other county of the state, that section has no concern. The power of the Legislature to enact general laws for the government of counties, as such, including San Francisco, remains unaffected and unimpaired by that section. It does not make the charter of San Francisco paramount to such laws as to county affairs. The only section of the Constitution which abridges the power of the Legislature in this respect over counties is section 8½, above mentioned. The last clause of that section is as follows: "Where a city and county government has been merged and consolidated into one municipal government, it shall also be competent in any charter framed under said section eight of said article eleven, to provide for the manner in which, the times at which, and the terms for which the several county officers shall be elected or appointed, for their compensation, and for the number of deputies that each shall have, and for the compensation payable to each of such deputies."

In *Fleming v. Hance*, supra, the court, speaking with reference to legislative power to establish inferior courts, said: "It is thoroughly settled by the decisions of this court that the Legislature had the power, prior to the constitutional amendments in question, not only to establish police or other inferior

courts in municipalities, but to provide for the payment of the salaries and office rent of the judges or justices of such courts out of the county treasury. *Jenks v. Council*, 58 Cal. 576; *Bishop v. Council*, 58 Cal. 572; *Coggins v. City of Sacramento*, 59 Cal. 599. It would seem to follow from the views above expressed that in cities governed by charters which have made no provisions for police courts, or other inferior courts exercising similar functions, the Legislature may still, notwithstanding the adoption of section 8½ and the amendment of section 6 of article 11 of the Constitution, provide that the city must pay the salaries of the police judges or city justices created by general law." The principle applied in this passage to inferior courts established by general laws, under section 1 of article 6 of the Constitution, is equally applicable to laws giving additional jurisdiction to superior courts, such as that here involved. The San Francisco municipal charter makes no provision for the compensation of probation officers and their assistants. They constitute a part of the machinery of the judicial system of the state, officers of the superior court provided to enable that court to effectually exercise the special jurisdiction given by the act, concerning which the charter does not speak. Conceding that, if their compensation was provided for in the charter, its provisions would prevail over the provisions of the act, both as to the amount and as to the manner of payment, the necessary conclusion, in the absence of such charter provisions, in view of this principle, is that the act is in force, and that the city and county is bound by its provisions relating to the compensation of the probation officers of the so-called "juvenile court."

The defendant contends that these officers are nothing more nor less than deputy sheriffs, and that as the charter provides for the number and compensation of such deputies, and for an increase in their number when necessary, the attempt of the Legislature to add to their number by the device of calling the additional deputies probation officers is unavailing and without effect. But section 5 of article 11 confers upon the Legislature plenary power to prescribe the duties of sheriffs and other county officers. Section 8½ does not say that the duties of the county officers may be fixed by the charter of a consolidated city and county. That power still remains with the Legislature. The duties to be performed by these probation officers are in some respects not unlike those prescribed for sheriffs by the previous laws on the subject. He was required to "obey all lawful orders and directions of all courts held within his county." Pol. Code, § 4157; St. 1907, p. 402, § 4157. Perhaps the juvenile court jurisdiction of the superior court could have been carried on within the city and county of San Francisco by requiring the sheriff and his deputies to execute its orders and processes in that behalf. But these duties

are of a character not before imposed upon sheriffs. The probation officer is required to inquire into the antecedents, character, family, history, environments, and cause of delinquency of every child brought before the court, to be present in court and represent the interests of such child upon the hearing as to its being a delinquent, to give the court such information and assistance upon that hearing as the court may require, to take charge of the child before and after the hearing if so ordered, and, in some circumstances, he is required to act in a capacity similar to that of a guardian of such child. Section 5 of article 11 gives the Legislature power to create such other county offices and provide for the appointment of persons thereto, as public convenience may require, in addition to the officers specifically named therein. For the performance of these new duties, of a character different from those usually imposed on sheriffs, the Legislature undoubtedly had the power, under this constitutional provision, to create a new county office, and provide for the appointment of persons to perform the duties thereof who would be county officers. And as the city charter neither creates such an office, prescribes the duties thereof, nor provides any compensation for the persons who perform the same, there is nothing in its provisions which can in any way affect the validity and force of the declaration of the act that such compensation must be paid out of the county treasury. The treasury of the city and county of San Francisco is, for that purpose, a county treasury.

The remaining objection is that the appointment of these probation officers is an act of the executive department of the state, and that the judge of the superior court, being an officer of the judicial department of the state, cannot be vested with power to exercise functions belonging to the executive department. Article 3 of the Constitution provides that "no person charged with the exercise of powers properly belonging to one of those departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted." In *People v. Provines*, 34 Cal. 525, this court decided that this provision of the former Constitution, which is in the identical language above given, referred to the respective departments of the state government, and not to the local county and municipal governments which the Legislature might establish. The superior court is one of the courts of the state, and the judge of that court may perhaps be classed as a person charged with the exercise of powers belonging to the judicial department of the state. But the probation officers in question are not officers of the state government. They are minor officers of the local county government. The appointment of such officers is not necessarily a part of the duties or functions of the executive depart-

ment of the state government, according to the system outlined in the Constitution. Perhaps the Legislature, after creating such county offices, could authorize the state executive to appoint persons to fill them, but it is no part of the constitutional scheme of government that such appointments should be made by state officials. The judge of the superior court, when he appoints these probation officers, does not exercise functions intended to be described in the Constitution as those appertaining to the executive department of the state. It is apparent that the act does not conflict with this provision of the Constitution.

Furthermore, the appointment of persons to discharge duties of this character, acts necessary to be done to enable a court to transact its judicial work in an orderly and expeditious manner, or necessary or even merely convenient to the exercise of its jurisdiction, has always been recognized as a power incidental to the judicial office. The Legislature may indeed provide for the appointment of such assistants of the court by the executive department, or by election of the people, and thus relieve the court of the burden of choosing such persons. But if the Legislature or the Constitution should fail to provide such persons, a court invested with jurisdiction would have all the powers necessary to its convenient exercise, and could appoint such assistants as might be required. And doubtless the Legislature can authorize the court to appoint such assistants. Instances are not wanting. The Supreme Court is authorized to appoint bailiffs, secretaries, phonographic reporters, a librarian, and janitors. Code Civ. Proc. § 265; Pol. Code, §§ 769, 2314; Code Civ. Proc. § 47. The district courts of appeal are authorized to appoint a stenographer and a bailiff. Pol. Code, § 758. These powers are not given to the courts by the Constitution. They have never been considered a part of the functions of the executive department of the state. The judges of the superior courts appoint receivers, referees, phonographic reporters, and guardians, each of whom may be said to be assistants of the court, necessary to the exercise of its jurisdiction. The functions of these probation officers are in some respects similar to those of guardians, in others like those of a bailiff or sheriff, and in others not unlike those of an attorney. The appointment of persons to discharge such duties is clearly not a necessary part of the functions of the executive department of the state government.

Indeed, it may be said that the selection of officers is not, per se, abstractly speaking, an exclusive function of the executive department. It may be done by the people by election. The executive department has power to appoint the executive officers pertaining thereto, if no provision for their election is made, and in that case such appointment will be a

part of the duties of that department. But if assistants are required for the judicial or legislative departments, and no provision is made for their election, there is nothing in the Constitution that can properly be construed to require that the appointment of such assistants must be committed to the executive department. There is much force in the concurring opinion of Justice Sawyer in *People v. Provines*, supra, page 541 of 34 Cal., that the appointment of an officer is not strictly or essentially either a legislative, executive, or judicial act, within the meaning of article 3 of the Constitution.

For the reasons here given, we are of the opinion that the appointment of the probation officers in the city and county of San Francisco was lawfully delegated to the judge of the superior court, and that the salary provided by the act is lawfully payable out of the treasury of the city and county.

Let the writ issue as prayed for.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

(157 Cal. 515)

UNITED REAL ESTATE & TRUST CO. v. BARNES, Superintendent of Streets.
(L. A. 2,457.)

(Supreme Court of California. March 30, 1910.)
APPEAL AND ERROR (§ 781*)—QUESTIONS REVIEWABLE—MOOT QUESTIONS.

An appeal from a judgment dismissing a suit to enjoin the sale of land for a delinquent assessment taken after payment under protest to avoid a sale will not be dismissed as presenting a moot question, the questions whether on the reversal of the judgment the superior court may under its equity powers order a refund of the money paid under protest, and as to the liability of the sureties on the undertaking on the issuance of the temporary injunction, involve the merits.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 781.*]

In Bank. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by the United Real Estate & Trust Company against T. L. Barnes, as Superintendent of Streets of the City of San Diego. From a judgment for defendant, plaintiff appeals. Motion to dismiss appeal denied.

Wadham & Pritchard, for appellant. Ward & Wells, for respondent.

BEATTY, C. J. Plaintiff sought to enjoin the defendant from selling its lot in San Diego to satisfy a delinquent assessment for opening a street through an assessment district created by resolution of the city council. The ground of the action was the alleged fraud of the council in adjusting the boundaries of the district, and fraud in the assessment. A temporary injunction was issued some time in 1908. In February, 1909, de-

fendant's demurrer to the second amended complaint was sustained, and, plaintiff declining to amend further, the action was dismissed. Upon the dismissal of the action the defendant again offered the lot for sale, to prevent which plaintiff paid, under protest, the amount of the assessment, penalties, and costs amounting to over \$1,100, and on April 2d took this appeal from the judgment. The motion to dismiss is based upon the ground that the payment of the assessment, etc., put an end to the controversy and leaves only a moot case. It is not, however, by any means clear that it is a moot case, for evidently the claim of the plaintiff to recover the money paid under protest involves the same questions that are involved in this appeal; and it claims that in this action, if the judgment should be reversed, the superior court, as a court of equity, could and should order the defendant to refund the money paid under protest as a condition of being allowed to answer to the merits. This is a serious question—new in this state—which has not been adequately presented in the briefs filed on this motion, and it is too much involved in the merits of the case to be decided on a motion to dismiss the appeal.

There is a question, also, as to the right of appellant to have the judgment of this court on the merits of his case, in view of the liability of his sureties on the undertaking required upon the issuance of the temporary injunction—a question also new in this state—and upon which we prefer to reserve our opinion until the question above stated has been disposed of.

Motion denied.

We concur: ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

(157 Cal. 494)

EDGAR v. McNAIR. (L. A. 2,267.)

(Supreme Court of California. March 30, 1910.)

1. PUBLIC LANDS (§ 37*)—CERTIFICATE OF DESERT LOCATION—TITLE.

Where, in an action for land claimed under a certificate of entry as a desert location, described as the south half of section 33 of a designated township and range, the evidence showed that the description in the certificate was based on the description in a private survey, and that the land in controversy was under the government survey in sections 34 and 35, the certificate showed no title, for the description in the certificate must mean the south half of section 33 as finally located by an official survey of the federal government.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 81; Dec. Dig. § 37.*]

2. PUBLIC LANDS (§ 37*)—DESERT LOCATION—POSSESSION—EVIDENCE.

Where there was no evidence that a claimant to a desert location had possession of it when the adverse claimant entered on the land in September, 1907, or that the claimant was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in possession at any time within one year, before the adverse claimant entered, and it did not appear that any one was ever on the land on behalf of the claimant, except in January, 1906, when some men and teams were employed a little more than a day and a half at work on a small part of the land, there was nothing to support a claim of possession by the claimant previous to the entry of the adverse claimant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 81; Dec. Dig. § 37.*]

In Bank. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by J. H. Edgar against James McNair. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed and remanded.

M. W. Conkling, for appellant. F. C. Farr and R. D. McPherrin (D. S. Ewing, of counsel), for respondent.

PER CURIAM. Plaintiff sued for possession of property in Imperial county described in the complaint as "the south half of section 33, township 15 south, range 15 east, S. B. M." The complaint alleged his quiet, peaceable, and exclusive possession of the land for more than one year; defendant's wrongful entry and taking possession of the property on September 20, 1907; plaintiff's written demand for restoration of the premises, and defendant's refusal to comply with it; and plaintiff's damage in the sum of \$150. The answer denies plaintiff's peaceable or exclusive, or other, possession, or that while plaintiff was occupying, or in possession of it, defendant entered upon said land or any part thereof, or took or held possession of it, or any part of it. Judgment was in favor of plaintiff, and this appeal is from that judgment, and from the order denying a motion for a new trial.

Plaintiff introduced in evidence a receipt showing that he had made a payment of \$80 to the land office on August 21, 1905, for desert land, using the same description as that employed in the complaint. He testified that soon after receiving his certificate of entry from the land office, he caused a small amount of clearing and leveling to be done upon the property, and made arrangements with his brother, a contractor, to prepare the entire tract for irrigation; that in November, 1906, he bought 320 shares of water stock in Imperial Water Company No. 1, and had it applied to this tract. It was in evidence that locating water stock upon a tract of land claimed by a settler under the desert land act was the usual method of complying with the requirement that \$1 per acre each year should be expended for the reclamation of the property.

Defendant's claim was based upon a purchase of the asserted interest of one Hollingsworth, who testified at the trial that he entered upon the land in October, 1904, did a

small amount of work, and in August of the following year performed labor worth \$85. Mr. Hollingsworth also stated that he made application to the land office for a desert location on the property, using the section number employed by the Bothwell survey, but that his application was rejected on the ground that the land was covered by a filing of one McKinney. From this decision he took an appeal, which was still pending when he testified.

There is much learning displayed by counsel for both litigants in discussing the effect of the various surveys in Imperial Valley and the status of claimants asserting rights to property described according to their lines. The Bothwell survey and that called the "Imperial" were private ones. Mr. Edgar used the former in getting the proper description, as he supposed, of his land. While it was asserted at the trial that the United States land office recognized the Bothwell survey, there is nothing to indicate that Edgar explained to the registrar how he got his description. The land is described as the S. ½ of section 33, township 15 S., range 15 E., S. B. M. This, of course, must mean the south half of that section as finally located by the approved official survey of the United States. One of the witnesses for defendant testified with reference to the property in dispute: "The land in question by Imperial Land Company survey would be the N. W. ¼ of section 36, and the N. E. ¼ of 35. By the Henderson survey it would be the E. ½ of the N. E. ¼ of 34 and the N. W. ¼ of 35 and the W. ½ of the N. E. ¼ of 35; that is, practically. I mean by the Henderson survey the township survey recently made by United States Deputy Surveyor A. A. Henderson, the most recently approved government survey." It will thus be seen that by the Henderson survey—the only official admeasurement of that land—the property in dispute is part of sections 34 and 35. The respondent's certificate, therefore, purports to give him title to land of which he has never had or claimed possession—i. e., the land which the Henderson survey would describe as the south half of section 33—but the land which is the subject of this litigation is placed by the official and conclusive survey, that of Henderson, in parts of sections 34 and 35. Edgar, therefore, gains nothing as to this land by his certificate, and has shown no title. He is forced to rely wholly on an asserted previous possession. The evidence is not sufficient to support a finding that Edgar had such possession of the land, or that he held it when McNair entered upon the property. Nor is it shown that he was in possession at any time within one year before McNair entered. W. A. Edgar, respondent's brother, did some work upon a small part of the land in controversy in January, 1906. Some men and four teams were em-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ployed a little more than a day and a half at that work. It does not appear that any one was ever on the land at any other time on Edgar's behalf. Such a showing was insufficient to support a claim of a possession previous to that of appellant.

The judgment and order are reversed, and the cause remanded.

BEATTY, C. J., does not participate in the foregoing.

(157 Cal. 442)

HORSESHOE PIER AMUSEMENT CO. v. SIBLEY et al. (L. A. 2,490.)

(Supreme Court of California. March 28, 1910.)

1. CORPORATIONS (§ 76*)—STOCK—SUBSCRIPTIONS—VALIDITY.

A person could agree to pay in certain installments a subscription to a trustee for stock in a corporation to be subsequently formed, after a specified amount had been subscribed for such purpose, upon demand therefor, payment not depending upon the creation of the corporation, and would be liable thereon, regardless of any obligation due to the relation of stockholder, and hence the fact that such person's name was not included in the articles of incorporation would be no defense.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 215; Dec. Dig. § 76.*]

2. PARTIES (§ 6*)—PLAINTIFF—REAL PARTY IN INTEREST.

Where a person contracted with a trustee to buy stock in a proposed corporation, the agreement being solely for the benefit of such corporation, the promise was in legal effect to pay to the corporation when organized, and, though the corporation was not named in the contract, no formal assignment thereof from the trustee to the corporation was necessary to enable the corporation to sue thereon; it being the real party in interest and entitled to sue under the express provisions of Code Civ. Proc. § 367, though the trustee, being a trustee of an express trust, might also sue under the express provisions of section 369.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 6-8; Dec. Dig. § 6.*]

3. CORPORATIONS (§ 90*)—STOCK—SUBSCRIPTIONS—ACTIONS—DEFENSES.

In an action on a contract to buy \$1,500 worth of corporate stock and pay therefor upon calls for 50 per cent. of the amount subscribed, it was no defense that the calls were for a less sum than 50 per cent., the subscriber not being prejudiced thereby; nor, where such subscriber had voluntarily paid all but \$700 of the subscription, could she escape liability on the ground that such balance was less than 50 per cent. of the whole sum subscribed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 386; Dec. Dig. § 90.*]

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the Horseshoe Pier Amusement Company against Luella Sibley and husband. From a judgment for plaintiff and an order denying a new trial, defendants appeal. On rehearing after a judgment of affirmance in the District Court of Appeal. Affirmed on opinion of the Court of Appeal.

Tanner, Taft & Odell, for appellants. Force Parker and Anderson & Anderson, for respondent.

MELVIN, J. The judgment and order of the lower court in this case was affirmed by the District Court of Appeal and this court granted a rehearing in order that we might further consider the effect upon the contract, which was the basis of the action, and upon the rights arising therefrom, of the organization of the plaintiff corporation without including the name of Luella Sibley in the list of subscribers. A further study of the matter has convinced us that while, under certain circumstances, such action might operate as an estoppel against the corporation, preventing it from pursuing its claim that the defendant was a stockholder, this is not a case for the application of the doctrine of estoppel announced in *Monterey & Salinas Valley R. R. Co. v. Hildreth*, 53 Cal. 123. In addition to that which is written upon this subject in the opinion of the District Court of Appeal, it might be added that Mrs. Sibley, who made certain payments under the contract to the corporation long after its organization, is herself perhaps estopped from asserting that she was not a subscriber to the capital stock. If the action were reversed and she were suing for the delivery of stock, the corporation which had accepted payments from her under her contract could not successfully defend upon the ground that her name did not appear upon the list of subscribers to the capital stock. Such payments and their acceptance evidence a mutual obligation binding upon both parties. Perhaps this phase of the matter could not be considered under the present form of the pleading; but, if a new trial were ordered, doubtless the court would permit such proper amendments as would justify a ruling upon the result of her voluntary payments to a corporation from which she had demanded no stock. We are satisfied, however, with the opinion of the District Court of Appeal, which we hereby adopt:

"Defendants appeal from a judgment and an order of court denying their motion for a new trial. George Sibley is made a party defendant by reason of the fact that he is the husband of Luella Sibley, also known as Mrs. George Sibley.

"The action is founded upon a certain agreement alleged to have been signed by defendant, as follows: 'I hereby subscribe \$1,500 to be used in the construction and fitting out of a Pleasure Pier running from or near the foot of Pier avenue to or near the foot of Marine street, in the cities of Ocean Park and Santa Monica, Cal., and amusement buildings and structures connected therewith; and I hereby agree to pay to the Ocean

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Park Bank, trustee, or its assigns, upon demand, in two payments of 50 per cent. each, at any time after the sum of \$40,000 (including any subscriptions) has been subscribed for said purpose, the second payment, however, not to be called for until at least 60 days after demand made for the first. It is expressly understood that this is a subscription for stock in a corporation to be hereafter formed to build, maintain, and operate said pier, buildings, and structures; and that I am to receive stock in said corporation when formed in the proportion that my said subscription bears to the total capitalization of such corporation. Mrs. Geo. Sibley.'

"The court found: That defendant Mrs. George Sibley executed and delivered this agreement to the Ocean Park Bank, as trustee, for the use and benefit of plaintiff, which was thereafter incorporated and created pursuant to and in consideration of said agreement and a number of similar agreements theretofore executed and likewise delivered. That plaintiff is the corporation referred to in said agreement as the corporation to be hereafter formed to build, maintain, and operate the pleasure pier and structures contemplated in said agreement. That in accordance with the terms of said agreement plaintiff did construct and fit out said pleasure pier and is now the owner and in the actual possession, control, and operation thereof; that more than \$40,000 had been subscribed for the purpose contemplated in said agreement; that calls were made for the amount of said subscriptions as follows: In November, 1905, 20 per cent.; February, 1906, 30 per cent.; May, 1906, 25 per cent.; June, 1906, 25 per cent. That defendant paid \$800 on account of the subscription made in said agreement, and, although demand therefor was made, refused to pay the remainder thereof, amounting to \$700. That at the time of making the demand for said \$700, the balance of defendant's subscription, plaintiff tendered to her the amount of capital stock in said corporation which her subscription bore to the total capitalization thereof. That no representations other than contained in said agreement were made to said defendant for the purpose of inducing her to sign the same.

"At the trial it was stipulated that the name of defendant Sibley did not appear in the articles of incorporation of said company as one of the stockholders thereof, nor in any of the papers or proceedings relating to the organization of the company, or subsequent increase of the capital stock thereof. Notwithstanding this fact, the court found that by virtue of said agreement defendant Sibley was a subscriber to the capital stock of the corporation.

"Appellant's chief contention is that this finding is not supported by the evidence, and that by reason of such stipulation plaintiff is estopped from claiming defendant to be a subscriber to the capital stock, for the rea-

son that her name did not appear as a stockholder in the articles of incorporation. In support of such claim appellant cites the case of *M. & S. V. R. R. Co. v. Hildreth*, 53 Cal. 123. In that case the action was by a corporation to recover assessments levied upon stock alleged to have been owned by the party sued. The only point involved therein was the defendant's obligation to pay the assessments levied upon the stock, the ownership of which he disclaimed. In the case at bar, however, the obligation of defendant Sibley is not founded upon her ownership of stock in plaintiff corporation, nor upon any assessment levied thereon in accordance with the provisions of section 332 of the Civil Code; but such obligation rests solely and alone upon the written agreement and promise to pay the sum subscribed to be used in the construction of the pleasure pier and amusement buildings and structures connected therewith. Clearly, the contract is a valid one. Under the terms thereof, the payment of the amount subscribed did not depend upon the creation of the corporation; but she agreed to pay the same to the trustee named at any time after \$40,000 had been subscribed for such purpose, upon demand therefor, in installments of 50 per cent. each, the second installment being payable not less than 60 days after the first payment. While she was entitled to the stock, delivery of which was tendered her, the question of her membership therein is wholly foreign to the controversy; plaintiff's right to recover, as we have seen, resting upon an express promise to pay, not upon an obligation due to the relation of stockholder. *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123; *San Joaquin L. & W. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349. 'A stockholder may expressly agree to pay the amount of his subscription immediately, or at stated times, and thus relieve the corporation of the duty of making calls. He will be liable to pay upon such contract according to its terms.' *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741; *California Southern Hotel Co. v. Calender*, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99.

"Appellant also insists that, in the absence of an assignment of the agreement by the trustee to whom the subscription was made payable, plaintiff cannot maintain suit to enforce payment. In view of the findings heretofore referred to, and the further finding that said agreement 'was made solely for the benefit of plaintiff,' no formal assignment was necessary. That plaintiff was not named in the agreement is immaterial, for, notwithstanding such fact, it clearly appears that the subscription was made for its benefit and in contemplation of its creation. 'In legal effect, the promise of defendant was to pay to the plaintiff corporation when organized.' *Marysville, etc., Co. v. Johnson*, 93 Cal. 538, 29 Pac. 126, 27 Am. St. Rep. 215. Plaintiff was the real party in in-

terest, and therefore could maintain the action. Code Civ. Proc. § 367; *Western Development Co. v. Emery*, 61 Cal. 611. Its right in this respect is unaffected by the fact that the Ocean Park Bank, as trustee of an express trust, might also, by virtue of the provisions of section 369, Code Civ. Proc., have maintained a like suit.

"There is no merit in the contention that the calls or demands as made were for a less sum than 50 per cent. of the amount subscribed. Defendant could not be prejudiced by such fact. Moreover, she, having voluntarily paid all of her subscription except a balance of \$700, is in no position to insist that she be released from her obligation upon the ground that such balance is less than 50 per cent. of the whole sum subscribed.

"A number of objections are urged to the rulings of the court in admitting testimony; but they are largely based upon appellant's theory that the contract was nonenforceable by reason of the fact that defendant's name was omitted from the articles of incorporation, and are fully answered in discussing that point.

"There was no abuse of discretion on the part of the court in reserving its decision upon defendant's motion for a nonsuit. It was properly denied.

"A careful examination of all the points to which our attention has been called in appellant's brief discloses no prejudicial error, and, as said by this court in *Los Angeles National Bank v. Vance*, 98 Pac. 58, 'upon every principle of right and justice, as well as upon authority,' the judgment and order should be, and are, affirmed."

We concur: SLOSS, J.; ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.

(157 Cal. 481)

CRAIG v. SUPERIOR COURT OF SAN JOAQUIN COUNTY et al. (Sac. 1,741.)

(Supreme Court of California. March 29, 1910.
Rehearing Denied April 27, 1910.)

1. MUNICIPAL CORPORATIONS (§ 155*)—OFFICERS—REMOVAL—JURISDICTION.

Under Const. art. 20, § 16, relating to the terms of office of any officer or commissioner, which was amended on November 6, 1906, by adding the proviso that, in case of any officer or employé of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the term of office or dismissal of such officer shall control, where the provisions of a freeholders' charter provide for the removal of municipal officers by the municipal authorities, the superior court has no jurisdiction to remove such officers under Pen. Code, § 758, and the following sections, providing for the removal of civil officers, otherwise than by impeachment, for certain misdemeanors.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 342-345; Dec. Dig. § 155.*]

2. MUNICIPAL CORPORATIONS (§ 185*)—OFFICERS—POLICE DEPARTMENT—REMOVAL—AUTHORITY.

Const. art. 11, § 8½, provides that freeholders' charters may provide for the regulation and government of boards of police commissioners and the municipal police force. *Stockton City Charter* (St. 1905, p. 851), § 131, places the police and fire department under a board of three commissioners elected by the city council; section 135 (page 851) provides that the officers and members of such departments shall be appointed by the board, and prohibits removals except for cause established after due investigation and trial as therein provided. Section 136 (St. 1888, p. 610) authorizes the board to hear all charges against any officer or member and to take such action thereon as is most conducive to the efficiency of the departments, and section 143 (St. 1905, p. 852) makes any member or employé guilty of any legal offense, inefficiency, etc., liable to reprimand, suspension, or dismissal. Charter, § 32, defines the duties of the mayor and requires him to lay before the council or city or district attorney any misconduct or neglect of official duty which he may discover. *Held*, that the charter provisions contemplated that the police and fire commissioners should have exclusive authority to dismiss members of the police and fire departments pursuant to such provisions, so that the superior court had no jurisdiction of proceedings to remove a policeman of the city of Stockton under Pen. Code, § 758, and the following sections, providing for the removal of civil officers for certain misdemeanors in office.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 497; Dec. Dig. § 185.*]

In Bank. Application for writ of prohibition, prayed to be directed against the Superior Court of San Joaquin County and Hon. W. B. Nutter, Judge thereof. Writ issued.

Clary & Louttit, for petitioner. Geo. F. McNoble and Max Grimm, for respondents.

ANGELLOTTI, J. Plaintiff was at the time of the institution of this proceeding captain of police and a policeman of the city of Stockton. The object of the proceeding was to obtain a writ of prohibition restraining the superior court of San Joaquin county from trying him upon an accusation presented to said court by the grand jury of San Joaquin county under the provisions of section 758 et seq. of the Penal Code, providing for the removal of civil officers otherwise than by impeachment, charging him with certain misdemeanors in office. The sections referred to provide for an accusation in writing made to the superior court by the grand jury against any district, county, township, or municipal officer, for wilful or corrupt misconduct in office, notice to the accused, a trial by jury, and, in the event of conviction, a judgment "that the defendant be removed from office." The main claim of plaintiff and the only one that it will be necessary to consider is that, by reason of certain provisions of the Stockton charter, the exclusive jurisdiction in the matter of the removal from office of officers, members, and employes of the police and fire departments of the city

*For other cases see same topic and section NUMBER in Dec. & Am. D. gs. 1907 to date, & Reporter Indexes

of Stockton is with the board of police and fire commissioners of that city, and that the superior court is therefore without jurisdiction in the matter of this accusation.

In the case of Coffey v. Superior Court, 147 Cal. 525, 82 Pac. 75, a similar contention was made on behalf of the chief of police of the city of Sacramento, and it was held that the provisions of the Sacramento charter were not such as to show an intention to confer exclusive jurisdiction on the city trustees, the official body vested in that city with the control of the police department; the court saying: "There is nowhere in the charter any provision which in terms confers exclusive jurisdiction upon the board of trustees to proceed against and remove municipal officers, nor is there apparent in any of the charter provisions an intention that its provisions should supersede the provisions of the general law as found in the sections of the Penal Code relative to the removal of delinquent officials from office."

Subsequent to the decision in the Coffey Case, viz., on November 6, 1906, section 16 of article 20 of the state Constitution, relating to terms of office, was amended by adding the following proviso: "Provided, however, that in the case of any officer or employé of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employé shall control." This amendment was in line with what was declared in *Dinan v. Superior Court*, 6 Cal. App. 221, 91 Pac. 808, to be "the policy of the state, and the tendency of the late decisions and constitutional amendments to broaden the scope of municipal corporations governed by charters as to their own affairs, to allow them to govern themselves, and to prescribe their own rules and regulations as to affairs which are purely municipal." There can be no serious question that the object of this constitutional provision was to make it clear that provisions of a freeholders' charter should control in the matter of the dismissal from office of any officer or employé of a municipality, and it was very properly recognized in the opinion of the learned District Court of Appeal in this proceeding that such provisions "would not control" if such an officer or employé can be removed by the superior court under the sections of the Penal Code heretofore referred to, where the charter provisions contemplate that the whole matter of removals shall be in the hands of the appropriate municipal authority. The question, then, is whether the charter provisions of the city of Stockton do so contemplate.

It is to be borne in mind that section 8½ of article 11 of the Constitution provides that it shall be competent to provide in freeholders' charters, "(3) for the manner in which, the times at which, and the terms for which the members of the boards of police commissioners shall be elected or appointed; and for

the constitution, regulation, compensation, and government of such boards and of the municipal police force." By the charter of Stockton, the police and fire departments are placed under the management of a board of three commissioners, elected by the city council. Section 131, Charter; St. 1905, p. 851. Section 135 of the charter provides: "The officers, members and employés of the police and fire departments shall be appointed by the board, but no appointment or removal shall be made for political purposes, nor shall any removal be made except for cause established to the satisfaction of the board after due investigation and trial, as herein provided." St. 1905, p. 851. By section 136 of the charter (St. 1889, p. 610) the board is invested with power to hear and determine all complaints of misconduct, inefficiency, "or other charges" against any officer, member, or employé, and "to take such action thereon as shall be most conducive to the maintenance, discipline and efficiency of said departments," and section 143 (St. 1905, p. 852) provides that any officer, member or employé "guilty of any legal offense, inefficiency," etc., "shall be liable to be punished by reprimand, forfeit of pay for a specified time, suspension or dismissal from the department of which he may be an officer, member or employé."

It appears to us that these provisions very clearly show the intention that the matter of employment, retention, and dismissal of officers, members, and employés of the police and fire departments of the city of Stockton shall be in the hands of the police and fire commissioners of that city, their control thereof to be exercised in accord with the provisions of the charter, free of any interference at the hands of any other authority as long as their acts are in accord with the charter provisions. Not only are they given the management of those departments and expressly invested with power to hear and determine all complaints for any cause, and to take such action as, in their judgment, shall be most conducive to "the maintenance, discipline and efficiency of said departments," including not only the removal of the offender (which is the only penalty under the Penal Code provision), but also the imposition of a lesser penalty, such as suspension, forfeit of pay, or reprimand, if they deem it conducive to the best interests of the department to which the offender belongs, but it is further expressly explicitly provided that no "removal" of any officer, member, or employé shall be made "except for cause established to the satisfaction of the board, after due investigation and trial." It would be difficult to express more clearly than is done by these various provisions that the commissioners shall be the sole judges in the matter of complaints against any officer, member, or employé of these departments, involving simply the question whether he should be removed from his office or employment. Of course, as was said by the District Court of Appeal, in

Dinan v. Superior Court, supra, if any such officer or employe should commit an offense against the laws of the state, "he would be subject to trial under such laws," and to punishment thereunder; but the provisions of the Penal Code here involved "deal only with the removal from office for misconduct in office"—a matter which, under our Constitution, so far as officers and members of the police department of the municipality are concerned, may properly be regulated by the provisions of a freeholders' charter of such municipality.

The provisions of the Sacramento charter involved in *Coffey v. Superior Court*, supra, were essentially different from those of the Stockton charter that we have referred to. The general intent to invest exclusive control in the municipal authorities was nowhere apparent, and the charter was entirely destitute of any provision to the effect that officers or members of the police department should not be removed except for cause "established to the satisfaction of the board." Under these circumstances a section of the Sacramento charter relative to the duties of the mayor, requiring him, among other things, to lay before the "board of trustees, city attorney, or district attorney" any official defalcation, willful neglect of duty, or official misconduct of an officer which he may discover, "in order that the public interests may be protected and the person in default be proceeded against according to law," was given some weight in determining whether it was intended by the charter framers that the jurisdiction of the board of trustees in the matter of removal should be exclusive. A very similar provision is to be found in section 32 of the Stockton charter, defining various duties of the mayor, it being provided that such information shall be laid before "the council, city attorney, or district attorney," and much reliance is placed on this provision by counsel representing the defendants. But we think that, in view of the presence in that charter of the other provisions to which we have referred, provisions which substantially, in the language of the Coffey Case, "in terms confer exclusive jurisdiction upon" the board of police and fire commissioners in the matter of removals from the police and fire departments, this provision is not important in the consideration of the question before us. There is ample room for the application of this provision without applying it to the matter of removal of members of the police and fire departments, to which matter, in view of the other provisions, it apparently has no application.

The case before us, in its material facts, does not differ from the case of *Dinan v. Superior Court*, 8 Cal. App. 217, 91 Pac. 806, in which the superior court of the city and county of San Francisco was restrained from trying a similar accusation against the chief

of police of that city and county, on the ground that the charter thereof provided the exclusive method in such cases. There is no substantial difference between the provisions of such charter and the charter of Stockton in regard to such matters. The San Francisco charter gave the same ample powers to the police commissioners as does the Stockton charter to the police and fire board, and it was provided that "no member of the department shall be subject to dismissal for any cause, * * * except after a fair and impartial trial before the commissioners." This provision occupied the same relative position in the charter of San Francisco as does the provision against removal in the Stockton charter, being in that portion thereof devoted to the powers and duties of the commissioners invested with control of the police department. It means the same thing as does the Stockton provision. We entirely approve the views expressed by the District Court of Appeal in that case.

From what we have said, it follows that the superior court of San Joaquin county is without jurisdiction to entertain the accusation against petitioner.

Let a peremptory writ of prohibition issue as prayed.

We concur: SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

(157 Cal. 487)

BRIARE v. SUPERIOR COURT OF COUNTY OF SAN JOAQUIN et al. (Sac. 1,743.)

(Supreme Court of California. March 29, 1910.)

In Bank. Application for writ of prohibition, prayed to be directed against the Superior Court of the County of San Joaquin, and the Honorable Frank H. Smith, Judge thereof. Writ issued.

Ashley & Neumiller, for appellant. Geo. F. McNoble, Dist. Atty., for respondents.

PER CURIAM. This is an application for writ of prohibition. The questions involved are the same as those involved in *Craig v. Superior Court et al.* (Sac. No. 1,741, this day decided) 108 Pac. 310. Upon the authority of that case, the writ must issue.

Let a peremptory writ of prohibition issue as prayed.

(157 Cal. 497)

PROVIDENCE JEWELRY CO. v. NAGEL (L. A. 2,448.)

(Supreme Court of California. March 30, 1910.)

1. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—RULINGS AS TO EVIDENCE.

The admissibility of evidence under special averments in the answer will not be considered on appeal, where the evidence objected to was admissible under the general issue pleaded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4154; Dec. Dig. § 1050.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

2. SALES (§ 52*)—SALE OR CONSIGNMENT FOR SALE—EVIDENCE.

Evidence held to justify the finding that the transaction between the parties was a consignment of goods for sale, and not a sale of the goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 137; Dec. Dig. § 52.*]

3. EVIDENCE (§ 434*) — PAROL EVIDENCE — FRAUD.

Where defendant claims that the contract under which plaintiff claims he sold goods to defendant was procured by fraud, evidence is admissible to show the circumstances under which the contract was procured.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2014; Dec. Dig. § 434.*]

Sloss, J., dissenting.

In Bank. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by the Providence Jewelry Company, a corporation, against A. Nagel. Defendant had judgment, and plaintiff appeals. Affirmed.

F. C. Spencer, for appellant. Tipton & Callor, for respondent.

PER CURIAM. The district court of appeal for the second district having failed to agree on a decision in this case it was certified to this court for determination. The following opinion written by Justice Allen of that court and concurred in by Justice Taggart, is approved and adopted as the opinion of this court:

"Appeal by plaintiff upon a bill of exceptions from a judgment rendered in favor of defendant. The action was one for the price and value of merchandise of the market value of \$379.30 alleged to have been sold and delivered by plaintiff to defendant. The answer denies the sale or the acceptance of the goods upon any promise or agreement to pay the said sum of money or any price or at all.

"We forbear any discussion of questions raised as to the sufficiency of the evidence to support certain averments in an answer denominated a separate and distinct answer, for the reason that all of the testimony adduced upon the trial, the admissibility or the effect of which is questioned by the specifications, was admissible under the general issue raised by the denial. Wendling, etc., Co. v. Glenwood, etc., Co., 153 Cal. 411 [95 Pac. 1029]. Upon the trial of the action, the court found that the allegations in the plaintiff's complaint which averred the sale and delivery of the goods under a contract of purchase were untrue. Appellant specifies as error the incorrectness of this finding. The record discloses that upon the trial plaintiff offered in evidence an order received by plaintiff for the shipment of the goods mentioned. The essential portions of this order were as follows:

"Following is a list of goods for our \$379.30 order:

"On condition that the purchaser complies with all the terms of this order at the time and in the manner stated hereon, promptly meets any obligations entered into with the Providence Jewelry Company, uses ordinary diligence in the sale of these goods, will sell nothing at a less profit than is usually charged on jewelry, and will make out and send to the Providence Jewelry Company, by mail quarterly, a report showing the goods on hand, at which time he will take advantage of the exchange privilege herein set forth, the Providence Jewelry Company guarantees that the gross profits from the sale of the goods purchased herein shall be fifty per cent. of the amount of this order, and if the profits do not amount to fifty per cent. as above provided, the Providence Jewelry Company will buy back and pay the original invoice price for all goods remaining on hand unsold, or will pay by Chicago or New York draft a sufficient amount to make up the deficiency, at the expiration of this agreement. Terms of payment: Six per cent. discount for cash in fifteen days, or one-fourth of the amount due in six months, one-fourth in eight months, one-fourth in ten months, one-fourth in twelve months, without interest. The above terms of credit will only be allowed if acceptances to our order are given within fifteen days from date of invoice. Otherwise terms are net cash 30 days. Same terms shall apply on all re-orders for these goods.' Here follows an itemized statement of the goods, with the catalogue price, occupying several pages of manuscript, followed by the following:

"The Providence Jewelry Co. will replace free of charge any article not wearing satisfactorily. Exchange privilege. Any goods contained in this order may be exchanged for different styles, patterns or other articles purchased in this order, any time within three years and after compliance with terms of settlement. The Providence Jewelry Co. will send purchaser of this order 500 advertising cards, 500 commutation cards and 100 silver spoons, wild-rose pattern, extra plate, for advertising purposes to be distributed as follows: Purchaser shall furnish names of 100 persons, to each of whom the Providence Jewelry Company will mail three advertising cards and an order on purchaser for one spoon; each order when properly filled out with the name and address of three persons, to each of whom the holder of the order has delivered an advertising card, shall be good for one spoon at purchaser's store. Additional spoons will be given by purchaser with every \$10 purchase of merchandise at his store. Purchaser agrees to account for spoons by sending all receipted orders to the Providence Jewelry Co. Date Feb. 1, 1907.

"Providence Jewelry Co., Rock Island, Ill.

"Gentlemen: On your approval of this order deliver to us at your earliest convenience

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

F. O. B. transportation companies, either at distributing point or at factory point, the above described goods, and no others, on the terms and conditions herein set forth, and no others, all of which I have read and found complete and satisfactory.

"[Signed]

A. Nagel.

"Providence Jewelry Co. will send their bond in the sum of \$300 to the merchant before he commences selling their goods."

"It further appears in evidence upon the part of plaintiff that under this order the goods were shipped to defendant, and the bond of \$300 conditioned upon the faithful performance of the contract was forwarded by plaintiff on February 7th; that on February 21st Nagel notified the company that the jewelry had arrived; that he had sent the names of the families some days ago; that he was in a dilemma as to whether he had made a mistake, and, 'if so, I am in for it.' Thereafter plaintiff wrote defendant a letter the effect of which was to notify him that plaintiff would insist upon the contract as one of sale. It further appears that the acceptances mentioned in the order were forwarded to Nagel, who, in reply, notified the plaintiff that he refused to sign the acceptances.

"There was evidence offered upon the part of defendant tending to show that this written order offered in evidence by plaintiff was signed under the following circumstances: That the representative of plaintiff called at defendant's place of business and proffered to put in a stock of jewelry in a case about four feet long; that he would be around every three months and check up the goods that had been sold by defendant and replace them with new goods; that he would send a case so that when the defendant got ready to turn the jewelry over, in case he did not want to handle the jewelry, they could pay him back the freight; that he was induced to sign the order because the representative told him he had nothing to lose in this proposition, that plaintiff carried the stock; that the representative had no samples of the goods, nothing but a catalogue; that this representative made the selection of all the goods included in the order and inserted the list in the order after it was signed and delivered; that, when defendant received the goods, he did not open the package, but shipped it shortly thereafter by express to the plaintiff, who refused to receive it from the express company, in whose hands it still remains subject to plaintiff's order. This he did for the reason that he could see from the correspondence that they claimed it was a sale instead of a commission proposition; that when they sent him the four acceptances he then discovered that it was an attempt to effect a sale; that he also returned the guaranty bond. Another witness in behalf of defendant, who was present, testified that the representative of plaintiff told the defendant that, if he did not want to keep the business

up, he could return the goods; that the case in which the goods were held and the goods all would belong to plaintiff and that Nagel was to pay only for just what he sold; that the representative was to come around every three months collecting and everything that was tarnished he would replace with new goods; that the representative picked out the goods, and said, if they did not sell well, they would make a change, because they wanted the goods sold; that on these representations he handed the paper introduced by plaintiff as the order, but then incomplete, to Nagel, and told him to sign it so that they would ship the goods, and they would put them in and it would be practically the same as on commission; that Nagel signed the paper and handed it back to him, 'and I don't think he had time to read it. He just wrote his name across the back and handed it to him.'

"We are of opinion that it cannot be said that there was no testimony to justify the findings of the court, that this transaction did not amount to a sale. The written order upon its face would indicate that an absolute sale was not intended; in fact, it is so adroitly worded that the true intent can scarcely be gathered from the terms of the instrument. It is such a paper as might well trap the unwary, and, when its peculiar terms are considered in connection with the testimony offered by the defendant that it was executed under a direct representation and statement that the title to the goods did not pass and that they were to be received by defendant and sold upon commission, there is sufficient to warrant the finding of the court.

"The objection interposed by plaintiff to oral testimony in relation to the circumstances under which the order was signed were not well taken. As said in *Maxson v. Llewellyn*, 122 Cal. 199 [54 Pac. 734]. The receipt of such testimony is not to vary or contradict the writing, 'but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it, that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.' The testimony of the defendant's witnesses which was accepted by the court as true clearly indicates that the minds of the parties did not meet, that there was in fact no contract between them as appears in the written order, and that the same was executed under such circumstances as would estop plaintiff from claiming any benefit thereunder. It seems clear that a fraud was practiced upon defendant by this representative of plaintiff, and that his signature to the order was procured by misrepresentation and fraud sufficient to vitiate the instrument. The defendant had a right to rely upon the representations of

plaintiff's agent that the written instrument presented for signature was but an order to send the goods for sale on commission, and plaintiff, in an action between the original parties, is not in a position to say that, having practiced this fraud, defendant must still be bound because he did not distrust plaintiff and signed without an independent examination. We do not think the rule that the injured party must show that he has availed himself of the means of information existing at the time of the transaction before he will be heard to say that he was deceived by the misrepresentations of the other party should be carried to the extent of holding that, under the circumstances of this case, defendant should be bound by a written instrument at variance with the terms of the actual agreement, and which he was induced to sign by misrepresentation upon the part of plaintiff. *Los Angeles, etc., Co. v. New Liverpool Salt Co.*, 150 Cal. 27 [87 Pac. 1029]. We are not prepared to say that the evidence showing fraud in this case was not clear and convincing. The trial court appears to have given it that effect and with its judgment we are content.

"Judgment affirmed."

SLOSS, J., dissents. BEATTY, C. J., does not participate in the foregoing.

(157 Cal. 472)

Ex parte ROBERTS. (Cr. 1,576.)

(Supreme Court of California. March 29, 1910.)

1. CRIMINAL LAW (§ 13*)—STATUTORY PROVISIONS—CONSTRUCTION.

Where a statute begins, "all persons," etc., and proceeds to state several apparently independent offenses and sets off each clause defining such offenses by appropriate punctuation, ending with a provision imposing a punishment for its violation, the language relating exclusively to each offense is not affected by that describing the other offenses; each being construed as if it stood alone, and was read in connection with the general words applying to all the offenses created.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 13, 14; Dec. Dig. § 13.*]

2. GAMING (§ 72½,* New, vol. 8, Key No. Series)—OFFENSES—RECEIVING MONEY AS STAKEHOLDER—STATUTORY PROVISIONS.

Pen. Code, § 337a, makes every person who receives, registers, records, or forwards any money wagered by or for any other person or sells pools upon the result of any contest of skill, speed, etc., of man or beast or upon any chance or contingency, or who, being the owner, lessee, or occupant of any building, etc., knowingly permits the same to be used for any of those purposes or therein employs any device for recording wagers, etc., or becomes a custodian for gain, hire, or reward of any money wagered upon such result, punishable by imprisonment. *Held*, that the first clause created a separate offense and forbade any person from receiving money wagered by or for another upon any contingent event.

3. GAMING (§ 83*)—PROSECUTIONS—COMPLAINT—CONSTRUCTION.

A complaint charging that accused without consideration or reward became the custodian of

\$10, then and there wagered by two others with each other upon the result of a horse race, only charged an offense under the first clause of the statute, and not under the last clause punishing one who as owner, etc., permits any room to be used for the purposes stated in the first clause.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. § 219; Dec. Dig. § 83.*]

4. GAMING (§ 63*)—STATUTES—REPEAL—INCONSISTENT CLAUSE.

Since the first clause of the statute requires that the person receiving the money must have received it as custodian for the parties to the wager in order to constitute an offense, irrespective of whether the stakeholder owns or leases a place for such business or receives a reward, while the second clause in effect permits the receipt of wagered money, if not received for gain in some of the places named therein, the latter clause is inconsistent with part of the first clause forbidding the receiving of wagered money as a stakeholder under any circumstances, so as to make it inoperative, under the rule that, where a later clause in a statute is irreconcilably inconsistent with a preceding clause, the later clause repeals the former as far as inconsistent therewith.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. § 120; Dec. Dig. § 63.*]

In Bank. In the matter of the application of W. W. Roberts for a writ of habeas corpus. Writ granted, and petitioner ordered released from custody.

Carroll Cook and Henry Ach, for petitioner. U. S. Webb, Atty. Gen., and Raymond Benjamin, Deputy Atty. Gen., for respondent.

SHAW, J. The petitioner was arrested upon a complaint which it is claimed alleges a violation of section 337a of the Penal Code. He contends that it does not charge any public offense whatever, and upon that contention he has sued out a writ of habeas corpus. It is admitted that no crime is charged against him, unless it be under the aforesaid section.

The charge in substance is that, without consideration, gain, hire, or reward, at some place in San Francisco not described, he became the custodian and depository of \$10 in money, then and there bet and wagered by two other persons with each other, upon the result of a horse race then about to take place. Although comprising but a single sentence, section 337a of the Penal Code creates many distinct offenses. It begins by the phrase "every person," and each subsequent clause is connected therewith by appropriate punctuation. It is written in the disjunctive throughout, and the several offenses therein described are apparently as distinct and independent of each other as if they had been enacted in separate sections. In general, when such form of expression is used, the effect of the language pertaining exclusively to each offense described is not affected or modified by the words used solely in describing the other offenses, but the description of each is to be construed as if it stood alone, and were read in connection with the general words applying to all. The section contains

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

two clauses which it is necessary to compare and construe, in order to determine the sufficiency of the charge. Separated from the other parts of the section and placed in paragraphs in the order in which they occur, they are as follows: "Every person * * * who receives, registers, records or forwards, or purports or pretends to receive, register, record, or forward, in any manner whatsoever, any money, thing or consideration of value, bet or wagered, or offered for the purpose of being bet or wagered by or for any other person, or sells pools upon any such result; * * * or who, being the owner, lessee, or occupant of any room, shed, tenement, tent, booth or building, float or vessel, or part thereof, or of any grounds within this state, knowingly permits the same to be used or occupied for any of these purposes, or therein keeps, exhibits or employs any device or apparatus for the purpose of recording or registering such bets or wagers, or the selling of such pools, or becomes the custodian or depositary for gain, hire or reward of any money, property or thing of value, staked, wagered or pledged, or to be wagered or pledged upon any such result: * * * is punishable by imprisonment in a county jail or state prison for a period not less than thirty days and not exceeding one year." The words "such result" in these clauses refers to a previous clause reading as follows: "Upon the result of any trial or contest of skill, speed, or power of endurance, of man or beast or between men or beasts, or upon the result of any lot, chance, casualty, unknown or contingent event whatsoever." The language of the first clause in order, relating to the receiving of money or things bet or wagered, is not in itself ambiguous or uncertain in meaning. As plainly as words can declare, it forbids every person from receiving money bet or wagered by or for any other person upon the result of a horse race, or upon any contingent or unknown event. It may require some stretch of credulity to believe that the Legislature could have enacted a penal law making an act which may be so trivial a felony, but, when a reading of the act discloses that it has been enacted, there can be no misunderstanding of its meaning or effect, if it stands alone and without qualification.

The complaint plainly shows that it was not intended to charge a violation of the second clause, but *ex industria*, to exclude that clause from consideration. It does not aver that the petitioner was the owner, occupant, or lessee of any place of the kind specified in that clause, or at all, and it states that he became a custodian and depositary of the money "not for gain, hire or reward," thus eliminating the conditions essential to the commission of a crime under the second clause. If it describes an offense at all, it is an offense defined in the first clause. In effect, one who receives money of another becomes the custodian thereof, and conversely,

one who becomes a custodian of money receives it. If the rule that the exact language of the statute need not be followed in charging an offense and that words of like import will suffice, particularly in a complaint for a preliminary examination, is applied, the complaint in substance charges that the petitioner received the money alleged to have been wagered. If this be so, the complaint charges an offense under the first clause, if that clause is not modified, qualified, or partially repealed by the second clause. Whether or not it is so affected is the only question to be decided.

To constitute a criminal acceptance of such money under the first clause, it is necessary that it be received for the use of the parties to the bet or wager, and not as the due or right of the person receiving it. He must take it as their property, and not as his own. If he receives it in payment of a debt or as a gift, he commits no offense, and the fact that it was the identical money or thing which had been wagered by the party or parties from whom he received it is immaterial. In that case he would be no party to the bet or wager which the law intends to denounce as criminal. In order to constitute a crime under the first clause, therefore, the person receiving the money must do so as custodian or depositary for the parties to the bet or wager and must act as such for some period of time, however brief. If that clause alone is considered, it would be immaterial that he does not keep, lease, or own a place for such business or that he receives it neither for gain, hire, or reward. Under the second clause, it is necessary that both of these elements shall exist to constitute the crime there defined. The second clause in effect excepts and permits all receiving which is not for gain, hire, or reward and which is not done in some one of the places mentioned by one who uses or occupies such place for that purpose. It is therefore to that extent inconsistent with that part of the first clause which forbids the receiving of such money for the use of the parties to the bet or wager anywhere, or under any circumstances. (We speak now of one who receives the money, and not of one who merely owns or leases such a place and permits its use by others for such purposes.) The rule applicable to a statute in which a later clause is found to be irreconcilably inconsistent with a preceding clause is that the clause later in position operates as a repeal of the former clause, so far as it is inconsistent. "The part of a statute later in position in the same act or section is deemed later in time, and prevails over repugnant parts occurring before, though enacted to take effect at the same time. This rule is applicable where no reasonable construction will harmonize the parts." 1 Lewis' *Suth. Stat. Const.* § 280. See, also, *Emerie v. Alvarado*, 64 Cal. 609, 2 Pac. 418; *Pol. Code*, § 4484; *Harrington v. Rochester*, 10 Wend. (N. Y.) 551; *Branagan v. Dulaney*, 8

Colo. 412, 8 Pac. 699; *Powers v. Barney*, 5 Blatchf. 203, No. 11,361; *Ex parte Thomas*, 113 Ala. 1, 21 South. 370; *Hand v. Stapleton*, 135 Ala. 162, 167, 33 South. 690; *Van Horn v. State*, 46 Neb. 77, 64 N. W. 365; *Omaha, etc., Co. v. Kragcow*, 47 Neb. 611, 66 N. W. 658. Applying this rule, it is clear that the provision of the first clause, so far as it relates to the mere receiving of money or property bet or wagered, is practically inoperative, and that the only conditions under which the receiving alone will be criminal are those mentioned in the second clause. As the complaint against the petitioner expressly negatives the existence of some of these conditions, and fails to aver the others, and does not charge that he either registered, recorded, or forwarded the money received, as specified in the first clause, it fails to charge an offense under either clause of the section. The petitioner is entitled to his discharge.

What we have said concerning the inconsistency between the two clauses applies only to the part of the first clause relating to the "receiving" of money or things bet or wagered. It has no necessary bearing upon so much of the first clause as relates to a person who "records, registers, or forwards" such money or things. Those acts are different from merely receiving and involve other elements, intents, and results.

It is ordered that the petitioner be released from custody under the warrant, and that his bail upon the issuance of the writ herein be exonerated.

We concur: ANGELLOTTI, J.; SLOSS, J.

HENSHAW, J. I concur in the judgment for the following reasons:

Section 337a of our Penal Code is in all essentials (saving that of the penalty prescribed) an exact re-enactment of section 351 of the Penal Code of the state of New York. It is a familiar rule that, when one state enacts a statute taken from the books of a sister state, the construction which the courts of the latter state have put upon the statute is of great value and of high persuasive force in its interpretation. If a reading of this statute did not clearly disclose, as I think it does, that its principal, if not its sole, object is to prevent bookmaking and pool selling, the construction which the courts of New York have put upon it would resolve all possible doubt. The courts of New York were called upon to consider this law in the light of a provision of their Constitution of 1894, which provided (article 1, § 9): "Nor shall any lottery, or the sale of lottery tickets, pool selling, bookmaking, or any other kind of gambling hereafter be authorized or allowed within this state, and the Legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section." No such provision is found in the Constitution of California, and, as this state adopts the common

law where the statutes are silent, it follows, as at common law, that the mere laying of a bet or wager upon an indifferent subject is not illegal. "The distinction has always been observed," says Wharton, *Criminal Law*, par. 2, p. 446, "between betting or gambling and maintaining a gambling house or a place to which people resort to gamble. While at common law wagers on indifferent subjects were legal and might be enforced, a gambling house or a resort for gamblers was a public nuisance, for which its keeper might be indicted." And the Court of Appeals of New York, upon this subject has said (*People v. Stedeker*, 175 N. Y. 57, 67 N. E. 132): "The same distinction has obtained in this state, where ordinary betting has never been made a crime, * * * while the keeping of a gambling house, selling lottery tickets, and the profession of a common gambler have been subject to severe punishment." This opinion, it is pointed out in *People ex rel. Collins v. McLaughlin*, 128 App. Div. 599, 113 N. Y. Supp. 188, was rendered in 1903, eight years after the enactment of section 351 of the New York Penal Code in practically its present form. In the last-cited case the defendant was charged with a violation of the section in having "received" \$5 at the race course of the Brooklyn Jockey Club as the result of a bet which he had made upon a horse race; the bet having been made and accepted orally with one John Ball. The court declared in terms that section 351 of the Penal Code was intended to prevent bookmaking and pool selling; that is, the business of taking and recording bets and wagers and acts which are incidental to that business, and does not make it a crime to receive a sum of money as the result of a bet upon a horse race which was made and accepted orally. We may pause here to say that it would certainly be a singular law which would make it no crime to lay such a wager and for the winner to receive the money, and yet would make it a crime if one became a stakeholder of such wager without gain, hire, or reward. The Court of Appeals of New York in *People ex rel. Lichtenstein v. Langan*, 196 N. Y. 260, 89 N. E. 921, construing this law, reaffirmed the declaration in *People v. Stedeker*, *supra*, saying that "in this state an ordinary bet has never been made a crime, while the keeping of a gambling house has been subject to severe punishment. The laying of odds standing alone does not, therefore, constitute a crime. If a man should offer to bet the ladies of his party a pair of gloves to a box of candy, it would be the laying of odds and publishing the same. To hold him to be a bookmaker would, in my judgment, be a departure from the rule which gives to the terms of the statute their ordinary and accepted meaning, and would be a construction which was not within the contemplation of the Legislature. The vice of bookmaking chiefly consists in soliciting and in the inducing the public to take chances in the carefully figured and planned scheme of

the bookmaker, and this, in order to be profitable to him, requires the writing out of the list of the odds laid on some paper or material so that they could be seen by those who were solicited to invest."

With the light thus thrown upon the meaning, the purpose, the scope, and intent of the statute, the question immediately under consideration is easily answered: Is a man who without consideration to him paid, or to be paid, and not for gain, hire, or reward, becomes the custodian and depository of a sum of money already wagered between two citizens, guilty of a felony? The very language of the law is against such a construction. And, bearing in mind that at common law the laying of a wager upon such an event was not a crime, the mere depository of the money or things wagered himself could not be guilty of a crime. The language of section 337a in effect declares that "the custodian or depository for gain, hire or reward is alone guilty." In other words, the law is directed against one who for gain, hire, or reward has become such a depository, who thus is engaged in a business violating the spirit of the law aimed against pool selling, bookmaking, and professional gambling. Elsewhere the section under consideration makes one guilty of a felony "who receives, registers, records or forwards, or purports or pretends to receive, register, record or forward in any manner whatsoever any money, thing, or consideration of value bet or wagered, or offered for the purpose of being bet or wagered by or for any other person, or sells pools upon any such result." A reading of this language, with its context, makes it apparent that the "receiving" there under consideration does not make the mere reception as a stakeholder a crime, but it is a receiving in aid of the condemned purposes of bookmaking and pool selling, a receiving which is a part of the scheme of registering, recording and forwarding the money bet, in aid of the actual bookmaker or pool seller. Not only is this quite apparent from the context, but it is the precise construction which has been put upon the language in New York, where the attempt was made to convict one who had received \$5 as the result of a wager. In *People ex rel. Collins v. McLaughlin*, 128 App. Div. 599, 113 N. Y. Supp. 188, a historical review is had of the legislation in New York upon this subject, and the reasons for the enactment of this especial provision are given. In brief, it appears that bookmaking and pool selling upon race tracks in the state of New York were not illegal, though it was a felony to sell pools or make books elsewhere than at an authorized race track. The poolroom people outside of the race tracks "thereupon devised a scheme by which they claimed to be merely forwarders of the money deposited by betters with them. They pretended to receive the same as common carriers to send to the race

tracks where it could be bet. This is clearly shown by the opinions in *People v. Wynn* [12 N. Y. Supp. 379], decided in December, 1890, affirmed on opinion below, 128 N. Y. 599 [28 N. E. 251], and *People v. Fisher* [17 N. Y. Supp. 162], decided in December, 1891." It was to meet this condition that the language which we have been considering was adopted in New York. Thus one who becomes a depository of a thing wagered for the purpose of recording and forwarding the wager, and so aids the business of bookmaking and pool selling, or one who becomes a depository of things wagered for hire, gain, and reward, and thus becomes a professional aid to gambling, are one, and both under the ban of the law. But as the law nowhere denounces as criminal the mere laying of a wager, so it would be preposterous to say that it denounced as a criminal one who became the depository of such wager, not by way of aiding the poolselling business, and not for hire or reward, but as a mere matter of accommodation to the better.

LORIGAN, J. I concur.

(157 Cal. 432)

SCHWARTING v. CARPENTER.

(L. A. 2,175.)

(Supreme Court of California. March 23, 1910.)

1. LANDLORD AND TENANT (§ 157*)—LEASE—IMPROVEMENTS—TIME.

Under Civ. Code, § 1657, providing that, where no time is specified for the performance of an act, a reasonable time is allowed, where a lease requiring the lessor to make improvements is silent as to time, they must be made within a reasonable time.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 157.*]

2. TRIAL (§ 395*)—FINDINGS—SUFFICIENCY.

A general finding that "no allegation contained in the amended complaint or in the answer thereto is true, save and except as hereinbefore found," is too vague and indefinite for any purpose.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 927-934; Dec. Dig. § 395.*]

3. HIGHWAYS (§ 44*)—"LOCATION."

The word "location," as used in Pol. Code, § 2689, relating to the establishment of highways, refers to proceedings designed to fix the line of the highway at a time prior to its actual construction and opening.

[Ed. Note.—For other cases, see *Highways*, Dec. Dig. § 44.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4219-4222; vol. 8, p. 7709.]

4. TRIAL (§ 396*)—FINDINGS—RESPONSIVENESS TO ISSUES—"LOCATED."

In an action to rescind a lease for failure of defendant lessor to make certain improvements before the commencement of the term, the answer alleged the pendency of proceedings to open and establish a road, and averred that the location of the improvements was to be fixed after the road had been definitely located through the land, and convenient to the road when it was opened and ready for travel. Held that, while the term "located" as applied to a road is of uncertain significance, and may refer to the fixing

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the line which the road is to occupy or to the actual construction of the road, it was meant as used in the answer to describe the act of the public officials in determining the place which the road was to occupy, and hence a finding that the improvements were to be placed after the road was located "and built" was beyond the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935-938; Dec. Dig. § 396.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4217-4219.]

5. APPEAL AND ERROR (§ 1054*).

Error in the overruling of an objection to evidence is prejudicial where it leads directly to the making of an erroneous finding, on which the court bases its conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.*]

In Bank. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Victor H. Schwarting against Emory W. Carpenter. Judgment for defendant, and from an order denying a new trial, plaintiff appeals. Reversed.

S. V. Wright and T. A. Norton, for appellant. W. H. Spencer, for respondent.

SLOSS, J. Action on the part of lessee to rescind a written lease, and recover moneys paid in advance on account of rental reserved therein. Judgment went for defendant, and the appeal is from an order of the court denying plaintiff's motion for a new trial.

By the terms of the lease, dated September 1, 1906, the premises, consisting of 340 acres of land, were demised for a period of five years, commencing on October 1, 1906. The lessor, defendant herein, covenanted that he would erect on the land a house of not less than five rooms, together with a barn, and furnish the materials for making other minor improvements; plaintiff agreeing to furnish the labor of one man in the performance of the work. The lease was silent as to the time when these improvements were to be made. On October 13, 1906, nothing having been done toward making the improvements, plaintiff served upon defendant a notice of his intention to rescind said contract of lease, and demanded the repayment of the amount which he had upon the execution of the lease paid to defendant on account of rental of the premises.

The grounds for rescission stated in said notice and in the complaint were the failure on the part of defendant to make the improvements called for in the lease, and that defendant had failed and omitted to deliver possession of the premises on October 1, 1906. The only questions requiring discussion here are those relating to the first ground. If there was no default by the lessor with respect to the improvements, the court's findings, sufficiently supported by the evidence, showed a good excuse for the failure to de-

liver possession at the beginning of the term.

As has been said, the lease was silent on this subject, and contained no express stipulation concerning the time when the improvements were to be made. In the absence of any other agreement, the lessor would have been obliged to perform the stipulated acts within a reasonable time. Civ. Code, § 1657. The complaint alleges an understanding that the improvements should be made prior to the commencement of the term, and further avers that with reasonable diligence the defendant could have completed said improvements before the commencement of said term. The answer denies all the allegations of the complaint. In addition, it alleges that on September 1, 1906, the county of San Luis Obispo was taking legal steps to open and establish a county road from Oceano to Pismo, passing through the lands described in the lease; that the plaintiff and the defendant agreed that the location of the improvements to be placed on the land by defendant would be fixed and determined "after said road had been definitely located through said land, and convenient to such road when the same was opened and ready for travel; that said road, and the line and route thereof through said land, was not definitely located until October 25, 1906." The finding was that the parties agreed "that the improvements * * * should be placed thereon as soon as the defendant could do so after a county road from Oceano to Pismo was located and built through said land; that said road through said land was not built through said land until on or after October 25, 1906." This was the only finding on the question of the time agreed upon for the erection of improvements. There was no specific finding on plaintiff's averments that such improvements were to be erected before the commencement of the term, and that with reasonable diligence the defendant could have completed them by that time. The general finding that "no allegation contained in the amended complaint or in the answer thereto is true, save and except as hereinbefore found," is "too vague and indefinite for any purpose." *Perkins v. West Coast Lumber Co.*, 120 Cal. 27, 52 Pac. 118.

The judgment was evidently based upon the special finding regarding the agreed time for the making of the improvements. As to this the appellant contends, and we think rightly, that the finding is beyond the issues. The allegation of the answer is that the improvements were to be placed after the proposed road had been definitely located. The term "located," as applied to a road, is of uncertain significance. It may refer to the fixing of the line which the road is to occupy (*Foster v. Park Com'rs*, 133 Mass. 321; *Turner v. Road Company*, 33 Ind. 317); or to the actual construction of the road upon

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the ground (*Moule v. Road Co.*, 6 How. Prac. [N. Y.] 37; *Railroad Co. v. Jones*, 2 Cold. [Tenn.] 574; *Westfield Borough v. Tloga Co.*, 150 Pa. 152, 24 Atl. 700). Whether one or the other meaning is to be given depends upon the context. The word "location" appears in section 2689 of the Political Code, a part of the chapter relating to the establishment of highways. As there used, it plainly refers to proceedings designed to fix the line of the highway at a time prior to its actual construction and opening. The answer in this case undertook to describe proceedings under this very chapter. But, apart from this consideration, we think there can be no doubt that the word "located," as used in the answer, was meant to describe the act of the public officials in determining the place which the road was to occupy. The pleading alleges the pendency of proceedings by the county to open and establish a road. It states that the location of the improvements was to be fixed after the said road had been definitely located through said land, and convenient to the road when the same was opened and ready for travel. The addition of the adverb "definitely" is significant. It would have been useless if the word "located" had meant actually constructed. Again, the pleader himself distinguishes between the terms "located" and "opened and ready for travel." The only fair interpretation of defendant's answer is that he alleged an agreement whereby the erection of the improvements was to be deferred until the line of the proposed road should be definitely established and known, so that the improvements should be convenient to such road when the latter should be actually built.

The finding of the court was, however, that the parties agreed that the improvements should be erected as soon as the county road was located and built through said land, and that the road was not built until October 25, 1906. The effect of this finding was to excuse the delay of the defendant upon a ground not asserted in the answer. Whether the presence of a finding beyond the issues is ground for new trial need not be decided. The point is presented by the record in another way. The plaintiff objected to evidence of the time when the road was actually constructed, basing his objections specifically on the ground that the answer alleged that the improvements were to be erected "as soon as the county road should be located, not as soon as it should be built or constructed." The objection was overruled. This was error, and the error was clearly prejudicial, since it led directly to the making of a finding upon which the court obviously based its conclusion.

Numerous other points are made by the appellant, but we think the foregoing dis-

cussion disposes of the only matters of importance which seem likely to arise upon a new trial.

The order is reversed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

(157 Cal. 437)

JENSEN v. DORR. (L. A. 2,441.)

(Supreme Court of California. March 28, 1910.)

1. MARITIME LIENS (§ 73*)—ATTACHMENT.

The attachment provided for by Code Civ. Proc. § 813 et seq., affording a special statutory procedure for the enforcement of liens upon vessels, and authorizing a writ of attachment, is entirely distinct from the ordinary attachment described in section 537, subd. 1 of which precludes an attachment against a resident defendant, where the debt is secured by a lien, unless the security has become valueless; the attachment under section 817, which provides that plaintiff may have the vessel attached as security for the satisfaction of any judgment that may be recovered, presupposing the existence of a lien, and being issuable only where there is such lien and for the purpose of aiding in its enforcement.

[Ed. Note.—For other cases, see *Maritime Liens*, Cent. Dig. §§ 113, 114; Dec. Dig. § 73.*]

2. MARITIME LIENS (§ 73*)—ATTACHMENT—NECESSITY FOR AFFIDAVIT.

As Code Civ. Proc. § 813 et seq., do not mention an affidavit for an attachment to enforce a maritime lien, none is required.

[Ed. Note.—For other cases, see *Maritime Liens*, Cent. Dig. § 115; Dec. Dig. § 73.*]

3. MARITIME LIENS (§ 73*)—ATTACHMENT—EFFECT OF FILING AFFIDAVIT.

No affidavit being required in such proceedings, the attachment could not be vitiated by plaintiffs' having filed a useless and superfluous affidavit, nor by the fact that such affidavit contained a misstatement regarding an immaterial matter.

[Ed. Note.—For other cases, see *Maritime Liens*, Dec. Dig. § 73.*]

4. MARITIME LIENS (§ 73*)—ENFORCEMENT BY ATTACHMENT—IMPROPER DIRECTION OF WRIT.

Code Civ. Proc. § 819, provides that on an attachment in foreclosing a lien upon a vessel the writ must be directed to the sheriff of the county to which the vessel lies, and require him to attach such vessel with its tackle, etc., and keep the same, etc., it being a special writ, giving authority to seize specific property only; and in such a proceeding a writ following the terms of the general attachment law (Code Civ. Proc. § 540), directing the sheriff to attach and safely keep all the property of defendant within his county, or so much thereof as may be sufficient to satisfy plaintiff's demand, is insufficient.

[Ed. Note.—For other cases, see *Maritime Liens*, Cent. Dig. § 115; Dec. Dig. § 73.*]

5. MARITIME LIENS (§ 73*)—ENFORCEMENT BY ATTACHMENT—IMPROPER DIRECTION OF WRIT.

Under Code Civ. Proc. § 823, providing that attachments on vessels may on motion be discharged in the same manner as attachments in other cases, and sections 556, 558, providing that a writ of attachment must be discharged if upon motion it appears that the writ was improperly or irregularly issued, a writ for a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

maritime attachment directed as provided by the general attachment law must be discharged, regardless of whether the sheriff did in fact levy on any property other than the vessel.

[Ed. Note.—For other cases, see *Maritime Liens*, Dec. Dig. § 73.*]

In Bank. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by Lawrence Jensen against Fred Dorr. From an order denying defendant's motion to dissolve an attachment, he appeals. Reversed.

Wilbur Bassett, for appellant. Patterson Sprigg, for respondent.

SLOSS, J. Appeal by defendant from an order of the superior court of San Diego county denying his motion to dissolve an attachment. The complaint in the action was in 19 counts, each of which set up a cause of action for services or material furnished and used in the construction of the yacht "Yankee Girl," owned by the defendant, Dorr. The total sum demanded was \$4,001.76, for which plaintiff claimed a lien upon said vessel, under the terms of section 813 of the Code of Civil Procedure. Upon the filing of the complaint, the plaintiff filed an affidavit, in the form prescribed by section 538 of the said Code, averring, among other things, that the payment of the contract in suit "has not been secured by any mortgage or lien upon real or personal property or any pledge upon personal property." At the same time an undertaking on attachment in the sum of \$500 was filed. Thereupon, a writ of attachment, in the form prescribed by section 540, was issued out of said court to the sheriff of Los Angeles county, and said sheriff made return that he had attached the yacht "Yankee Girl," with its tackle, apparel, and furniture. Thereafter the defendant moved the court to dissolve and discharge the attachment upon the grounds: (1) That the attachment was improperly issued in that the contracts sued upon are alleged in the complaint to be secured by a lien upon personal property; (2) that the attachment was irregularly issued in that the affidavit is false in the statement that the amount sought to be recovered had not been secured by any lien upon personal property; and, (3) that the writ was irregularly issued in that it did not direct the sheriff to attach the vessel "Yankee Girl," with its tackle, apparel, and furniture, as provided in section 819 of the Code of Civil Procedure. The motion, as already stated, was denied, and the defendant appeals.

Under subdivision 1 of section 537 of the Code of Civil Procedure, an attachment can issue in an action against a resident defendant only where the debt is unsecured by lien, mortgage, or pledge, or where the security has become valueless. The requisite fact must appear by affidavit. Section 538.

The first and second grounds of the motion to dissolve are based upon the proposition that the plaintiff's demand was, by virtue of section 813 of the Code of Civil Procedure, secured by a lien upon the vessel; such lien being antecedent to and independent of any seizure. *The Great West v. Oberndorf*, 57 Ill. 168; *Bennett v. Beadle*, 142 Cal. 239, 75 Pac. 843. From this the appellant draws the inferences that an attachment could not issue upon such secured debt, and that, in any event, the attachment was irregularly issued because based upon an affidavit which falsely stated that the debt was not secured. These positions are not well taken. The attachment provided for in the chapter of the Code relating to actions against steamers, vessels, and boats (Code Civ. Proc. § 813 et seq.) is entirely distinct from the ordinary attachment described in section 537 of the Code of Civil Procedure. The section which gives a lien upon vessels in certain cases is followed by other sections providing for the manner of enforcing such lien. The action is to be brought against certain defendants, if known (section 814); the form of the complaint and the manner of service of summons (sections 815, 816) are prescribed; and it is then provided that the plaintiff may have the vessel attached as security for the satisfaction of any judgment that may be recovered (section 817). The writ in a given form (section 819) is to be issued by the clerk upon receiving an undertaking (section 818). There are further provisions as to the execution of the writ (section 820) and the release of attached property by undertaking (section 822). Here is a special statutory procedure designed to permit the enforcement of liens upon vessels, and authorizing a writ of attachment to facilitate that end. Obviously, the provisions of subdivision 1 of section 537, precluding an attachment in an action against a resident defendant where the debt is secured by a lien, unless the security has, without the act of the plaintiff, become valueless, can have no application to such proceedings against vessels or their owners. The attachment under section 817 presupposes the existence of a lien. It can issue only where there is such lien, and for the purpose of aiding in its enforcement. For the same reason, the ordinary affidavit on attachment, showing a debt unsecured by lien, is entirely inappropriate to the case of an action to foreclose a lien upon a vessel. Since the sections covering such actions make no mention of an affidavit, we must conclude that none is required. If this be so, the plaintiff's writ cannot be vitiated by his having filed a useless and superfluous affidavit, nor by the fact that such affidavit contained a misstatement regarding an immaterial matter. *Thorn v. Alvord*, 32 Misc. Rep. 456, 66 N. Y. Supp. 587.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

But the very reasons which lead us to hold that the first and second grounds of defendant's motion are without merit force the conclusion that the third ground was well taken, and should have been sustained. As respondent must concede, the general attachment law did not authorize an attachment in this case, and the issuance of the writ can be supported only as a proceeding under the statutory provisions regarding claims against vessels. It was essential, therefore, that the steps taken should have been in substantial compliance with the terms of these provisions. Proceedings for attachment, whether in ordinary cases or in actions to enforce liens against vessels, are created by statute, and must, in each of such classes of cases, follow the terms of the law governing that class. *Edwards v. Cooper*, 28 Ark. 466.

Where the attachment is sought in aid of an action to foreclose a lien upon a vessel, the Code requirement is that the writ "must be directed to the sheriff of the county within which the steamer, vessel, or boat lies, and direct him to attach such steamer, vessel, or boat, with its tackle, apparel, and furniture, and keep the same in his custody until discharged in due course of law." Code Civ. Proc. § 819. It is a special writ which gives authority to seize specific property only. The writ here issued, however, followed the terms of the general attachment law (Code Civ. Proc. § 540), and directed the sheriff "to attach and safely keep all the property of said defendant Dorr * * * within your said county, or so much thereof as may be sufficient to satisfy the said plaintiff's demand. * * *" This was essentially different from the writ to which plaintiff was entitled under the vessels statute. In place of process authorizing a seizure of the yacht "Yankee Girl" alone, the sheriff was armed with a writ empowering him to seize any property of the defendant, and this in a case in which, under the averments of the complaint, a general attachment could not issue.

It is of no consequence that the sheriff did not in fact levy on any property other than the vessel. Under section 823, attachments on vessels may, on motion, be discharged in the same manner, and on like terms and conditions, as attachments in other cases. Sections 556 and 558, thus imported into the procedure for enforcing liens against vessels, provide that a writ of attachment must be discharged, if upon motion, made before or after levy, it appears that the writ was improperly or irregularly issued. "Under these sections it is immaterial whether much or little or any property of a defendant has been actually levied upon, but the court must, upon proper application therefor, discharge the writ of attachment thus wrongfully issued." *Kennedy v. Cal. Sav. Bank*,

97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163; *Sparks v. Bell*, 137 Cal. 414, 70 Pac. 281.

By a proviso recently added to section 558 (St. 1909, p. 253), a motion to discharge for irregularity may now be met by proper amendment of the affidavit, undertaking, or writ. But this enactment was not in force when the motion in the present case was made, and, besides, it does not appear that plaintiff made any attempt to correct the defective writ.

The order is reversed.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

(157 Cal. 425)

In re DANFORD. (Cr. 1553.)

(Supreme Court of California. March 28, 1910.)

1. ATTORNEY AND CLIENT (§ 36*) — DISBARMENT OF ATTORNEY—GROUNDS.

That misconduct charged against an attorney may also render him liable to punishment under the criminal laws does not necessarily deprive the court of power to hear disbarment proceedings against him; Code Civ. Proc. § 287, subd. 2, authorizing removal of an attorney for any violation of the oath taken by him or of his duties as such attorney.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 49; Dec. Dig. § 36.*]

2. ATTORNEY AND CLIENT (§ 51*) — DISBARMENT OF ATTORNEY—PROCEEDINGS BY PRIVATE INDIVIDUAL.

The rule that an application for disbarment preferred by a private individual, who has a remedy for his alleged grievance by ordinary civil or criminal process, will not be considered, does not apply to the superior court, where the accusation has the sanction of a bar association, and is prosecuted by attorneys directed by that body to act in the matter.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 67; Dec. Dig. § 51.*]

3. ATTORNEY AND CLIENT (§ 44*) — OFFICE OF ATTORNEY—VIOLATION OF DUTY.

An attorney who exacted money from his client upon the false representation that he was authorized to practice in a United States court, and would conduct her case therein, violates his oath and duties as an attorney, as prescribed by Code Civ. Proc. § 282.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 55-62; Dec. Dig. § 44.*]

4. ATTORNEY AND CLIENT (§ 123*) — NATURE OF RELATION.

The relation between attorney and client is a fiduciary one of the very highest character, and binds the attorney to most conscientious fidelity, and precludes him from obtaining any personal advantage by abusing the confidence reposed in him by his client.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 239-249; Dec. Dig. § 123.*]

5. APPEAL AND ERROR (§ 1011*) — REVIEW — CONFLICTING EVIDENCE.

Where the evidence is conflicting, the facts are to be determined by the trial court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. TRIAL (§ 393*)—NECESSITY FOR WRITTEN FINDINGS.

Written findings were not required at common law, and are necessary only where the statute so provides.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 920-923; Dec. Dig. § 393.*]

7. ATTORNEY AND CLIENT (§ 54*)—PROCEEDINGS FOR DISBARMENT—NATURE—NECESSITY FOR FINDINGS.

Disbarment proceedings are peculiar to themselves and governed exclusively by the Code sections specifically covering them, and as Code Civ. Proc. §§ 287-297, which outline a complete scheme, covering the details of charge, process, plea, trial, and judgment, do not provide for findings, the court is not required to make them.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 73; Dec. Dig. § 54.*]

8. APPEAL AND ERROR (§ 708*)—TRANSFER OF CAUSE—NECESSITY FOR BILL OF EXCEPTIONS.

A motion to vacate the judgment is not a part of the judgment roll, and can be presented for review only when the papers used on the motion and the action of the court are authenticated by a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 708.*]

9. JUDGES (§ 6*)—RIGHT TO OFFICE—COLLATERAL ATTACK.

That a judge presiding at a trial was an alien and therefore ineligible made him none the less a de facto officer, and his right to the office could be questioned only in proceedings regularly instituted for that purpose, and could not be attacked collaterally by motion to set aside his official acts.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 11, 12; Dec. Dig. § 6.*]

In Bank. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Proceedings for disbarment of William J. Danford. From a judgment of disbarment and an order denying a new trial, respondent appeals. Affirmed.

J. D. Reymert and Wm. J. Danford, for appellant. O'Melveny, Stevens & Millikin, for respondent.

SLOSS, J. Upon an accusation purporting to charge William J. Danford, an attorney at law, with a violation of his professional duties, a hearing was had in the superior court of Los Angeles county, and that court gave judgment depriving the accused of the right to practice as attorney or counselor in the courts of the state of California. This is an appeal by Danford from the judgment and from an order denying his motion for new trial.

The first point made is that the accusation fails to state facts justifying disbarment, and that therefore appellant's demurrer should have been sustained. The accuser, Catherine E. Smith, alleged, in effect, that on May 1, 1908, Danford was an attorney at law, entitled to practice before the superior court of Los Angeles county, and held himself out to the public as an attorney at law. Said Catherine E. Smith consulted him relative to

her defense in a certain case then pending in the district court of the United States for the Southern district of California, entitled "The United States of America v. Mrs. C. E. Smith." It was alleged that Danford then and there falsely, fraudulently, and unlawfully represented and stated to said accuser that he could and was authorized to practice in the said district court of the United States, and could and was able to represent her as her attorney in said action in said court. At the same time he requested her to pay him the sum of \$500 for services to be rendered by him as her attorney in defending said action in said court, and she paid said sum, believing and relying upon his statements and representations. In fact, Danford was not authorized to or admitted to practice as an attorney at law in the United States district court, and could not represent or appear for Mrs. Smith as her attorney in said action or before said court, and, as is averred, his representations in this regard were false, were known by him to be false, and were made with the intention of misleading and deceiving the accuser, and inducing her to pay to the accused the said sum of \$500. In June, 1908, it is alleged, Danford obtained from Mrs. Smith the further sum of \$2,500, upon the representations, made with knowledge of their falsity, that he could and would represent her in said action, and that if she would pay him the said \$2,500, he would cause said action against her in the district court to be "wiped out," discontinued, and disposed of.

It is argued that the complaint charges a public offense, and that an application for disbarment, in advance of the termination of a criminal prosecution for such offense, should not have been entertained. The fact that the misconduct charged against an attorney at law may also render him liable to indictment and punishment under the criminal law does not necessarily deprive the court of power to hear disbarment proceedings against him. Section 287 of the Code of Civil Procedure authorizes the suspension or removal of an attorney for various causes, including, "(1) His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence; (2) * * * any violation of the oath taken by him, or of his duties as such attorney and counselor." Where disbarment is sought upon the mere ground that the accused has been guilty of a public offense involving moral turpitude, but not necessarily connected with the practice of his profession, it has very properly been held that a case for disbarment is not made until there has been a conviction of the offense. In re Tilden, 87 Cal. xxi, 25 Pac. 687. In the Tilden Case the charge was that the accused had committed larceny, but it was not alleged that the act had been done in the discharge of any professional relation. There

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was no attempt to show a ground arising under any part of section 287 other than subdivision 1. Under that subdivision, a conviction was essential. But, as pointed out in later cases, an attorney may be disbarred for a violation of his professional duties, i. e., for any ground coming within the terms of subdivisions 2, 3, or 4 of section 287, notwithstanding the fact that the charge against him might also be made the basis of an indictment or information. *Ex parte Tyler*, 107 Cal. 78, 40 Pac. 33; *In re Wharton*, 114 Cal. 367, 46 Pac. 172, 55 Am. St. Rep. 72. See, also, *In re Treadwell*, 67 Cal. 358, 7 Pac. 724; *Ex parte Wall*, 107 U. S. 205, 2 Sup. Ct. 569, 27 L. Ed. 552. "If * * *" says this court in *Ex parte Tyler*, supra, "an attorney is charged with a violation of his professional obligations, either to his client or to the court, or with professional delinquency in matters pertaining peculiarly to the relations between him and his client, it is no defense to a proceeding for his suspension or disbarment that the same transactions may render him liable to a criminal prosecution." *In re Delmas*, 139 Cal. xix, 72 Pac. 402, is not to be taken as laying down a different rule. The refusal of the court to proceed in that case was based primarily upon the ground that the Supreme Court would not entertain an original proceeding for disbarment in the absence of a showing of good reasons for the failure to first resort to the superior court, which is vested with concurrent jurisdiction in this class of cases. The opinion declares, further, that an application for disbarment preferred by a private individual, who has a remedy for his alleged grievance by ordinary civil or criminal process, will not be considered. *In re Stephens*, 102 Cal. 264, 36 Pac. 536. We do not understand that this rule was intended to be applied to the superior courts, as well as to this court. At any rate, it was limited to cases in which the accusation was without the sanction of a bar association or of some responsible public officer. It appears here that the charge against Danford was authorized by the Los Angeles Bar Association, and was prosecuted by attorneys directed by that body to act in the matter.

We have no doubt that the facts alleged show a violation of appellant's oath and of his duties as an attorney. Code Civ. Proc. § 282. The relation between attorney and client is "a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity—uberrima fides." *Cox v. Delmas*, 99 Cal. 104, 123, 33 Pac. 836. It is one which precludes the attorney from obtaining any personal advantage by abusing the confidence reposed in him by his client. *In re Burris*, 101 Cal. 624, 36 Pac. 101. The allegation here is that the accused, by means of a misrepresentation, induced his client to pay him a large sum for services which he was not, and knew that he was not, in a position to perform. This was a plain breach

of the obligation of fidelity imposed upon him by the law and by the employment which he accepted.

The contention that the finding of guilt is contrary to the evidence cannot prevail. The testimony of the accuser and her witnesses supports every material allegation of the complaint. It is true that the testimony introduced by the appellant contradicted the accuser in various particulars, but the resulting conflict was as we have so often said, one to be determined in the trial court. It cannot be said that the representation that Danford was entitled to practice in a federal court was not material. Ordinarily, an attorney licensed to practice in all the courts of a state, as Danford has been, will, on motion and showing of good moral character, be admitted to the bar of the various inferior federal courts. The admission may, in a sense, be regarded as a merely formal matter. It was not so, however, in this instance for the record shows that, when a motion was made in the district court to have the appellant admitted to practice there, an objection to his admission was interposed, and action upon the motion was indefinitely deferred.

At the close of the trial, the accused requested the court to make written findings of fact and conclusions of law. This the court declined to do, and its refusal is assigned as error. We find no statutory provision requiring findings in a case of the character of the one before us. Written findings were not required under the common-law practice, and are necessary only where a statute so provides. Sections 632 and 633 of the Code of Civil Procedure, which declare that the decision must be in writing, and that the facts found and the conclusions of law must be separately stated, are included in title 8 of part 2 of said Code. Part 2 is entitled "Civil Actions." The requirement of findings, with some other details of procedure found in Part 2, applies only to civil actions and to those special proceedings—for example, matters of probate—(Code Civ. Proc. § 1713) to which such provisions are specially made applicable. *Lyons v. Marcher*, 119 Cal. 382, 51 Pac. 559. Proceedings on an accusation against an attorney are prescribed by sections 287 to 297 of the Code of Civil Procedure. These sections outline a complete scheme, covering the details of charge, process, plea, trial, and judgment. Section 295 authorizes an oral denial of the accusation, without oath. The procedure is in almost all respects dissimilar to that provided for civil actions, and, as it makes no mention of findings, there is no reason for holding that the Legislature intended to import the need of findings into it. This court has uniformly treated disbarment proceedings as peculiar to themselves, and governed exclusively by the Code sections specifically covering them. Thus, it has held that the statute of limitations applicable to civil or criminal applications is no bar (*Ex parte Tyler*, supra); that

the accused is not entitled to a jury trial (In re Wharton, 114 Cal. 370, 46 Pac. 172, 55 Am. St. Rep. 72); and that the accuser has no right to an appeal (In re Thompson, 114 Cal. xvii, 45 Pac. 1034).

The transcript contains a copy of a purported notice of intention to move to vacate the judgment, on the ground that the judge presiding was not a citizen of the United States. This is followed by copies of affidavits and exhibits relied on by appellant to establish the ground of his motion. In like manner appear counteraffidavits and an order striking said notice of motion, with its accompanying affidavits and exhibits, from the file. The appellant assigns the refusal to vacate the judgment and the order striking out as error. His point cannot receive favorable attention for two reasons: (1) The motion to vacate the judgment is not a part of the judgment roll, and can be brought before this court for consideration only when the papers used on the motion and the action of the court are authenticated by a bill of exceptions. *Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. 299; *Melde v. Reynolds*, 120 Cal. 234, 52 Pac. 491; *Bank v. Goodsell*, 137 Cal. 420, 70 Pac. 299; *Skinner v. Horn*, 144 Cal. 278, 77 Pac. 904. In the record before us there is no authentication by means of such bill, or otherwise. (2) The motion was, on its face, without merit. The fact, if it had been a fact, that the judge presiding at the trial was an alien, and therefore ineligible, made him none the less a de facto officer. His right to hold the office could be questioned only in proceedings regularly instituted for that purpose. It could not be attacked collaterally by motion to set aside his official acts. *People v. Sassovich*, 29 Cal. 480; *People v. Hecht*, 105 Cal. 621, 38 Pac. 941, 27 L. R. A. 203, 45 Am. St. Rep. 96.

No other points are made by appellant. The judgment and order are affirmed.

We concur: SHAW, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

(12 Cal. A. 671)

LOEHR v. BOARD OF EDUCATION et al.
(Civ. 670.)

(Court of Appeal, First District, California.
Feb. 23, 1910. Rehearing Denied by
Supreme Court April 22, 1910.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 141*)—
TEACHERS—GRADES—CERTIFICATES—LIMITATION.

The law recognizes but three school grades, namely, primary, grammar, and high school; and certificates authorizing teachers to instruct in these grades qualify the teacher for service only in the grade or grades covered by the certificate, hence it is in the statutory sense that the court must regard the term "grade" when asserting a limitation upon the powers of the board of education to transfer and assign teachers.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 301-304; Dec. Dig. § 141.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 141*)—
TEACHERS—APPOINTMENT—TRANSFER—ASSIGNMENT—DISMISSAL.

In the absence of a constitutional or statutory limitation, boards of education may exercise an unlimited discretion both in the employment and dismissal of teachers, and in their transfer and assignment.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 302; Dec. Dig. § 141.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 141*)—
TEACHERS—CONSOLIDATION OF CLASSES—DISCONTINUANCE OF SCHOOLS—RETIREMENT OF TEACHER.

Pol. Code, § 1791, defines the general powers of city and county boards of examination. Section 1793 provides that holders of city or city and county certificates are eligible to teach in the cities or cities and counties in which the certificates were granted, in schools or classes of grades corresponding to the grades of their certificates, etc. *Held*, that teachers elected without definite tenure have the right to hold their position while competent and faithful, and are subject to dismissal only for insubordination, etc., though boards of education may consolidate classes and discontinue a school or class in the interest of economy or for other good cause, and in such event to determine what teacher shall be retired.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 302; Dec. Dig. § 141.*]

4. SCHOOLS AND SCHOOLS DISTRICTS (§ 138½,*
New, vol. 9, Key No. Series)—TEACHERS—TRANSFER.

Under Pol. Code, § 1793, the board of education has power to transfer a teacher from class to class or from school to school, providing the teacher shall be retained in some class in a school of the grade which the certificate qualifies him to teach in.

5. SCHOOLS AND SCHOOL DISTRICTS (§ 144*)—
TEACHER ON UNASSIGNED LIST—RIGHT TO SALARY.

Where a teacher was without cause placed upon the unassigned list while away on a leave of absence, upon her return she was entitled to immediate assignment, and she could draw her salary until lawfully assigned to a position in the same class.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 303; Dec. Dig. § 144.*]

6. SCHOOLS AND SCHOOL DISTRICTS (§ 133*)—
TEACHERS—INDEFINITE EMPLOYMENT—STATUTES—CONSTRUCTION.

Under Pol. Code, § 1793, conferring the right of indefinite employment upon those who are the holders of city or city and county certificates, the right is conferred only as an incident to the holding of a city certificate as distinguished from a county, state, or special certificate.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 289; Dec. Dig. § 133.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Mandamus by Adeline M. Loehr against the Board of Education and others. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

Percy V. Long and John T. Nourse, for appellants. C. M. Fickert and I. F. Chapman, for respondent.

KERRIGAN, J. This is an appeal by the defendants from a judgment of the superior court in favor of the plaintiff in a mandamus proceeding.

The trial court awarded plaintiff a peremptory writ, by which the board of education of the city and county of San Francisco was commanded to admit plaintiff to the position of teacher of a class designated as "A first grade" in a common public school of said city and county, and to approve, allow, and order to be paid her demand for \$83 per month as compensation for services as teacher of such grade.

The case was submitted to the court upon an agreed statement of facts, from which it appears that plaintiff was the holder of a high school certificate, granted by an order of said board of education, which rendered her eligible to teach in any of the public schools of said city and county. In June, 1903, plaintiff was elected to the position of teacher in the primary grade, and placed upon the substitute list without any regular assignment. Thereafter she was assigned and transferred at various times to different schools and classes, all of the primary department, until June, 1906, when, her probation period having expired, she was by a resolution of the board of education elected a regular teacher in the department and placed upon the unassigned list until such time as her services would be required. In August, 1906, she was assigned as a teacher of a class of first grade and second grade pupils in the Sheridan Annex School at a salary of \$83 per month. She remained there until June, 1907, when, at her request, she was granted a leave of absence until August 19, 1907. At the termination of this leave, she learned that she had been placed on the unassigned list of teachers. The reason of this action by the board of education is not indicated in the agreed statement of facts; and, unless for such moving cause as was held sufficient to sustain similar action in *Bates v. Board of Education*, 139 Cal. 145, 72 Pac. 907 (where, in the interest of economy the plaintiff's class had been consolidated with others), it would be held to constitute a violation of her rights as defined in *Kennedy v. Board of Education*, 82 Cal. 483, 22 Pac. 1042, and *Fairchild v. Board of Education*, 107 Cal. 92, 40 Pac. 28. The significance of this action of the board, however, is lost in what subsequently occurred, for it further appears from the agreed statement of facts that whatever may have been the cause of the placing of the plaintiff upon the unassigned list the board did again in November, 1907, assign her to the Marshal Primary School, to take charge of the B third grade, which position carried a salary of \$76 a month. She refused to accept this assignment, and subsequently made a number of demands to be assigned to an A first grade class in the Sheridan Annex School, or to a class of similar rating in any other school

paying a like salary, but such demands were not complied with. She has refused to accept assignment to a class having a different rating, or to a different grade, or to any class or grade carrying a different salary.

The questions presented by these facts call for a definition of the powers of the board of education in the transfer and assignment of teachers. That the board ought to have wide discretion in such matters would seem to be dictated by the necessity of maintaining the efficiency of the department. No doubt it often occurs that a teacher assigned to a particular class forming a part of a particular grade is shown by experience to be better suited to the instruction of a different class forming part of a different grade. In such event, it is reasonable to suppose that the Legislature intended that the board of education should be vested with discretion to make a reassignment of the teacher to such class; and, unless there is something in the statute plainly requiring a different construction, we should be reluctant to decide that boards of education do not possess this power. These considerations caused the court in *Kennedy v. Board of Education*, supra, at page 492 of 82 Cal., at page 1045 of 22 Pac., to express the reservation: "We do not wish to be understood as holding that the board of education has not the power to transfer a teacher from one school to another of the same grade. The statute does not guarantee to a teacher the right to teach in any particular school, but to continue as such teacher in a certain grade, and the transfer of teachers from one school to another may be necessary for the good of schools, and should not be prohibited." The term "grade" as used in that decision, we assume, was employed in the statutory sense. In the agreed statement of facts reference is made to the "A first primary grade," and the "B third grade," from which we infer that the public schools of the city and county of San Francisco have been so classified as to permit the application of such generic designations to all classes having the same course of instruction. Indeed, it is a matter of common knowledge that such a classification is made by the school authorities of the various counties and cities of the state. Pupils are said to belong to the first, second, third, or other grades, as the case may be, and to this fact some confusion of thought may be attributed. Such classification into grades is made by boards of education for the purpose of dividing the course of study or curriculum into convenient periods. There is nothing in the statute, however, which recognizes their existence. The law itself recognizes but three principal grades, namely, primary, grammar, and high school grades. Certificates authorizing teachers to instruct in these grades are issued accordingly as primary, grammar or high school certificates, and, as such, qualify the teacher for service only in the grade or grades covered by the

certificate. It is in this statutory sense that we must regard the term "grade" when seeking a limitation upon the powers of the defendant to transfer and assign teachers, as it will not be pretended that the asserted right of the teacher to teach a particular class within a particular grade, in preference to another class within the same grade, can be upheld without express, statutory authority. On the contrary, it has been uniformly held in this state that in the absence of a constitutional or statutory limitation, boards of education may exercise an unlimited discretion in the employment and dismissal of teachers, as well as in their transfer and assignment. *Kennedy v. Board of Education*, supra; *Barthel v. Board of Education*, 153 Cal. 376, 95 Pac. 892; *Stockton v. Board of Education*, 145 Cal. 246, 78 Pac. 730; *Bradley v. Board of Education*, 1 Cal. App. 212, 81 Pac. 1036; *Harby v. Board of Education*, 2 Cal. App. 418, 83 Pac. 1081. Therefore, unless there is some provision of the law denying the board of education the right in its discretion to transfer and assign teachers, it must be held in this case that the assignment of the plaintiff to the Marshall Primary School, to take charge of the "B third grade," was a valid transfer and assignment.

Plaintiff contends that there is such a limitation contained in section 1793 of the Political Code. That section has been held to confer upon teachers elected without definite tenure the right to hold the position while competent and faithful, and to be subject to dismissal only for insubordination or other causes specified in section 1791 of the same Code. To this statement of the rights of the teachers must be added the qualification expressed in the case of *Bates v. Board of Education*, 139 Cal. 145, 72 Pac. 907, that power resides in boards of education to consolidate classes and to discontinue a school or class in the interest of economy or for other good cause, and in such event to determine what teacher shall be retired. Section 1793 in part provides: "The holders of city, or city and county, certificates, are eligible to teach in the cities, or cities and counties, in which such certificates were granted, in schools or classes of grades corresponding to the grades of such certificates, and when elected shall be dismissed only for insubordination or other causes, as mentioned in section seventeen hundred and ninety-one, of this Code, duly ascertained and approved by the boards of education of such cities, or cities and counties." It will be observed that the section makes teachers eligible to teach only in "schools or classes of grades corresponding to the grades" of their certificates. There is nothing in this section, however, placing any limitation upon the power of the board of education to transfer a teacher from class to class, or from school to school. All that the statute seems to require is that the teacher shall be retained in some class in a school of the grade which

the certificate qualifies him to teach in. However, it is sufficient for the purposes of this case to say that while plaintiff was transferred from one class to another, to which a slightly lower salary was attached, nevertheless she was not removed from the statutory grade to which she was elected, and, as we find nothing in the law preventing the board of education from making such transfer, it follows that the board acted within its powers, and that its action is valid. The Legislature certainly intended to leave such freedom of action in a board of education as would permit it in its discretion to make such assignment or transfer of a teacher as is complained of in this case. In *Kennedy v. Board of Education*, supra, the teacher was transferred from one school to another of lower grade, and the court observes: "She was removed from the grade in which her certificate and the statute entitled her to teach."

As we have seen, the placing of the plaintiff without cause upon the unassigned list while away on a leave of absence was unauthorized by law. Upon her return she was entitled to immediate assignment, and the fact that she had been wrongfully placed on the unassigned list did not operate to deprive her of her right to draw the salary incident to the position from which she had been wrongfully removed. This right existed from the date of her return, August 19, 1907, until November 26, 1907, when she was, as we have held, lawfully assigned to a class in the primary grade. We hold, therefore, that she is lawfully entitled to a salary of \$83 a month from August 19, 1907, to November 26, 1907, and the court below should have issued a writ of mandate, directing the defendants to approve, allow, and order to be paid such salary. But her refusal to accept the assignment and enter upon the discharge of the duties of a teacher in the "B third grade" in the Marshall Primary School at a salary of \$76 a month was a refusal on her part to perform the services which she was legally required to perform, and she cannot legally refuse to perform such services and insist upon the payment of the salary incident thereto. "The public schools," as was pertinently observed in *Bates v. Board of Education*, supra, "were not created, nor are they supported, for the benefit of teachers therein, * * * but for the benefit of the pupils and the resulting benefit to their parents and the community at large."

Section 1793 confers the right of indefinite employment upon those who are "the holders of city or city and county certificates." And it has been repeatedly held, in accordance with the plain language of the section, that this right is conferred only as an incident to the holding of a city certificate as distinguished from a county, state or special certificate. *Stockton v. Bd. of Education*, 145 Cal. 246, 78 Pac. 730; *Barthel v. Bd. of Ed-*

ucation, 153 Cal. 376, 95 Pac. 892; Bradley v. Bd. of Education, 1 Cal. App. 212, 81 Pac. 1036. Defendants contend in this case that the holder of a high school certificate is not the holder of a city certificate within the contemplation of the section quoted, but the views we have expressed render the determination of this point unnecessary at this time.

The judgment is reversed, with directions to the trial court to enter judgment in accordance with the views herein expressed.

We concur: COOPER, P. J.; HALL, J.

(12 Cal. A. 639)

JUSTIS et al. v. ATCHISON, T. & S. F. RY. CO. (Civ. 732.)

(Court of Appeal, Second District, California. Feb. 11, 1910. Rehearing Denied March 12, 1910; Denied by Supreme Court April 11, 1910.)

1. CARRIERS (§ 310*)—INJURY TO PASSENGER—ACTION FOR—BREACH OF CONTRACT—TORT.

At common law a passenger injured could elect between the breach of the contract to deliver him in safety and the wrong which justified an action in tort.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 310.*]

2. CARRIERS (§ 253*)—CONTRACT—TICKET—RECEIPT—EVIDENCE.

Though a ticket purchased by a passenger, when considered alone, might be deemed merely a receipt, containing only part of the contract, it was evidence that there was a contract, that the fare was paid, and of the right to be carried according to its terms, even though it did not express all the terms of the contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1011-1018; Dec. Dig. § 253.*]

3. CONTRACTS (§ 144*) — INTERPRETATION — WHAT LAW GOVERNS.

Where a contract between a citizen and a common carrier for transportation to another state was made in this state, its implied terms are to be supplied, and it is to be interpreted by the laws of this state, since the law of the domicile must prevail in the absence of express statutory provision.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 724-727; Dec. Dig. § 144.*]

4. PROPERTY (§ 2*)—RIGHT TO RECOVER DAMAGES.

Under Civ. Code, § 953, providing that a "thing in action" is a right to recover money or other personal property by a judicial proceeding, the right to recover damages from a common carrier for breach of a contract is "property."

[Ed. Note.—For other cases, see Property, Cent. Dig. § 2; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1144-1148; vol. 8, p. 7602; vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

5. HUSBAND AND WIFE (§ 260*)—RIGHT TO RECOVER DAMAGES—COMMUNITY PROPERTY.

Under Civ. Code, § 164, providing that all property acquired after marriage is community property, the right to recover damages from a common carrier for breach of a contract when acquired after marriage by husband or wife, or both, is community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 912; Dec. Dig. § 260.*]

6. HUSBAND AND WIFE (§ 270*)—RIGHT TO RECOVER DAMAGES—COMMUNITY PROPERTY—PARTIES.

The right of action for an injury to the wife and the money recovered therefrom being community property, the wife could not bring an action without making her husband a party, and she could not alone execute a release or satisfaction of the obligation, though the husband and wife could join in such an action.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 270.*]

7. HUSBAND AND WIFE (§ 270*)—RIGHT TO RECOVER DAMAGES—FORM OF ACTION—ELECTION.

Neither could she alone elect the form of action in which the damages for the injury could be recovered.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 270.*]

8. EVIDENCE (§ 80*)—PRESUMPTIONS—LAWS OF OTHER STATES.

The laws of another state are presumed to be the same as the laws of the forum, in the absence of evidence to the contrary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Minnie Justis and another against the Atchison, Topeka & Santa Fé Railway Company, a corporation. Judgment for plaintiffs, and defendant appeals. Affirmed.

E. W. Camp and A. H. Van Cott, for appellant. C. F. McNutt and McNutt & Hannon, for respondents.

TAGGART, J. This is an action to recover damages for injuries received by the plaintiff Minnie Justis while riding as a passenger upon one of defendant's trains through the territory of Arizona; she having a ticket, issued by defendant's agent, entitling her to passage from Los Angeles, Cal., to Kansas City, Mo. Judgment was for plaintiffs in the sum of \$1,975, and defendant appeals from the judgment.

The principal defense of appellant was based upon a written release and settlement of all damages arising from the injury, and a receipt therefor, signed by Mrs. Justis while on the train in the state of Kansas two days after the collision in which she was hurt. It is contended by appellant that, under the law of Arizona, and particularly under certain sections of the Revised Statutes of that territory which were read into the record and considered as evidence, without objection, the damages which could be recovered by plaintiffs, or either of them, on the cause of action stated, became and were the separate estate of the wife, and not the property of the community.

We are much inclined to the view of respondents' counsel that the discussion of the cause of action before us upon the theory that it is an ordinary action sounding in tort has "led us a chase in the wilder-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ness." Section 2100 of the Civil Code of the state provides that "a carrier of persons for reward must use the utmost care and diligence for their safe carriage," etc. In applying this section to instructions given in cases relating to injury to passengers of common carriers, the rule relating to such cases clearly distinguishes them from ordinary actions in tort. *Kline v. Santa Barbara*, 150 Cal. 741, 90 Pac. 125; *Valente v. Sierra Railway*, 151 Cal. 534, 91 Pac. 481. Even at common law, the party injured might in such a case elect between the breach of the contract to deliver him in safety and the wrong which justified an action *ex delicto*. *Sheldon v. Steamship Uncle Sam*, 18 Cal. 527, 534, 79 Am. Dec. 193.

The complaint here states a cause of action against the defendant for a violation of the obligation assumed by it to carry Mrs. Justis in safety to her destination, as indicated by the ticket which its agent sold to her. While the ticket purchased by her, when considered alone, might be deemed merely a receipt, containing only a part of the contract made, yet it was evidence that there was a contract. It was evidence of the payment of her fare and of her right to be carried according to its terms, even though it did not express all the terms of the contract. *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 685, 44 Pac. 320, 32 L. R. A. 193; *Ames v. Southern Pacific Co.*, 141 Cal. 728, 732, 734, 75 Pac. 310, 99 Am. St. Rep. 98. The facts alleged in the complaint sufficiently state a cause of action based upon the contract created by the purchase of the ticket and the provisions of the Code. The findings are sufficient to sustain a judgment upon the same theory. We may then consider the cause of action as one based upon a contract. So regarded, the contract was made at Los Angeles, its implied terms are to be supplied from the laws of the state of California, and it is to be interpreted by the laws of this state.

The right to recover damages for such an injury by a judicial proceeding is property in this state (Civ. Code, § 953); and when acquired after marriage by husband or wife, or both, it is community property (section 164). *McFadden v. Santa Ana*, 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252; *Neale v. Railway Co.*, 94 Cal. 425, 29 Pac. 954. The right of action for an injury to the wife and the money recovered therefrom being community property, the wife could not bring an action without making her husband a party, and could not, of course, alone, execute a release or satisfaction of the obligation. The husband and wife, however, may join in such an action. *Williams v. Casebeer*, 128 Cal. 82, 58 Pac. 380; *Paine v. San Bernardino*, 143 Cal. 658, 77 Pac. 659. As the wife alone could not release the obligation of defendant to the community for her injury, neither could she elect the form of action in

which the damages for that injury could be recovered.

While the complaint and findings, in the absence of demurrer to the former, sustain the judgment upon the theory that the action is on the contract, the complaint supports and the evidence justifies the finding of the trial court that, "under the laws of Arizona, a cause of action for such personal injuries to the wife and the fruits thereof were community property," if the action be considered as based upon the tort instead of the contract. The same conclusion would be reached whether the Arizona law introduced is considered as "evidence," or as a law to be construed as such, notwithstanding it is required by the statute to be introduced in evidence in the same manner as the facts in the case. Code Civ. Proc. §§ 1900, 1901, 1902, 1903; *Cummings v. O'Brien*, 122 Cal. 204, 54 Pac. 742.

Of the sections of the Revised Statutes of Arizona contained in the record only sections 3104, 3106, and 3111 need be specially mentioned, as these are the ones chiefly relied upon to sustain appellant's view that the wife had authority to discharge the claim for damages. Section 3106 provides: "Hereafter married women of the age of eighteen years and upwards shall have the same legal rights as men of the age of twenty-one years and upwards, except the right of suffrage and of holding office, and *except the right to make contracts binding the common property of husband and wife*," etc. (The italics are ours.) Section 3104 is as follows: "All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children, while she has lived, or may live, separate and apart from her husband, shall be deemed the common property of the husband and wife, and during the coverture personal property may be disposed of by the husband only; but the wife must join in all deeds and mortgages affecting real estate, except unpatented mining claims." The section which furnishes the basis for most of the arguments in the briefs is section 3111, which reads as follows: "The marital rights of persons married out of this territory, who may move to this territory, shall, in regard to property acquired in this territory, during the marriage, be regulated by the laws of this territory." Considered alone, the last section does not affect the material rights of the plaintiffs here, since they are not persons married out of the territory who have moved into it, but are residents of the state of California. Appellant contends, however, that by the application of the rule *expressio unius*, etc., to this section, the general rule declared in section 3106 would govern, and therefore the wife, by the law of Arizona, would have the same legal rights of contract in relation to injuries to herself that any

man of 21 would have as to injuries received by him. We cannot accept this interpretation of the section. The general effect of the statutes of Arizona before us, other than section 3111, is to declare the law of that territory with respect to common property to be practically the same as that of this state, and the introduction in evidence of these statutes served merely to confirm the presumption which should have governed the decision of the superior court, in which the case was tried, if no such evidence had been introduced. In *re Hancock's Estate*, 106 Pac. 58. The effect of section 3111 was to bring within the operation of the laws of the territory relating to marital rights in property acquired in the territory the one class, to wit, persons married out of the territory who have moved into it. If the rule invoked by appellant were applied here, all persons not mentioned must be excluded and all other classes, including persons married in the territory, as well as those married elsewhere, who had not moved into the territory, would, as to property acquired by them in the territory, be excluded from the benefit of the laws of the territory affecting marital rights. It is apparent that the Legislature of the territory never intended such a result.

Respondents contend that the section is but the useless relict of a departed condition, a condition which existed at the ingrafting of community rights into the American system in all the Pacific Coast states and territories when that territory became a part of the United States, and which, having served its purpose, has, in all the other jurisdictions, been removed from the statute books by appropriate legislation. There is much to sustain this view, but we do not think we are driven to the necessity of accepting either the impossible and inconsistent construction of section 3111 by appellant, or to eliminate the section from consideration on the ground of decay, disuse, or laches, as urged by respondents. The reasonable interpretation of it would seem to be that it was intended to admit certain persons married out of the territory to the benefits of the community laws of the territory. Of those not affected by the express terms of the section, the resident, whose marriage occurred in the territory, under the laws of the territory, would be governed by its general laws. Persons married out of the territory and who have not moved into it would be governed, as to personal property acquired by them in the territory, by the well-established, almost universally acknowledged rule that the law of the domicile must prevail in the absence of express statutory provision. The law of California thereby became the law of Arizona as to these plaintiffs, and the finding of the trial court that the cause of action for the personal injuries

to the wife was community property was a proper deduction from the law and evidence. Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(47 Colo. 557)

BURNS v. NATIONAL MINING, TUNNEL & LAND CO. et al.

(Supreme Court of Colorado. April 4, 1910.)

1. APPEAL AND ERROR (§ 781*)—DISMISSAL—SETTLEMENT OF CAUSE.

Where the disputes between parties have been settled pending appeal, the court will dismiss the appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3122; Dec. Dig. § 781.*]

2. APPEAL AND ERROR (§ 804*)—DISMISSAL—PLEA IN BAR.

That the disputes between the parties to a cause have been settled pending appeal, whereby the appeal should be dismissed, which fact does not appear of record, cannot be taken advantage of by motion, but should be taken by a plea in bar.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 58; Dec. Dig. § 804.*]

Appeal from District Court, El Paso County; R. E. Lewis, Judge.

Action by James F. Burns against the National Mining, Tunnel & Land Company and another. From a judgment for defendants, plaintiff appeals. On motion to dismiss. Motion denied, with leave to file plea in bar.

Gunnell & Chinn, Thomas, Bryant & Malburn, Chas. S. Thomas, and Murat Master-son, for appellant. K. R. Babbitt and F. L. Sherwin, for individual appellees.

GABBERT, J. Since this case was lodged here on appeal, the appellees have filed a motion to dismiss it, based upon the ground that since the appeal was taken a settlement of the subject-matter of controversy has been effected. If there has been such a settlement that the rights of the parties will not be affected by any judgment which this court might render, the appeal should be dismissed; for its province as a court of review is to decide and settle controversies by a judgment which will fix the rights of the parties before it, and not to determine either questions of law or fact which cannot affect them. *Floyd v. Cochran*, 24 Colo. 489, 52 Pac. 676. In other words, where the disputes between parties have been settled pending appeal, this court will decline to determine any of the questions upon the record, and will dismiss the appeal. *Hunter v. Dickinson*, 3 Colo. App. 372, 33 Pac. 932.

But, in the circumstances of this case, a motion is not the proper procedure, for the reason that the matters upon which appellees rely in support of their motion to dismiss the appeal do not appear of record. Matters may occur subsequent to the judgment rendered by the trial court which operate to bar the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

right to have such judgment reviewed either on appeal or error. When such matters appear of record, the question is properly raised by motion to dismiss; but when they do not so appear it must be raised by a plea in bar of the proceedings pending on appeal or error. *Atkinson v. Tabor*, 7 Colo. 195, 3 Pac. 64.

The motion to dismiss is denied, with leave to appellees to file a plea in bar within 20 days from this date.

STEELE, C. J., and MUSSER, J., concur.

(47 Colo. 617)

WEAVER v. PEOPLE.

(Supreme Court of Colorado. April 4, 1910.)

1. CRIMINAL LAW (§ 1090*)—APPEAL AND ERROR—BILL OF EXCEPTIONS—QUESTIONS FOR REVIEW.

Where the motion for a new trial, the instructions and the rulings thereon, and the objections and exceptions of defendant are not brought up by a bill of exceptions, they cannot be reviewed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2789, 2803-2827, 2927, 2928, 2948; Dec. Dig. § 1090.*]

2. JURY (§ 138*)—CRIMINAL LAW (§ 1152*)—ORDER OF CHALLENGING.

In the absence of a statute in the trial of criminal cases, the mode of challenging is left to the sound discretion of the court, and will not be disturbed on appeal, in the absence of abuse, and a rule allowing the exercise of the right to challenge alternately is proper.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 624-626; Dec. Dig. § 138.* *Criminal Law*, Cent. Dig. §§ 3053-3057; Dec. Dig. § 1152.*]

3. HOMICIDE (§ 203*)—ADMISSIBILITY OF DYING DECLARATIONS.

It is essential to the admission of dying declarations that they were made under a sense of impending death, but it is not necessary that the person making them state at the time that they are so made, as that fact may be proved, either by the express language of the declarant, or inferred from the evident danger, or the opinions of attendants stated to him, or from his conduct or other circumstances of the case.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*]

4. HOMICIDE (§ 216*)—DYING DECLARATIONS—PRELIMINARY EVIDENCE—BELIEF IN IMPENDING DEATH.

Evidence in a prosecution for murder held to show that the declarations of the person murdered introduced in evidence were made under a sense of impending death.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 457; Dec. Dig. § 216.*]

5. HOMICIDE (§§ 200, 209*)—DYING DECLARATIONS—ADMISSIBILITY OF WRITING.

A person who was shot, and who subsequently died of his wounds, made statements, believing that death was impending, as to the circumstances surrounding the shooting, and these statements were written by a person present, but not in the exact language of declarant, and read over to him, and he was asked if he understood them and was willing to affix his

signature thereto, to which he answered, "Yes." He was too weak to write his name, and only affixed his mark. *Held*, that the oral declarations and the paper were admissible in evidence in the prosecution for murder.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 425-428, 441; Dec. Dig. §§ 200, 209.*]

Error to District Court, Conejos County; Charles C. Holbrook, Judge.

Thomas Weaver was convicted of murder, and brings error. Affirmed.

Ira J. Bloomfield and B. F. Harwitz, for plaintiff in error. John T. Barnett, Atty. Gen., and Albert L. Moses, Dist. Atty. (George H. Thorne, of counsel), for the People.

CAMPBELL, J. The defendant, Weaver, was tried and convicted of murder in the first degree, and sentenced to imprisonment in the penitentiary for life. The assignments relied upon by him for a reversal of the judgment are: Errors of the court in impanelling a jury; in admitting alleged dying declarations of Mr. Brown, the man who was killed; in the instructions; in improperly overruling defendant's motion for a new trial. Neither the motion for a new trial nor the instructions, nor the rulings thereon, nor the objections and exceptions of defendant thereto, if any, have been brought to this court by a bill of exceptions. Our established practice in criminal cases requires that they be incorporated in a bill, and thus made a part of the record, to entitle the complaining party to a review of the trial court's rulings thereon. *Edwards v. People*, 26 Colo. 539, 59 Pac. 56; *Packer v. People*, 26 Colo. 306, 57 Pac. 1087; *Bergdahl v. People*, 27 Colo. 302, 61 Pac. 228; *Keady v. People*, 32 Colo. 57, 74 Pac. 892, 66 L. R. A. 353. The only questions, therefore, upon which defendant may be heard on this review are the manner of impanelling the jury and the admission of dying statements.

In the district court of Conejos county, where trial was had, the former practice in impanelling a jury was for the people first to exercise all its peremptory challenges before a defendant was called upon to exercise any. The practice prevailing at the time of this trial was for the people and the defendant to make their peremptory challenges alternately; the people making the first one. Defendant complains that this method of alternating challenges is wrong, and was prejudicial to him. His counsel recognize that the decision of this court in *Nicholson v. People*, 31 Colo. 53, 71 Pac. 377, is against their position. In that case this court, speaking by Steele, Justice, held that: "In the absence of a statute regulating the impanelling of juries and the exercise of the privilege of peremptory challenges in the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

trial of criminal cases, the mode of challenging is left to the sound discretion of the court; and, unless there has been a manifest abuse of that discretion, the action of the trial court will not be disturbed by the appellate court." Notwithstanding vigorous argument of counsel that the earlier method is the better, and that it prevails in other jurisdictions, we are satisfied with the decision in the Nicholson Case, and again approve its doctrine. We think the better rule is as there stated: "Challenges should be exercised alternately, one by one, and after each challenge the panel refilled. This gives the parties an opportunity to challenge in proper order, and would seem to be the most orderly way of selecting a jury." Such practice, under the direction of the trial court, was observed by the parties in exercising their peremptory challenges at this trial, and no harm was thereby done defendant.

In 1 Greenleaf on Evidence (15th Ed.) at section 158, the learned author, in speaking of the admission of dying declarations, says: "It is essential to the admission of these declarations, and is a preliminary fact, to be proved by the party offering them in evidence, that they were made under a sense of impending death; but it is not necessary that they should be stated, at the time, to be so made. It is enough, if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind." In *Graves v. People*, 18 Colo. 170, 32 Pac. 63, this court, after stating the reasons for admitting such declarations, said: "They are only admitted when it is shown that the party making them was in extremis at the time, and when all hope of this world had passed." In *Brennan v. People*, 37 Colo. 256, 86 Pac. 79, substantially the same language was employed, and the court said on the question of declarant's belief: "This may be shown not only by what the injured person said, but by his condition and the nature and extent of his wounds. Whether, from all the circumstances under which the statement was made, it satisfactorily appears that it was made under a sense of impending death is a question exclusively for the court." *Zipperian v. People*, 33 Colo. 134, 79 Pac. 1018, is a case quite in point in favor of the rulings below.

The foregoing statements of the rule governing the admission of dying declarations are, generally speaking, sanctioned by the courts of this country. The difficulty is not so much in the statement of the rule as in its application to the facts of the various

cases as they arise. The declarations of Brown—who was shot by defendant, Weaver, and who died on the next day after the infliction of the mortal wounds—that defendant shot him down without provocation, as charged in the information, were admitted in evidence over defendant's objections. These objections, so far as necessary to consider here, are that it was not made to appear to the trial judge that the declarant at the time the statements were made believed that he was about to die, and that he had abandoned all hope of recovery. The record shows that soon after Brown was shot in a saloon in Alamosa, he was taken to a hotel in that town, and a doctor at once summoned. Brown was shot twice; one shot taking effect in his left thigh, the other passing through his abdomen. The latter wound was mortal, and the victim's condition was serious from the beginning. In a conversation with his physician soon after the latter reached his bedside, Brown said "he thought he was going to die," and the doctor said his condition was such as to warrant that impression. Brown did not say how soon he expected to die, but he used this language, as testified to by the physicians: "He said he was done for." The doctor did not advise him as to his condition, but the expression used by Brown was his own conclusion about his condition. This, or a similar, expression was repeatedly used by him in the presence of the doctor and other persons who have so testified, and there is not any evidence to the contrary. Brown was shot about 1 o'clock in the afternoon, and about an hour thereafter his friends secured a special train to take him from Alamosa to a hospital at Salida. He was put aboard the train, which reached Salida about 6 o'clock of the same day, and he was operated on between 7 and 8 o'clock that night, with a view to see if an operation would be helpful. He died some time the next day. While on the train he repeatedly said to those about him, "I am done for," and when the doctor and others present tried to cheer him up, Brown would not believe their statements, and said: "No; I am done for. He [referring to the doctor] can't do anything." To a witness who told him that his friends had planned to take him to a hospital to try to save his life, Brown replied: "I am all in; I am done for. It is no use. I am going to die. I would like to see my wife before I die. Try to get her to me before I die." He further said "he was all in, and could not live." These, in substance, are the statements made at various times by Brown of his own volition, and in reply to questions asked him. The wounds, as we have said, were mortal, and it is entirely clear that Brown fully recognized that they were. Never at any time after receiving the wounds did he express any belief or conviction as to his condition other than, or

different from, the foregoing quoted expressions. Unquestionably, therefore, under the rule of law applicable to dying declarations, Brown made these statements under a sense and belief of impending death, and had no hope of recovery. From his statements, thus made, a writing was prepared by one of the persons present when they were made, which was read over to Brown after the train started from Alamosa, and he was asked if he understood it and was willing to affix his signature to it, and his answer was, "Yes." A pen was given to him with which to write his name, and he was supported by an attendant while trying to do so, but was too weak to sign his name, but made his mark instead. The writing, though not reproducing the exact language which Brown used in expressing his belief as to his condition, was in effect the same, and it contained the statement that he was "mortally wounded and about to die," to which he expressly assented, and impliedly approved by knowingly affixing his mark. His every word about his condition indicated that he knew he was very near to death, and, being fully conscious thereof, he made the statements.

Perhaps the strongest case cited by defendant in support of his contention is *State v. Gianfala*, 113 La. 463, 37 South. 30. In that case it appeared that the wounded man repeatedly said that he thought he was going to die, yet it was apparent from his conduct and his actions that he had not given up all hope; for, when a physician came to him, he asked the latter's opinion, and on his advice started on a journey to a distant city to have himself operated upon as being his one chance of recovery. The court held that, although the declarant had stated that he thought he was going to die, nevertheless, since he asked the opinion of his physician and took his advice to go to a distant city to obtain relief, this indicated that he still had some hope, particularly as the physician told him that there would be a chance for him if he went to New Orleans and had himself operated on. That, however, is not this case. Instead of asking to be sent to Salida, or giving his consent thereto when one of his friends stated that the journey was to be made, Brown, in effect, protested against it, and said that it would be useless, for he knew he was going to die, and asked to have his wife brought to him before he passed away. Considering all of the facts and circumstances, we think these oral declarations and the confirmatory writing were properly admitted in evidence.

No prejudicial error having been shown, the judgment is affirmed.

Affirmed.

STEELE, O. J., and MUSSER, J., concur.

(18 Idaho, 11)

BEST v. BROADHEAD.

(Supreme Court of Idaho. Oct. 30, 1909. On Rehearing, April 19, 1910.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 604*)—REGULATING ANIMALS — RUNNING AT LARGE — CONSTRUCTION OF STATUTE.

Under the provisions of subdivision 15 of section 15 of an act of the Legislature providing for the organization, government, and powers of cities and villages (see Sess. Laws 1905, p. 113), the cities and villages of the state have power and authority to pass ordinances to prevent the running at large of horses within corporate limits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 604.*]

2. TROVER AND CONVERSION (§ 34*)—PLEADING—SUFFICIENCY OF ANSWER—EVIDENCE.

Held, that the court erred in not admitting all evidence offered tending to establish the defense set up in the answer.

[Ed. Note.—For other cases, see *Trover and Conversion*, Dec. Dig. § 34.*]

3. MUNICIPAL CORPORATIONS (§ 604*)—REGULATING ANIMALS — RUNNING AT LARGE — CONSTRUCTION OF STATUTE—"OTHER ANIMALS."

Held, that the phrase "other animals," as used in said section, is broad enough to, and does, include horses and all other animals.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 604.*]

For other definitions, see *Words and Phrases*, vol. 6, p. 5073.]

On Rehearing.

4. MUNICIPAL CORPORATIONS (§ 112*)—ORDINANCES—SUBJECT TO BE EXPRESSED IN TITLE.

Under the provisions of section 2276, Rev. Codes, an ordinance must contain no subject which shall not be clearly expressed in its title.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 258-262; Dec. Dig. § 112.*]

5. MUNICIPAL CORPORATIONS (§ 112*)—ORDINANCES—SUFFICIENCY OF TITLE.

The title of an ordinance, "An act relating to domestic animals and prohibiting their running at large," is sufficient to authorize the incorporation in such ordinance of provisions incident to and regulating animals running at large, such as naming the kind, the territory or place in which they shall not run at large, the impounding and sale, the fees to be collected, and the penalty. It is sufficient if the title in its general scope clearly expresses the objects and purposes of the ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 112.*]

6. MUNICIPAL CORPORATIONS (§ 105*)—ORDINANCES — STYLE—SUFFICIENCY—CONSTRUCTION OF STATUTE.

Section 2274, Rev. Codes, providing, "The style of all ordinances shall be: 'Be it ordained by the mayor and council of the city of — or the chairman and board of trustees of the village of —,'" is directory, and the enacting clause of a village ordinance as follows: "Be it ordained by the town of Post Falls," is sufficient, as such enacting clause indicates the intention and declaration of the village to legislate.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 105.*]

7. MUNICIPAL CORPORATIONS (§ 114*)—ORDINANCES—AMENDMENT—VALIDITY.

Under the provisions of section 2276, Rev. Codes, "No ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section as revised or amended, and the ordinance or section so amended shall be repealed." Under this provision of the statute, an amendatory ordinance which purports to amend an ordinance by inserting therein particular language without indicating where such insertion shall be made, or containing the entire ordinance as amended or the particular section amended, is void.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 263-265; Dec. Dig. § 114.*]

8. MUNICIPAL CORPORATIONS (§ 115*)—ORDINANCES—REPEAL—VALIDITY.

Where the provisions of an amendatory ordinance are illegal and void, and it is apparent that such amendment is to be substituted for the ordinance repealed, or for a particular part thereof, the illegal and void character of the repealing ordinance will also render void the repealing clause.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 115.*]

Appeal from District Court, Kootenai County; W. W. Woods, Judge.

Action by W. H. Best against J. W. Broadhead. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

Ezra R. Whitla, for appellant. R. E. McFarland, for respondent.

SULLIVAN, C. J. This action was commenced to recover from the defendant the value of two mares with their sucking colts and one bay mare about two years old, alleged to have been wrongfully taken by the defendant from the plaintiff and converted to his own use, and for damages for their detention and \$100 attorney's fee for prosecuting the action. The defendant by his answer denied the allegations of the complaint, and as an affirmative defense averred that he was poundmaster of the village of Post Falls, Kootenai county, and that said village had by an ordinance duly enacted provided for impounding and selling horses running at large, and on the 8th day of May, 1906, while said ordinance was in full force and effect, the defendant, as poundmaster and acting under said ordinance, took up and impounded said horses and colts, and alleges that the ordinance was complied with in all respects, and that thereafter the animals were sold by the village marshal of the village of Post Falls, and that at such sale, which was by public auction, the defendant purchased the two year old mare, also one mare with her sucking colt, and alleges that this was the way and none other in which he had said animals, and asked for judgment upon that state of facts. The ordinances under which the defendant claimed to be acting as poundmaster were set out and made a part of the answer. Upon the issues thus made the cause

was tried by the court with a jury, and verdict and judgment rendered and entered for the plaintiff for \$375 damages and costs of suit. A motion for a new trial was denied, and this appeal is from the judgment and the order denying a new trial. On the trial the court excluded the ordinances of the village of Post Falls providing for impounding horses and other animals which were found running loose in the village. The court held that under the provisions of subdivision 15, § 15, of an act to amend section 73 of an act entitled, "An act to provide for the organization, government and powers of cities and villages," etc. (Sess. Laws 1905, p. 113), that no authority was given to a city or village to pass ordinances for the purpose of impounding stray horses, and held that said statute enumerated certain animals and that such animals excluded all animals not therein named, regardless of the general clause of said section providing for the regulation of running at large of "other animals," after enumerating cattle, hogs, mules, sheep, goats, and dogs. Thus holding, the court would not permit the defendant to introduce in evidence the ordinance of said village providing for the impounding of horses and other animals, and thus shut out entirely the defense pleaded by the defendant to the effect that said horses were taken by the poundmaster when running loose in the village of Post Falls and impounded and sold under the provisions of said ordinance.

While there are a number of assignments of error going to the admission and rejection of evidence, they substantially all rested upon the proposition that they were immaterial for the reason that said village had no authority whatever to pass an ordinance to prevent the running at large of horses in said village, and for that reason horses could not be impounded under said ordinance. In support of this decision counsel for appellant cites from the act concerning cities and villages found in the Laws 1899, p. 204, Laws 1901, p. 100, and Laws 1903, p. 422, the provision authorizing villages to pass ordinances regulating the running at large of animals. Each and every one contains among other animals named "horses," but that that provision was amended by the Laws of 1905 and the word "horses" was omitted, and said provision made to read as follows: "Regulate the running at large of cattle, hogs, mules, sheep, goats, dogs and other animals, and to cause such as may be running at large to be impounded and sold to discharge the cost and penalties provided for the violation of such prohibition, and the expense of impounding and keeping the same, and of such sale." And it is contended that, whatever the purpose of the Legislature was in omitting the word "horses" from said section, it is not open to discussion, and that it was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

evident the Legislature may have come to the conclusion that the running at large of horses ought to be permitted, while hogs, mules, sheep, goats, and other animals should not be permitted to run at large, and for that reason the court did not err in refusing to admit said ordinance in evidence. In support of that contention Black on Interpretation of Laws, p. 141, and Sutherland on Statutory Construction, § 268, are cited. The trial court evidently took the position that, although former statutes in regard to cities and villages regulating animals running at large contained among other animals enumerated "horses," because of its omission in the statute as amended by Laws 1905, it was the purpose and intent of the Legislature to prohibit cities and villages from regulating the running at large of horses, and that "other animals" as used in said section did not include horses. We find on an examination of Sess. Laws 1907 that the Legislature in amending said act in regard to cities and villages inserted the word "horses" in said section 15, and made said section read the same as it did prior to its amendment in 1905. It is clearly evident that the word "horses" was left out of the act of 1905 by mistake or carelessness, as there could be no reason why mules should be prevented from running at large in a village and horses be permitted to do so, and we conclude that the words "other animals," as used in said section in the act of 1905, is broad enough to, and does, include horses, and was intended to include all other animals not specially enumerated. The rules of interpretation as stated in Black and Sutherland are useful as a guide in determining the probable intention of the Legislature; but, if it should be apparent in any particular case that the Legislature did not in fact intend that its express mention of one thing should operate as an exclusion of all others, then the maxim, "*Expressio unius est exclusio alterius*," must give way. We are clearly of the opinion that cities and villages have the power by proper ordinance to regulate the running at large of horses, and the court erred in holding that the village of Post Falls had no authority under Laws 1905 to regulate the running at large of horses within the limits of such village.

In our view of the case, it is not necessary for us to pass upon all of the other assignments of error, for they all revolve around the action of the court in holding that the village had no authority to enact said ordinance. The answer of the defendant pleads a complete defense to this action, and the court should have admitted all pertinent and relevant evidence which tended to establish that defense, and on a retrial ordinances and all other evidence offered tending to establish that defense ought to be admitted.

The judgment of the court must be reversed and the cause remanded for a new trial,

and it is so ordered, with costs in favor of appellant.

STEWART and AILSHIE, JJ., concur.

On Rehearing. (18 Idaho, 16)

STEWART, J. A rehearing was granted in this case, and upon reargument it was contended by counsel for respondent that Ordinances Nos. 36 and 40, regulating the running at large of certain stock and providing for the impounding thereof in the town of Post Falls, were illegal and void. Certified copies of these ordinances were offered in evidence, and a number of specific objections to their introduction were made by counsel for respondent, and the trial court sustained the objection that the statute did not authorize such ordinances; and it was this question this court discussed and decided in the former opinion.

Counsel for respondent upon reargument urges very earnestly that this court should also determine the validity of the ordinances for the reason that, the cause having been reversed, the validity of such ordinances will necessarily arise upon a retrial of said case. Counsel for appellant, however, contends that the validity of such ordinances, because of their form, is not presented by the record. Strictly speaking, this contention is no doubt correct; but in view of the fact that a new trial has been ordered, and the validity of such ordinances will necessarily be involved, and counsel upon the reargument having fully and exhaustively discussed the validity of such ordinances, we have concluded to express our views with reference to the same.

It is first contended that the title to Ordinance No. 36 is insufficient, because it does not express or contain the subject-matter of said ordinance, and does not specify the penalty or punishment for a violation thereof, and does not refer to the provisions contained therein for the impounding and sale of the animals described, and does not describe the territory within which such animals are prohibited from running at large. The title reads as follows: "An act relating to domestic animals and prohibiting their running at large." Section 2276, Rev. Codes, provides: "Ordinances shall contain no subject which shall not be clearly expressed in their title." It is unnecessary in the title of an ordinance to index every particular provision contained therein. It is sufficient if the title in its general scope clearly expresses the object and purpose of such ordinance. When, therefore, the title provides that it is "an act relating to domestic animals and prohibiting their running at large," it is sufficient to authorize the incorporation therein of all provisions incident to the regulation and prohibition of animals running at large, such as naming the kind, the territory or place, the impounding and sale, the fees to be collected, and the penalty. We think this title sufficient. Village of St. Anthony v. Brandon, 10 Idaho, 205, 77

Pac. 322; *State v. Calloway*, 11 Idaho, 719, 84 Pac. 27, 4 L. R. A. (N. S.) 109, 114 Am. St. Rep. 235; *Bayard v. Baker*, 76 Iowa, 818, 40 N. W. 818; *McQuillan on Munic. Ordinances*, § 141; *Smith v. City of Emporia*, 27 Kan. 528. Sections 1 and 10 of the ordinance clearly described the territory. It is true it does not say that the territory is within the town of Post Falls, yet the ordinance has reference only to the town of Post Falls, and could not extend beyond its boundaries, and can only apply to the territory described and within the town. The territory is described as follows: "Limit of territory included in this ordinance commencing at a point where Sixty street intersects with the Spokane river, thence running in an easterly direction to Idaho street, thence running south to Spokane river, thence along the main or north channel to the place of beginning." This is sufficient.

It is next contended that the enacting clause of the ordinance is not in the form provided by section 2274, Rev. Codes. This section provides: "The style of all ordinances shall be: 'Be it ordained by the mayor and council of the city of — or the chairman and board of trustees of the village of —.'" The enacting clause of Ordinance No. 36 reads as follows: "Be it ordained by the town of Post Falls." It will thus be seen that the enacting clause of Ordinance No. 36 is not in the language of the statute. The enacting clause of an ordinance, however, is merely a declaration of intention and purpose, and the enacting clause of Ordinance No. 36 clearly shows the intention and purpose of the town of Post Falls to enact such ordinance and that it was the town of Post Falls which enacted the same, and such appearing from the enacting clause is a sufficient compliance with the statute. The statute is directory only. *McQuillan on Munic. Ordinances*, § 145; *City of Napa v. Easterby*, 76 Cal. 222, 18 Pac. 253; *State v. Fountain*, 14 Wash. 236, 44 Pac. 270; *People v. Murray*, 57 Mich. 396, 24 N. W. 118; *People v. Chipman*, 31 Colo. 90, 71 Pac. 1108; 1 *Dillon, Munic. Corp.* (4th Ed.) § 309. We think, therefore, that Ordinance No. 36 was a valid ordinance, and was in force at the time of the trial unless repealed by Ordinance No. 40.

It is contended that Ordinance No. 40 is invalid for the reason that the title does not express the object or purpose of the ordinance, because it does not state or provide that it is an ordinance amending Ordinance No. 36. The title reads as follows: "An ordinance establishing the boundary limits and making known the limit of territory included in Ordinance No. 36." It thus appears that the object and purpose of this ordinance, as declared by the title, is to make some alteration or change in Ordinance No. 36, but the particular change as applied to any particular part of the ordinance is not disclosed in the title. The title of an amendatory ordinance would be sufficient if it indicated the

particular section or part of the ordinance to be amended without declaring in such title the general scope or purpose of the ordinance amended; and, while it would have been better, no doubt, to have indicated the particular section of Ordinance No. 36 to be amended and to have stated such fact in the title, yet we are inclined to think that the title is sufficient to indicate the purpose and intent to amend Ordinance No. 36.

It is next contended that Ordinance No. 40 is invalid for the reason that it does not indicate that the territory described is within the village of Post Falls. This objection is not well taken. The village of Post Falls is legislating with reference to its own territory, and its ordinances include only territory within the village corporation, and it would appear useless to say that the ordinance is made applicable to the village of Post Falls.

It is next urged that the enacting clause of Ordinance No. 40 is void because not in proper form. What has been said with reference to the enacting clause of Ordinance No. 36 applies alike to the enacting clause of this ordinance. It is also urged that Ordinance No. 40 is void for the reason that it does not comply with section 2270, Rev. Codes. This section provides: "No ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section as revised or amended, and the ordinance or section so amended shall be repealed." Ordinance No. 40, in part, is as follows:

"An ordinance establishing the boundary limits and making known the limit of territory included in Ordinance No. 36.

"Be it ordained by the chairman of the board of trustees of the village of Post Falls.

"Commencing at a point where the artificial channel empties into Spokane river, thence in a northeasterly direction to a point where Sixty street intersects with the N. P. R. R. Co.'s right of way, thence in an easterly direction to Idaho street, thence in a southerly direction to Spokane river, thence along Spokane river to the place of beginning.

"And that Ordinance No. 36 is hereby amended so as to read accordingly, and that all ordinances and sections of ordinances conflicting with this ordinance is hereby repealed."

Then follows the provision with reference to the time the ordinance shall take effect and the history of its passage. It will thus be seen that this ordinance does not purport to amend any particular section of Ordinance No. 36, but pretends to amend the entire ordinance. The ordinance does not contain the entire ordinance or section as revised or amended as required by the statute. In order to read Ordinance No. 40 as an amendatory ordinance of No. 36, we are called upon to exercise our judgment as to the particular section of No. 36 intended to be amended, and

to insert the amendment in lieu thereof. After the enacting clause follows the description, but where that description is to be placed in Ordinance No. 36, or what part of No. 36 it is to repeal or displace, is a matter left entirely to conjecture. This is not a compliance with the provisions of section 2276, supra. To make a valid amendment, the amendatory ordinance should comply with the provisions of the statute; that is, the new or amendatory ordinance should contain the entire ordinance or section as revised or amended, and not leave the question open to guess or conjecture as to the particular place where the amendment is to be inserted or what particular portion of the old ordinance is to be displaced by the new or amendatory ordinance. *McQuillan, Munic. Ordinances*, § 195; *Pentecost v. Stiles*, 5 Okl. 500, 49 Pac. 921. For these reasons, we are of the opinion that Ordinance No. 40 is void.

From what has been said it follows that no part of Ordinance No. 36 has been repealed or superseded by the provisions of Ordinance No. 40, which is held to be void. The common council of Post Falls did not repeal any provision in Ordinance No. 36 by adopting Ordinance No. 40, if the provisions of the latter are illegal and void, notwithstanding the fact that the latter ordinance contains a clause to the effect "that all ordinances in conflict herewith are hereby repealed," as it clearly appears that Ordinance No. 40 was to be a substitute for a part of Ordinance No. 36. The illegal and void character of Ordinance No. 40, in so far as amending Ordinance No. 36, renders illegal and void also the repealing clause found in Ordinance No. 40. *City of Portland v. Schmidt*, 13 Or. 17, 6 Pac. 221; 26 Am. & Eng. Ency. of Law (2d Ed.) 716, 717.

The judgment will be reversed and a new trial ordered. Costs awarded to appellant.

SULLIVAN, C. J., concurs.

AILSHIE, J. In concurring I desire to add that I think the title to Ordinance No. 40 is insufficient for the same reasons that render the ordinance itself void.

(18 Idaho, 24)

FEATHERSTONE v. KEANE.

(Supreme Court of Idaho. April 9, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 567*)—RECORD—STATEMENT—STRIKING FROM TRANSCRIPT.

Where a proposed statement is not presented and settled within the time required by law and is inserted in the transcript, on motion, it will be stricken therefrom.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2521; Dec. Dig. § 567.*]

2. APPEAL AND ERROR (§ 623*)—RECORD—FILING OF TRANSCRIPT—TIME.

Under the provisions of rule 25 of the rules of this court (96 Pac. x), the time during which

the trial court or judge holds a bill of exceptions or statement prior to the settlement and filing thereof and the time during which the attorney for the respondent may retain the transcript on appeal before certifying or refusing to certify the same must be excluded in computing the 60 days' time in which a transcript is required to be filed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2736; Dec. Dig. § 623;* *Time*, Cent. Dig. § 27.]

3. TRIAL (§ 330*)—VERDICT—SET-OFF—CONSTRUCTION.

Where an action is brought to recover for money had and received and for services alleged to have been performed at the instance and request of the defendant, and the answer in effect denies the allegations of the complaint and sets up by way of cross-complaint certain damages alleged to have been sustained by the defendant on account of the neglect and incompetency of the plaintiff in performing certain services for defendant, and the cause is tried by the court with a jury, and the jury renders a verdict in favor of the plaintiff on his first cause of action and in favor of the defendant on the second cause of action, and does not mention the cause of action set out in the cross-complaint, the effect of such verdict is that the defendant is not entitled to recover on the alleged cause of action set up in the cross-complaint.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 781; Dec. Dig. § 330.*]

4. TRIAL (§ 330*)—VERDICT.

This being an action at law, the jury by its verdict in effect found upon all of the issues presented.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 777; Dec. Dig. § 330.*]

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by A. H. Featherstone against Joseph P. Keane. Judgment for plaintiff, and defendant appeals. Affirmed.

Jos. P. Keane, pro se. Carlton Fox, for respondent.

SULLIVAN, C. J. This action was brought to recover on two separate causes of action: First, on account of money had and received by the defendant for and on behalf of the plaintiff in the sum of \$400; and, second, for personal services alleged to have been rendered for the defendant by the plaintiff of the value of \$300. The answer put in issue all the material allegations of the complaint and averred as an offset or counterclaim damages in the sum of \$12,000 resulting from incompetency and neglect on behalf of the plaintiff in performing certain services as an attorney for the defendant. The cause was tried by the court with a jury, and the jury returned the following verdict: "We, the jury in the above-entitled action, find for the plaintiff on his first cause of action and assess his damages at four hundred dollars (\$400.00). We further find for the defendant on plaintiff's second cause of action." On that verdict a judgment was entered in favor of the plaintiff for the sum of \$400. The appeal is from the judgment.

The respondent interposed a motion to

strike from the transcript the statement or bill of exceptions contained therein, and to strike the transcript from the files. The motion to strike the statement from the transcript was based on the ground that it had not been filed, served, and settled within the time required by law. Upon an examination of the record, we find the motion well taken and is therefore sustained.

The motion to strike the transcript from the files was based on several different grounds; the last one being that the transcript was not filed within 60 days from and after the appeal was perfected. On an examination of the record, we find that the transcript was filed within the time provided by law, after deducting the time during which the attorneys for the respondent retained the transcript on appeal before certifying or refusing to certify the same. Rule 25 of the rules of this court provides that the time above referred to shall be deducted from the 60-day period within which the transcript must be filed after an appeal has been perfected. We have examined the other grounds contained in said motion to strike the transcript from the files and find no cause therein for granting the motion. The motion to strike the transcript is therefore denied.

This leaves the case for hearing upon the judgment roll alone, which contains no bill of exceptions or statement on motion for a new trial.

It is contended that the court did not find upon all of the issues made by the pleadings. There is nothing in that contention, as this is an action at law, and the jury found for the plaintiff upon the first cause of action stated in the complaint and for the defendant on the second cause of action. The jury by its verdict in effect found that the defendant was not entitled to any damages as an offset against plaintiff's claim, or at all, thus settling all of the issues made by the pleadings. There is no merit in defendant's contention that the court failed to find upon all of the issues made by the pleadings.

The judgment is therefore affirmed, with costs of this appeal in favor of the respondent.

STEWART and AILSHIE, JJ., concur.

(18 Idaho, 28)

COAST LUMBER CO. v. WOOD, Judge.
(Supreme Court of Idaho. April 21, 1910.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 131*)—STATEMENT ON MOTION—AMENDMENTS—SETTLEMENT.

Under the provisions of subdivision 3, § 4441, Rev. Codes, if a proposed statement on motion for a new trial be not agreed to by the adverse party, he must within 10 days thereafter prepare amendments thereto, and serve the same, or a copy thereof, on the moving party. If the amendments be adopted, the statement shall be

amended accordingly and then presented to the judge who tried or heard the cause for settlement, or be delivered to the clerk of the court for the judge. If not adopted, the proposed statement and amendments shall within 10 days thereafter be by the moving party delivered to the clerk of the court for the judge, and thereupon the same proceedings for the settlement of the statement shall be taken by the parties and clerk and judge as are required for the settlement of bills of exception by section 4430, Rev. Codes. And if no amendments are served within the time designated, or, if served, are allowed, the proposed statement and amendments, if any, may be presented to the judge for settlement without notice to the adverse party.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 263-269; Dec. Dig. § 131.*]

2. NEW TRIAL (§ 131*)—STATEMENT ON MOTION—PRESENTATION FOR SETTLEMENT.

Where proposed amendments and the proposed statement are not delivered to the clerk of the court for the judge within 10 days after the service of such amendments upon the moving party, the presumption is that such amendments have been adopted and will be so treated, and the amendments and statement may be presented to the judge for settlement within a reasonable time after the expiration of said 10 days.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 263-269; Dec. Dig. § 131.*]

3. NEW TRIAL (§ 131*)—STATEMENT ON MOTION—AMENDMENT—SETTLEMENT.

Held, under the facts of this case, that the court had not lost jurisdiction to settle the statement, and that he erred in refusing to settle the same.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 263-269; Dec. Dig. § 131.*]

4. NEW TRIAL (§ 131*)—STATEMENT ON MOTION—STRIKING OUT MATTER.

Under the provisions of said subdivision 3, § 4441, Rev. Codes, in settling the statement, it is the duty of the judge to strike out of it all redundant and useless matter and make the statement truly represent the case, notwithstanding the assent of the parties to such redundant and useless matter, or to any inaccurate statement.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 269; Dec. Dig. § 131.*]

5. SETTLEMENT OF STATEMENT.

The case of *Miller v. Hunt*, 7 Idaho, 486, 63 Pac. 803, cited and distinguished.

An original application by the Coast Lumber Company for a writ of mandate to Hon. Fremont Wood, judge of the district court of the Third judicial district, to compel him to settle a statement on motion for a new trial. Peremptory writ granted.

A. A. Fraser and Chas. M. Kahn, for plaintiff. N. M. Ruick, for respondent.

SULLIVAN, C. J. This is an original application to this court for a writ of mandate to compel Hon. Fremont Wood, judge of the district court of the Third judicial district, to settle a statement on motion for a new trial and appeal, in the case of *Charles N. Maw, Plaintiff, v. The Coast Lumber Co., a Corporation*. That action was brought to recover for injuries alleged to have been sustained by the plaintiff by reason of a defective, unsafe, and insecure condition of a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

certain rip saw used in the mill of the defendant. The said plaintiff was injured by being struck on the head by a piece of board or timber projected with great force from said rip saw. That cause was tried by the court with a jury, and a verdict was rendered and entered on April 14, 1909, in favor of the plaintiff, for \$12,500. Thereafter the lumber company made its motion for a new trial, and prepared and served upon the attorneys for said Maw its proposed statement on motion for a new trial and appeal. Thereafter the attorneys for said Maw served upon the attorney for the Coast Lumber Company his proposed amendments to said statement on motion for a new trial, consisting of 120 distinct amendments. On the 22d day of February, 1910, the attorney for the lumber company was informed by telephone by the attorney for Maw that said judge of the district court would settle said statement on that day, and the attorneys for the respective parties appeared before the judge at the time so fixed. At that time the attorney for Maw served upon the attorney for the lumber company two certain papers, one denominated "Objections by plaintiff to settlement of defendant's proposed bill of exceptions," and the other, "Additional objections by plaintiff to settlement of defendant's proposed bill of exceptions." Prior to the time of the service of said papers upon the attorney for the lumber company, he had not made any objections to the adoption of the proposed amendments, and had not filed such proposed amendments with the clerk of the court to be presented to the judge for settlement. He alleges, however, in his petition for the writ that he was willing to and did accept all amendments served upon him prior to February 22, 1910, and any objection or refusal he had to the adoption of the same on said date was by reason of the filing and serving upon said attorney of the paper denominated, "Additional objections by plaintiff to settlement of defendant's proposed bill of exceptions," which he claims was, in effect, an amendment to the statement. At the time of the hearing the attorney for the lumber company made some objection to some of the amendments offered. The matter was then heard by the judge on said 22d day of February, and on the 24th day of that month the judge announced orally that he would sustain the objections of counsel for the plaintiff Maw to the settlement of said proposed statement. Thereafter, on the 8th day of March, 1910, the attorney for the lumber company duly presented to said judge for settlement its proposed statement on motion for a new trial and appeal, duly engrossed. It contained the original statement theretofore served on said attorney for Maw as modified by the proposed amendments, and omitted from said statement all matters objected to by said counsel for Maw in his objections filed on February 22d. The

district judge then and there refused to sign and settle said statement, on the ground that he had no jurisdiction to sign and settle the same.

Upon that state of facts, this court issued the alternative writ of mandate, and upon the return thereof the defendant filed a general demurrer and answer to said application. Thereupon the Coast Lumber Company filed its general demurrer to the answer of the defendant. Upon that condition of the record, the cause was argued by respective counsel and submitted for decision.

The question arises: Had the court lost jurisdiction to settle the proposed statement? The facts above set forth are substantially admitted by the answer of the honorable district judge, and the following statement is found in the answer, to wit:

"Neither of the attorneys for plaintiff at any time suggested to me the fixing of a time for the settlement of the statement, neither did the defendant's attorney at any time notify me or indicate to me that he had accepted or adopted, or proposed to accept or to adopt, plaintiff's amendments to defendant's proposed statement on motion for a new trial or any portion thereof prior to the hearing on February 22, 1910, and then offered to accept a part only of the amendments proposed; that at the time and place fixed by me, to wit, on February 22, 1910, the matter of settlement of said proposed statement on motion for a new trial came on to be heard before me as judge of said court, N. M. Ruick appearing as attorney for plaintiff and Charles M. Kahn appearing as attorney for defendant. Whereupon Mr. Ruick, of counsel for plaintiff, filed objections to the settlement of defendant's proposed statement on motion for a new trial upon the ground that the court had no jurisdiction to settle said proposed statement, but had lost jurisdiction to settle the same by reason of facts appearing of record in said cause as follows:

"(1) Said proposed bill of exceptions was served on N. M. Ruick, of counsel for plaintiff, on December 10, 1909.

"(2) On December 18, 1909, on the application of counsel for plaintiff, the judge of said court made an order extending the time allowed plaintiff under the statute within which to propose and serve amendments to defendant's proposed statement on motion for a new trial to and including thirty (30) days from said date.

"(3) That, on January 15, 1910, as shown by the written admission of service by defendant's attorney indorsed on such proposed amendments, plaintiff served upon counsel for defendant a copy of plaintiff's proposed amendments to said defendant's proposed statement on motion for a new trial.

"(4) That said amendments were not adopted within the time allowed by the statute for the delivery of said proposed

statement and proposed amendments to the clerk of the court for the judge, nor have the same ever been adopted.

"(5) That said proposed statement and amendments were not within ten (10) days after the service of such amendments upon the attorney for defendant, as shown by such admission of service (defendant being the moving party), delivered to the clerk of said court for the judge, nor had the same been so delivered when said objection was made.

"That, after such objections had been made and presented, counsel for defendant delivered to me, the judge of said court, the copy theretofore on January 15, 1910, served upon him of plaintiff's proposed amendments to defendant's proposed statement on motion for a new trial, and then and there offered to accept a part only of the amendments proposed. This was the first time and occasion on which said amendments had been presented to me. That thereafter in open court, on the 24th day of February, 1910, N. M. Ruick being present representing the plaintiff, and C. M. Kahn being present representing the defendant, and after considering the objections offered by plaintiff to the settlement of the proposed statement on motion for a new trial, I sustained such objections upon the ground and by reason of the facts as hereinbefore stated, and then and there declined and refused to settle said proposed statement, upon the ground that, as such judge, I had no jurisdiction to settle said proposed statement, but had lost jurisdiction to settle the same by reason of the facts as hereinbefore stated, and I then and there directed Mr. Ruick, counsel for plaintiff, to prepare a certificate and order embodying the facts and the ruling of the court and present it for my signature. Shortly thereafter, and before the order was signed, Mr. Alfred A. Fraser, attorney, not then an attorney of record in the cause, and whom I then for the first time learned was interested as an attorney on behalf of defendant, requested me to withhold my signature to the order until he could present a further application for the settlement of the statement, stating that he would have to have time to engross the statement and include the amendments therein. In compliance with which request, I withheld signing said certificate and order containing the facts and my decision of February 24th until after the presentation, as hereinafter referred to, of the engrossed statement. That on the 28th day of February, 1910, said defendant, Coast Lumber Company, through its attorney, C. M. Kahn, withdrew the original proposed statement on motion for a new trial, which had been handed to me by the clerk of the court on the 10th day of December, 1909, and also withdrew at the same time the proposed amendments of plaintiff presented to me for settlement on the 22d day of February, 1910. That thereafter, on the 8th day of March, 1910, the defendant, appearing by

its attorneys, C. M. Kahn and Alfred A. Fraser, presented to me as such judge an engrossed statement on motion for a new trial in said cause for settlement, said engrossed statement consisting of the original proposed statement on motion for a new trial served and filed on the 10th day of December, 1909, with the amendments served on the defendant on the 15th day of January, 1910, incorporated and embodied therein, with the request from the attorneys for said defendant that the same be settled as said defendant, Coast Lumber Company's statement on motion for a new trial, giving me as a reason that said defendant had then accepted the amendments proposed by plaintiff to said defendant's statement on motion for new trial, which said application to settle said statement on motion for new trial I declined, and declined to settle said statement for the reason that the matter had already been disposed of by my decision and order of February 24, 1910, and that I had no jurisdiction to settle said statement, and for the further reason the said proposed amendments had not been accepted and incorporated in the original statement on motion for a new trial and presented to me as judge for settlement within a reasonable time after the service of said amendments. Whereupon, I then and there subscribed to a certificate in writing of the proceedings on the refusal by me as such judge to settle said proposed statement on motion for a new trial in the said cause of Maw, Plaintiff, v. Coast Lumber Company, Defendant, a copy of which said certificate and order is hereto annexed, marked 'Defendant Fremont Wood's Exhibit No. 1,' and made a part of this answer, and showing why I, as judge of said court, should not settle said statement on motion for a new trial."

It will be observed from the allegations of the answer above set forth that the judge concluded from the facts presented that he had lost jurisdiction to settle said statement. The provisions of the statute in regard to the settlement of a statement on motion for a new trial, applicable to this case, are found in subdivision 3 of section 4441 of the Revised Codes of 1909, which is as follows: "If the motion is to be made on a statement of the case, the moving party must, within ten days after service of the notice, or such further time as the court in which the action is pending, or the judge thereof may allow, prepare a draft of the statement, and serve the same, or a copy thereof, upon the adverse party. If such proposed statement be not agreed to by the adverse party, he must, within ten days thereafter, prepare amendments thereto, and serve the same or a copy thereof, upon the moving party. If the amendments be adopted, the statement shall be amended accordingly and then presented to the judge, who tried or heard the cause, for settlement, or be delivered to the clerk of the court for the judge. If not adopted,

the proposed statement and amendments shall, within ten days thereafter, be by the moving party delivered to the clerk of the court for the judge; and thereupon the same proceedings for the settlement of the statement shall be taken by the parties, and clerk and judge, as are required for the settlement of bills of exception by section 4430. If the action was heard by a referee, the same proceedings shall be had for the settlement of the statement by him as are required by that section for the settlement of bills of exception by a referee. If no amendments are served within the time designated, or, if served are allowed, the proposed statement and amendments, if any, may be presented to the judge or referee for settlement without notice to the adverse party. When the notice of the motion designates as the ground of the motion the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates as the ground of the motion, errors in law occurring at the trial and excepted to by the moving party, or deemed excepted to, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion. It is the duty of the judge or referee in settling the statement, to strike out of it all redundant and useless matter and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant or useless matter, or to any inaccurate statement. When settled, the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed and shall then be filed with the clerk." It will be observed from the above provisions that, if a proposed statement be not agreed to by the adverse party, he must within 10 days thereafter prepare amendments thereto, and serve the same, or a copy thereof, on the moving party, and, if the amendments be adopted, the statement shall be amended accordingly, and then presented to the judge who tried or heard the cause for settlement, or be delivered to the clerk of the court for the judge; and, if not adopted, the proposed statement and amendment shall within 10 days thereafter be by the moving party delivered to the clerk of the court for the judge. In this case the amendments were not delivered to the clerk for the judge within 10 days after they were served on the moving party. From that fact the presumption arises that they were adopted. The statute does not make it the duty of the moving party to deliver the amendments to the clerk for the judge unless they are not adopted. Said statute provides in cases where the amendments are adopted that the statement with the proposed amendments may be presented to the judge for settlement without notice to the adverse party,

and as no time is fixed by the statute in which they must be presented to the judge, if they are presented within a reasonable time, the law is satisfied. However, in this case it is contended that on the 22d of February, the time fixed by the court for settling said statement, counsel for the adverse party moved to strike out certain portions of said proposed statement and objected on the grounds above set forth to its settlement. Thereupon counsel for the moving party insisted that all of said amendments should not be allowed, and the court concluded that it had lost jurisdiction to settle the statement, for the reason that all of the amendments proposed had not been adopted by counsel for the moving party. If the failure of the moving party to deliver to the clerk for the judge the proposed amendments within 10 days after their service on him was in effect an adoption of the amendments, that ended the matter and the amendments were adopted, and it was too late for the moving party then to object to such amendments or refuse to adopt them. It was also too late for the adverse party to offer any amendments after the time had expired in which he was given to serve his amendments.

From the facts presented, the matter stood on the 22d of February in this condition, and it must be borne in mind that the hearing on that day was not brought on by counsel for either of the parties, but on the suggestion of the judge. Counsel for the adverse party moved to strike certain matter from the proposed statement that was not embodied in his proposed amendments, and also raised other objections to the settlement of the statement. Counsel for the moving party thereupon contested the matter, and urged that certain of the amendments proposed ought not to be adopted, and the judge took the view that, as counsel for the moving party objected at that time to the adoption of certain amendments, he had lost jurisdiction to settle said statement, for the reason that the proposed amendments had not been delivered to the clerk for him within 10 days after service of such amendments. But, under the law, it was too late for counsel for the adverse party to ask for anything additional that would result in the amendment of the statement, and it was also too late for the moving party to insist that he had not adopted all of the amendments, and the court erred in holding that he had lost jurisdiction, and should have directed the proposed statement with all of the amendments that had been proposed in time, to be engrossed and settled, and, after that was done, if said engrossed statement then truly represented the case, it was the judge's duty to settle it. It is the judge's duty, however, notwithstanding the assent of the parties to a statement or bill of exceptions, to strike out of it all redundant or useless matter, and to make it truly represent the facts of the case. By the provisions of said statute, it is incumbent

upon the judge to strike from a proposed statement all redundant and useless matter, regardless of whether the parties have agreed to it or not, and to insert any matter necessary to make the statement speak the truth. In other words, the judge is not bound to settle a statement, if assented to by both parties, unless it speaks the truth, and truly represents the case. *Humbird Lumber Co. v. Kootenai Co.*, 10 Idaho, 490, 79 Pac. 398.

Counsel for the defendant contends that the action of the judge in this matter was probably predicated upon, and was justified by, the decision of this court in *Hoehnan v. New York Drygoods Co.*, 8 Idaho, 66, 67 Pac. 796. This court held in that case if amendments are proposed to a statement on motion for a new trial, and not adopted by the moving party, under the provisions of subdivision 3, § 4441, Rev. Codes, they must be delivered to the clerk for the judge, and, if the amendments be adopted, the statement shall be amended accordingly, and then presented to the judge who tried the case for settlement, or be delivered to the clerk of the court for the judge, and, if the time for settlement of the statement has expired and such fact appears from the record, the trial court is without jurisdiction to settle the same. The facts in that case were different from the facts in the case at bar, and it was held under that state of facts that the statutory time for the settlement of the statement had lapsed, and the court had no jurisdiction to extend the time. The question presented in the case at bar was not presented in that case. Counsel in that case did not adopt the proposed amendments, but insisted on having such amendments settled, and set up facts tending to show excusable neglect for having failed to deliver the amendments to the clerk for the judge within 10 days after their service. The moving party in that case was not willing and did not consent to the adoption of the proposed amendments, whereas in the case at bar it appears that the amendments were adopted.

Counsel also cite *Wills v. Kong*, 70 Cal. 548, 11 Pac. 781. That case involved the settlement of a statement to which amendments had been proposed. Upon objection by the plaintiff, the judge refused to settle the statement. The defendant thereafter engrossed the statement with the proposed amendments and presented the engrossed statement to the judge for settlement after the time for service of the statement had passed. It was held under the statute of California that the judge was not authorized by the statute to settle the statement under that state of facts. Subdivision 3, § 659, Code Civ. Proc. Cal., reads as follows: "If not adopted, the proposed statement and amendments shall, within ten days thereafter, be presented by the moving party to the judge upon five days' notice to the adverse party, or delivered to the clerk of the court for the judge." That subdivision is different from the provisions of

subdivision 3, § 4441, Code Idaho, above quoted. In *Hicks v. Masten*, Judge, 101 Cal. 651, 36 Pac. 130, the court had under consideration subdivision 3 of said section 659 of the California Code of Civil Procedure, and it was there held that the written notice required by the provisions of said section of the presentation of a proposed bill of exceptions and the amendments thereto to the judge for settlement is for the benefit of the adverse party, and may be waived by him. In open court, when the attorney for the adverse party was present, counsel for the moving party requested the court to fix a time for the settlement of the bill of exceptions, and the judge from the bench stated that the bill of exceptions and objections to the settlement and proposed amendments to the bill had been left with him for settlement, and that he would proceed to settle the same on the 12th day of April, 1902, at ten o'clock at his chambers, and requested both parties to be present. No written notice of the presentation of the proposed bill and amendment was served by the moving party. At the time fixed by the court, the counsel for both parties were present and the adverse party's attorney then presented written objections to settling the bill upon two grounds: First, that the proposed bill of exceptions was not prepared and served in time; second, that the five days' notice in writing required by the Code had not been given, and on the latter ground the judge refused to settle the bill. The Supreme Court held under that state of facts that the court erred in not settling the bill, and in that case the court cites the case of *Wills v. Kong*, supra, and quotes from it as follows: "The judge having once refused to settle the statement, the matter was ended so far as that officer was empowered to settle it." The court then said: "What was there said was upon facts which justified it. It was said of a statement presented long after the time for the service of a statement had passed, and after the court had refused to settle a prior statement, no complaint as to the refusal to settle the first statement appearing in the case," and directed the writ of mandate to issue requiring the judge to settle the statement. Provisions of our statute for the settlement of statements on motion for a new trial must be liberally construed with a view to promoting the rights of the parties and in the interest of justice. Section 4, Rev. Codes; *Douglas v. Southern Pac. Co.*, 151 Cal. 242, 90 Pac. 588. In *Miller v. Hunt*, 7 Idaho, 486, 63 Pac. 803, this court held that, where no amendments were served on the adverse party to a proposed statement within the statutory time, the provisions of section 4441 do not limit the time within which to present the statement for settlement. Of course, the facts of that case are not the same as the facts in the case at bar.

In accordance with the conclusion that we have above reached, the failure of the mov-

ing party to deliver the amendments with the proposed statement to the clerk for the judge within ten days after such amendments are served is in effect an adoption of such amendments, in which case the statement may be settled by the court within a reasonable time. It is therefore ordered that a peremptory writ of mandate do issue against the respondent, commanding him to proceed and settle and certify said statement. Costs are awarded to the plaintiff.

STEWART and AILSHIE, JJ., concur.

(18 Idaho, 28)

TOMSCHKE v. HUMMEL

(Supreme Court of Idaho. April 4, 1910.)

(Syllabus by the Court.)

1. REVIEW OF EVIDENCE.

Evidence held sufficient to support the findings made by the court.

2. APPEAL AND ERROR (§ 1011*)—REVIEW—CONFLICTING EVIDENCE—FINDINGS OF COURT.

Where there is a substantial conflict in the evidence, the decision of the trial court will not be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by Emil Tomsche against Mary Hummel. Judgment for defendant, and plaintiff appeals. Affirmed.

James A. Wayne, for appellant. Kerns & Ryan, for respondent.

SULLIVAN, C. J. This suit was commenced by the plaintiff, who is appellant, to quiet the title to lots 7 and 8 in block 8 of Canyon addition to the city of Wallace, Shoshone county. The defendant answered by denying the allegations of the complaint, and by way of cross-complaint sought affirmative relief, and prayed to have her title quieted to said lots. The appellant did not answer said cross-complaint, and default was entered against him. The action was tried by the court without a jury, and findings of fact and conclusions of law were made by the court, and judgment entered in favor of the defendant, quieting the title to said lots in her. This appeal is from that judgment.

Seven errors are assigned, all to the effect that the findings are not supported by the evidence. We have carefully examined the evidence, and concluded therefrom that the findings are fully sustained by it. On some material points there is a substantial conflict in the evidence, and under the well-established rule of this court, where that occurs, the judgment will not be reversed. It will serve no good purpose in this opinion to quote extensively from the evidence, or to review it to any extent.

The judgment must be affirmed, and it is so ordered, with costs in favor of the respondent.

STEWART and AILSHIE, JJ., concur.

(18 Idaho, 42)

HEATH v. POTLATCH LUMBER CO.

(Supreme Court of Idaho. April 9, 1910.)

(Syllabus by the Court.)

1. COMPROMISE AND SETTLEMENT (§ 23*)—ACTION ON AGREEMENT—EVIDENCE.

Evidence examined, and held to support the verdict of the jury.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 94; Dec. Dig. § 23.*]

2. CORPORATIONS (§ 426*)—AUTHORITY OF AGENT—RATIFICATION.

Whether an assistant general manager of a lumber company, in charge of the operation of the company's plant, has authority to make a contract with an injured employe in compromise of damages claimed by such employe is immaterial if such company ratifies the acts of the assistant general manager in making such compromise agreement, and makes payments in accordance with the terms thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1714; Dec. Dig. § 426.*]

3. COMPROMISE AND SETTLEMENT (§ 6*)—CONSIDERATION.

Where a claim is made against another in good faith, and the latter denies its liability, and to avoid a lawsuit agrees to pay such claim in consideration that suit will not be brought upon such claim, there is a sufficient consideration to support such compromise agreement.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 39; Dec. Dig. § 6.*]

4. COMPROMISE AND SETTLEMENT (§ 21*)—ENFORCEMENT OF AGREEMENT.

There is sufficient consideration to support a compromise agreement if the claim is made in good faith and is disputed, and in consideration that the claimant forbears to sue in respect to such claim, a promise is made to pay a certain sum of money, and such promise may be enforced in an action at law.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 89; Dec. Dig. § 21.*]

5. PLEADING (§ 237*)—AMENDMENT—EVIDENCE TO SUPPORT.

It is not error for the trial court to refuse a proffered amendment after the evidence has been concluded, where there is no evidence to support the allegations of such proposed amendment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 605; Dec. Dig. § 237.*]

6. ACCORD AND SATISFACTION (§ 11*)—PART PAYMENT—EFFECT AS RELEASE.

Where a check is given as a partial payment in accordance with a compromise agreement, the fact that the person giving such check incorporates therein language releasing the payor for all claims and damages will not operate to release the promisor from complying with the compromise agreement, unless it clearly appears that it was the intention of both parties that such check should be in full payment of all claims and demands whatsoever.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. § 76; Dec. Dig. § 11.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from District Court, Latah County; E. C. Steele, Judge.

Action by Frank S. Heath against the Potlatch Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

George M. Ferris, James E. Babb, and A. H. Featherstone, for appellant. William E. Stillinger and Forney & Moore, for respondent.

STEWART, J. The appellant, a corporation, was engaged in the operation of a sawmill and a lumber manufacturing plant in the town of Potlatch, in Latah county, state of Idaho. The respondent was employed by the appellant as a barn man, and engaged in feeding and taking care of the appellant's stock, and cleaning and caring for the barns and stables where such stock was kept. On June 22, 1907, and while the respondent was in the employ of the appellant, he was called to assist one Ira George, a department manager of the business of the appellant, who as such had control and management of all stables, barns, horses, teams, wagons, etc., used by the appellant, in raising and assisting a sick horse to his feet. It appears that the horse was lying on his side in a box stall located in one of the barns of the appellant, and said George requested the respondent to go in between the wall of the box stall and the back of the horse and assist in raising the horse to his feet; that the horse was sick and unable to stand alone, and that, while plaintiff was assisting said George in raising said horse to his feet, said horse fell upon the plaintiff, and injured plaintiff in such manner as to break both bones of his right leg.

At the time this accident occurred it appears to have been a rule of the appellant company to require all employees to pay \$1 a month as a hospital fee, the payment of which entitled the employee to hospital services in case of sickness or injury, in either a hospital located in Palouse, Wash., and conducted by one E. T. Hein, or in a hospital at Moscow, Idaho, conducted by one Charles L. Gritman; that appellant company had collected and withheld from the moneys and wages due the respondent for the months of March, April, May, and June, 1907, \$1 for each month as a hospital fee, and issued to the respondent a card on the Gritman hospital at Moscow, Idaho, and that such card was in full force and effect at the time of the accident; that after the accident respondent requested that he be taken to the hospital of Gritman at Moscow, but was urged by A. W. Laird, the assistant general manager of the appellant company, to go to the hospital of E. T. Hein at Palouse, and finally consented and was taken to such hospital. He remained at the Hein hospital for several weeks. He was not satisfied at this hospital, and complained of the treatment he received and was returned to his home at

Palouse. He complained to Laird that Hein was incompetent and did not give him proper treatment, and that he was not improving as he should, and he felt as though the company had not treated him right in urging him to go to the Hein hospital, and told Laird that he intended to bring an action against the appellant company for damages because of such treatment. He testifies that he made such complaint to Laird, and after having told Laird that he intended to bring an action against the company, Laird told him if he would say nothing about an action he would see that his wages were sent up to him each month. It appears that he had been receiving \$2.50 a day as wages including Sundays. This conversation Laird denies; he does admit that plaintiff made complaint to him of his mistreatment, but denies that the question of suit or action for such treatment was ever mentioned by plaintiff. He testifies that he did tell the plaintiff that he would see that he was taken care of and would send him money when needed; whether Laird agreed to pay him his wages until he was able to go to work again, in consideration that the plaintiff would forego suit, is the foundation for this action.

The plaintiff brought this action to recover the sum of \$1,250 claimed to be due him by reason of this agreement. The cause was tried to a jury and a verdict returned in favor of the plaintiff for the sum of \$650. A motion for a new trial was denied, and this appeal is from the judgment and from the order overruling the motion for a new trial.

It is first contended that the evidence does not support the verdict. In corroboration of the plaintiff's testimony the plaintiff introduced in evidence the following check:

"Potlatch Lumber Company. No. 8,063.

"Potlatch, Idaho, Aug 16, 1907.

"Pay to Frank Heath or order in payment in full for labor from date of injury, June 22, '07, to Aug. 1st, 1907, 38 days at \$2.50.....	\$95 00
Less July rent.....	\$10 70
3 loads of wood in August...	4 50
	15 20
	\$79 80

"Above Frank Heath hereby releases all claims of whatsoever nature against Potlatch Lumber Company. Seventy-nine and 80-100 dollars. If not correct, return without alteration, stating differences.

"Potlatch Lumber Company,

"By A. W. Laird, Asst. General Manager.

"To Potlatch State Bank, Potlatch, Idaho."

This check was indorsed by the plaintiff and paid. It will be seen that the terms of this check tend to support the evidence of the plaintiff to the effect that the defendant would pay him his wages during the time he was unable to work by reason of the injury, and that this check was in payment of such

wages. Also a second check issued to plaintiff as follows:

"Potlatch Lumber Company. No. 9,303.

"Potlatch, Idaho, Sept. 30, 1907.

"Pay to F. S. Heath or order in payment of his August time 31 days at \$2.50.....	\$77 50
Less his August house rent..	\$10 70
Less his Sept. house rent...	10 70
	21 40
	\$56 10

"In full for all claims for injuries or damages of whatsoever nature against the Potlatch Lumber Co. Fifty-six and 10-100 dollars. If not correct, return without alteration, stating differences.

"Potlatch Lumber Company,

"By A. W. Laird, Asst. General Manager.

"To Potlatch State Bank, Potlatch, Idaho."

Accompanying this check was the following communication:

"Potlatch, Idaho, Oct. 2, 1907. Mr. Frank S. Heath, Moscow, Idaho—Dear Sir: Enclosed find check for \$56.10 which is in full payment for your August time, less house rent for August and September. We have been glad to help you out by allowing you time from your injury up to September 1st, but feel that we cannot longer continue the help, as it is contrary to our custom to do this. Trusting you will think this satisfactory, we are, Yours truly, Potlatch Lumber Company, by A. W. Laird, Asst. Gen. Mgr."

This latter check was not cashed by the plaintiff, and was returned by him to the defendant.

These remittances taken in connection with the evidence of the plaintiff, we think were sufficient to warrant the jury in concluding that Laird did agree to pay plaintiff his regular wages if the plaintiff would do nothing with reference to an action against the company for alleged mistreatment received by him at the hospital where he went at the request of the defendant company.

It is next contended that the appellant company cannot be held in damages because one of its employés, the managing officer, advises an injured man to go to a hospital to effect a cure, and later promises the injured man that the company will pay him his wages until he is cured if he will not sue for damages growing out of the assistant manager's poor judgment in recommending such hospital, for the reason that such act on the part of the assistant manager is outside of his duty as such, and in giving such advice he has no authority to bind his principal.

It appears from the record that A. W. Laird, the person advising the plaintiff, and urging that he go to the Hein hospital instead of the Gritman hospital where he had a hospital card, was an assistant general manager of the business of the appellant company. He was on the ground at the time

the accident occurred. He came to the plaintiff after the injury and conversed with him about receiving treatment for such injury, and was the only person speaking or acting for the company in such matter. In addition to this, after the appellant had followed the advice of Laird and the compromise agreement was entered into as claimed by the plaintiff, Laird issued checks to plaintiff in payment of his wages as agreed, signed the company's name to such checks, and the company accepted one of such checks and cashed the same. In other words, all the evidence tends to show authority, and there is no evidence tending to show that Laird did not have authority to make such compromise agreement, but whether he originally had the authority to make the compromise agreement, yet he did make such agreement, and the company ratified the same by approving his acts and paying a check issued by him in the name of the company to carry out such compromise agreement. Under such circumstances we are satisfied that the making of such agreement was fully ratified and approved by the company, and that the company is bound by the acts of its assistant general manager. *Brighton v. Lake Shore & M. S. Ry. Co.*, 103 Mich. 420, 61 N. W. 550.

It is also contended that there was no consideration for the compromise agreement, even admitting that such agreement was made, for the reason that the evidence does not show an honest belief by both parties that the plaintiff's claim for damages was doubtful. In other words, plaintiff contends that to support a settlement and compromise, both parties must bona fide consider the question a doubtful one, and that the compromise was made to avoid a lawsuit upon a doubtful claim. In the case of *Vane v. Towle*, 5 Idaho, 471, 50 Pac. 1004, this court summarized the opinion by stating in the syllabus as follows: "While the compromise of a claim asserted upon the one side, but questioned upon the other, will be deemed a sufficient consideration to support an agreement to pay such claim, it is still essential that the claim so asserted should have some basis upon principles of law or equity." In *Smith v. Farra*, 21 Or. 395, 28 Pac. 241, 20 L. R. A. 115, the Supreme Court of Oregon entered into a very full discussion of this question and said: "It is not every disputed claim, however, which will support a compromise, but it must be a claim honestly and in good faith asserted, concerning which the parties may bona fide and upon reasonable grounds disagree. The compromise of such a claim in good faith is a good consideration to pay money in settlement thereof, and when an action is brought upon such promise it is no defense to say that the claim was not in fact a valid one, or that the parties were mistaken either as to the law or the facts. * * * Nor is it a defense that the claim could not have been maintained if suit or

action had been brought upon it, or that the parties were mistaken as to the law; for, if it is, then it would follow that contracts by the parties settling their own disputes would at least be made to stand or fall according to the opinion of the court as to how the law would have determined it. 'If, therefore,' says Logan, J., 'the solemn compromise of the parties is made to depend on the question whether the parties have so settled the dispute as the law would have done, then it may be truly said that a compromise is an unavailing, idle act, which questions even the power of the parties to bind themselves.' * * * The settlement of a controversy is valid and binding, not because it is the settlement of a valid claim, but because it is the settlement of a controversy. And when such settlement is characterized by good faith the court will not look into the question of law or fact in dispute between the parties, and determine which is right. All that it needs to know is that there was a controversy between the parties, each claiming in good faith rights in himself against the other and that such controversy has been settled."

In 8 Cyc. 509, the author cites a large number of cases, and announces his conclusion as follows: "The usual test, however, as to whether a compromise and settlement is supported by a sufficient consideration is held to be not whether the matter in dispute was really doubtful, but whether or not the parties bona fide considered it so, and that the compromise of a disputed claim made bona fide is upon a sufficient consideration, without regard to whether the claim be in suit or not. The law favors the avoidance or settlement of litigation, and compromises in good faith for such purposes will be sustained as based upon a sufficient consideration, without regard to the merits of the controversy or the character or validity of the claim of the parties, and even though a subsequent judicial decision may show the rights of the parties to have been different from what they at the time supposed." *McGlynn v. Scott*, 4 N. D. 18, 58 N. W. 400.

It is disclosed by the record that after the injury the plaintiff desired to be taken to the Gritman hospital, and that he was not taken there, but was taken to the Hein hospital because of the urgency of Laird, and that he was dissatisfied from the inception with the treatment given to him at the Hein hospital, and claimed that the company had not treated him right in inducing him to go to the Hein hospital instead of the Gritman hospital, and complained to Laird of such mistreatment and informed Laird of his intention to bring suit against the company for damages sustained by him because of such mistreatment. Whether the plaintiff in fact could have maintained such action is not the test in determining whether there was a consideration for the compromise agreement. If the plaintiff made his claim

in good faith and the defendant company denied its liability, and to avoid a lawsuit agreed to pay the plaintiff his wages as a consideration for the plaintiff's not bringing such suit, then there was sufficient consideration to support such compromise agreement. In such case it is sufficient if the plaintiff in good faith makes a claim, and the defendant disputes such claim and in consideration of the plaintiff's forbearance to sue in respect to such claim promises to pay plaintiff a certain sum of money. In such case there is a consideration for such promise and the same may be enforced in an action at law.

In determining the good faith of the plaintiff, in making a claim against the defendant for damages, the jury no doubt very properly took into consideration the fact that the plaintiff was taken to the Hein hospital against his own desire and wish, and at the solicitation and urgent request of Laird who acted for the company. This fact no doubt also influenced the defendant in entering into the promise to pay the plaintiff his wages until he was able to resume work. The defendant no doubt felt responsible for the plaintiff being taken to the Hein hospital, and no doubt felt that if in fact the plaintiff did not receive proper care and attention at such hospital, that the company was in some way responsible because of the fact that the plaintiff went to such hospital at the company's solicitation. When all these facts are considered, we believe the evidence is sufficient to show that there was a consideration to support the compromise agreement sued upon.

At the close of the evidence counsel for appellant asked leave to amend its answer to conform to the proof by making the following allegation: "That the delivery of the check marked 'Exhibit F,' and its acceptance by the plaintiff, is in accord and satisfaction of, and a bar to, a recovery in this action." The court denied this application to amend, and the ruling is now assigned as error. Exhibit F referred to in this proposed amendment is the check of August 16, 1907, heretofore referred to and set out in full in this opinion. The contention of the appellant that this check was a receipt and satisfaction of any and all claims the plaintiff might have against the defendant company is based upon the following language contained in such receipt: "Above Frank Heath hereby releases all claims of whatsoever nature against Potlatch Lumber Company." Whether this proposed amendment would have been sufficient as a plea in accord and satisfaction may be seriously doubted, but whether sufficient or not the only evidence which would in any way tend to support such plea was the receipt itself, and this was offered by the plaintiff; and having been offered by the plaintiff, if it established the fact that the claim for which plaintiff's action was instituted had been settled and paid, the plaintiff could not have recovered

a judgment even though such plea had not been interposed, and the defendant was in no way prejudiced by reason of the court's refusal to permit such amendment to be made. We are satisfied, however, that the evidence clearly shows that it was not the intention of either the plaintiff or the defendant that this receipt should operate as a receipt in full for any claim for damages made by the plaintiff against the defendant.

According to the contention of the defendant, no payment was made on account of any damages; the payment covered by this check was rather a gratuitous gift to the plaintiff because of his need, and was not compensation for services or in lieu of any damages claimed; and, upon the other hand, if a compromise agreement was made as claimed by the plaintiff, and this check was given for the purpose of carrying out such compromise agreement, then the release clause in the check would not preclude the plaintiff from recovering the amount fixed by the compromise agreement, especially when the defendant made default in carrying out its part of such agreement. In other words, if a compromise agreement was made as claimed by the plaintiff, and the defendant company made default in carrying out its part of such agreement, then the fact that the defendant wrote the release clause in the check given as a payment upon such compromise agreement, would not operate to discharge the plaintiff's claim as agreed upon by such compromise agreement.

It was apparent that the defendant company did not consider the language of this check to be a release of any claim of the plaintiff against the defendant company, for on September 30th the defendant company sent to the plaintiff another check for wages which contained a similar provision; and if it had been the intention of the defendant company in delivering the check of August 16th, and its acceptance by the plaintiff, that the same should operate as a release of all claims against the defendant for damages, then there would have been no reason and no consideration for the check of September 30th.

While it is true, as a proposition of law, that where payment is made upon an unliquidated claim for an amount less than that claimed, upon condition that the amount so paid is to be in satisfaction of said claim as a whole and the acceptance of the same constitutes an accord and satisfaction, yet this principle of law has no application whatever to the facts of this case, for, as the evidence shows, the payment of August 16th was made for an amount agreed upon by the parties as a partial payment, to be continued monthly until the plaintiff was able to resume work, and was not made or accepted in satisfaction of any claim made by the plaintiff for damages. In such case,

the principles of law applicable to accord and satisfaction do not govern. 1 Cyc. 306.

Judgment affirmed. Costs awarded to respondent.

SULLIVAN, C. J., and AILSHIE, J., concur.

(37 Utah, 339)

STATE ex rel HALLEN v. UTAH STATE BOARD OF EXAMINERS IN OPTOMETRY et al.

(Supreme Court of Utah. April 2, 1910.)

1. PHYSICIANS AND SURGEONS (§ 1*)—OPTOMETRY—REGULATION.

The Legislature has power to define and regulate the practice of optometry, and to that end to prescribe reasonable qualifications to be possessed by those who desire to engage in the practice, and to provide reasonable means by which such qualifications may be ascertained, in order to authorize those qualified to practice, and to prevent those who are not from doing so.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. PHYSICIANS AND SURGEONS (§ 5*)—"OPTOMETRY"—CERTIFICATES TO PRACTICE—STATUTES.

Comp. Laws 1907, regulating the practice of optometry in section 1686x1, defines optometry as the employment of "subjective and objective" mechanical means to determine the accommodative and refractive conditions of the eye, and in the three preceding sections created a board of examiners, defining to what extent applicants for a license to practice shall be examined before license, with a proviso that every person then engaged in the practice of optometry shall file an affidavit thereof, and satisfactory evidence with said board, who shall, in consideration of \$3, issue to him a certificate of registration. Section 1686x5 provides that a failure to apply in time for a certificate shall be a waiver of right thereto. The board furnished blanks to be filled in by applicants under the proviso, stating their names, addresses, length of time and where engaged in refracting. Held, that where an applicant complied with the terms of the proviso, filled in the blanks correctly, and filed an affidavit under oath, he was entitled to a certificate, though he used only the subjective method, since while it was the intention to require all those who had no practice to take an examination as to both methods, one method was sufficient under the proviso, as otherwise section 1686x5 would be inoperative.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 5.*]

3. PHYSICIANS AND SURGEONS (§ 5*)—CERTIFICATE TO PRACTICE—OPTOMETRY—REVOCATION OF LICENSE.

Under such facts the board could not refuse to give him a certificate because of incompetency, under the power given to the board to revoke certificates for gross incompetency, since revocation therefor could be had only on charges and hearing thereon.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 5.*]

Appeal from District Court, Third District; Geo. G. Armstrong, Judge.

Proceedings by the State, on the relation of Percy Hallen, against the Utah State Board of Examiners in Optometry and its

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

members. From a judgment for relator, the board appeals. Affirmed.

Thurman, Wedgwood & Irvine, for appellant. E. A. Walton, for respondent.

FRICK, J. This proceeding was instituted in the district court of Salt Lake county to compel the Utah State Board of Examiners in Optometry, the appellant in this court, to issue a certificate called a "certificate of registration" to the petitioner, who is respondent here, to authorize him to practice optometry, in accordance with the provisions of a certain act passed in 1907 (Laws 1907, p. 87), and which act is now included in the Compiled Laws of 1907, constituting sections 1686x to 1686x12 thereof.

The material parts of the act on which the petition of respondent is based are, in substance, as follows: Section 1686x provides that it shall be unlawful to practice optometry in the state of Utah without obtaining the certificate provided for in the act. Section 1686x1 defines what shall constitute the practice of optometry in the following language: "The practice of optometry is the employment of subjective and objective mechanical means to determine the accommodative and refractive conditions of the eye and the scope of its functions in general and the application and adjustment of lenses for the correction of errors of refraction, the relief of eye strain, and the aid of vision." The three succeeding sections create a board to be known as the Utah State Board of Examiners in Optometry, to be appointed by the Governor, and said sections also define the powers and duties of said board, and provide how and to what extent applicants shall be examined before being authorized to practice optometry in this state. There is, however, a proviso to these sections, which, in our judgment, is controlling in this case, which reads as follows: "Provided further, that every person who shall have been engaged in the practice of optometry in the state of Utah on March 14, 1907, shall file an affidavit in proof thereof and satisfactory evidence with said board, who shall make and keep a record of each person and shall, in consideration of the sum of \$3, issue to him a certificate of registration." Applicants other than those who apply under the proviso must pay an additional fee of \$10. Section 1686x5 in substance provides that any person who shall be entitled to a certificate of registration under said proviso, and who shall fail to apply to the board of examiners for such certificate "by July 15, 1907," shall be deemed to have waived the right to a certificate. The other sections of the act are not material in this proceeding.

Pursuant to the foregoing provisions the board of examiners prepared a form of application in which certain blanks had to be filled by the applicants, who applied for certificates under the proviso referred to. These appli-

cants were required to state their names, addresses, the length of time and where engaged in "refracting." The respondent filled out one of those applications, in which he gave his name, his address, and the time he had been engaged in the practice of "refracting." This time he stated was 14 years, and the place where he was engaged in practice was Salt Lake City. He made the foregoing statements under oath, filed them with the board of examiners, and paid the fee required by the proviso aforesaid. The board, after the application had been filed for some time, returned the fee to the applicant, and refused to issue to him a certificate of registration, and thus prevented him from practicing optometry in this state.

Upon the foregoing facts, and upon much other evidence, nearly all of which, in the view we take of the case, is entirely immaterial, the district court issued a writ of mandate, directing the board of examiners to issue and deliver to the respondent a certificate of registration, authorizing him to practice optometry in this state as an applicant under the proviso to which we have referred. The board presents the record to this court for review on appeal.

It is contended that the district court erred in issuing the writ of mandate: (1) Because the respondent on the 14th day of March, 1907, was not engaged in the practice of optometry as defined by the act aforesaid; and (2) because he did not furnish to the board of examiners satisfactory or any evidence that he was so engaged. For these reasons, among others, it is contended that the respondent was and is not entitled to a certificate of registration. It is not claimed that the respondent did not correctly and truly answer all the interrogatories required to be answered by him in the blank application furnished him by the board; but it is contended that, in propounding other questions to the applicant by one or more of the members of the board, it was disclosed that the respondent was not engaged in the practice of optometry as the same is defined in section 1686x1, supra, because he used and applied subjective mechanical means only, while said section provides that "the practice of optometry is the employment of subjective and objective mechanical means * * * for the correction of errors of refraction, the relief of eye strain, and the aid of vision." In view of the language just quoted, it is contended that no one who on March 14, 1907, used and applied only one of the mechanical means aforesaid was legally qualified to practice optometry in this state. It is further contended that the statement made by respondent in his affidavit "that, on the 14th day of March, 1907, he was a practicing optometrist in the state of Utah," by his subsequent admissions, to at least one member of the board, with regard to the mechanical means used and applied by him in the "ad-

justment of lenses for the correction of errors of refraction," was shown not to be true. That is, that it was made to appear that respondent was not practicing optometry within the purview of the language of the section we have quoted.

No one can doubt the power of the Legislature to define and regulate the practice of optometry, and, to that end, to prescribe reasonable qualifications to be possessed by those who desire to engage in the practice, and to provide reasonable means by which such qualifications may be ascertained, in order to authorize those qualified to practice, and to prevent those who are not from doing so. We are of the opinion that it was the intention of the Legislature to require all those who were not engaged in the practice of optometry in this state on March 14, 1907, to pass an examination and prove their fitness and qualifications to use and apply both subjective and objective mechanical means to aid them in the "correction of errors of refraction, the relief of eye strain, and the aid of vision." The board of examiners were thus by the act authorized to examine applicants, not then engaged in the practice, with respect to their knowledge and proficiency in the application and use of both the means aforesaid, and to withhold a certificate from the applicants if the board was satisfied that the applicants were not so qualified. But we find no warrant in the statute to authorize the board of examiners to examine or pass upon the qualifications of any one who was engaged in the practice of optometry on March 14, 1907, provided such person made application for a certificate of registration "by July 15, 1907," and furnished proof of the fact that he was engaged in the practice of optometry at the time aforesaid. To make such proof is all that the law required of such applicants, and this is all that the board of examiners could require from them. If the Legislature had intended that those who were engaged in the practice of optometry on March 14, 1907, should nevertheless satisfy the board of examiners that each and every applicant shall use and apply both subjective and objective mechanical means for the purposes mentioned in the statute, then the proviso under which such persons were entitled to certificates is meaningless, and section 1686x5, which provides that in case application for a certificate is not made within the time specified, the right to such a certificate under the proviso shall be deemed waived, is a useless appendage to the act. If all applicants, those who were then engaged in as well as those who desired to enter upon the practice of optometry thereafter, were to be required to pass an examination and prove themselves proficient in the use of both the mechanical means specified in the act, then both the proviso and the provisions of section 1686x5 are without force or effect,

and the applicants under the proviso had nothing to waive.

Power is also conferred upon the board of examiners to revoke certificates for certain causes, one of which is gross incompetency. In order to revoke a certificate upon this ground, however, there must be a charge filed with the board, and after due notice to the accused, a hearing must be had, at which he must be confronted by the witnesses against him, and be permitted to produce any competent evidence in his favor. What the board in effect sought to do in this case was to adjudge the applicant incompetent in advance of any charge against him, and without a hearing, and before complying with the law, which is based on the presumption that those who were engaged in practice when the act went into effect were qualified to do so, and were entitled to certificates which could, however, be revoked in the manner aforesaid.

It is our duty to give effect to all the provisions of the act; and, if we do so in this case, it is clear to us that the Legislature intended that the proof of the fact that an applicant was engaged in the practice of optometry on March 14, 1907, was sufficient evidence of his qualifications to practice under the act in question, provided the applicant made his application and proof within the time, and paid the fee required by the act. In so far as the act applies to those who were then engaged in the practice, we think that all that was required of them was to make proof that they were engaged in the practice of what was then commonly known as constituting the practice of optometry, by the use and application of either one or both of the mechanical means aforesaid; and, when such proof was made, the applicants were entitled to be placed upon the records required to be kept by the board of examiners as licensed practitioners. We are of the opinion that, under the undisputed facts, the respondent furnished the evidence required by the act, and was thus entitled to a certificate from the board of examiners. The district court, therefore, committed no error in granting the writ of mandate.

The judgment is affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

(37 Utah, 330)

STATE v. GIBSON.

(Supreme Court of Utah. March 25, 1910.)

1. LARCENY (§ 52*)—GRAND LARCENY.

Comp. Laws 1907. § 4384, makes every person guilty of embezzlement punishable in the same manner prescribed for stealing property of the value of that embezzled, and section 4359 makes it grand larceny to steal property valued at more than \$50, and section 4360 makes all other cases petit larceny. Accused was employed to solicit advertising contracts, and within about 38 days collected \$235 from

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

various persons, and appropriated it to his own use; but \$48 was the largest amount collected from one person at one time. *Held*, that the taking of the \$235 was one embezzlement committed by a series of connected transactions, so as to make accused punishable as for grand larceny.

[Ed. Note.—For other cases, see *Larceny*, Dec. Dig. § 52.*]

2. EMBEZZLEMENT (§ 10*) — AUTHORITY OF AGENT—EFFECT OF EXCEEDING AUTHORITY.

Where accused demanded and received the money appropriated as his employer's agent, and it was paid in the discharge of obligations under advertising contracts which he had solicited for his employer, he was guilty of embezzlement, though he did not have authority to collect money due under such contracts.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 8; Dec. Dig. § 10.*]

Appeal from District Court, Third District; T. B. Lewis, Judge.

T. B. Gibson was convicted of embezzlement, and he appeals. Affirmed.

Mathonibah Thomas and Dale H. Parke, for appellant. A. R. Barnes, Atty. Gen., for the State.

STRAUP, C. J. The appellant was convicted of the crime of embezzlement. Under the statute (Comp. Laws 1907, § 4384), every person guilty of that offense is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled. Grand larceny is committed when the value of the property taken exceeds \$50. Section 4359. When the value is \$50, or less, the offense is petit larceny. Section 4360. It is charged in the information that the appellant embezzled \$200, the property of the Theater Publishing Company, a corporation. The jury found the appellant guilty of embezzlement "as charged in the information," and that "the value of the money embezzled exceeded \$50."

The evidence on the part of the state tended to show that the appellant was employed by the publishing company to solicit advertising contracts. Between the 12th day of November and the 20th day of December, 1908, he collected from divers persons the sum of \$235.60 due the publishing company upon contracts solicited and procured by him. He failed to account for the moneys so collected, and fraudulently and unlawfully appropriated and converted them to his own use, and left the state for California, where he went under an assumed name, as testified to by himself, "to avoid being located on account of the money I had collected in Salt Lake (Utah) and appropriated." The evidence shows that \$48.60 was the largest sum collected by him from any one person at any one time. In view of such fact, the appellant requested the court to charge the jury that to find him guilty of embezzlement exceeding \$50 it was essential to find that he "had in his possession at one time more than \$50 of the money belonging to the Theater Pub-

lishing Company," and that he "misappropriated more than \$50 at any one time." That is to say, it is in effect urged that if the appellant collected \$48.60 from one customer in the forenoon of a particular day and fraudulently and unlawfully appropriated and converted the money to his own use and spent it, and thereafter and in the afternoon of the same day he collected \$15 from another customer and converted and spent that, and the next day collected and misappropriated another sum less than \$50, and so on until he had in the aggregate, between November 12th and December 20th, collected and received \$235.60 belonging to his employer, and misappropriated and spent the moneys as fast as he collected them, he was guilty only of numerous petit offenses and misdemeanors, but not of any greater offense. The refusal of the court to give the request presents the principal question on the appeal.

We think no error was committed in the ruling. The case is not like that argued to us by appellant where the successive larcenies, each complete and distinct, did not constitute one continuous transaction; or where properties belonging to different persons located at different places were purloined, and where each asportation constituted a separate and distinct offense. *Scarver v. State*, 53 Miss. 407; *State v. Maggard*, 160 Mo. 469, 61 S. W. 184, 83 Am. St. Rep. 484. But it is one of embezzlement "committed by a series of connected transactions from day to day" (1 Bishop Crim. Pro. § 398), and shown to be "a continuous offense committed by a trusted servant by means of a series of connected transactions; and in such case a charge of embezzlement on a certain date will cover and admit evidence of the whole" (*State v. Reinhart*, 26 Or. 466, 38 Pac. 822), and is one constituting "in fact and in law a single embezzlement" (*Brown v. State*, 18 Ohio St. 496), and where "the one substantive charge of embezzlement was supported by proof of the receipt at different times of the amount" the appellant "was charged to have embezzled and one conversion of the whole" (*State v. Wise*, 186 Mo. 42, 84 S. W. 954), and falling within the principles stated in the cases of *Jackson v. State*, 76 Ga. 551, *State v. Broughton*, 71 Miss. 90, 13 South. 885, and *Gravatt v. State*, 25 Ohio St. 162.

It is further urged that the appellant is not guilty of embezzlement because it is shown that he was authorized by his employer to only solicit advertising contracts, and not to collect money due or to become due thereon. It might about as well be argued that the appellant was not guilty because he was not authorized to appropriate and convert the money to his own use. The money was demanded and received by him from the customers in the capacity of an agent of his employer, for its use and benefit, and was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

paid to him by the customers in discharge of obligations owing by them to his employer under the terms of the contracts. The money so paid to and received by the appellant, whether with or without authority from the employer to collect and receive it, became and was the property of his employer, and was received by and intrusted to him as the agent and servant of the publishing company. When he fraudulently appropriated it to his own use, he misappropriated and converted his employer's property, and committed the offense of embezzlement.

We think the judgment ought to be affirmed.

Such is the order.

FRICK and McCARTY, JJ., concur.

(37 Utah, 204)

ARNOLD v. POPE, Sheriff.

(Supreme Court of Utah. Jan. 20, 1910.)

1. PLEADING (§ 205*)—SCOPE OF GENERAL DEMURRER.

A general demurrer reaches only defects of substance.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 492; Dec. Dig. § 205.*]

2. EXECUTION (§ 172*)—INJUNCTION—NECESSARY PARTIES.

In an action to enjoin the collection of a judgment, the judgment creditor or his legal representative is a necessary party.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 522; Dec. Dig. § 172.*]

3. APPEAL AND ERROR (§ 1040*)—REVIEW—HARMLESS ERROR—SUSTAINING DEMURRER.

While ordinarily the objection that there is a defect of parties must be taken by special demurrer, where the defect appears from the face of the complaint, yet, where the complaint also fails to state a cause of action against the only party to the action, it is not prejudicial error to sustain a general demurrer to the complaint, although a good cause of action is stated against one not a party to the action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

4. EXECUTION (§ 172*)—RESTRAINING COLLECTION OF JUDGMENT—ACTION AGAINST SHERIFF ALONE.

A judgment debtor seeking to enjoin the collection of a judgment because of insolvency of a judgment creditor, and because he has a valid subsisting judgment against the creditor which is a set-off to the judgment sought to be collected, has no cause of action against the sheriff alone to whom an execution has been given by the judgment creditor.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 172.*]

Appeal from District Court, Fourth District; J. E. Booth, Judge.

Suit by John H. Arnold against Richard Pope, Sheriff. From a judgment for defendant, complainant appeals. Affirmed.

J. A. Wilson, for appellant. Peter Hansen, for respondent.

FRICK, J. In the complaint it is alleged, in substance, that Asenath Chadwick had obtained a judgment against the appellant and one A. C. Emert for \$221.50, which, at the time of filing the complaint, was in full force as appeared from the records of the district court of Uintah county, Utah; that on a day named said Chadwick caused an execution to be issued on said judgment out of said court and placed the same in the hands of the defendant, as sheriff of said county, with directions that he collect the amount aforesaid, as by said execution commanded; that the plaintiff also has a judgment against the said Asenath Chadwick, in the court aforesaid, for the sum of \$363.67, which is in full force and effect. The complaint contains many other allegations of fact which are unnecessary to state. From all the allegations, however, it is made to appear that said Asenath Chadwick is further indebted to the plaintiff and that she is insolvent, and that therefore the defendant sheriff should be restrained from satisfying said execution, and that the judgment of the plaintiff should be offset against the judgment of said Chadwick. The defendant sheriff appeared and demurred generally to the complaint. Upon a hearing on the demurrer the district court sustained the same, and, the plaintiff electing to stand upon the allegations of his complaint, the court entered judgment dismissing the action. Appellant assigns the ruling of the court as error.

It is not clear upon what ground the court based its ruling, but we assume that the demurrer was sustained upon the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendant sheriff. If the demurrer had been based upon the ground of a defect of parties defendant, it should undoubtedly have been sustained. The demurrer, however, was general, and thus could only reach defects of substance. We are of the opinion, however, that the complaint, in so far as the defendant sheriff was concerned, was defective in matters of substance, as well as in not making the judgment creditor, Asenath Chadwick, a party defendant to the action. The defendant sheriff was the mere instrument or agent of Asenath Chadwick through whom the law required her to act in attempting to collect the amount due upon the execution issued upon her judgment. The plaintiff stated no facts constituting a cause of action against the defendant sheriff. It certainly cannot be contended that, because a complaint states a good cause of action against the real party in interest, it therefore states a good cause of action against another who is made, and who may be, a necessary party defendant to the action. Nor can it be doubted that, in an action by which it is sought to enjoin the collection of a judgment, the judgment creditor,

or his legal representative, is a necessary party. We know of no rule of law or practice which authorizes a court to pass upon the legal rights of any person without making him a party to the action or proceeding by which it is attempted to pass upon such rights. While, ordinarily, the objection that there is a defect of parties must be taken by special, and not by general, demurrer, where the defect appears from the face of the complaint, yet where, as in this case, the complaint also falls to state a cause of action against the only party to the action, it cannot constitute prejudicial error to sustain a general demurrer to the complaint, although a good cause of action is stated therein against one not a party to the action. In view, therefore, that the complaint did not state a cause of action against the only defendant to the action, the court did not err in sustaining the general demurrer.

The judgment, therefore, should be, and it accordingly is, affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

(37 Utah, 345)

STATE v. BARKER.

(Supreme Court of Utah. April 2, 1910.)

WATERS AND WATER COURSES (§ 80*)—CHANGE OF CHANNEL—USE OF OLD CHANNEL—FISH PONDS.

Where a public stream, abounding in fish valuable for food, flowed across defendant's premises, he was entitled to change the course of the stream over such premises and construct fish ponds in the old bed, without injury to public or private interests, or interfering with the fish in the stream, permitting the water diverted to his fish ponds and hatchery to run undiminished and unpolluted back into the stream.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 72; Dec. Dig. § 80.*]

Appeal from District Court, Second District; J. A. Howell, Judge.

Action by the State against Joseph Barker to abate an alleged nuisance. Judgment for defendant, and the State appeals. Affirmed.

A. R. Barnes, Atty. Gen., for the State.
J. D. Skeen, for respondent.

McCARTY, J. This is an action by the state of Utah to abate an alleged nuisance, consisting of a fish hatchery and screens, constructed and maintained by respondent across what was once the natural channel of Huntsville Spring creek, a tributary of Ogden river, and to enjoin respondent from maintaining said screens and hatchery. From a judgment rendered in favor of respondent, the state of Utah prosecutes this appeal.

The appeal is upon the judgment roll, and the only error assigned is that the conclusions of law and decree are not justified or

supported by the pleadings or the findings of fact. It appears from the allegations of the complaint and answer, and from the findings of fact, that respondent is the owner of certain real estate in Weber county, consisting of about 97 acres. Huntsville Spring creek, which contains about 15 second-feet of water, flows in a general westerly course across respondent's premises. This creek is a natural feeding and spawning ground of valuable fishes, and is fed by a large number of small springs arising on respondent's premises. In addition to the small springs that arise on these premises, there is a large spring, known as the "Knudson spring," which contains a little more than one-half second-foot of water, which flows through a natural channel into the old creek bed of Huntsville Spring creek. The natural channel of Huntsville Spring creek across respondent's premises was very crooked, and by reason thereof the value of the land was materially lessened for ordinary purposes. In the year 1906 respondent constructed a dam across the main channel of Huntsville Spring creek near the east boundary line of his land, and excavated a straighter channel of sufficient size to carry all the waters of the creek across his premises, and connected it with the old channel near the west end of his land, and has utilized the old channel for a series of fish ponds and a fish hatchery, and has placed in it a large number of screens to prevent the fish in his ponds from escaping to the waters of Huntsville Spring creek, which are conceded to be public waters of the state of Utah, and to prevent the fish in Huntsville Spring creek from entering his private fish ponds. The respondent also cleaned out the Knudson spring, excavated ponds, and placed screens at regular intervals in the channel leading from the spring, making it suitable for the propagation and growth of fish. The respondent also, by means of ditches, diverted from the main channel of Huntsville Spring creek to his private fish ponds a small stream of water, which ran undiminished and unpolluted back into the main channel.

The court made findings in accordance with the facts as we have stated them, and further found "that the new channel constructed across defendant's [respondent's] land is, and at all times mentioned in the complaint has been, open and unobstructed, and is practically as good as the old channel for the feeding and spawning of fish," and further, "that the spring known as the 'Knudson spring' was, prior to the time defendant [respondent] converted the same into private fish ponds, shallow and unsuitable for the feeding or spawning of fish, and was not inhabited by fish valuable for food." The court also stated in its findings of fact that it was "not satisfied that the screens now in the various streams upon said premises are

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

properly constructed and maintained to accomplish the purposes for which they were intended." As conclusions of law the court found that the respondent had a legal right to change the channel of Huntsville Spring creek where it crosses his premises, the legal right to use the old channel for private fish ponds, the legal right to clean out the Knudson spring and use it for a private fish pond, and the legal right to divert a reasonable amount of water from Huntsville Spring creek to his private fish ponds, provided he returned it to Huntsville Spring creek unpolluted and undiminished to any appreciable extent. The court also found, as a conclusion of law, "that a qualified and disinterested person should be named as commissioner to examine and superintend the construction of screens at all points on said premises where fish may, if not prevented, pass from the public waters of the state of Utah to the private fish ponds" of the respondent.

A decree was entered in accordance with the foregoing findings of fact and conclusions of law, and the action dismissed. The decree, however, provides that the court shall retain jurisdiction of the suit for the purpose of exercising supervisory control over the commissioner appointed to superintend the construction of and placing in the ponds and streams mentioned screens necessary to prevent the fish in the Huntsville Spring creek from entering the private fish ponds of respondent. The contention made on behalf of the state is that where the channel of a public stream, which is a natural feeding and spawning ground of valuable fishes, crosses a person's premises, such person cannot lawfully construct a new channel and turn the waters of the public stream into such channel as it crosses his premises, and then utilize the old channel for private fish ponds, regardless of whether the diversion of the stream from the old and natural channel into the new and artificial is in any way detrimental to the feeding, spawning, and growth of fish therein.

We think this contention is unsound. While a person across whose premises a public stream, abounding in fish valuable for food, flows, may not, because of his ownership of the premises, place dams, screens, or other substances in the channel that would tend to interfere with the passage of fish up and down the stream, or do any other act therein prohibited by the fish and game laws of the state, yet we know of no reason why such person should not be permitted to change the course of the stream across his premises, where, as in this case, neither public nor private interests are affected by such change. The question of whether a party across whose land a public stream stocked with fish flows may or may not change the course of the channel of such stream over his premises for the purpose of improving

his land and making it more valuable for agricultural or other purposes, where such change would render the stream less suitable for the feeding, spawning, and raising of fish, we are not called upon to determine, as no question of that kind is presented by this appeal. The court having found that the new channel across respondent's land has not interfered, and does not interfere, with the spawning and feeding of fish, that the Knudson spring, prior to the time respondent converted it into a fish pond, was unsuitable for the feeding or spawning of fish, and that the water diverted by respondent from the main channel of Huntsville Spring creek to supply his fish ponds and hatchery runs undiminished and unpolluted back into the creek, no judgment other than that rendered by the court would be permissible in the case.

The judgment is therefore affirmed, with costs to respondent.

STRAUP, C. J., and FRICK, J., concur.

(41 Mont. 87)

MCINTYRE v. MONTANA GOLD MOUNTAIN MINING CO. et al.

(Supreme Court of Montana. April 2, 1910.)

1. NEW TRIAL (§ 123*)—NOTICE OF INTENTION—TIME OF SERVING.

Under Rev. Codes, § 6796, requiring a party intending to move for a new trial to serve within 10 days after notice of entry of judgment a notice of intention, a notice of intention served after decision, but before entry of judgment, is premature.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 280; Dec. Dig. § 123.*]

2. NEW TRIAL (§ 123*)—NOTICE OF INTENTION—SERVICE—WAIVER OF NOTICE OF ENTRY OF JUDGMENT.

Waiver of formal notice of entry of judgment resulting from the institution of proceedings in support of a motion for a new trial without such notice is not imputable to one who inadvertently institutes his proceedings before the time at which he may do so.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 123.*]

3. NEW TRIAL (§ 123*)—NOTICE OF INTENTION—SERVICE.

Where the notice of intention to move for new trial was served on the only party appearing on the record to have any interest in opposing the motion, the service of the notice was sufficient.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 123.*]

4. APPEAL AND ERROR (§ 413*)—NOTICE OF APPEAL—SUFFICIENCY.

Where the notice of appeal was served on the only party appearing on the record to have any interest in opposing the relief sought on appeal, the notice was sufficiently served, though there were other parties to the action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2136; Dec. Dig. § 413.*]

5. APPEAL AND ERROR (§ 654*)—NOTICE OF APPEAL—SERVICE—RECORD.

Where the fact of service of notice of appeal not shown on the record is admitted during

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the oral argument on the motion to dismiss the appeal, the necessity of an amendment to the record showing service is dispensed with.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 654.*]

6. MECHANICS' LIENS (§ 35*)—PARTIES ENTITLED TO LIEN—STATUTES.

Rev. Codes, § 7290, giving any person performing any work on or furnishing any material for any building, structure, mining claim, etc., a lien on the property, provides for a lien in favor of any person bestowing labor on any character of property as such, or by whom material is furnished for the improvement of the property.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 35.*]

7. MINES AND MINERALS (§ 112*)—OPERATION OF MINE—LIEN—STATUTES—APPLICABILITY.

The limitations prescribed in Rev. Codes, § 7293, defining the property affected by a mechanic's lien, and providing that, where the interest of the person owning the structure is less than the fee, the lien affects his interest only, etc., do not apply to mining claims, and a lien thereon extends to the whole claim because such a claim cannot be divided and the improvements or structures put on it often cannot be removed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 235; Dec. Dig. § 112.*]

8. MINES AND MINERALS (§ 113*)—OPERATION OF MINE—PERSONS ENTITLED TO LIEN—STATUTES.

Under Rev. Codes, § 7290, giving to any person performing any work on, or furnishing any material for, any building, structure, mining claim, etc., a lien on the property, men making repairs and alterations in a mining claim, building roads, and preparing fuel for use to carry on the mining enterprise, and keeping the machinery in order and clearing away debris which accumulates from time to time about the buildings erected to house the machinery, are entitled to liens for the work done.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 234; Dec. Dig. § 113.*]

9. MINES AND MINERALS (§ 114*)—OPERATION OF MINE—NOTICE OF LIEN—ACCOUNT.

Rev. Codes, § 7291, requiring any person desiring a mechanic's lien to file a just and true account of the amount due him after allowing just credits, etc., does not require the character of the work done to be classified, or even the items of it to be set out in the account filed, and accounts for work on mining claims need not specify the amount due for each kind of work, whether construction work or on repairs, or in mining, or road building.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 114.*]

10. MINES AND MINERALS (§ 112*)—OPERATION OF MINE—PROPERTY SUBJECT TO LIEN.

Where a group of mining claims were improved as a consolidated claim, men employed on the enterprise entitled to a lien for their work were entitled to a lien on the entire group, and the fact that they limited their liens to only a part of the mining claims did not destroy their right to a lien against such claims.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 235; Dec. Dig. § 112.*]

11. WORK AND LABOR (§ 17*)—PERSONS LIABLE.

Where work on a group of mining claims was done at the instance of two individuals who in part paid therefor, they were personally liable for the amount unpaid, whether they were technically partners or not.

[Ed. Note.—For other cases, see Work and Labor, Dec. Dig. § 17.*]

12. APPEAL AND ERROR (§ 880*)—PERSONS ENTITLED TO ALLEGE ERROR.

Where, in a suit to enforce liens for work on mining claims, it appeared that some of the lien claimants had been engaged solely in construction work on a mill erected on the claims, and the court properly rendered a judgment enforcing a lien on an undivided interest in the mining claims and in the mill and other improvements thereon belonging to one of the defendants, and then ordered that, in case the proceeds of a sale of such interest were not sufficient, the entire mill should be sold, such defendant could not complain of the judgment, but the owner of the other interest in the property who was a party defendant was the only person who could complain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3584-3590; Dec. Dig. § 880.*]

Smith, J., dissenting in part.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by R. B. McIntyre against the Montana Gold Mountain Mining Company and others. From a judgment for plaintiff, defendant John MacGinniss appeals. Affirmed.

John F. Davies & Scott, for appellant. M. P. Gilchrist and W. D. Kyle, for respondent.

BRANTLY, C. J. This action was brought by plaintiff to recover of defendants Montana Gold Mountain Mining Company (hereafter referred to as the company), John MacGinniss, B. T. Spaulding, and James Breen for services performed by him as a laborer, at their instance and request, between August 1, 1907, and November 1, 1907, and to establish a lien for the amount alleged to be due upon three mining claims, with a mill thereon, situate in Silver Bow county, upon which the labor was performed, and of which the said defendants are alleged to be the owners. Plaintiff also sued as assignee of 16 other claimants for similar services rendered to the same defendants at various times between August 1, 1907, and December 5, 1907, setting forth these claims in separate counts. The amended complaint, after alleging facts sufficient to support a judgment for the different amounts alleged to be due as upon account, alleges the filing of notices of claim of lien by plaintiff and each of his assignors in conformity with the requirements of the statute. The Silver Bow National Bank (hereafter referred to as the bank) was made a defendant because it asserts an interest in the property upon which plaintiff claims liens. Several other persons from whom the company acquired its interest in the property were also made parties defendant; but at the close of the hearing the action was dismissed as to them. Breen appeared by filing a demurrer to the complaint, but no disposition was ever made of it, and, as to him, the action is still pending in the district court. Spaulding suffered entry of default for failure to appear. The answer of MacGinniss and the company denies generally all the ma-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

terial allegations of the complaint. In addition to the same general denials, the bank alleges that on October 15, 1907, it became the owner of the mill by purchase from Spaulding, together with all the tools, machinery, and appliances therein, and is now the owner thereof. This allegation the plaintiff puts in issue by reply. The court found for plaintiff, as against defendants MacGinniss and Spaulding, for the full amount claimed in each count of the complaint, except one. As to this no evidence was offered. It rendered and caused to be entered a personal judgment against them, and declared the plaintiff entitled to liens upon the property for the several amounts due, and to have sale of it to satisfy his judgment, as follows: First, an undivided interest in the mining claims and in the mill and other improvements thereon, belonging to MacGinniss; and, second, in case the proceeds are not sufficient to satisfy the judgment of the entire mill. Plaintiff was also awarded counsel fees, to be paid out of the proceeds of the sale. The defendant MacGinniss has appealed from the judgment and an order denying his motion for a new trial.

1. When the record was filed in this court, counsel for plaintiff submitted a motion to affirm the order denying the motion for a new trial, on the ground that the notice of intention had not been served upon all the adverse parties, and because it had not been served in time. They also submitted a motion to dismiss the appeal from the judgment, on the ground that the notice of appeal had not been served upon all the adverse parties. Disposition of these motions was deferred until hearing upon the merits, because a determination of them required an examination of the entire record. Now that we have made this examination, aided by the argument and admissions of counsel, we have concluded that the motion should be denied. Proceedings on the motion for a new trial were first instituted by MacGinniss by serving his notice of intention after the decision was made, but before entry of judgment. These proceedings were premature. Under the statute, a party intending to move for a new trial may do so by serving his notice within 10 days after the notice of entry of judgment, but not before. Rev. Codes, § 6798. When the bill of exceptions first prepared in the case was submitted to the trial judge for settlement, it was found by counsel for MacGinniss that the notice of intention had been served prior to the entry of judgment. Thereupon, having then for the first time knowledge of the entry of judgment, counsel abandoned the proceedings as nugatory, and served and filed a new notice. The proceedings on the motion based upon the second notice were timely; for, though formal notice of the entry of judgment may be waived by the moving party by instituting his proceedings in support of his motion without it, such waiver is not properly imputable to one who inadvertently institutes

his proceedings before the time at which he may do so. Both the notice of intention and the notice of appeal were served upon Spaulding, the only party who appears upon the record to have any interest in opposing the purpose sought to be accomplished by the motion for a new trial and the appeal, viz., the vacation of the judgment. The fact of service does not appear of record; but counsel for defendant MacGinniss during the oral argument on the motions in this court having repeated a statement made in his brief, to the effect that the service had in fact been made of both notices, this statement was accepted by counsel for plaintiff as true. This dispensed with the necessity of an amendment to the record showing the fact, which counsel for defendant stated they were ready to make.

2. On the merits, the first contention is that the court erred in admitting in evidence the notices of lien, for the reason that they do not describe the property upon which the work was done, nor properly indicate the character of the work. It is argued that there are three classes of liens claimed, to wit: Certain ones for work done exclusively in the mine; others for work done exclusively in the construction and operation of the mill; and still others for work done both in the mine and in the mill; and that, since the notices do not segregate the items for work done upon the different parts of the property and specifically describe such parts, they furnish no basis to support a claim of lien, either upon any specific part of the property or upon the whole of it as a unit. It is also said that the statute does not grant a lien for repair work, or for the cutting of cordwood, and that certain of the claims for work done in this behalf are made without authority of law. These contentions will be better understood if a brief statement be made of the circumstances under which the lienors were employed and the situation and character of the property upon which the work was done.

The company and MacGinniss were in 1906 owners as tenants in common of a contiguous group of mining claims, seven in all. Defendant Spaulding, having in the latter part of that year obtained an option from the stockholders of the company to purchase all of its capital stock held by them if the claims should after thorough examination and test by sampling prove of sufficient value to justify the purchase, the option contract authorizing him to take possession of the property for that purpose, and to build a sampling mill if necessary, assigned to MacGinniss and Breen certain shares of his option. Thereupon the three, Spaulding and MacGinniss acting for Breen, took possession, and in August, 1907, began the erection of a sampling mill near the portal of a tunnel which had theretofore been driven into the mountain upon a claim designated as the "Clara Jurgens." Previous to taking possession Mac-

Ginniss and Spaulding entered into a contract with the stockholders of the company to redeliver the property to them in case they failed to take up the option, free from liabilities or incumbrances of any kind or character. The tunnel mentioned extends into the mountain about 800 feet, passing entirely through the Clara Jurgens claim and into the Mabel Beal, a contiguous claim on the north. Immediately to the south is another claim in the group, designated "Placer Lot No. 42." Covering a part of the placer, and overlapping a portion of the Clara Jurgens on the south, is still another claim, designated as the "Central Lode." The mill is situated within the boundaries of this claim, and upon the boundary line between Placer No. 42 and the Clara Jurgens claim. Some of the men employed by Spaulding and MacGinniss worked exclusively in the construction of the mill and in operating it. Others worked exclusively in making repairs to the tunnel and in the pursuit of mining operations conducted in the Clara Jurgens claim. The repair work in the tunnel extended to its full length, and was therefore done in part within the boundaries of the Mabel Beal claim. Some of the men were employed in building a roadway, so that the teams could reach the mill. Others were hired to cut cordwood for use as fuel in the boiler house connected with the mill. Still others were engaged exclusively in construction work upon additions made to the mill building, and alterations and repairs made in the machinery. Some did a small amount of work in gathering samples of ore from claims not mentioned in the notices. None of them were employed under special contract, but all worked for wages at an agreed rate per day.

The contention is that, the plaintiff and his assignors having failed to specify in the accounts attached to their respective notices exactly the amount due them for each kind of work done by them, whether it was construction work or upon repairs, or in mining or road building, and to limit the claim of lien to the specific portion of the property upon which the work was done, the notices are insufficient, and should therefore have been excluded from the evidence. The statute declares: "Sec. 7290. [Rev. Codes.] Every mechanic, miner, machinist, architect, foreman, engineer, builder, lumberman, artisan, workman, laborer, and any other person performing any work and labor upon, or furnishing any material, machinery or fixture for any building, structure, bridge, flume, canal, ditch, aqueduct, mining claim, quartz lode, tunnel, city or town lot, farm, ranch, fence, railroad, telegraph, telephone, electric light, gas or water works or plant, or any improvements, upon complying with the provisions of this chapter, for his work or labor done, or material, machinery or fixtures furnished, has a lien upon the property upon which the work or labor is done, or material furnished." It is apparent from even

a casual reading of this provision that the Legislature intended to provide for a lien in favor of any person who bestows labor upon any character of property as such, or by whom material is furnished for the improvement of the property. That this is so is clear from the declaration at the close of the section that such person "has a lien upon the property upon which the work or labor is done, or material furnished." Under other provisions, the extent to which property, other than mines, is affected by the lien, is defined and limited. If the structure and land upon which it is situated both belong to the same person, the lien extends to the lot or lots occupied by the structure, if within a city or town, or to one acre of land if it is outside a city or town. If the interest of the person owning the structure is less than the fee, the lien affects his interest only. Rev. Codes, § 7293. In the latter case the structure may be sold and removed within 20 days after sale. Id. section 7294. It was pointed out in *Smith v. Sherman Min. Co.*, 12 Mont. 524, 31 Pac. 72, however, that the limitations prescribed in section 7293, *supra*, do not apply to mining claims, but that a lien upon such property extends to the whole claim; and this must be so, because such claims cannot be divided, and the improvements or structures put upon them often cannot be removed. They generally consist of shafts, tunnels, and similar excavations. The rule stated in *Smith v. Sherman Min. Co.* was held to be the rule under the statute of 1888 (Laws 1872, p. 509, § 1) in *Alvord v. Hendrie*, 2 Mont. 115. This statute has been amended in various other particulars, but the section referred to has been brought forward into the different compilations of our laws substantially as it then stood. In *Alvord v. Hendrie*, *supra*, it was held that, where one had expended work partly on a quartz claim and partly upon a mill erected thereon, he could claim and enforce a lien upon both the claim as an entirety and the mill. The decision in *Smith v. Sherman Min. Co.* proceeded upon the theory that, since the limitations declared in section 7293 cannot properly apply to this character of property, they were not intended to change the rule as declared in *Alvord v. Hendrie*, though they had been added to the statute by way of amendment since the decision in this case.

The rule declared in these cases was evidently had in mind by the person who prepared the notices involved in this case. The plaintiff and each of his assignors claimed a lien upon the mill and the claims upon which it is situated; that is, upon the Clara Jurgens, Placer Lot No. 42, and the Central Lode. One of the notices does not mention specifically the Central Lode, but, as already stated, this claim falls entirely within the boundaries of Placer Lot No. 42, and in our opinion the description of the latter is sufficient to indicate the area within which the work was done, though this claim is not

specifically mentioned. Evidently, also, there was had in mind at the time the notices were prepared the idea that, since the work was done for the exploitation of a group of contiguous claims. It was proper to treat them as constituting a single consolidated claim. This theory we think is correct. It is frequently the case that a group of contiguous claims is treated as a single one, and work is done upon one for the benefit of all. If such work is reasonably adapted to the development of all the claims and tends in any measure to accomplish this object, it is considered as annual representation work for all of the claims (*Copper Mt. Min. Co. v. Butte & Corbin C. & S. Min. Co.*, 39 Mont. 487, 104 Pac. 540), and all of them may be patented as a single claim. If this theory is legitimate for the purpose of developing and patenting mining claims, we see no good reason why lien claimants may not proceed upon the same theory in making their claims. There is nothing in the statute, *supra*, prohibiting it, and it is entirely consonant with the correct notion of what constitutes a mining claim.

Here the purpose had in view by Spaulding, Breen, and MacGinniss was the exploitation and sampling of the entire group of claims. All the work done, including the erection of the mill, was with that end in view. The mill was apparently intended to be a permanent structure, and to become a part of the unit property, made up of the entire group. The workmen were all employed upon the enterprise, whether in construction work as such, or in repairs and alterations, or in mining work, or in building roads, or in cutting cordwood. The entire group constitutes a consolidated claim, and the work of the whole enterprise was expended upon it. The statute does not mention repairs and alterations; yet it takes labor to accomplish them. Touching the labor expended in building roads and preparing fuel belonging to the owner for use in producing power to carry on his enterprise, it may be said it is as much labor done on the claim, as is that expended in the use of a pick or hammer and drill in the workings of the mine above or below ground. The same may be said of operatives in the mill whose duty requires them to keep the machinery in order and to clear away debris which accumulates from time to time in and about the buildings erected to house the machinery. It is true that it was held by this court in *McGlaulin v. Wormser*, 28 Mont. 177, 72 Pac. 428, that one must look to the statute for the right to claim a lien for labor done or materials furnished, and that no such right exists unless specific provision is made for it. It was also held in *Holter Hardware Co. v. Ontario Min. Co.*, 24 Mont. 198, 61 Pac. 8, 81 Am. St. Rep. 421, that one furnishing fuel or lubricating oil to a mining company has no lien for the price of it, because lubricating oil and fuel are consumed in the use, and do not become a part of the property of the owner. Neither

of these cases furnishes, even by implication, support for the conclusion that one employed by a mineowner to do work upon his property in connection with his enterprise, without which it cannot proceed, has not a lien upon the property to secure the price of his work. The statute does not require the character of the work done to be classified or even the items of it to be set out in the account filed with the notice. All that is required is a just and true account—an honest statement—from which may be understood what amount is claimed. *Rev. Codes, § 7291; Black v. Appolonio*, 1 Mont. 342; *Merrigan v. English*, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837; *Smith v. Sherman Min. Co.*, *supra*.

It is argued in this connection that, since the evidence shows that a portion of the work done by some of the men was done upon the "Mabel Beal" claim and others in the group not included among those described in the notices, and the value of this portion of the work cannot be definitely ascertained, all claims affected by this condition should have been excluded. This argument is fully answered by the statement that the plaintiff and each of his assignors was entitled to a lien upon the entire group, including the seven claims, and that the defendant cannot complain that they claimed less than they were entitled to and asserted their right as to only three claims of the group. If they had a right of lien upon the whole group, they had the same right as to each claim constituting the group. The work done, whether upon one or the other of the claims, affected each claim. Therefore it seems unreasonable to say that, because they failed to assert as extensive a right as they really had, they lost their right altogether.

3. The foregoing discussion disposes of the contention that the court erred in rendering judgment for plaintiff. The evidence fully establishes the fact that the work was done at the instance of Spaulding and MacGinniss, and that they are personally liable for the amounts claimed to be due. Whether they were technically partners or not, the work was done at their instance and in part paid for by them. Neither the company nor the bank had any connection with the employment of any of the men.

From the facts detailed in the statement heretofore made, it is apparent that some of the lien claimants were engaged in construction work upon the mill exclusively. Those so engaged might have proceeded upon the theory that Spaulding and MacGinniss were lessees, and claimed their liens against the mill only and enforced them by sale of it under the provisions of section 7294, *supra*. It might plausibly be argued that, since they did not pursue this course but elected to treat the mill as a part of the realty, neither they nor the rest of the claimants who had no such right, because they did other kinds of work, ought to have ordered a sale of the mill as a whole as the judgment directs. The com-

pany, which is the owner of the other interest in the property, is the only person who could complain of this feature of the judgment. Since this is so, and since it did not appeal, we must presume that it is satisfied with the result. The judgment is clearly correct in ordering the sale of the MacGinniss interest in the realty, including his interest in the mill.

The judgment and order are affirmed.
Affirmed.

HOLLOWAY, J., concurs.

SMITH, J. I am unable to concur in that portion of the foregoing opinion which deals with labor performed upon the Mabel Beal claim.

(32 Nev. 346)

KNIGHT v. DISTRICT COURT OF SEVENTH JUDICIAL DIST. et al.
(No. 1,893.)

(Supreme Court of Nevada. April 26, 1910.)

1. INDICTMENT AND INFORMATION (§ 9*) — PRELIMINARY EXAMINATION—BAR.

Under Comp. Laws, § 4167, providing that the grand jury has power to inquire into all public offenses committed within the jurisdiction of the court, and to present them either by presentment or indictment, the grand jury is authorized to indict a person accused of crime, notwithstanding the case may be pending on preliminary examination before a justice of the peace.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 34; Dec. Dig. § 9;* Criminal Law, Cent. Dig. §§ 415, 461-467.]

2. PROHIBITION (§ 3*)—JURISDICTION—OTHER REMEDY.

Where the indictment is regular on its face, and the trial court has jurisdiction of the person named in the indictment, the Supreme Court will not intervene by writ of prohibition; it appearing that relator had another remedy.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

Application for writ of prohibition by Bart Knight against the District Court of the Seventh Judicial District and another. Writ denied.

J. Emmet Walsh and Frederick W. Hankey, for petitioner. R. O. Stoddard, Atty. Gen., for respondents.

SWEENEY, J. This is an application for a peremptory writ of prohibition against the district court of the Seventh judicial district of the state of Nevada, in and for Esmeralda county, and Hon. Peter J. Somers, judge of said court, to restrain and prohibit the said respondent from proceeding or taking any further action upon certain indictments pending in said court against the relator, Bart Knight.

It appears from the record that the relator, Bart Knight, together with Jake Hildebrandt, M. J. Smith, and Martin Miller, of

Goldfield, Nev., were indicted by the grand jury of said county of Esmeralda for the crime of grand larceny. That prior to said indictments, on the 14th day of February, 1910, six complaints were laid before Arthur E. Barnes, justice of the peace in and for Goldfield township, county of Esmeralda, state of Nevada, charging said above-named parties with the crime of grand larceny. That warrants of arrest were issued for said defendants, and each of them was arrested and taken into custody by virtue of said warrants of arrest, and on the 15th day of February, 1910, said defendants and each of them were arraigned before said justice of the peace at his courtroom in Goldfield, and upon motion of the district attorney of Esmeralda county the hearing of said complaints against said defendants was set for the 18th day of February, 1910, at the courtroom of said magistrate. That on the 18th day of February, 1910, the relator and his codefendants above named appeared in said magistrate's court ready for, and demanding, hearings and examinations upon the said complaints, and that, after being arraigned, the district attorney refused any hearings or examinations upon said complaints and charges, and submitted charges to the grand jury of Esmeralda county, which was then in session, which said grand jury, on the 24th day of February, 1910, found and returned against said relator and his codefendants true indictments for grand larceny. Thereupon, on the 24th day of February, 1910, the relator was arrested upon a bench warrant issued out of the district court of the Seventh judicial district, brought before Hon. Peter J. Somers, judge of said court, and was directed by said court to remain in custody unless said relator entered into a bond, as required by law, in the sum of \$3,000, which said bond was duly given, and relator, upon being called before the bar of said court to plead to said indictments, filed a plea in abatement to the said indictments, to which a demurrer was interposed by the district attorney of said county, and sustained by the judge of said court. That relator, upon being called to further plead to said indictments, stood mute. That the judge of said court directed and ordered a plea of not guilty to be entered against said relator, Bart Knight, and relator maintains and alleges that, unless this writ of prohibition issues, he will be forced to trial upon said indictments by said court.

The contentions of petitioner, as raised by his plea in abatement, and which are interposed in this court in justification of his right to the issuance of the writ prayed for, are as follows: First, that, complaints having been filed before a magistrate, the grand jury was without jurisdiction to investigate the matters involved in those complaints during the pendency, and before the deter-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mination of the issue of probable cause before the magistrate, and that the procedure in the state of Nevada, while permitting the presentation of a charge of crime before a grand jury, contemplates and requires that, when an investigation before a magistrate is initiated, it must be concluded, and until it is concluded the grand jury cannot consider it; second, that in the case presented by the petitioner the plea in abatement in the district court discloses that the action of the district attorney and the justice of the peace in not proceeding with the matter vitiates the indictments found by the grand jury, for the reason that they are irregular, and not found in accordance with law.

After a very careful examination of the law cited by counsel in behalf of petitioner, in support of his contentions, and a due consideration of the very able and eloquent appeal in behalf of his client, we are of the opinion that his contentions are not sufficient to warrant this court in intervening in this proceeding by the issuance of a writ of prohibition. While we agree with counsel for petitioner that a person accused of and arrested for crime is entitled to a prompt examination, and that his substantial rights must be protected at all times, and that his examination should not be unnecessarily delayed to suit the accommodation or convenience of the officers of the law, still we are of the opinion that the grand jury are authorized, under the law in this state, to indict a person accused of crime notwithstanding that the case may be pending on preliminary examination before a justice of the peace. Section 4167 Comp. Laws Nevada. The law is well established that the grand jury may investigate and indict one charged with a felony, although he has been arrested and arraigned for a preliminary examination, and is not bound to await the action of the examining court, for the reason that the action of the examining court is no bar to the right of the grand jury to inquire into the case and indict the accused, even though he has been discharged on the preliminary examination.

The grand jury has unquestioned power to investigate any criminal offense and find an indictment without any previous preliminary examination of the accused; and even when a preliminary examination of an accused person is pending, the grand jury has full power to make inquiry and find an indictment against such person notwithstanding such preliminary examination. No matter what the action of the justice of the peace may be in his determination of the preliminary examination, his action cannot relieve the grand jury from their bounden duty, or deprive them of their right to investigate and act upon the charges against the accused, and under no circumstances can an examination before a justice of the peace divest the grand jury of their

power to investigate the charge against the accused. 17 Am. & Eng. Ency. of Law, 1280; State v. Whalen, 148 Mo. 286, 49 S. W. 989; State v. Gleseke, 209 Mo. 331, 108 S. W. 525; State v. Bringer, 42 La. Ann. 1091, 8 South. 279, 10 L. R. A. 137; State v. Jeffries, 210 Mo. 302, 109 S. W. 615; People v. Horton, 4 Parker, Cr. R. (N. Y.) 222; People v. Hafferman, 5 Parker, Cr. R. (N. Y.) 393.

The indictment being regular on its face, and the district court having jurisdiction of the person named in the indictment, this court will not intervene by writ of prohibition, as relator appears to have another remedy, even conceding any errors were committed. However, believing as we do, that the plea in abatement was properly overruled, it is not necessary to further consider any of the other points urged in the petition. *Ex parte Easton*, 95 U. S. 77, 24 L. Ed. 373; *Fraser v. Freelon*, 53 Cal. 644; *Walcott v. Wells*, 21 Nev. 47, 24 Pac. 367, 9 L. R. A. 69, and notes p. 60, 37 Am. St. Rep. 478; 16 Am. & Eng. Ency. Pl. & Pr., p. 1128; *Beil v. District Court*, 28 Nev. 280, 81 Pac. 875, 1 L. R. A. (N. S.) 843, 113 Am. St. Rep. 854.

The application for the writ is denied.

NORCROSS, C. J., and TALBOT, J., concur.

(25 Okl. 853)

EIKLOR et al. v. BADGER.

(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 758*) — DISMISSAL — BRIEF—SPECIFICATION OF ERRORS.

Where the brief of plaintiff in error fails to contain a specification of the errors required by rule 25 (95 Pac. viii), the proceeding in error may be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093; Dec. Dig. § 753.*]

Error from District Court, Kingfisher County; A. H. Houston, Judge.

Action by E. H. Eiklor and H. E. Hopkins against David Badger. Judgment for defendant, and plaintiffs bring error. Dismissed.

F. P. Whistler, for plaintiffs in error. F. L. Boynton, for defendant in error.

TURNER, J. On September 24, 1907, E. H. Eiklor and H. E. Hopkins, partners as Eiklor & Hopkins, plaintiffs in error, sued David Badger, defendant in error, in the district court of Kingfisher county, to recover \$200 commission alleged to have been earned by them in procuring for said Badger a purchaser ready, willing, and financially able to buy his farm, theretofore listed with them for sale. After answer filed, in effect a general denial; there was trial to a jury, and judgment for defendant. After motion for a new trial filed, and overruled, plaintiffs bring this case here by petition in error and case-made.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Plaintiffs' brief is assailed by motion to dismiss on the ground that the same falls to comply with rule 25 of this court (95 Pac. viii), in that, among other things, it fails to contain an assignment of error. We think the motion good. The brief contains under head of "Statement of the Pleadings" a résumé thereof, and under head of "The Evidence" the substance thereof, consisting principally of questions and answers. Under the head of "Instructions" there is set forth the third, fourth, fifth, sixth, seventh, and eighth instructions given by the court, none of which are excepted to, except the sixth. Then follows "Conclusions of Law and Facts," and, lastly, under the head of "Argument," we find the only semblance of an assignment of error, in effect that the trial court erred in so instructing the jury, for the reason that the same was a misapplication of the law to plaintiffs' alleged right of action "and contrary to the evidence in the case." Then follows an argument of something over a page, nowhere containing anything upon which we could predicate, or construe into, an assignment of error. This is too indefinite, and falls to comply with rule 25 of this court. For that reason, the motion to dismiss is sustained.

In passing, however, we desire to say that we have gone carefully into the testimony, and, while it discloses that defendant in error authorized plaintiffs in parol to sell his farm in that county for \$7,000, out of which they were to be paid a commission of \$200, the testimony nowhere shows that they secured in the person of Blessing, or any one else, a purchaser ready, willing, and financially able to purchase the land upon any terms whatever.

For the reasons stated, the petition in error is dismissed. All the Justices concur.

(26 Okl. 308.)

A. F. SHARPLEIGH HARDWARE CO. v. PRITCHARD et al.

(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*)—FAILURE TO FILE BRIEF—REVERSAL.

Where plaintiff in error has completed his record and filed it in this court, and has served and filed a brief in compliance with the rules of the court, and the defendant in error has neither filed a brief nor offered any excuse for such failure, this court is not required to search the record to find some theory upon which the judgment below may be sustained; but where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the case in accordance with the prayer of the petition of plaintiff in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3110; Dec. Dig. § 773.*]

Williams, J., dissenting.

Error from District Court, Pittsburg County; Preslie B. Cole, Judge.

Action between the A. F. Sharpleigh Hardware Company and George K. Pritchard and another. From the judgment, the Hardware Company brings error. Reversed and remanded.

A. C. Markley, for plaintiff in error.

DUNN, C. J. This case presents error from the district court of Pittsburg county. Plaintiff in error filed its petition in error, with case-made attached, September 4, 1908, praying for a new trial. October 5, 1908, he filed in the office of the clerk of this court an abstract of the case and a brief in support of his petition in error. This brief shows service on counsel for defendant in error on October 3, 1908. More than a year has elapsed since this was done, yet counsel for defendant in error has filed no answer brief. An examination of plaintiff in error's brief shows that it reasonably sustains the assignments of error, and we will not search the record to find some theory upon which the judgment may be sustained. The increasing work of this court is such that in justice to diligent litigants we cannot brief cases for those who ignore and neglect it.

Hence, on the authority of the cases of Ellis et al. v. Outler et al., 106 Pac. 957, Butler et al. v. McSpadden, 107 Pac. 170, and Buckner v. Oklahoma National Bank of Shawnee et al., 106 Pac. 959, all recently decided, but not yet officially reported, the cause is reversed and remanded to the district court of Pittsburg county, with instructions to set aside the judgment heretofore entered and grant plaintiff in error a new trial.

TURNER, KANE, and HAYES, JJ., concur. WILLIAMS, J., dissents.

(26 Okl. 24)

ALBAUGH BROS. DOVER CO. v. WHITE.
(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 44*)—JURISDICTION—ACTION FOR MONEY.

In a civil action for the recovery of money only, commenced before a justice of the peace, the bill of particulars showing that the amount due by the defendant to the plaintiff exceeds \$100, but the plaintiff claiming or asking judgment thereon for only \$100, which amount was within its jurisdiction, such justice had jurisdiction of such action.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 157; Dec. Dig. § 44.*]

2. CONSTITUTIONAL LAW (§ 23*)—RETROACTIVE OPERATION—JURISDICTION—APPEAL.

The district court of Oklahoma Territory, on appeal from such judgment, acquired jurisdiction.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 20; Dec. Dig. § 23.*]

Error from District Court, Oklahoma County; W. M. Bowles, Judge.

Action by J. A. White against the Albaugh

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Bros. Dover Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Harris & Wilson, for plaintiff in error.
Jno. H. Wright, for defendant in error.

WILLIAMS, J. On the 28th day of February, 1906, the defendant in error, as plaintiff, commenced his action against the plaintiff in error, as defendant, by filing a bill of particulars before J. J. Beall, a justice of the peace of Oklahoma City township, Oklahoma county, Okl. T., showing that the defendant was due him the sum of \$106.50, but making claim or demand thereon for recovery of judgment for only \$100. Judgment was rendered in favor of plaintiff for the sum of \$87.50 and costs, which were taxed in the sum of \$9.70. An appeal was prosecuted to the district court of said county. On the 3d day of April, A. D. 1908, the plaintiff, first having obtained leave of the court, amended by interlineation his bill of particulars by inserting, in lieu of the said \$106.50 alleged to be due, the sum of \$91.50, and his demand or prayer for judgment or recovery was likewise amended to read \$91.50, instead of \$100. Thereupon defendant's motion to dismiss for want of jurisdiction was overruled. It is now urged that the court erred in not sustaining said motion.

Section 4929, Wilson's Rev. & Ann. St. 1903, par. 2, provides: "Under the limitations and restrictions, herein provided, justices of the peace shall have original jurisdiction of civil actions for the recovery of money only, and to try and determine the same where the amount claimed does not exceed one hundred dollars." In the case of *Everette Piano Co. v. Bash*, 31 Ind. App. 498, 68 N. E. 329, it is held: "Under Burns' Ann. St. 1901, § 1500, conferring on justices of the peace original jurisdiction in actions of contract or tort where the debt or damages claimed, or the property sought to be recovered, does not exceed \$200, where a complaint for breach of warrant of a piano avers that plaintiff had incurred expenses for its repair amounting to \$75, and that the instrument, if equal to the guaranty, would be worth \$400, whereas it was not worth exceeding \$125, by reason of which he was damaged \$200, and prays judgment for such sum, the justice of the peace has jurisdiction, as plaintiff was bound by his claim for damages." See, also, *Elgin v. Mathis*, 9 Ind. App. 277, 36 N. E. 650. In the case of *Brunson v. Furtick*, 72 S. C. 579, 52 S. E. 424, section 21, art. 5, of the Constitution of 1895, providing that "magistrates shall have jurisdiction in such civil cases as the General Assembly may prescribe, provided where the value of the property in controversy or amount claimed exceeds one hundred dollars," etc., was construed, and it was held that the magistrate had jurisdiction to entertain an action where the amount

involved exceeded the jurisdictional amount, in case the amount claimed did not exceed the jurisdiction. See, also, to the effect under similar statutes that the amount claimed, and not the amount due on the subject-matter determines the jurisdiction of the justices of the peace. *Brantly v. Finch*, Adm'r, 97 N. C. 91, 1 S. E. 535; *Knight v. Taylor et al.*, 131 N. C. 84, 42 S. E. 537; *Ferguson v. Reiger*, 43 Or. 505, 73 Pac. 1040; *McCormick Har. Mac. Co. v. Marchant et al.*, 11 Utah, 68, 39 Pac. 483; *Georgia Railway & Electric Co. v. Knight*, 122 Ga. 290, 50 S. E. 124; 2 Current Law, p. 653. As to same constituting a remittitur, see *Davis v. Bedsole*, 69 Ala. 364; *Hanna v. Morrow*, 43 Ark. 107.

This action having been commenced and tried in a justice court, and an appeal perfected in the district court prior to the erection of the state government, it is not necessary to determine whether or not the same rule would apply as to section 18, art. 7, of the Constitution of Oklahoma, which provides that courts of justices of the peace shall have concurrent jurisdiction with the county court in civil cases where the amount involved does not exceed \$200 exclusive of interest.

The judgment of the lower court is affirmed. All the Justices concur.

(24 OKL. 764)

CLARK v. ST. LOUIS & S. F. R. CO.

(Supreme Court of Oklahoma. Sept. 14, 1909.)

(Syllabus by the Court.)

1. NEGLIGENCE (§ 136*)—QUESTION FOR JURY. When the evidence is conflicting, or when the facts are undisputed, but different minds might reasonably draw different conclusions from them, the question of negligence is always for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 298; Dec. Dig. § 136.*]

2. RAILROADS (§ 350*)—CROSSING ACCIDENTS—QUESTION FOR JURY—NEGLIGENCE.

In an action to recover damages for alleged negligence, whereby the plaintiff was injured at a railroad crossing, it appeared that the plaintiff at the time of the accident was driving north on a street in a village towards the railroad crossing in a farm wagon covered with a wagon sheet, the corners of the sheet being tied down at each end. At the point of collision the railroad track runs east and west, the street running north and south. The plaintiff was driving a team of gentle horses, and was traveling about three or four miles an hour. As he approached within about 50 feet of the crossing, he stooped forward, looked up and down the track, and listened for approaching trains, but did not see or hear any; that from the place where he looked and listened he could see the track to the east, the direction from which the train was coming, for a distance of 500 or 600 feet, the view beyond that being obstructed by a section house which stood east of the street on which he was traveling and near the track; that after he looked and listened he sat down on the wagon seat, which was 18 or 20 inches under the wagon sheet,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and drove on towards the crossing in an ordinary walk, and continued at this pace until his wagon was struck by the train; that he knew the crossing was there, having crossed it several times before; that his hearing and eyesight are fairly good; that before the accident the bell of the engine did not ring, neither did the whistle blow; that he did not see any part of the train or engine, and did not know there was a train approaching until he was struck; that the train was about 2½ hours late and was running at the rate of 30 or 40 miles an hour, and no effort was made to stop it before the collision occurred. *Held*, that the questions of negligence on the part of the defendant, and contributory negligence on the part of the plaintiff, were questions of fact for the jury, and it was error for the court below to sustain a demurrer to such evidence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152, 1169-1173; Dec. Dig. § 350.*]

3. NEGLIGENCE (§ 83*)—LAST CLEAR CHANCE.

The doctrine of last clear chance is recognized by the courts, as an exception to the general rule that the contributory negligence of the person injured will bar a recovery, without reference to the degree of negligence on his part, and under this exception to the rule the injured person may recover damages for an injury resulting from the negligence of the defendant, although the negligence of the injured person exposed him to the danger of the injury sustained, if the injury was more immediately caused by the want of care on the defendant's part, to avoid the injury, after discovering the peril of the injured person.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.*]

(Additional Syllabus by Editorial Staff.)

4. RAILROADS (§ 827*)—CROSSINGS—DUTY OF PERSON CROSSING.

The presence of a railroad track on which a train may at any time pass is notice of danger to such an extent that it is the duty of a person about to cross the track on a public highway to exercise caution in so doing, and to stop, look, and listen before crossing, and it is negligence per se to omit such ordinary precautions.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

5. RAILROADS (§ 338*)—CROSSING ACCIDENTS—LAST CLEAR CHANCE—APPLICATION OF DOCTRINE.

Where there was no evidence that the engineer in charge of a train which struck plaintiff at a crossing discovered plaintiff's peril until the accident, the doctrine of last clear chance does not apply, though the engineer may have seen plaintiff approaching the track in a covered wagon, the engineer having a right to presume that a person so approaching the track had not omitted the ordinary precautions, and would stop in time to avoid an injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1096-1098; Dec. Dig. § 338.*]

Error from District Court, Comanche County; F. E. Gillette, Judge.

Action by James H. Clark against the St. Louis & San Francisco Railroad Company. A demurrer to the evidence was sustained, and plaintiff brings error. Reversed and remanded for a new trial.

J. L. Hamon and Chas. Mitschrich, for plaintiff in error. R. A. Kleinschmidt and Flynn & Ames, for defendant in error.

KANE, C. J. This was an action for damages for personal injuries, commenced by the plaintiff in error, plaintiff below, against the defendant in error, defendant below, in the district court of Comanche county, Okl. The petition of plaintiff alleged, in substance, that he was injured at a railroad crossing at the town of Cache, in said county, by a train of defendant striking the wagon in which he was driving, and violently throwing him to the ground. The negligent acts complained of were the failure of the employees of the defendant to ring the bell of its engine, or whistle for the crossing, and the failure of the company to erect a sign board as required by law. The answer of the defendant was a general denial, and a plea that the injury resulted from the contributory negligence of the plaintiff. The evidence introduced on behalf of the plaintiff tended to show that at the time of the accident he was driving north on Fifth street, towards the railroad crossing in a farm wagon covered with a wagon sheet, the corners of the sheet being tied down at each end. At the point of the collision the railroad track runs east and west, the street being nearly level with it. The plaintiff was driving a team of gentle horses, and was traveling about three or four miles an hour; that as he arrived within about 50 feet of the crossing he stooped forward, put his hand on the dash board, looked up and down the track, and listened for approaching trains; that from the place where he looked and listened he could see the track to the east, the direction from which the train was coming, for a distance of about 500 or 600 feet, the view beyond that being obstructed by a section house which stood east of the street on which he was traveling, and near the track; that after he looked and listened he sat down on the wagon seat and drove on towards the crossing in an ordinary walk, and continued at this pace until his wagon was struck by the train; that he knew the crossing was there, having crossed it several times before; that his hearing and eyesight are fairly good; that before the accident the bell of the engine did not ring, neither did the whistle blow; that he did not see any part of the train or engine, and did not know there was a train approaching until he was struck; that no effort was made to stop the train by the trainmen before the collision occurred; that the train was about 2½ hours late, and was running at the rate of 30 or 40 miles an hour; that before plaintiff drove upon the crossing those within the wagon could not be seen by those outside on account of the wagon sheet covering the wagon; that the train consisted of two passenger coaches, baggage and mail car, engine and tender, and ran about the length of the train before they stopped after striking plaintiff's wagon; that the trainmen could have seen plaintiff's wag-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on 500 or 600 feet at a distance of 50 to 75 feet south of the crossing on Fifth street, and the nearer he approached the track the farther they could have seen him. After the plaintiff rested his case, the defendant interposed a demurrer to the evidence, which was sustained by the court, and thereupon the court excused the jury and entered judgment in favor of the defendant and against the plaintiff for costs. To review this judgment the case is now in this court by petition in error and case-made.

There are but two questions presented to this court for determination: (1) Was the plaintiff guilty of contributory negligence? and (2) if he was, is he entitled to the benefit of the doctrine of the last clear chance? Both parties agree that the court below sustained the demurrer to the evidence upon the ground that the plaintiff was guilty of contributory negligence, and that the demurrer to the evidence was sustained upon the authority of *Severy v. C., R. I. & P. Ry. Co.*, 6 Okl. 153, 50 Pac. 162; the Supreme Court of Oklahoma territory basing its decision upon the *Houston Case*, 95 U. S. 697, 24 L. Ed. 542, and the *Freeman Case*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014. The plaintiff contends that the foregoing cases are not in point, and, further, that if the plaintiff was guilty of contributory negligence the failure of the railway company to attempt to avoid the accident when, by the exercise of proper care, it might have discovered the perilous situation of plaintiff in time to stop the train and avert the calamity was the proximate cause of the injury, and therefore the plaintiff was entitled to recover notwithstanding his negligence. In other words, he insists that he is entitled to the benefit of the doctrine of the last clear chance.

On the first proposition we believe it was error for the court below to sustain the demurrer to the evidence. The case at bar is quite distinguishable from the cases hereinbefore referred to, upon which the judgment of the court below was based. In all of those cases it was admitted that the plaintiff did not look and listen before going upon the track. It is true that in the *Severy Case* there was no specific finding that the plaintiff did not look and listen, but Mr. Chief Justice Dale, who delivered the opinion of the court, no doubt inferred from the answers of the jury to several interrogatories propounded to it that he did not, and that the opinion is based upon that theory is obvious from the following language quoted from the opinion of the learned chief justice: "Under the facts as established in this case, it appears that the deceased at any time after he reached a point 49 feet west of the crossing might have, by casting his eyes to the west, discovered the approach of the train which caused his death; that it was his duty to have done so is too well established by the courts of this country to admit of doubt, and that

he was negligent and thoughtless and took no account of the danger which might be encountered by reason of the operation of defendant's train is plainly apparent from the facts of this case."

It is well settled by the authorities that the presence of a railroad track, upon which a train may at any time pass, is notice of danger to such an extent that it is the duty of a person about to cross the track, on a public highway, to exercise caution in so doing and to look both ways for approaching trains, if the surroundings are such as to admit of such precautions. The reason for this rule which requires a traveler to stop, look, and listen, before crossing a railroad track, is, that by such action he may inform himself whether a train is approaching or not, the instinct of self-preservation being sufficient to keep a person from getting in front of such a deadly vehicle, when he knows it is approaching. On this proposition it is useless to multiply authorities; the courts have by almost uniform decision declared that it is negligence per se on the part of a traveler injured at a crossing to omit these ordinary precautions to protect himself. But in the case at bar it is admitted that the plaintiff did look and listen when about 50 feet from the track; that from this point he had an unobstructed view of the track to the east for a distance of 500 or 600 feet and saw no train; that beyond that point his view of the track was obstructed by the section house heretofore mentioned. The question then in this case is not whether it is negligence per se for the plaintiff not to have looked and listened before attempting to cross, but whether it was negligence per se having once looked and listened at a distance of about 50 feet from the track and seeing no train approaching within the distance of 500 or 600 feet, for which distance the view was unobstructed, not to have continued his vigilance until reaching the track. We are not prepared to so hold. From this statement of facts reasonable men might very well draw different conclusions as to the negligence of the plaintiff, and it is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court. *Sans Bois Coal Company v. Janeway*, 99 Pac. 153, an Oklahoma case not yet officially reported. In all lawsuits, and particularly personal injury cases, a slight difference between the exact facts of cases claimed to be analogous, makes a wide difference in the application of the law of one case to the facts of another. Every case therefore must depend more or less upon its own circumstances. As was said by Earl, J., in *Kellogg v. N. Y. C. & Hudson R. R. Co.*, 79 N. Y. 72, where counsel was insisting that that case fell within the rule laid down in a previous opinion by the same court in another case: "It seems to have been supposed at the General Term of

the Supreme Court that our decision in the case of *Salter v. Utica & Black River Railroad Co.*, 75 N. Y. 273, controls this case. But without taking time to point out the differences between that case and this, it is sufficient to say that the facts of no two cases are alike. There are many circumstances here which did not exist in that case. We have laid down in many cases the principles which are to govern in the decision of this class of cases. These general principles are to be applied to the cases as they arise, and in their application to this case we are constrained to differ from the learned court below."

The line of authorities cited by counsel for defendant in error to the effect that ordinary care in approaching railroad crossings requires the traveler to look and listen in every direction from which danger may be apprehended, are not in point here. Neither are those to the effect that when the physical facts are such that the plaintiff, if he had looked, must have seen the approaching train, the court will disregard the statement that he did look and failed to see. The plaintiff in this case did look and listen, and he saw everything that was in sight on the track between the point from whence he looked and where the view of the track was obstructed by the section house. The question squarely presented by the facts then is, Did the plaintiff, notwithstanding the fact that he looked and listened, fail to approach the crossing with the care and caution of an ordinarily prudent man? And this is generally a question for the jury. *Norfolk & Western Railroad Company v. Burge*, 84 Va. 63, 4 S. E. 21. In *Moberly v. K. C., St. J. & C. B. R. R. Co.*, 98 Mo. 183, 11 S. W. 569, the plaintiff approached the crossing, according to his testimony, after 9:00 p. m. It was rather a cold, moonlight night. He approached from the west side. On that side was a warning signboard, marked "Look out for the Cars." This stood near the Hannibal & St. Joseph Railroad, and was at the base of the incline starting up to the railroad track. The evidence tended to show that this was the most favorable point for a person approaching these crossings to stop and take observations to ascertain whether any train was approaching on either of said roads. In the direction from which defendant's train approached this night, a person standing under the signboard could see it as far as the whistling post or farther, which evidence showed was about 1,000 feet from the crossing. Between that point and the crossing, the railroads made a curve towards the west. The next best point of seeing trains approaching from the south was on the Hannibal & St. Joseph track, and the opportunities for so observing diminished as one went east on account of this curve, and brush, weeds, etc., on the right of way of the tracks. The plaintiff's evidence tended to show that trees, brush, weeds, and vines

were so thick that the view was cut off so that one could not see an approaching train from the south on defendant's road for over 250 yards, and perhaps more. He testified that he did stop, just as his wagon stood under the signboard; that he raised his cap from his ears and looked in every direction for approaching trains; that he neither saw nor heard the noise of one; that he took out his watch and saw that it was far past the time when the train on defendant's road was due at that point, he being familiar with the time of its usually passing; and, satisfying himself that the way was clear and safe, he started immediately across.

Upon this statement of facts, which is taken from the report of the case in 17 Mo. App. 516, Mr. Justice Barclay, who delivered the opinion for the Supreme Court, says: "There was a sharp conflict on the issue of plaintiff's negligence. We may summarize the effect of all the evidence in the statement that it was not such as warrants the court in declaring, as matter of law, that plaintiff's negligence contributed to the injury." This case seems to us to be strongly analogous to the case at bar, and the Supreme Court of Missouri refused to hold the plaintiff guilty of contributory negligence as a matter of law.

In another and later Missouri case, it was held that it is not essential for a traveler to look constantly in both directions. *Gratiot v. Mo. Pac. Ry. Co.*, 118 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189.

Another case in point is *Greany v. Long Island R. R. Co.*, 101 N. Y. 419, 5 N. E. 425. In that case the accident happened at about 5 o'clock in the afternoon, at Richmond Hill, where the defendant had a station, and by which passed two of its tracks running east and west, intersecting a highway running north and south. The station was at this point and on the south side of the tracks. The plaintiff lived on the north side of the railroad, and at the time in question was going along the highway to a store situated on the south side of the tracks. As she came to the tracks to cross the railroad, she saw a train coming from the west on the southerly track; it stopped at the station to let off passengers, and its cars covered the highway. She stood still, waiting about five minutes for the train to move ahead, but when she reached the track the train was still standing there and she stopped just as it started. She testified: "As I came to the track I stood and looked both ways, and along the track, and saw no engine" other than that of the train from the west. She took a step or two, and just as she did so, saw a train coming from the east on the north track, but it was so close that she could not make her escape. This occurred in what seemed to her not more than a few seconds after she had looked up and down the track. On cross-examination by the defendant's counsel, she says: "When I stepped on the first track I looked both ways and could see nothing, but a few seconds

after that I was struck." "I could see no engine looking either way." She was further questioned by defendant's counsel as follows: "Q. If you had stepped up by the side of that track and looked up the road, you would have seen the train, wouldn't you?" She says: "I did look up, and saw it too. It was so close by me that I could not possibly make my escape. If I had looked earlier I would have seen it, but I did not think there was any need of my looking more than once, and I did not think there was any other train due at that time. I had looked a few seconds before and then went right on. When I looked I could see about a quarter of a mile. I did not see any train, and then I walked on toward the track, and the train was right upon me before I noticed it." Danforth, J., who delivered the opinion of the court, in commenting on this evidence, says: "Can it be said under these circumstances that she was bound as a matter of law to see the incoming train? Was it not rather for the jury to say whether or not she had made the effort which a prudent person would make in like circumstances? I think it was for the jury, for it cannot be said to be impossible for a reasonable person to conclude that the accident was caused by the negligent running of the defendant's train, and not by the omission of a duty, or reasonable care on the part of the plaintiff to avoid the collision."

In *Rodrian v. N. Y., N. H. & H. R. R. Co.*, 125 N. Y. 526, 26 N. E. 741, a case that adheres strictly to the rule requiring a traveler to look and listen, it was held that: "If in case of an accident at a crossing it appears that the person injured did look for an approaching train, it would not necessarily follow as a rule of law that he was remediless because he did not look at the precise place and time, when and where looking would have been of the most advantage. Many circumstances might be shown which could properly be considered by the jury in determining whether he exercised due and reasonable care in making the observation."

In the case of the *C. & E. I. R. R. Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801, it is held that "A person about to cross a railroad track must, to be free from negligence, take such precaution as could reasonably be expected from an ordinarily prudent person under like circumstances; but the fact that he does not, at the instant of stepping upon the track, look to ascertain if a train is approaching, is not conclusive of want of due care on his part."

The foregoing cases sufficiently illustrate the distinction between the case at bar and the cases relied upon by counsel for defendant in error, and it will be observed that in every case where the facts are similar to the admitted facts in the case at bar, the courts have uniformly held that the case should go to the jury upon the question of negligence.

When the evidence is conflicting, or when the facts are undisputed, but different minds may reasonably draw different conclusions from them, the question of negligence is always for the jury. Hence, when the question of negligence arises upon a conceded state of facts, if reasonable men might arrive at different conclusions, it must be submitted to the jury.

On the second proposition we are satisfied, as the case now stands, the doctrine of last clear chance or the humanitarian doctrine, as it is called by Mr. White in his work on *Personal Injuries on Railroads* (section 398), has no application to it. The admitted facts do not bring it within the rule laid down by this court in *A. T. & S. F. Ry. Co. v. Baker*, 21 Okl. 51, 95 Pac. 433. We think the statement of the rule quoted approvingly in *Railway Company v. Baker*, *supra*, from *Highland Ave. & B. R. Co. v. Sampson*, 91 Ala. 560, 8 South. 778, is the correct one, and are constrained to adhere to it in the case at bar. The rule laid down in the *Highland Case* is to the effect that, "If plaintiff, injured in a collision at a railroad crossing, used due diligence after discovering his peril, he can recover, though he was negligent in not stopping and listening, provided defendant, after seeing the danger failed to use due care." In the case at bar there was no evidence tending to prove that the engineer in charge of defendant's engine discovered the peril of the plaintiff until the accident occurred. The mere fact that the engineer may have seen the plaintiff approaching the track in a covered wagon, would not necessarily put him on his guard as to the peril of the plaintiff. The engineer has the right to presume that a person thus approaching the track has not omitted the ordinary precautions imposed upon him by law, and will stop in time to avoid an injury. But when the engineer sees the plaintiff approaching the track apparently unconscious of his danger or unable to extricate himself therefrom, the humanitarian doctrine requires the engineer to exercise reasonable care and prudence to avoid injuring him. In other words, he may not, without incurring civil liability, deliberately run down and kill or seriously injure a person so situated, although it may have been shown that his negligence contributed to the injury. This rule of last clear chance is recognized by the courts, as an exception to the general rule that the contributory negligence of the person injured will bar a recovery, without reference to the degree of negligence on his part, and under this exception to the rule it may now be stated to be well established that the injured person, or his representative, may recover damages for an injury resulting from the negligence of the defendant, although the negligence of the injured person exposed him to the danger of the injury sustained, if the injury was more immediately caused by the

want of care on the defendant's part, to avoid the injury after discovering the peril of the injured person.

The judgment of the court below is reversed and the cause remanded, with directions to grant a new trial.

DUNN, WILLIAMS, HAYES, and TURNER, JJ., concur.

(25 Okl. 785)

FORD v. FORD.

(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

DIVORCE (§ 171*) — SECOND ACTION — EVIDENCE.

A decree in an action of divorce between the same parties for the same cause of action bars a re-examination of the same facts in a subsequent case, and it is only when enough has occurred since the rendition of the first decree to entitle the plaintiff to relief that a divorce will be granted in a subsequent proceeding.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 554-558; Dec. Dig. § 171.*]

Error from District Court, Murray County; R. McMillan, Judge.

Action by M. W. Ford against W. H. Ford. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

J. P. Lockwood and Tibbetts & Green, for plaintiff in error. E. W. Fagan and C. B. Hendrick, for defendant in error.

DUNN, C. J. This is an action for divorce brought by Mollie W. Ford against W. H. Ford, as defendant, in the district court of Murray county, on the ground of extreme cruelty. To plaintiff's petition in which she sets up the indignities which she claims to have suffered defendant filed an answer, denying same and a plea of a former adjudication and condonation. This action was filed June 11, 1908, and it appears from the evidence that on January 29, 1908, a little over four months before, the district court of Ottawa county, Okl., rendered judgment against plaintiff in an action there filed for the same grounds as those set up in the present case. Testimony of indignities alleged by plaintiff to have been suffered by her at the hands of the defendant was admitted over the objection of the defendant of both before the date of the former judgment, as well as after, and plaintiff's testimony discloses that she had testified in the former trial to most of the transactions upon which she now relies to recover the case. Upon this evidence the court entered a decree granting plaintiff an absolute divorce, alimony, and custody of the children. A notice of appeal was given, and a motion for new trial filed and overruled by the court, and the case has been brought to this court by petition in error and case-made.

One of the errors alleged for which reversal is urged is the admission of the evidence referred to. Counsel for plaintiff take the position in reference to this proposition that the doctrine of res judicata should not apply in cases of cruelty in divorce actions, for the reason that evidence of a long course of cruelty and abuses both prior to and subsequent to an adjudication in a divorce action might, taken together, render marriage bonds intolerable, where the subsequent acts taken alone would be insufficient; that in such cases the memory of past abuses on the part of either spouse could not be obliterated; and that hence prior acts were competent to supplement the subsequent acts, and that together a cause of action might be sustained. Counsel, however, do not cite any authorities to sustain this argument, and a diligent search on our part fails to discover such authorities. The court seem to adhere uniformly to the rule that a decree in an action of divorce between the same parties for the same causes of action bars a re-examination of the same facts in a subsequent case, and that it is only when enough has occurred since the rendition of the first decree to entitle the plaintiff to relief that a divorce will be granted in a subsequent proceeding. 2 Van Fleet's Former Adjudication, § 335, pp. 712, 713; 1 Freeman on Judgments (4th Ed.) 313; 2 Bishop on Marriage, Divorce, and Separation, pp. 1589, 1590; 2 Bishop on Marriage and Divorce (14th Ed.) p. 766; Farquar v. Farquar, 20 Ore. 69, 25 Pac. 146, 23 Am. St. Rep. 93; Tillison v. Tillison, 63 Vt. 411, 22 Atl. 531; Lewis v. Lewis, 106 Mass. 309; Dwyer v. Dwyer, 26 Mo. App. 647; Slade v. Slade, 58 Me. 157; Thurston v. Thurston, 99 Mass. 39; Miller v. Miller, 150 Mass. 111, 22 N. E. 765.

The following brief quotation taken from a discussion by the Supreme Court of Vermont in the case of Tillison v. Tillison, supra, is entirely applicable to the case at bar. Referring to the evidence of facts heard in the former trial, the court said: "It was contended upon the part of the libelee that it was within the discretion of the court to permit her to introduce this evidence. There is no reason why the rights of parties under the marriage contract should not rest on as secure a basis as mere property rights. Indeed, there are many reasons why such rights should be more carefully regarded. Nothing has been suggested why a court in its discretion simply because the case on trial happens to be a divorce case should be permitted to ignore the effect of a judgment which, on reason and authority, should be held to be conclusive. To so hold might produce a state of affairs which would become intolerable. To entitle the libellant to a divorce under the ruling of the court below, he must not only establish the adultery of the libelee, but also overcome this evidence

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

introduced by her in defense by way of re-crimination. He may have made out a case with the exception of overcoming this testimony; hence it was material, under the decision of the court, that his libel was not sustained. For error in admitting this evidence, judgment must be reversed, and the case remanded for a new trial."

The case of Dwyer v. Dwyer, *supra*, is likewise in point on this proposition. There had been two actions for divorce between the parties prior to the instant case, the last one being determined in the year 1883. In 1887 the wife brought another action, and gave testimony that had been heard and considered in the prior trials. On exception being taken thereto, the Missouri Court of Appeals in the consideration thereof said: "At the trial the plaintiff gave evidence tending to show the treatment by her husband toward herself while she lived with him in 1873, and the reasons which impelled her to quit his place of abode; and she admitted that she testified to substantially the same facts in the former actions. The defendant put in evidence against the objection of the plaintiff the record of the court in the former actions, under that part of the answer which pleaded a former adjudication. There was no error in this, and it is not necessary to enlarge upon so plain a proposition. The circuit court could not, and neither can we, rejudge the judgments of this court in those cases. Those judgments, whether well or ill-founded, are, upon elementary principles, conclusive upon that court, upon this court, and upon every other court." In the case at bar the court called a jury to which was submitted certain questions, and, in response to one of them, the jury answered without specification that the acts charged against the defendant occurred both before and after January 29, 1908. An investigation of the evidence submitted leaves the matter uncertain just what acts of which plaintiff complained occurred before that date and what particular ones occurred subsequent thereto, and the condition of the record is such that we are unable to say that there is evidence of acts occurring since the former adjudication which standing alone would be sufficient to reasonably sustain the judgment of the trial court. The defendant is entitled to have presented to a trial court which can see both parties and hear them testify the evidence he is lawfully required to meet unclouded as it was in this trial by a mass of damaging evidence which is incompetent. He may be able to meet and refute the legal evidence alone, but not so when it is intermingled with the incompetent. Appellate courts labor under manifest disadvantages in attempting to give proper weight to even undisputed evidence—more so in divorce than most other kind of cases. Moore on Facts, § 1279. The judgment against plain-

tiff in the former trial was a conclusive finding that the defendant was not guilty of any of the acts which were or might have been adjudicated therein. It constituted a conclusive finding, binding on all courts between the same parties involving the same matters in the same kind of an action that they did not take place. *Lewis v. Lewis, supra*. Hence they should not be pleaded or proved in any subsequent case.

The judgment is reversed, and the case remanded to the district court of Murray county for a new trial.

TURNER, KANE, and HAYES, JJ., concur. WILLIAMS absent and not sitting.

(26 Okl. 87)

HASKELL, Governor, v. REIGEL et al.
(Supreme Court of Oklahoma. March 22, 1910.)

(Syllabus by the Court.)

COUNTIES (§ 14*)—DIVISION—CONSTRUCTION OF STATUTE—SUBMISSION TO VOTERS—VALIDITY.

Section 5, art. 1, c. 26, Sess. Laws 1907-08, providing that, "if the object sought be to transfer territory from one county to an existing county, and if sixty per centum of the votes cast at said election vote 'Yes,' the Governor shall, within ten days after declaring the result of said election, issue his proclamation calling an election," etc., as to such time, is directory.

(a) The voters of Hunter township, a part of Kiowa county, at an election by a 60 per cent. majority voted to transfer said township from Kiowa county to Tillman county, the Governor having issued his proclamation after declaring the result of said election, calling an election to be held in Tillman county, at which he submitted, not the proposition of attaching Hunter township, but only a certain portion thereof. His action in so doing was void.

(b) Although the statute requires the Governor within 10 days after declaring the result of such election to issue his proclamation, etc., yet the fact that through inadvertence or misapprehension of the law he has failed to do so, that does not relieve him of the duty of issuing the proclamation as required by law. The statute imposed a duty which should be performed within the time stated, but, if not, it yet remains a duty.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 10; Dec. Dig. § 14.*]

Error from District Court, Logan County; A. H. Huston, Judge.

Action by O. B. Reigel and others against C. N. Haskell, Governor. Judgment for plaintiffs, and defendant brings error. Reversed, with directions to dismiss.

S. W. Johnson, Hudson & Mounts, and Ledbetter, Stuart & Bell, for plaintiff in error. H. E. Asp, Devereux & Hildreth, and Moss, Turner & McInnis, for defendants in error.

WILLIAMS, J. The question essential for determination in order to dispose of this case is as to whether section 5, art. 1, c. 26, Sess. Laws 1907-08, p. 278, providing that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"if the object sought be to transfer territory from one county to an existing county, and if sixty per centum of the votes cast at said election vote 'Yes,' the Governor shall, within ten days after declaring the result of said election, issue his proclamation calling an election to be held in the county to which said territory is sought to be transferred, which said election shall be held not less than thirty nor more than forty days thereafter," is mandatory.

In the case of *Town of Grove v. Haskell et al.*, 104 Pac. 56, this court held as to the notice that the clause, "such election shall be held under the provisions of the election laws of the state and upon such public notice of the election as the Governor in his proclamation may direct" (section 8, art. 1, c. 26, p. 277, Sess. Laws 1907-08), was directory. This identical clause is taken from section 6, subd. a, art. 17, Const. Section 3 also contains a clause that "upon filing of said petition or petitions, accompanied by affidavits mentioned in the preceding section, with the Governor, he shall, within twenty days of the filing of said petition or petitions, issue his proclamation calling an election to be held in said territory sought to be formed into a new county, or transferred to another county, not less than thirty nor more than sixty days from the date of his proclamation." Then follows the companion provision directing the mode of procedure of a public officer, as construed in the case of *Town of Grove*, supra. If that clause relating to notice is merely directory, why should the preceding provision as to the time in which the notice shall be issued not also be directory? Is it not more essential that the provision for the giving of notice be more directly complied with in order that all the electors residing within such proposed territory may have an opportunity to participate in the election and express their will on the questions submitted than the provision prescribing that the public officer should act within a certain time? "Where a statute specifies the time within which a public officer is to perform an official act affecting the rights and duties of others, it will be considered as directory merely, unless the nature of the act to be performed, or the language used by the Legislature, shows that the designation of the time was intended as a limitation of the power of the officer." *Paine on the Law of Elections*, 1888, § 309, p. 207; *Black on Interpretation of Laws*, pp. 343-345; 3 *Lewis' Sutherland, Statutory Construction* (2d Ed.) § 612, p. 1117; *Endlich on Interpretation of Statutes*, 1888, § 437, p. 618. The cases of *Dishon v. Smith*, Co. Judge, 10 Iowa, 212, and *People v. Cook*, 14 Barb. 259, Id., 8 N. Y. 67, 59 Am. Dec. 451, relate to election cases, the former involving a county seat. See, also, *Colt et al. v. Eaves*, 12 Conn. 243; *Walker et al. v. Chapman, Governor*, etc., 22 Ala. 116; *Com'rs Court of Limestone County v. Jno. D. Rather*

et al., 48 Ala. 433; *Hart v. Plum*, 14 Cal. 149; *Pond v. Negus et al.*, 3 Mass. 230, 3 Am. Dec. 131; *People ex rel. v. Town of Fairbury*, 51 Ill. 149; *Gale v. Mead & Seely*, 2 Denio. (N. Y.) 160; *Heath's Case*, 3 Hill (N. Y.) 42; *State v. Smith*, 22 Minn. 218; *Edwards v. Hall*, 30 Ark. 37; *Sackett v. State ex rel.*, 74 Ind. 486; *Norris et al. v. Cross, Secretary of State*, 105 Pac. 1000.

The only case cited by the defendants in error in support of the contention that the statute is mandatory is that of *Gossard v. Vaught et al.*, 10 Kan. (2d Ed. p. 129) 162. Section 5, c. 26, Gen. St. Kan. 1868, relating to county seats, declares: "The elections provided for in this act shall be held within fifty days after the presentation of the petition therefor; and the county commissioners shall cause thirty days' notice of such election to be given, by publication in one or more newspapers published in the county, or by posting written or printed notices at the several voting places in the county." In construing this section the Supreme Court of Kansas said (*Gossard v. Vaught*, supra): "It is an old rule that time and place are of the substance of an election. This has its exceptions and limitations. Yet, when the Legislature has named a day on which an election shall be held, an election on any other day is void and confers nothing. So, when the proper authorities have designated certain places for the polls, an unnecessary removal to remote places will vitiate the election. There the Legislature has not named the day of the month, but it has placed bounds within which it must be held, not less than 30, that being the time of publication of notice, nor more than 50, days from the presentation of the petition." It will be observed that the foregoing case is based upon the ground that the statute relates to the time of holding the election, and not to the time within which the notice or proclamation should be given. Whilst it is a general rule that the statutes designating the time for the holding of an election are construed to be mandatory, yet the converse is true as to the time within which notice shall be given. It follows that the Kansas case harmonizes with the rule hereinbefore announced, and is not an authority in point to the effect that section 5, art. 1, c. 26, supra, should be construed to be mandatory. Neither the nature of the act to be performed nor the language used by the Legislature shows that the designation of the time within which the proclamation was to issue was intended as a limitation of the power of the Governor. Therefore such statute is merely directory.

Counsel for the defendants in error in their brief say: "It is conceded that mandamus will not issue to control the action of the Governor in a matter of discretion, but the defendants contend that the duty of the Governor to call an election in accordance with the petition is ministerial and manda-

tory, not discretionary. If it is true that the Governor yet has the right to act in obedience to the petition upon the part of Hunter township to attach itself to Tillman county, and the election held therein for that purpose, by calling the election in Tillman county to accept all of the petitioning and voting territory, and to call the election for a new county in obedience to the defendants' petition, and the time when those two duties arose have no influence upon their exercise, then it is true that mandamus would not lie to compel the Governor to do one or the other." Counsel for all parties concede that the Governor's action in calling the election in Tillman county, submitting a different proposition to the voters of said county than was voted on in that portion of Kiowa county described as Hunter township, is void. In this we agree. It is further insisted, however, that the Governor in calling such election exhausted his authority. With this we do not concur. In the case of *State ex rel. Reyburn et al. v. Ringo, County Clerk, etc.*, 42 Mo. App. 115, the court said: "We are asked (by mandamus proceedings) to compel the respondent, who is clerk of the county court of Ray county, to proceed under section 5506, Rev. St. 1879, and Laws 1887, p. 180, to cast up the vote given at an election in said county held therein under the local option law of 1887 for the purpose of determining whether liquors could be sold in said county. The facts are these: An election under the local option law was held in Ray county on the 9th day of August, 1887. Within five days thereafter, the respondent, as clerk of the county court, attempted to cast up such vote, as is provided in section 5506, Rev. St. 1879. By such casting up, the law appeared to have been adopted by a majority vote, and it was so entered in the county court record. This counting of the vote and determination that the law had been carried was afterwards decided by this court to be irregular and invalid. *State v. Macklin*, 41 Mo. App. 99, wherein it was held that the vote had not yet been counted in the manner directed by the statute. To the alternative writ now issued the return of the respondent admits all the material allegations, but alleges as a reason why the writ should not be made absolute that the five days allowed by law in which said vote should be cast up has long since expired, and that he is now without warrant of law to cast it. We are thus called upon to decide whether the omission of the clerk to cast the vote within the time limited by the law bars or prevents its being done afterwards. The statute is as follows: 'Sec. 5506. The clerk of each county court shall, within five days after the close of such election, take to his assistance two justices of the peace of his county, or two judges of the county court, and examine and cast up the votes given.

* * * We are not in doubt as to what is the proper construction of this section. Its true meaning is this: That, to the end that there may be no unnecessary delay in the result of an election, the clerk is commanded to ascertain that result within five days. The statute does not go to the election, but merely to the action of the clerk. It imposes upon him a duty which he ought to perform as directed, but it nowhere attempts to relieve him of that duty in case he fails to perform it within the time stated. In other words, the statute does not absolve him from performing this important duty merely for the reason that he failed to perform it as he should have done. This statute enacts two things—one, a duty; the other, a time for its performance. The duty must be performed as required by the statute. It should be done within the time commanded, that he will thereby be excused from performance afterwards. If there was any good reason for such construction, we would give it effect, but, in the absence of any, we shall not do so, especially as such interpretation of the law would nullify elections in all cases where upon any cause the time had passed without performance. The case shows that respondent endeavored to perform his duty as he understood it, and we are not inclined to permit an honest misconstruction of the statute to abrogate the election. A peremptory writ will be awarded."

In this case no opinion is expressed as to whether the defendants in error could maintain this action or as to the district court of Logan county having jurisdiction to render a judgment awarding a writ of mandamus against the plaintiff in error, the Governor, supervising or controlling in any way his action in matters involving ministerial action.

The judgment of the lower court is reversed, with instructions to dismiss the petition. All the Justices concur.

(25 Okl. 798)

CONTINENTAL GIN CO. v. HUFF et al.
(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 780*)—DISMISSAL.

If the interests of those who are brought into the appellate proceedings as parties will be injuriously affected by a reversal or modification of the final order complained of, without a reopening of the case as to the other parties as to whose interest the order has become final by a failure to appeal, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8121; Dec. Dig. § 780.*]

2. APPEAL AND ERROR (§ 836*)—DISMISSAL—WANT OF NECESSARY PARTIES.

Where, in an action against all of the makers jointly and not severally liable on a promissory note, a joint demurrer of all the defendants to plaintiff's petition is sustained, and an appeal therefrom is taken, but only one of the defendants is made a party thereto, the appeal will be

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dismissed, for the reason that the remaining defendants are necessary parties to the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1870; Dec. Dig. § 336.*]

Error from Murray County Court; Harry W. Fielding, Judge.

Action by the Continental Gin Company against G. W. Huff and others. A demurrer to the petition was sustained, and plaintiff brings error. Dismissed.

B. H. Epperson, for plaintiff in error. Hill & Latimer, for defendants in error.

HAYES, J. This is an action by plaintiff in error on a promissory note against G. W. Huff, J. A. Dean, G. W. Kerbo, J. A. Smith, Jess Luster, W. H. Moore, and T. M. Lattimore as joint makers thereof. This proceeding in error is taken from and to review an order of the trial court sustaining a general demurrer of defendants to plaintiff's petition. A motion to dismiss this proceeding in error has been filed by defendant T. M. Lattimore, in which a dismissal of this proceeding is urged upon several grounds. It will be unnecessary to notice all of them, since for the reasons hereinafter mentioned the cause must be dismissed. Defendant T. M. Lattimore, within one year after the entry of the order appealed from, by his attorneys, waived the issuance of summons in error and service thereof, and entered his appearance, but no summons in error has ever been issued or served upon the other defendants in error, nor has any appearance been entered by them, and more than one year has now elapsed since the entry of the order appealed from.

The first question presented is: Are the defendants below who have not been served or entered their appearance here necessary parties to the appeal? Mr. Chief Justice Burford in *Outcalt v. Collier*, 8 Okl. 473, 58 Pac. 642, states the general rules for determining this question in the following language: "(1) All persons who are parties to the proceedings in the trial court, and whose interests will be adversely affected by a reversal of the judgment, must be brought into the appellate proceeding. (2) If the interests of those who are brought into the appellate proceedings as parties will be injuriously affected by a reversal or modification of the judgment complained of, without a reopening of the case as to other parties as to whose interests the judgment has become final by the failure to appeal, the appeal will be dismissed." This statement of the general rules applicable to the determination of necessary parties to an appeal has been several times approved and followed by this court. *Strange v. Crismon*, 98 Pac. 937; *Board of Commissioners et al. v. Lemley*, 101 Pac. 109; *Weisbender et al. v. School District*, 103 Pac. 639. Testing the case at bar by these rules, should the appeal be dismissed? The order sustain-

ing the demurrer has become final as to those defendants who have not been made parties to this appeal, for the reason that the time within which to perfect an appeal therefrom has expired. No proceeding for reversing, vacating, or modifying a final order shall be commenced unless within one year after the making of the final order complained of. Section 6082, Comp. Laws Okl. 1909. An order sustaining a demurrer is a final order within the meaning of this section of the statute. When a trial court sustains a demurrer, the complaining party may immediately bring the order to the Supreme Court for review. Section 6067, Comp. Laws Okl. 1909. But it must be brought within one year from the making of the order. *Blackwood v. Shaffer*, 44 Kan. 273, 24 Pac. 423.

The note which is the basis of this action is in form a joint note, but it is alleged in the petition that all the makers thereof received the consideration for which it was executed. By reason of section 1119 of the Compiled Laws of Oklahoma of 1909, the promise of the maker must therefore be presumed to be joint and several. Plaintiff could have brought his action against any one of the makers instead of all, as was done, and, under the provisions of the Code of this state, he might, after having brought his action against all, and having failed to obtain service upon some of them, have proceeded against those served in the same manner as if they were the only defendants, and a judgment against one or more of them would not be a bar against those not served, and an appeal could be taken from a judgment against some of the makers, without making those against whom no judgment was taken parties to the appeal. *Outcalt v. Collier*, supra. But plaintiff chose to prosecute his action against all the makers of the note, and the order here complained of was made upon the joint demurrer of all the defendants, and they are therefore each and all parties to the order. This court is without power to reverse, vacate, or modify it as to any of those defendants who have not been served with summons in error, and have not entered an appearance, for it has no jurisdiction of their persons. If the court could examine the assignment urged, and should find that plaintiff's petition states a cause of action, and the order sustaining the demurrer should be reversed, a reversal could be made only as to the defendant who is now before the court, but that could not be done without prejudice to his rights in the absence of his codefendants. If plaintiff cannot by amendment to his petition strengthen his cause of action, and it is reasonable to presume that he cannot do so, or he would have amended his petition before bringing this proceeding, defendants are entitled to a judgment on the order sustaining the demurrer. But if this court should hold that the petition now states a cause of ac-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion, and should reverse the cause as to the defendant who is now before it, and plaintiff should establish by evidence the allegations of his petition, he would be entitled to and would obtain a judgment against this defendant. On any judgment on this note that this defendant may be required to pay, he would be entitled to contribution from his joint makers; but his joint makers would have a judgment discharging them from any liability.

It is therefore apparent that a reversal of the order of the trial court could not be made, with only the present defendant before the court, without prejudice to his rights and the motion to dismiss should be sustained.

DUNN, C. J., and TURNER and KANE, JJ., concurring. WILLIAMS, J., not participating.

(25 Okl. 707)

FARRIMOND et al. v. COALGATE SCHOOL DIST.

(Supreme Court of Oklahoma, March 8, 1910.)

(Syllabus by the Court.)

SCHOOLS AND SCHOOL DISTRICTS (§ 111*)—RESTRAINING ACTS OF SCHOOL OFFICERS.

A taxpayer and citizen of a school district having children of school age cannot maintain an action against the officers of said district calling in question the propriety of their public acts upon the ground that the act complained of will make it less convenient for him to send his children to school.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 266; Dec. Dig. § 111.*]

Error from District Court, Coal County; A. T. West, Judge.

Action by Joe Farrimond and others against the Coalgate School District. Judgment for defendant, and plaintiffs bring error. Affirmed.

C. M. Threadgill, for plaintiffs in error. Fooshee & Brunson, for defendant in error.

KANE, J. This was an action commenced by Joe Farrimond, William Fewister, N. J. Cockburn, J. T. Walters, C. W. Jones, D. A. Tate, Jasper Strange, B. M. Jones, R. T. McKinney, W. J. Briscoe, and C. E. Gill, whom it is alleged are qualified school electors and taxpayers of the Coalgate school district, as plaintiffs, against the Coalgate school district, as defendant, wherein it is prayed that the court require the defendant to appear and answer, and, after hearing, the plaintiffs be given judgment for the annulment of a certain order made by the defendant in annexing, or attempting to annex, certain outlying territory, and making it a part of the Coalgate school district, and it is further prayed that said order of the board of education be set aside and held for naught, and that the board be restrained from exercising any authority over the out-

lying territory. A demurrer was filed to the petition upon the ground (1) that the amended petition does not state a cause of action in favor of the plaintiffs or any of them against the defendant; (2) that it appears on the face of the petition that the plaintiffs have no capacity to maintain this action. The cause coming on to be heard upon this demurrer, the same was sustained, and, plaintiffs refusing to plead further, the cause was dismissed. To reverse the order dismissing the cause, this proceeding in error was commenced.

The grounds on which counsel for plaintiffs in error contend they have a right to maintain this action are stated by him in his brief as follows: "The suit is brought for the purpose of having the act of the board of education of the city of Coalgate annexing certain outlying territory to said city of Coalgate to the Coalgate school district, and the interest the plaintiffs have in the subject-matter of the suit is that they (except Joe Farrimond, William Fewister, and W. J. Briscoe) are residents of the said outlying territory, which was attempted to be annexed; that they are taxpayers; that they are school electors, and that they have children to send to school; that N. J. Cockburn, J. T. Walters, D. A. Tate, Jasper Strange, and R. T. McKinney live in the outlying territory which was taken from school district No. 22 and annexed to the Coalgate school district; and that it is impractical for them to send their children across Caney Creek into Coalgate to school. It is a question of their best interest in educating their children. It is the same question involved with the plaintiffs living in that part of the outlying territory taken from school district No. 23. They need a neighborhood school to serve their best interest in educating their children. There is no obligation more sacred than the obligation of educating one's children, and this obligation is a personal and private obligation, and such an interest that no one can say that it is common to others, and therefore an interest that the public hold not in common." The question then before this court, boiled down, is: May a private citizen, simply because he is a taxpayer and citizen of a school district, having children of school age, challenge the public officers of such district to meet him in the courts of justice to defend their official acts, upon the ground that the acts complained of make it less convenient for him to send his children to school?

Upon the authority of Thompson et al. v. Haskell, Governor, 102 Pac. 700, this question must be answered in the negative. In that case Mr. Justice Williams, in distinguishing it from Kellogg v. School District, 13 Okl. 285, 74 Pac. 110, and cases of that class, says: "The case of Kellogg v. School District No. 10, supra, does not ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pear to go to the extent of permitting private individuals to restrain public officers to correct purely public wrongs, but to restrict the right of a private individual to that class of cases which involves the creation of debts illegally against, or the wrongful expenditure of moneys of, the taxpayers." The case at bar does not belong to that class of cases which involve the creation of debts illegally against, or the wrongful expenditure of moneys of, the taxpayers. It involves a dispute between the officers of the school district and some of the taxpayers therein over the formation of a school district suitable to the convenience of the complainants. "To allow any citizen to litigate with public officers the propriety of their acts exposes them to constant litigation. If one may, so may another. If one act may be litigated, so may all; and so the time, attention, and thought of the officer (will be) diverted from the duties of his office to the defense of harassing suits." Mr. Justice Brewer in the case of *Bobbett v. State ex rel. Dresher*, 10 Kan. 9.

The judgment of the court below is affirmed.

DUNN, C. J., and WILLIAMS, HAYES, and TURNER, JJ., concur.

(25 Okl. 788)

HERRING & YOUNG v. WEST et al.
(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

REFERENCE (§ 100*)—FILING REPORT—WAIVER OF OBJECTIONS.

Where the report of a referee appointed by the court to report the law and facts in the case is filed after the time set in his order of appointment, and the party against whom judgment is rendered appears in court after the filing thereof and excepts generally to its confirmation, and on the next day files motion to set aside the order of confirmation for the purpose of excepting thereto, which is overruled, and does not raise the question of such report being filed out of time until after judgment is rendered on said report, it will be presumed that such objection is waived.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 100.*]

Error from District Court, Roger Mills County; G. A. Brown, Judge.

Action by Herring & Young against John H. West and Milo Burlingame. Judgment for defendants, and plaintiffs bring error. Affirmed.

R. E. Echols and W. B. Merrill, for plaintiffs in error. D. W. Tracey, for defendants in error.

TURNER, J. On August 18, 1905, plaintiffs in error, Herring & Young, sued defendants in error, John H. West and Milo Burlingame, in the district court of Roger Mills

county. After answer in the nature of a cross-petition and reply thereto filed, the court on April 19, 1906, being of opinion that a trial of the issues necessitated an examination of mutual accounts between the parties, by consent referred the same to a referee both as to law and facts involved, with instructions to make full and final report at the next regular term of the court. Prior thereto, on August 1, 1906, pursuant to said order, both parties announcing ready for trial, the referee proceeded to hear the evidence and arguments of counsel, and on October 29, 1907, the same being the second day of the third term thereafter, filed his report in the cause; two terms of court having intervened since the making of said order. On the same day defendants were given until the 1st day of the next term to file objections to the report. On January 20, 1908, being one of the days of said October term, defendants filed motion to confirm the report of the referee, which was accordingly done on January 27, 1908, same being the 1st day of the January term of said court, to which order plaintiffs excepted. On the next day by leave plaintiffs filed motion to set aside the order confirming the referee's report for the purpose of excepting thereto, which was overruled, and on February 6, 1908, filed motion to vacate the judgment, on the ground that the same was not filed within the time set by the order, which was also overruled and plaintiffs bring the case here. They assign that the court erred in overruling their motion to vacate the judgment. We do not think so, and are of the opinion that plaintiffs' acts should be declared in effect a consent to the extension of time taken by the referee, or, to put it as stated in *Bradford v. Cline*, 12 Okl. 339, 72 Pac. 369, a waiver of the objection that the report was filed out of time. As in that case, so in this, no objection was raised to the report being filed out of time until after judgment was rendered. The court there held such objection waived, and so we do here for the same reason. The court in passing said: "It is a universal rule, which we think obtains in all courts, that an objection of this kind must be made and the attention of the court challenged to the matter at the time, or it cannot subsequently be a ground or a claim of error. We think there is no doubt that the filing a referee's report within the time required by the order of his appointment is something that the parties to litigation may waive, and, if their conduct is such as to reasonably raise the presumption in the mind of the court that it is waived, they are bound thereby, and estopped from subsequently denying it."

Such, in effect, was the holding of the court in *Sieker v. Pracht*, 39 Kan. 521, 18 Pac. 718. There the report of the referee was made and filed after the intervention of a regular

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

term of court between the order of reference and the filing of the report, without any order having been made at the intervening term continuing the reference or extending the time within which to file the report. Exceptions were filed thereto, but overruled, the report approved, and judgment rendered in favor of Pracht and against Sieker for the amount found due by the referee. A motion for new trial was filed and overruled, and the cause appealed. One of the assignments made in the brief was that the report was not filed at the next term after the appointment of the referee. The court held that the objection came too late, and, in effect, that plaintiff in error had consented to an extension of the time taken by the referee, and for that reason had waived any error on that point. In passing the court said: "We think that the plaintiff in error is not in a position to now take advantage of the failure to report at the next succeeding term, even if it was essential that the referee should either report, or that the court should continue the reference by an extension of time within which a report was to be made. The facts were as well known then as now; and the plaintiff in error, without objection so far as we know, proceeded to contest the matter before the referee, and then, for the first time (induced, we have no doubt, by the adverse report), raised the objection now insisted upon. It is too late." And in the syllabus said: "After parties to an action have submitted their whole case to a referee without objection, it is then too late for the losing party to insist that a regular term of the court had intervened between the order of reference and the report, at which no order was made continuing the reference, or extending the time for a report, and that, for this reason, the referee had no jurisdiction." In *Robinson's Will*, 53 Misc. Rep. 171, 104 N. Y. Supp. 588, the third paragraph of the syllabus reads: "The provisions of Code Civ. Proc. § 1019, that a referee shall report within 60 days from the submission of the cause may be waived by the conduct of the parties." In this case the court said: "The time of the referee to report * * * is deemed extended by such conduct of the parties as in fairness should estop the litigant from taking advantage of the strict letter of the law." See, also, *Gill v. Clark*, 31 Misc. Rep. 337, 65 N. Y. Supp. 406.

In the instant case it affirmatively appears that the testimony was taken on August 1, 1906, which was within the time set by the court in the order of reference. It does not appear when the referee reached a determination upon the question submitted to him, but presuming that he did his duty, and in favor of the judgment of the lower court, we presume such determination was also reached within that time, and that only the filing of the report therein was out of time. Where

such is the case, such filing is a mere irregularity, and does not preclude a waiver, or the court in passing on the report and rendering its decision on the questions involved. *Creeden v. Patrick*, 3 Neb. (Unof.) 459, 91 N. W. 872, citing *Deltrich v. Lincoln*, 13 Neb. 43, 13 N. W. 13; *Brown v. Williams*, 34 Neb. 376-382, 51 N. W. 851; *Gibbons v. Gibbons*, 24 Neb. 394-406, 39 N. W. 450.

As stated by the court in *Bradford et al. v. Cline et al.*, *supra*, a party should not be allowed to encourage the court in receiving a report which he knows is out of time and allow the same to be filed, and then only object when the decision is against him. The motion to dismiss this appeal has been heretofore overruled by this court.

Finding no error in the action of the court in overruling defendant's motion to set aside the judgment, the decision of the trial court is affirmed. All the Justices concur.

(25 Okl. 855)

ORCUTT v. ORCUTT.

(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

DIVORCE (§ 181*)—APPEAL—REQUISITES FOR TRANSFER OF CAUSE—NOTICE OF INTENT TO APPEAL.

Where, on appeal from a judgment granting a divorce, plaintiff in error has failed to file, within 10 days after the rendition of such judgment, written notice of his intention to appeal in the office of the clerk of the court in which the judgment was rendered, as prescribed by section 6180, Comp. Laws Okl. 1909, this court is without jurisdiction to hear and determine the appeal, and the same will be dismissed.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 567; Dec. Dig. § 181.*]

Error from District Court, Wagoner County; John H. King, Judge.

Action by Hattie Orcutt by F. H. Moore, her next friend, against Alvin H. Orcutt. Judgment for plaintiff and defendant brings error. Dismissed.

R. C. Allen and J. C. Pinson, for plaintiff in error. B. J. Beavers, for defendant in error.

DUNN, C. J. This is an action for divorce, brought in the district court of Wagoner county by the defendant in error, through her next friend, against plaintiff in error. From a decree of that court granting defendant in error a divorce, the plaintiff in error has attempted to appeal.

Section 6180 of the Compiled Laws of Oklahoma, 1909, provides: " * * * A party, desiring to appeal from a judgment granting a divorce, must within ten days after such judgment is rendered file a written notice in the office of the clerk of such court, duly entitled in such action, stating that it is the intention of such party to appeal from such

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

judgment and unless such notice be filed no appeal shall be made or taken in such cause. * * *

The notice thus provided for its jurisdictional, and this court in the case of *La Due v. La Due*, 100 Pac. 513, said: "Where, on appeal from a judgment granting a divorce, plaintiff in error has failed to file, within 10 days after the rendition of such judgment, written notice of his intention to appeal, in the office of the clerk of the court in which the judgment was rendered, as prescribed by section 4840, Wilson's Rev. & Ann. St. Okl. 1903 (section 6180, Comp. Laws Okl. 1909), this court is without jurisdiction to hear and determine the appeal, and the same will be dismissed."

While we are without jurisdiction to entertain this cause by reason of the lack of the notice above mentioned, we will say that we have carefully read the briefs of the parties, along with the entire record, and to our minds the situation presented would not justify a reversal of the judgment of the lower court.

The cause is dismissed.

TURNER, WILLIAMS, KANE, and HAYES, JJ., concur.

(25 Okl. 845)

FISHER v. HUSSEY et al.

(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

INJUNCTION (§ 174*)—MOTION TO DISSOLVE—EVIDENCE.

On the hearing to dissolve a temporary injunction on motion, pursuant to Wilson's Rev. & Ann. St. Oklahoma, §§ 4437, 4438, which recites that oral testimony would be offered in support thereof, the admission of such testimony, over objection, was not error.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 174.*]

Error from District Court, McClain County; R. McMillan, Judge.

Action by J. B. Fisher against S. M. Hussey and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Rennie, Hocker & Moore, for plaintiff in error. Ben Franklin and J. F. Sharp, for defendants in error.

TURNER, J. On October 8, 1908, Hon. R. McMillan, judge of the district court of McClain county, on petition of J. B. Fisher, plaintiff in error, plaintiff below, issued at chambers a temporary injunction against S. M. Hussey, J. D. Lynch, and B. A. Smith, defendants in error, defendants below, restraining them from tearing down, opening, destroying, or otherwise removing any fences in and along the section line between sections 26 and 27 and sections 27 and 34, intersecting the land of plaintiff in error, and

from trespassing upon said land, and particularly that part thereof described as 33 feet on each side of said section line. On October 16, 1908, pursuant to notice that they would introduce oral testimony on the hearing in support thereof, defendants moved in open court to vacate said injunction, on the ground that the petition failed to state facts sufficient to sustain the order, and because the allegations therein made were not true. When the motion came on for hearing, after argument, the sufficiency of the petition was taken under advisement. Defendants then offered oral testimony in support thereof, to which plaintiff objected, on the ground that the same could only be heard on affidavits. The objection being overruled, plaintiff excepted, and declined to take part in the examination of the witnesses. At the close of the testimony the court dissolved the injunction, and plaintiff brings the case here, assigning as error that the court erred in permitting said testimony to be introduced in support of said motion. In support of his contention he relies on Wilson's Rev. & Ann. St. Okl. 1903, § 4437, which reads: "If the injunction be granted without notice, the defendant, at any time before the trial, may apply, upon notice, to the court in which the action is brought, or any judge thereof, to vacate or modify the same. The application may be made upon the petition and affidavits upon which the injunction is granted, or upon affidavits on the part of the party enjoined, with or without answer." And on section 4438, which reads: "If application be made upon affidavits, on the part of the defendant, but not otherwise, the plaintiff may oppose the same, by affidavits or other evidence, in addition to that on which the injunction was granted."

The objection is not well taken. Section 4437 specifically provides that the application to dissolve may be made upon plaintiff's own showing—that is, "the petition and affidavits upon which the injunction is granted, or (may be made) upon affidavits on the part of the party enjoined, with or without answer"; which means that, where the application to dissolve is made by the defendant, it "may" be made on affidavit, not that it must be made on affidavit. The language is permissive, and does not mean that the showing must be on affidavit only. These sections of the statute are identical with sections 4697 and 4698 of the General Statutes of Kansas (1901), but the question seems never to have been squarely passed on in that state. The question was attempted to be raised in *Olsson et al. v. City of Topeka et al.*, 42 Kan. 709, 21 Pac. 219, where the court in the syllabus say: "On the hearing to dissolve a temporary injunction on motion, which was silent concerning the nature of the evidence to be offered at the hearing, the admission of oral evidence was not error, after

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

both parties had announced themselves ready for trial."

Sections 4437 and 4697, *supra*, are also the same in substance as Bates' Ann. Ohio St. (4th Ed.) § 5584, and sections 4438 and 4698, *supra*, are identical with section 5585 of said Ohio Statutes. In the State of Ohio v. Budd, 65 Ohio St. 1, 60 N. E. 988, this question was squarely passed on in the construction of sections 5584 and 5585 of the Ohio Statutes, *supra*. That was a prosecution for perjury. The indictment charged that defendant willfully and corruptly swore falsely upon a material matter in the giving of oral testimony before a judge of the common pleas court, sitting at chambers, upon the hearing of a motion to dissolve an injunction. He was convicted in that court, but, on petition in error, the circuit court of Adams county sustained a demurrer to the indictment on the ground that it failed to state any offense under the law. In the Supreme Court, it was urged that said judgment was right because oral testimony was incompetent upon such hearing. That court, however, held the evidence competent, and reversed the holding. In construing said sections the court, in passing, said: "When the parties appear before the court or judge, whether upon an application to grant or to vacate an injunction, to contest the allegations of fact involved, they may, under favor of these provisions, present their evidence by affidavits; but the natural meaning of the language by which the use of affidavits is authorized is permissive only."

* * * These provisions of the statute regulate the presentation of evidence upon controverted questions of fact. The Legislature had the common knowledge that the general and most satisfactory mode of presenting evidence, not documentary, is by the testimony of witnesses who appear in court, so that an opportunity is afforded for cross-examination, and some helpful inferences may be drawn from the appearance and manner of the witness; that a less satisfactory mode of presenting the testimony of witnesses is by deposition, where there is opportunity for cross-examination, although the witnesses do not appear in court, and that the least satisfactory mode of presenting such testimony is by affidavit, where there is neither the appearance of the witness nor an opportunity for cross-examination. These less satisfactory methods of presenting evidence are specially provided for to meet considerations of convenience or necessity. While the Legislature may have required affidavits as the predicate of actions to present evidence which shall enter upon the record, and may have permitted their use upon hearings of this character in view of exigencies which may require immediate judicial action, it is not to be presumed that there was an intention to compel a resort to the least satisfactory and reliable of all modes of presenting

evidence. A purpose to deny a resort to the most satisfactory mode should not be imputed to the General Assembly in the absence of provisions indicating it with reasonable clearness. Certainly the natural meaning of words should not be changed to create opportunity for such an inference. We think the circuit court erred in reversing the judgment of the court of common pleas."

Being of opinion that the complaint states facts sufficient to constitute a cause of action, that the court did not err in admitting oral testimony in support of the motion to dissolve, and in no wise abused its discretion in sustaining said motion in the light of the testimony, the judgment of the lower court is affirmed. All the Justices concur.

(25 Okl. 871)

STATE ex rel. HOGAN et al. v. DISTRICT COURT OF THIRTEENTH JUDICIAL DIST. et al.

(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 460*)—STAY OF PROCEEDINGS.

The institution of a proceeding in error in the Supreme Court to reverse an order granting a new trial does not of itself, without a supersedeas bond or order of the Supreme Court staying procedure, operate to suspend further proceedings in the case in the court below, nor does it entitle the plaintiff in error, as a matter of right, to continuance in the court below, until said proceeding in error is disposed of.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2217; Dec. Dig. § 460.*]

Application by the State, on the relation of Daniel W. Hogan and others, for writ of prohibition to the District Court of the Thirteenth Judicial District and others. Writ denied.

Fred S. Cladwell, for petitioners. Thorp & Thorp, for respondents.

HAYES, J. This is an original proceeding in this court, on the relation of Daniel W. Hogan and others for a writ of prohibition, prohibiting and restraining the district court of the Thirteenth judicial district and George W. Clark, judge thereof, from proceeding to try a certain cause in that court. On the 30th day of September, 1907, Thomas J. Bailey filed in the district court of Oklahoma county his action against relators to cancel and set aside a certain trust deed. A trial in that cause resulted in a judgment for relators, but upon motion of plaintiff therein a new trial was granted. From the order granting a new trial, relators appealed to this court, where said appeal is now pending. No supersedeas bond has been filed in that proceeding, and no order obtained from this court staying the proceedings therein. The cause has been set down for trial in the lower court, and respondent, as judge of that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

court, is about to proceed to try the same in compliance with the order of that court granting a new trial. The sole question of law presented by this proceeding is whether under the statutes of this state a proceeding in error from an order granting a new trial without a supersedeas bond, and without any order of the Supreme Court staying proceedings in the cause, operates to stay all proceedings in the case in the court below, and to entitle, as a matter of right, those appealing from such an order to a continuance until their proceeding in error is disposed of.

Section 8078, Comp. Laws Okl. 1909, provides that no proceeding to reverse, vacate, or modify any judgment or final order rendered in the county court or district court, except in two certain named classes of cases, shall operate to stay executions, unless the clerk of the court in which the record of such judgment or final order shall be, shall take a written undertaking, to be executed on the part of the plaintiff in error to the adverse party, with one or more sufficient sureties, conditioned as by said section provided. Section 6084 reads: "Execution of the judgment or final order of any judicial tribunal, other than those enumerated in this article, may be stayed on such terms as may be prescribed by the court or judge thereof, in which the proceedings in error are pending." These sections of the statute were adopted by the Territorial Legislature from the state of Kansas, where they had received construction by the highest appellate court of that state before their adoption.

In *Central Branch Union Pacific Ry. Company v. Andrews et al.*, 34 Kan. 563, 9 Pac. 213, while an appeal was pending in the Supreme Court taken from a judgment against the railway company, plaintiff died, and defendants in error were appointed administrators of his estate. Thereafter they prosecuted the suit to a judgment in their favor. On the last appeal the railway company questioned the jurisdiction of the trial court to make the order appointing defendants in error administrators during the pendency of the preceding appeal. The court said: "Does the institution of a proceeding in error to reverse a judgment or final order necessarily operate to suspend the judgment and to stay all proceedings in the court below? We think not. At common law the party against whom a judgment was rendered in a civil case was entitled to a writ of error as a matter of right, which, when issued, operated to stay execution, and no bail or security for the prosecution of the writ, or for the payment of the debt and costs, in case the judgment should be affirmed, was required or necessary to stay the execution. Bou-

vier's Institutes, 545; Powell on Appellate Procedure, 275. In most of the states this rule has been changed by statutory enactments, and these statutes determine the effect of an appeal or proceeding in error. In some states it is provided that the giving of an undertaking will operate to stay the judgment and suspend all proceedings in the court below. The statute in this state does not go to that extent." After stating the substance of the statute, the court then said: "In none of the provisions of the Code, however, is the undertaking made to stay any of the proceedings beyond the issuance of an execution to enforce the judgment or final order of the court below. And section 1, c. 21, Gen. St., by implication at least, denies the proposition that the institution of a proceeding in error in this court will operate to stay all proceedings in the district court." We understand the effect of this decision to be that a proceeding in error by reason of the foregoing provisions of the statute, does not operate to stay all further proceedings in the trial court, unless there be executed by plaintiff in error a supersedeas bond, as provided by the statute, or unless some order be made by the appellate court staying proceedings in the lower court, until the determination of the appeal. Such has been held to be the effect of such decision in *City of Topeka v. Smelser*, 5 Kan. App. 95, 48 Pac. 874, wherein the exact question now before us was involved. The decision of the Supreme Court of Kansas made before the adoption of the statute is controlling upon us. Counsel for relators in an exhaustive brief has cited cases holding to the contrary under similar statutes, and we cannot say that we are not more impressed with the cogency and soundness of the reason of some of the cases cited by him than by that of the courts in the foregoing cases. But, for the reason already stated, the construction given by the Kansas court must control. This rule does not, however, necessarily work any hardship upon relators as contended by their counsel. They have their right of appeal, and may stay proceedings in the lower court pending such appeal by obtaining from this court an order to that effect upon such terms as may be just, if upon application therefor they can make it appear that the merits of their appeal and the conditions surrounding the case are such as ought to require the court to exercise its discretion in their behalf.

It follows from the foregoing conclusions that the court below is acting within its jurisdiction, and the writ is therefore denied.

DUNN, C. J., and KANE, WILLIAMS, and TURNER, JJ., concur.

(25 Okl. 782)

FT. SMITH & W. R. CO. v. McCORMICK.
(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

**RAILROADS (§ 440*) — INJURY TO STOCK —
PLEADING—EVIDENCE.**

In an action for damages for the negligent killing of live stock by a railroad company, on a dark night, where one of the averments of negligence was to the effect that the locomotive that ran into the stock was equipped with a dim headlight, not sufficient to see stock any distance from said train, it was not error to allow plaintiff to introduce evidence tending to prove that said locomotive was equipped with a dim oil headlight.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1570-1574; Dec. Dig. § 440.*]

Error from District Court, Okfuskee County; John Caruthers, Judge.

Action by L. C. McCormick against the Ft. Smith & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Chas. E. Warner and Harry P. Warner, for plaintiff in error. C. T. Huddleston, for defendant in error.

KANE, J. This action was prosecuted by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover damages for the alleged negligent killing of one gray mare and two colts. The petition contains averments of negligence in the operation of the defendant's train, and that the engine was equipped with an oil headlight only. The answer denied all the allegations of the petition, putting in issue all the averments thereof. There was a verdict for plaintiff, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

The evidence of plaintiff was to the effect that the horses were run down and killed at a point about 250 yards west of the station of Boley, by an east-bound passenger train of the defendant; that the track for a quarter of a mile west of where the stock was struck was straight; that the engineer could have seen objects upon the tracks for that distance; that it had been raining, and from hoof tracks on the roadbed it appeared that the stock had run down the track 200 yards or better ahead of the train, until they reached a trestle, upon which they had stopped, where they were struck; that at the speed the train was running it could have been stopped within 150 feet. The stock was struck about 9:25 o'clock on a very dark and misty night. The engineer gave the station signal, but sounded no other whistle. This was substantially the evidence on the part of the plaintiff; no one testifying in his behalf having been an eyewitness of the accident. The evidence on the part of the defendant was to the effect that the train was coming into Boley about 9:25 p. m. He (the engineer) had shut off the steam and was rolling into town.

"It was very dark and misty, and we were coming around a curve to the left, and I was sitting with my hand on brake valve. Had already whistled for town, and was leaning on outside of window, and discovered some animals on the track ahead, about 75 feet, and as quick as I saw them I applied brakes and emergency, knowing that there was bridge just ahead of me, and reached then for whistle and blew it two or three times and kept watching stock to see if they were going onto the bridge. I got down between engine and tank, in case engine went to turn over, so I could get off. Ran into stock, and I went out and saw one lying under the pilot. Backed engine, and when we went to back out saw suckling colt lying to the left of bridge with legs broken, and on right of bridge noticed a gray animal standing on all four feet. Animals came on tracks about 75 feet from engine when first seen. They ran something like 50 feet until they ran into bridge. Had oil headlight on engine at time. After animals came on the track, used every effort in my power to stop the train. I was sitting ready to make station stop. Had my hand on brake, and as quick as I saw them I put the brake valve into emergency. Had already shut off steam."

There are two assignments of error signed by counsel for plaintiff in error in their brief: (1) Error in denying defendant's request to direct verdict for defendant; and (2) error in admission of testimony as to headlight of engine. We do not believe either ground is well taken. There is a line of stock-killing cases coming up from the Indian Territory, commencing with *Gulf, C. & S. F. Ry. Co. v. Washington*, 49 Fed. 347, 1 C. C. A. 286, and *Gulf, G. & S. F. Ry. Co. v. Ellis*, 54 Fed. 481, 4 C. C. A. 454, that have been followed by this court in *M., K. & T. Ry. Co. v. Shepherd*, 20 Okl. 626, 95 Pac. 243, *M., K. & T. Ry. Co. v. Ford*, 103 Pac. 602, and *Harris et al. v. M., K. & T. Ry. Co.*, 103 Pac. 758, that seem to cover the first point made by counsel so fully that a further discussion would seem superfluous. In all of these cases the facts were similar to the facts in the case at bar, and in all of them it was held that it was proper to submit them to the jury. There is no room to distinguish the case at bar from them.

It was not error to admit evidence that the locomotive headlight to the train was equipped with an oil headlight only, and that it was a dim light as well. "The general rule is that if the employer uses ordinary care to provide, and to keep in reasonably safe condition, appliances of the kind that are in common use, he is not guilty of negligence." *Elliott on Railroads* (2d Ed.) § 1274. It is a matter of common knowledge that electric headlights have been in general use by railroads for many years, and that such lights have many advantages over the old oil lights

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in enabling the engineer to see objects on the track at night. The jury had a right to take into consideration the knowledge and experience of men in relation to matters and things of common knowledge. The testimony in this case was not only to the effect that a coal oil headlight was in use, but it was a dim light as well. We think it was a question for the jury as to whether the railway company used ordinary care to provide and keep in repair a proper headlight, and whether its failure to provide an electric headlight was negligence under the circumstances of this case.

The judgment of the court below is affirmed.

DUNN, C. J., and WILLIAMS, HAYES, and TURNER, JJ., concur.

(26 Okl. 833)

ST. LOUIS & S. F. R. CO. v. JOHNSON.
(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

1. TERRITORIES (§ 20*)—LEGISLATIVE POWER—RATIFICATION OF ACT BY CONGRESS—SUBSEQUENT REPEAL OR AMENDMENT.

An act of the territorial Legislature which requires the ratification of Congress in order to make it valid as law, after such ratification cannot be modified, repealed, or amended by the Legislature without the assent of Congress.

[Ed. Note.—For other cases, see Territories, Cent. Dig. § 17; Dec. Dig. § 20.*]

2. CARRIERS (§ 359*)—RULES—EJECTION OF PASSENGERS.

Under section 504 of the Compiled Laws of Oklahoma of 1909, common carriers of persons may make reasonable rules for the conduct of their business, and may require passengers to conform thereto and under the provisions of section 506 may eject any passenger who refuses to conform thereto, provided the same is done with as little violence as possible at any usual stopping place or near some dwelling house.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1439; Dec. Dig. § 359.*]

3. CARRIERS (§ 254*)—RULES—LIMIT OF TICKET.

Common carriers of passengers may limit the time within which tickets for passage will be valid subject only to the qualification that the limitation made is reasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1021-1023; Dec. Dig. § 254.*]

4. CARRIERS (§ 356*)—CARRIAGE OF PASSENGERS—EJECTION—RIGHT OF RECOVERY.

January 24, 1905, plaintiff purchased an ordinary local ticket over the line of the St. Louis & San Francisco Railway, at Chandler, Okl. T., for passage to Oklahoma City. The same was stamped as of the date of purchase, and on its face bore the condition, "good only one day from date of sale as stamped on back." Not having used the same plaintiff tendered it for passage on April 8, 1905, and the same was refused by the conductor, and on plaintiff's refusal to pay his fare was, in the daytime near a residence and without violence, required to leave the train, whereupon he brought suit for damages, and on a showing of these facts the court

denied a request for an instructed verdict for the defendant. *Held* error.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1416, 1425; Dec. Dig. § 356.*]

Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by R. L. Johnson against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions to dismiss.

Flynn & Ames and R. A. Kleinschmidt, for plaintiff in error. J. H. Grant and E. G. McAdams, for defendant in error.

DUNN, C. J. This action presents error from the district court of Oklahoma county. R. L. Johnson, as plaintiff, sued plaintiff in error, as defendant, in the probate court of Oklahoma county, filing his petition therein prior to statehood. After trial in that court the case was appealed by the defendant, against whom judgment was rendered to the district court of Oklahoma county, and a trial de novo had therein. Plaintiff was again successful and recovered a judgment, to reverse which defendant has brought the case to this court. The action is one for damages on account of an alleged wrongful expulsion of plaintiff from a train on defendant's road. We are met at the outset of our consideration of this case by an objection to our jurisdiction, counsel for defendant in error insisting that under section 4, art. 3, c. 12, of the Session Laws of Oklahoma of 1905, all appeals from final judgments of the probate court, except certain ones not necessary to here notice, should be taken direct to the Supreme Court of the territory, and it is contended that jurisdiction was not vested in the district court to entertain a trial of this case de novo. Counsel for plaintiff in error contend that the statute referred to was ineffective to divest the district court of jurisdiction upon the probate courts, and allowing an appeal in cases such as this to district courts, for trial de novo was an act which became effective by and through congressional sanction, and the territorial Legislature did not have authority to amend it as was attempted in the section above noted. On this proposition we cannot agree with counsel for defendant in error. The Supreme Court of the territory of Oklahoma in the case of *Martin v. Territory*, 8 Okl. 41, 56 Pac. 712, held: "An act of the territorial Legislature, which requires the ratification of Congress in order to make it valid as law, after such ratification cannot be modified, repealed, or amended by the Legislature without the assent of Congress." The section of the Session Laws of 1905 never having received the assent of Congress was not effectual to amend the act referred to, and the district court had jurisdiction to entertain this cause. This

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

brings us to the consideration of the case on its merits.

A statement of the facts involved, sufficient upon which to predicate the conclusion to which we have come, is embodied in the following: Plaintiff testified that on the 8th day of April, 1905, he resided at Oklahoma City, and was coming home from Tulsa on the Frisco. He bought a ticket from Tulsa to Sapulpa, and during the journey tendered to the conductor a ticket from Chandler to Oklahoma City, which he had purchased at Chandler on the 24th day of January, 1905, at a cost of \$1.46. The conductor said the ticket was out of date and that Johnson would have to pay cash fare; refusing to do this, he was put off the train about 1½ miles west of Chandler. He identified the ticket which is as follows: "St. Louis & San Francisco Railroad Company. Frisco System. Chandler, O. T.—C 47. Oklahoma City, O. T.—O 12. Good only one day from date of sale as stamped on back and on such trains as stop at destination of ticket, as per official time table. A. Hilton, G. P. A. A5185." On the back of said ticket is stamped: "St. Louis & San Francisco Railroad Company. Chandler, O. T., Jan. 24, 1905." He further testified that he had been a traveling salesman for 15 years, and had bought a great many tickets in that time; that he could read and write; that he had the ticket in question in his pocket all the time between the 24th day of January, when it was bought, and the 8th day of April, when it was tendered for passage; that on the day in question he bought a ticket from Tulsa to Sapulpa, also a ticket from Sapulpa to Bristow, and, when he gave the conductor that ticket, paid cash fare from Bristow to Chandler; that he presented the ticket in question at the time he paid the cash fare from Bristow to Chandler and before reaching Chandler, and at that time the conductor told him that it was no good; that when the train stopped at Chandler he made no attempt to buy another ticket. When the conductor came through after leaving Chandler, he again tendered him the ticket in question, and the conductor again told him the ticket was not good, as it had expired. The conductor demanded fare, and plaintiff told him that was his ticket. The conductor said he would have to put him off the train if he did not produce another ticket or pay cash fare. "Q. He told you he would put you off the train if you didn't produce another ticket, or pay the cash fare, and then what did you say to that? A. I said: 'It is up to you.' Q. He stopped the train? A. Yes, sir. Q. At once? A. Yes, sir. Q. And you went out on the platform with him? A. Of course; but I didn't go of my own accord. Q. He had to put you off? A. Yes, sir. Q. You would not have gone out if he had not taken you by the arm, and put you out? A. I didn't want to get off. Q. You were not going to get off unless he made you get off? A. No, sir."

The uncontradicted testimony on the part

of the railway company given by its conductor was that, prior to reaching Chandler, Johnson offered him the ticket in question, and he called his attention to the fact that the same had expired and was not valid; that Johnson said the ticket was all right until used, to which the conductor replied it was not and could not be accepted; that after the train left Chandler he again called on this passenger for his ticket and was tendered the one in question. He again informed him that it was no good and could not be accepted, and Johnson stated that was all he would get, and that he refused his fare, whereupon he was asked if he wanted to get off, or if he would have to put him off, and he said he would have to be put off. The conductor then took hold of Johnson's sleeve, and led him out between the seats, and Johnson stepped off on the ground. There was no disturbance or violence of any kind. It was a clear morning in April within sight of Chandler, and a dwelling house about 200 yards from the track. The station agent testified that the ticket was an ordinary local ticket of the defendant company.

The damages claimed are general, no special damages being averred or proven. At the conclusion of the evidence defendant asked the court to instruct the jury to return a verdict in favor of the defendant and against the plaintiff, which was refused. This ruling was excepted to, and is one of the errors urged in this court. It will thus be seen that the question presented is whether or not a railway company may limit a first-class local ticket purchased for passage by a provision making the same good only one day from the date of the sale as stamped on the back, and enforce such limitation by the eviction of a passenger who had purchased it at a time antedating the time fixed and who had not used it. It is the contention of counsel for defendant in error that the ticket constituted no contract between the parties; that the purchaser did not have his attention called to the printed condition thereon, and that he was not bound thereby.

Comp. Laws Okl. 1909, §§ 504, 505, and 506, dealing with the power of common carriers of persons to make rules for the conduct of their business and of their right to eject all who refuse to pay fares or conform to any lawful regulation, provide:

"504. A common carrier of persons may make rules for the conduct of his business, and may require passengers to conform to them if they are lawful, public, uniform in the application, and reasonable.

"505. A common carrier may demand the fare of passengers either at starting or at any subsequent time.

"506. A passenger who refuses to pay his fare, or to conform to any lawful regulation of the carrier, may be ejected from the vehicle by the carrier. But this must be done with as little violence as possible, and at any usual stopping place, or near some dwelling

house. After having ejected a passenger, a carrier has no right to require the payment of any part of his fare."

Was the regulation enforced in this case a reasonable one? It is a matter of common knowledge possessed by all who travel that local tickets generally if not uniformly contain the condition of the one in the case at bar limiting the time within which the same may be lawfully presented for passage. Every question presented in this case for our consideration was considered and passed on by the Supreme Court of the state of Kansas in the recent case of *Freeman v. A., T. & S. F. Ry. Co.*, 71 Kan. 327, 80 Pac. 592, in which case the court directed a judgment for the defendant company on facts almost identical with those in the case at bar, and, on an appeal being taken, the Supreme Court sustained that action. The court in the consideration of the case said: "There was no ambiguity in the condition expressed on the ticket. The date on the back was abbreviated, it is true, but it was in a form commonly used in business transactions, and one that a man of ordinary intelligence could not misunderstand. His signature was not attached to the contract, and he says that he did not notice the printed limitation in the ticket until it was refused; but the absence of his signature did not eliminate the condition, and he is bound by, and must take notice of, limitations plainly printed on the face of the ticket. No statement was made by the agent who sold the ticket with reference to the time when it might be used, nor was anything said as to the character of the ticket that would mislead the plaintiff. There was daily service on the railroad between Argonia and Wichita, and hence it cannot be said that the condition limiting the time of use to one day from the time of sale was unreasonable. That condition being plainly expressed on the ticket, it will be presumed to have been consented to be the purchaser in the acceptance and use of the ticket itself. Among the authorities sustaining these views are the following: *Dangerfield v. Railway Co.*, 62 Kan. 85, 61 Pac. 405; *Railroad Co. v. Price*, 62 Kan. 327, 62 Pac. 1001; *Rolfs v. Railway Co.*, 68 Kan. 272, 71 Pac. 526; *Hanlon v. Illinois Central Railroad Co.*, 109 Iowa, 136, 80 N. W. 223; *St. Clair v. Railroad*, 77 Miss. 789, 28 South. 957; *T. & N. O. Ry. Co. v. Powell*, 13 Tex. Civ. App. 212, 35 S. W. 841; *Callaway, Receiver, v. Mellett*, 15 Ind. App. 366, 44 N. E. 198, 57 Am. St. Rep. 238; *Lillis v. St. Louis, Kansas City & Northern Ry. Co.*, 64 Mo. 464, 27 Am. Rep. 255; *Boston & Lowell Railway Co. v. Proctor*, 1 Allen [Mass.] 267, 79 Am. Dec. 729; *State v. Campbell*, 32 N. J. Law, 309; *Elmore v. Sands*, 34 N. Y. 512, 13 Am. Rep. 617; *Boice v. Hudson River Railroad Co.*, 61 Barb. [N. Y.] 611; *Rawkitzky v. Railway Co.*, 40 La. Ann. 47, 3 South. 387; *Coburn v. Railway Co.*, 105 La. 398, 29 South. 882,

83 Am. St. Rep. 242; *Pennsylvania Co. v. Hine*, 41 Ohio St. 276; *Hutch. Carr.* pp. 576-581; 1 *Pet. Carr.* p. 285; 3 *Thomp. Neg. p.* 2599; 8 *Ency.* 575."

While it is true there are several authorities in conflict with the foregoing, yet the reasons for the rule are to our minds so manifestly just that we feel no hesitancy in following the almost universal consensus of judicial opinion on the same.

The judgment of the trial court is accordingly reversed, and the case is remanded, with instructions to dismiss the same.

TURNER, KANE, and HAYES, JJ., concur. WILLIAMS, J., absent, and not participating.

(25 Okl. 774)

KANSAS CITY, M. & O. RY. CO. v. COX.
(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 113*)—FREIGHT—DELIVERY TO CARRIER.

The mere fact that the owner of goods has loaded them in a car for shipment, even though the carrier, by the owner's direction, has placed the car in a position convenient for such purpose, will not of itself be sufficient to make the carrier an insurer of the goods loaded. Before the delivery will be deemed complete, the owner must not only have relinquished his control over the car, but notice that it was ready for shipment must have been given the carrier.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 100, 101, 608-620; Dec. Dig. § 113.*]

2. CARRIERS (§ 108*)—INJURY TO FREIGHT—LIABILITY OF CARRIER.

The strict rules making the carrier an insurer of freight have no application where the relation of the parties is not that of carrier and consignee or owner, and in such cases the carrier is liable only for losses resulting from its own negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 471-495, 520-522; Dec. Dig. § 108.*]

Error from District Court, Woods County; John L. Pancoast, Judge.

Action by John L. Cox against the Kansas City, Mexico & Orient Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

John A. Eaton and Dudley W. Eaton, for plaintiff in error.

KANE, J. This was an action, commenced by the defendant in error, as plaintiff below, against the plaintiff in error, defendant below, to recover damages for the destruction, by fire, of a certain lot of broom corn. After both sides had introduced their evidence and rested, the court instructed the jury that the evidence introduced showed that the railroad company was responsible for the car load of broom corn as a common carrier and was therefore an insurer of the property; that under such circumstances it was the duty of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

jury to return a verdict for the plaintiff for the value of the broom corn, stating the value thereof to be \$575.25. The jury, without retiring, brought in a verdict in accordance with the instructions of the court, upon which judgment was duly entered. To reverse this judgment this proceeding in error was commenced.

It is stated by counsel for plaintiff in error, in their brief, and, as counsel for defendant in error have filed no brief calling our attention to any discrepancy in the statement, we take it to be true, that there was evidence introduced at the trial reasonably tending to prove that on the 26th or 27th of January, 1906, pursuant to the order of the plaintiff, a car was placed upon the side track by the defendant at a broom corn platform erected by the defendant on the east side of one of its side tracks for the purpose of enabling shippers to conveniently and easily load the car with broom corn; that on the next day Mr. Greenlee, acting as the agent for the plaintiff, loaded some broom corn in said car. On the next day, to wit, the 28th day of January, six more bales were loaded. On the 29th day of January, more broom corn, enough to finish the car load, was loaded into the car, after which the door to the car was closed. After finishing loading the car, the plaintiff, or the party employed by him to do the loading, closed the door of the car and notified Mr. Cox, the plaintiff, that the car was loaded, but did not notify the agent of the company that the car was loaded, and did not give the agent any information as to the destination of the car or the name of the consignee. The last time that Mr. Cox saw the car was Saturday, January 27th, about noon, at which time the car was all loaded except about 15 bales. Cox did not notify the agent of the company that the car was loaded, nor did he notify him who the consignee of the car was to be, or where it was to go. The railway company had not issued a bill of lading, and Cox had not paid the freight. Cox had been for some time shipping broom corn from Fairview, and it was his custom when the cars were loaded to notify the agent that they were loaded, and give him the name of the consignee, the route the car was to take, and its destination; but none of these things had been done with reference to this car. The car was destroyed by fire about 2 o'clock in the morning of January 30th; the facts up to that time being as above stated. We are of the opinion that this evidence was sufficient to carry the case to the jury.

From the authorities cited by counsel for plaintiff in error, it seems clear that, before the railway company could be held liable as a common carrier, it must appear that it had been notified that the broom corn was ready for shipment or apprised of the name of the consignee. *Hutchinson on Carriers* (3d Ed.) § 125, pp. 122, 123, states the rule as follows: "When the owner of the goods has done all

in his power and all that he is required to do by his understanding with the carrier or the usage of the business to further the shipment, and it becomes then the duty of the carrier to do whatever else is necessary to put them in transit, the delivery and acceptance will be considered as complete from the time the carrier is informed that they are ready for him. The mere fact, therefore, that the owner of the goods has loaded them on a car, even though the carrier by the owner's directions has placed the car in a position convenient for such purpose, will not of itself be sufficient to constitute a delivery. Before the delivery will be deemed complete, the owner must not only have relinquished his control over the car, but notice that it was ready for shipment must have been given the carrier. Thus, where it was the course of business for a railroad company, when required to do so, to send its cars upon a side track at the place of shipment to receive cotton for transportation, and for the shipper there to load upon them the freight, make out a manifest, and leave it with the agent of the company, who then had the bales counted, signed bills of lading, and sent locomotives to remove the cars thus loaded and place them in the train destined to the point to which the shipments were to be made, it was held that the delivery was complete as soon as the cotton was put upon the company's care in this manner by the shipper and the company's agent informed of the fact. And where the owner of lumber ordered a car in which to load lumber for the purpose of shipment, and the carrier, in pursuance of such order, placed a car on one of its side tracks for such purpose, and after the car was loaded, but before the carrier had been notified that it was ready for shipment, or had been apprised of the name of the consignee, it caught fire, and the lumber was destroyed, it was held that as the carrier had not been notified that the car was ready for shipment, nor the name of the consignee given him, there was not such a delivery of the goods as to render him liable as a common carrier."

The case last referred to in the text is *Basnight v. Railroad Co.*, 111 N. C. 592, 16 S. E. 323. Mr. Justice MacRae, who delivered the opinion of the court, in discussing this proposition, says: "Taking the facts most strongly in favor of the plaintiff, he asked of the defendant's freight agent a car to load lumber to go to Philadelphia. The agent pointed out to the plaintiff a car which he might use for the desired purpose. The plaintiff loaded the car with lumber, and finished on the night of the 24th of December, but did not notify defendant's agent that the car was ready for shipment nor of the name of the consignee. Treating the loading of the car upon defendant's track as a delivery to defendant and an acceptance, it was not yet ready for transportation, for the defendant had not been notified of its readiness nor to

whom it was to be shipped. It was necessary for the defendant to await further orders before shipment. Where goods are delivered to a common carrier to await further orders from the shipper before shipment, the former, while they are so in his custody, is only liable as warehouseman. *O'Neill v. Railroad*, 60 N. Y. 138; *Wells v. Railroad*, 51 N. C. 47, 72 Am. Dec. 556; *Angell on Carriers*, § 129. He is only responsible as carrier where goods are delivered to and accepted by him in the usual course of business for immediate transportation."

Besides the foregoing authorities, counsel cites *Stapleton v. Grand Trunk Ry. Co.*, 133 Mich. 187, 94 N. W. 739; 5 A. & E. Enc. Law, p. 184; *Grosvenor v. New York Central Ry. Co.*, 39 N. Y. 34; *Tate & Co. v. Yazoo, etc.*, R. R. Co., 78 Miss. 842, 29 South. 392, 84 Am. St. Rep. 649; *St. Louis, Iron Mt. & So. Ry. Co. v. Murphy*, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202; *Mo. Pac. Ry. Co. v. Riggs*, 10 Kan. App. 578, 62 Pac. 712; and several other cases—all of which seem to be in point in their favor. The relation of common carrier and shipper not having arisen, the railway company's liability was that of a warehouseman, and it was only liable for failure to exercise ordinary care. It was error to charge it with a higher degree of responsibility. "The strict rules making the carrier an insurer of safe delivery of goods entrusted to it have no application where the relation of the parties is not that of carrier and consignee or owner, or where the relation, though previously existing, had come to an end at the time the delivery was made. In such cases the carrier is liable only for losses resulting from its own negligence." 5 A. & E. Enc. of L. 212.

There were several other errors assigned by counsel; but, upon the relation of the parties being fixed, they are not liable to appear again. We do not, therefore, feel called upon to discuss them.

The judgment of the court below is reversed, and the cause remanded, with directions to grant a new trial.

DUNN, C. J., and HAYES and TURNER, JJ., concur. WILLIAMS, J., disqualified, not sitting.

(25 Okl. 408)

GILPIN v. NETOGRAPH MACH. CO. et al.
(Supreme Court of Oklahoma. Jan. 11, 1910.)

(Syllabus by the Court.)

BILLS AND NOTES (§§ 140, 537*)—ACTIONS—FRAUD—SUFFICIENCY OF EVIDENCE—WAIVER OF FRAUD—RENEWAL OF NOTES.

Where, in a suit on two promissory notes, the testimony disclosed that the same were executed in renewal of two other notes given by defendant to plaintiff in payment for his share of the purchase price of a worthless patent right, that defendant was induced to sign the original

notes by the agent of plaintiff and L., one of defendant's copartners, by representing to him that L., on whose honesty, good faith, and judgment defendant relied, thought it a good investment and would join his copartners in the purchase thereof and pay for and share therein equally with them, that after the deal was closed, pursuant to a secret agreement between said agent and L., plaintiff returned to L. unpaid his note and check given in payment for his share of the purchase price of said patent right, *held*, that the evidence was sufficient to take the case to the jury on the ground of fraud; *held*, also, that the execution of the renewal notes before the discovery by defendant of the fraud did not constitute a waiver thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 353-359; Dec. Dig. §§ 140, 537.*]

Error from District Court, Oklahoma County; George W. Clark, Judge.

Consolidated actions by the Netograph Machine Company and others against C. F. Gilpin. Judgment for plaintiffs, and defendant brings error. Reversed.

Burwell, Crockett & Johnson, for plaintiff in error. H. H. Grant and E. G. McAdams, for defendants in error.

TURNER, J. On May 5, 1904, defendant in error, Netograph Machine Company, a foreign corporation, sued C. F. Gilpin, plaintiff in error, in the probate court of Oklahoma county on his promissory note for \$600, dated January 25, 1904, payable to it March 19, 1904, with interest and attorney's fees in case of suit. After issue joined there was trial to a jury, which resulted in judgment for plaintiff for \$680.60 and costs, from which defendant appealed to the district court. There the cause by stipulation was consolidated with the case of E. G. Rankin v. C. F. Gilpin, also appealed by him from the probate court; the same being a suit upon a promissory note for like amount, made by defendant at the same time, payable to plaintiff, and by it indorsed to said Rankin, who had sued and recovered judgment in that court. In the district court, after amended answer and reply filed, there was trial anew to a jury and judgment for plaintiff on both notes for \$1,632. Defendant brings the case here for review.

For amended answer defendant admitted the execution of both notes, and among other defenses thereto pleaded fraud in the execution thereof, and, assuming the burden of proof, introduced testimony to maintain the issue. At the close of all the testimony, plaintiff demurred to the evidence, which was sustained; and the first question for us to determine is whether the evidence is sufficient to take the case to the jury on the ground of fraud. Without undertaking to weigh conflicting testimony, but viewing it all in the light most favorable to defendant and allowing all reasonable inferences in his favor, on this point the evidence disclosed that on August 20, 1903, defendant in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

error was a corporation doing business under the laws of Missouri, with its principal office in St. Louis; that G. W. Fryhofer was its agent at Oklahoma City with full power to make contracts for the sale of the exclusive right to use the patent "Coin Netograph Machine No. 55241" in the Indian Territory and Oklahoma Territory; that some time prior thereto said agent put on exhibition at the Grand Avenue hotel in said city a sample of said machine for the purpose of selling its use as a patent right; that about that time defendant, being out of business, was approached by J. L. Ladd, and induced to go with him to inspect said machine, which Ladd told him was a good investment; that defendant had known Ladd as a business man in said city for a number of years; that he was regarded by defendant and generally as honest and intelligent, and upon whose business judgment defendant relied. After inspecting the machine, concerning which defendant knew nothing and so informed Ladd, and that he had no faith in patents and could see nothing, owing to defective eyesight, Ladd again informed him that it was a good investment, and was going to put some money in it, and wanted defendant to join the company when formed and likewise invest. This he agreed to do, and later a "partnership" was formed for the purpose of handling said machines, consisting of defendant, Scott Thompson, J. D. Speaker, J. L. Ladd, and A. J. Brown, under the name of The Netograph Machine Company, of which defendant was elected "secretary." Concerning the deal, the testimony further discloses that defendant talked to the other partners, but mostly with Ladd, and went into it in good faith, and supposed he did, and relied entirely on Ladd and Fryhofer as to the workings of said machine, Fryhofer assuring him that Ladd was to go in and pay therefor and share therein equally with the rest; that through said Ladd and Fryhofer he was induced to enter into an arrangement, whereby all five of said partners were to join in the purchase of a number of said machines for said Netograph Machine Company with the understanding that each would own a one-fifth interest in the purchase and pay or secure therefor his proportionate share of the purchase price; that as a result of said understanding, on the date aforesaid, they entered into a written contract with defendant in error, in which for \$6,000 it granted them as parties of the second part the exclusive right and license to sell, use, lease, and employ and license others so to do for and within said territories 60 of said machines, pictures, and phonograph records, the property of defendant in error, f. o. b. at St. Louis, said \$6,000 to be paid as follows: " * * * Each of said parties of the second part shall at the time of the approval of the patents hereinafter mentioned by the attorney of the party of the second part, pay the sum of

five hundred (\$500.00) dollars, and each of said parties shall execute their individual note to the party of the first part, due in six months after the date thereof, with six per cent. interest from date, and said notes and money to be deposited with the Oklahoma Trust & Banking Company, at Oklahoma City, O. T., to be delivered to the parties of the first part, only when the parties of the second part shall have received the said sixty machines and the said pictures and phonograph records: * * * Provided further, that the payment of said money by the parties of the second part shall be deemed and considered as a several contract. * * * After said contract was signed by defendant in error and by all of said partners, defendant, in payment for his one-fifth interest in the property, executed two notes for \$600 each, payable to defendant in error, and deposited the same in the bank pursuant to the terms of said contract, and on January 5, 1904, renewed the same by executing the notes sued on. At the same time Ladd, after signing the contract, in payment for his one-fifth interest in the property, executed his note for \$600 payable to defendant in error and drew a check for \$500, likewise payable, deposited them in the bank, but which were later returned to him unpaid by defendant in error, pursuant to a prior secret arrangement between Ladd and Fryhofer to the effect that Ladd should pay nothing for his interest in the property. About half of the machines arrived November 13, 1904; the other half later. Each was intended to show a picture under an electric light and sing a song when a nickle was dropped in a slot and a lever pulled. They were worthless.

It is impossible to read this record without being impressed that Ladd was simply acting as a decoy for Fryhofer as agent for defendant in error to get his copartners into this deal whereby, unknown to any of them, his one-fifth interest in the property should cost him nothing. Any such trick as that is a fraud. The representation by Fryhofer and Ladd as an inducement to defendant to purchase, that Ladd, whom defendant regarded highly, for his honesty, good faith, and judgment, had agreed to likewise purchase on the same terms, without disclosing the fact that Ladd's interest in the machine was to be given him as a gratuity for securing defendant and others to purchase, was such a fraud as will entitle defendant to defeat a recovery on the notes sued.

Coles v. Kennedy, 81 Iowa, 360, 46 N. W. 1088, 25 Am. St. Rep. 503; was a suit to recover upon a contract in writing for the purchase of stock in a mining company. Defendant pleaded among other things that he was induced to execute the contract by reason of the fraud of the appellant. The fraud alleged was that, to induce him to subscribe for the stock and to execute the agreement, appellant, among other things, exhibited spec-

imens of the ore and represented to him that one Mallory had subscribed and paid for 5,000 shares in the company; that the representation was false and fraudulent; that said Mallory had subscribed for said shares with a secret contract with appellant that they should cost him nothing. Mallory had resided in appellee's town for many years, and was known in the community as a man of much business experience, capacity, and success, whose name as a subscriber would be influential in inducing others to take stock. His name appeared upon the subscription list, and such fact was held out as an inducement to appellee to execute the contract. The court in passing said: "The testimony shows that Mr. Mallory was to have his stock free of charge, and that it was given to him to secure the influence of his name in procuring appellee and others to subscribe. The fact that Mr. Mallory was not to pay for his stock was concealed from the appellee. To have disclosed it would have been to defeat the very purpose for which the 5,000 shares were given to Mallory. We have no doubt but the belief that Mr. Mallory had subscribed for 5,000 shares of the stock, and that he had or was to pay for the same, operated as an inducement to appellee to subscribe for stock, and execute the contract in question. This was such a fraud as cannot have the approval of a court of equity, and for which the contract induced by it should be canceled and held for naught."

Walker v. Mobile & Ohio Ry. Co., 34 Miss. 245, was a suit by said road to recover certain installments then past due upon the subscription of the defendant Walker for capital stock in said company. Defendant, among other things, pleaded fraud in the procurement of the contract of subscription, in that one Wheeler, the agent of the road, procured one Nelson, an influential man in the community, who was supposed and represented by him to be well informed as to the costs and profits of certain enterprises engaged in by the road, ostensibly to subscribe for five shares of the capital stock in the same. Said Wheeler at the same time executed to him his obligation in writing, as agent of said road, at any time on request of said Nelson, to release him from said subscription. That said Wheeler fraudulently represented to defendant that said subscription was in good faith, and that said Nelson was willing to invest money in said road; whereas, in truth, the same was only colorable, and made with a fraudulent design of inducing defendant and others to subscribe to its stock. On demurrer to this plea, the lower court held, in effect, that the same was bad, which holding was sustained on appeal, in that the same failed to allege that defendant was thereby induced to subscribe, but simply stated that Nelson was falsely held out to the community by the agent as a subscriber, thereby clearly implying that, had the plea averred such

inducement as is disclosed by the testimony in this case, it would have been good.

In Coulter v. Clark, 160 Ind. 311, 66 N. E. 739, the complaint in substance stated that theretofore the Indiana Hedge & Wire Fence Company owned the right under letters patent to manufacture, sell, and erect in Clinton county, Ind., and elsewhere, an improvement known as "a Growing Hedge & Wire Fence," and desired to sell and erect such fence in said county; that appellant, who was a banker and business man therein known to the inhabitants thereof, agreed with a certain agent of said company to induce appellee, among others, to purchase said right from said company for said county; that, pursuant thereto, appellant with other agents of said company called upon appellee and represented said right to be of great value, that he was ready to join with other citizens of said county in the purchase thereof, and to organize a corporation to be known as the Clinton County Hedge & Wire Fence Company with a capital stock of \$25,000 for the purpose of engaging in said enterprise; that the plan of such proposed organization was that the persons forming said new corporation were to execute their promissory notes to the former corporation in consideration of the assignment to it of said patent right for said county, whereupon the new corporation was to issue to the persons so associated shares of its capital stock to the amount of \$2 for every \$1 for the sums for which their respective notes had been so executed to the former company; that, pursuant to an agreement between appellant and other agents of said company, appellant solicited appellee and other citizens to join him in the purchase of said patent right, and pretended that he was one of the joint purchasers thereof, and was executing his notes for the same, with the understanding between appellant and said other agents that, if appellant should induce the appellee and others to purchase said patent right and enter into said scheme, then the notes executed by appellant for his part of the purchase money thereof were to be returned to him by said Indiana Company; that, pursuant to said scheme, appellee and others were induced to join in said purchase and the organization of said new corporation, appellant assuring appellee and others that in his judgment it was a good investment; that appellee, having no knowledge of the facts, believed and relied thereon, and with 23 other citizens executed his two notes to said Indiana Company for a sum certain payable at certain intervals and caused said new corporation to be organized and said patent right transferred to it; that soon thereafter said Indiana Company caused the notes executed by appellant to be handed back to him for his service in carrying out said scheme; that said patent right was of no value as appellant well knew at the time; that, before appellee discovered the fraud practiced upon

him, he paid said notes, and thereafter brought suit against appellant for said alleged fraud practiced upon him by appellant as a promoter of said new company.

A demurrer to the complaint was overruled in the trial court and said ruling sustained on appeal. In passing the Supreme Court in effect held that the secret agreement securing a special advantage to appellant upon whose representations appellee relied in entering the contract was a fraud on the rights of the appellee and cited in support thereof: *Western Union Tel. Co. v. Union, etc., Ry. Co. (C. C.)* 3 Fed. 1; *Chandler v. Bacon (C. C.)* 30 Fed. 538, 539, 540; *Davenport v. Buchanan*, 6 S. D. 376, 61 N. W. 47; *Walker v. Mobile, etc., Ry. Co.*, 34 Miss. 245; *Coles v. Kennedy*, 81 Iowa, 360, 46 N. W. 1088, 25 Am. St. Rep. 508; *Tolman v. Smith*, 43 Ill. App. 562.

We are therefore of opinion that the notes given in purchase of said machines were in their inception void for fraud; that said fraud was not waived by a renewal of said notes resulting in the execution of the notes sued on, for the reason that the testimony disclosed that said fraud was not discovered until after said renewal; that a discussion of a waiver of fraud by defendant retaining the machine after they were discovered to be worthless is not necessary to a proper decision of this case; and that the judgment of the trial court should be reversed, and it is so ordered. All the Justices concur.

(25 Okl. 770)

HARRIS v. PALMER.

(Supreme Court of Oklahoma. March 8, 1910.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 970*) — REVIEW — DISCRETION OF COURT—ORDER OF PROOF—REOPENING CASE.

The order of proof is largely a matter of discretion with the trial court, and hence evidence which is properly a part of plaintiff's case in chief may be permitted to be introduced out of its regular order, or the court in the exercise of a sound discretion may reopen a case for the introduction of relevant and material evidence, after both parties have rested; and, in the absence of a showing of surprise or prejudice or an abuse of discretion, such action will not be subject to reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 8851; Dec. Dig. § 970.*]

2. ELECTIONS (§ 291*) — CONTEST — PRESUMPTIONS AND BURDEN OF PROOF.

Where an election is held by duly appointed officers, the presumption is that the votes received and counted by them are legal, and the burden is on the party attacking the same to show their illegality.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 286; Dec. Dig. § 291.*]

3. ELECTIONS (§ 291*) — CONTEST — BURDEN OF PROOF.

In a contest over an election, where three separate and distinct ballots are cast, a party seeking to secure the rejection of any one of such ballots by reason of an alleged violation of

section 5, art. 1, c. 17, Sess. Laws Okl. 1905, because of an intentional exposure of his ballot on the part of an elector, the attacking party will be required to show that the identical ballot which he seeks to have excluded was the one exposed.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 286; Dec. Dig. § 291.*]

Error from District Court, Muskogee County; Malcolm E. Rosser, Judge.

Action by T. R. Palmer against W. B. Harris. Judgment for plaintiff, and defendant brings error. Affirmed.

Carl Pursel (J. E. Wyand and S. M. Ruth erford, of counsel), for plaintiff in error. Chas. A. Cook and A. A. Davidson, for defendant in error.

DUNN, C. J. This case presents error from the district court of Muskogee county, and grows out of a contest over the office of county commissioner of the first commissioner's district of that county. On a trial to the court judgment was rendered finding that the plaintiff was entitled to the office. A motion for new trial was duly filed and overruled, to which exception was saved, and the case has been brought to this court for review.

Two questions are presented for our consideration. First, it is contended that the court erred in overruling the objection of defendant to the introduction of testimony of plaintiff in rebuttal which did not in any way controvert or tend to controvert, or rebut the evidence theretofore introduced by the defendant, and which in effect permitted plaintiff to reopen his case after he had rested, and introduce an entirely new line of testimony. There is no showing made that defendant was taken by surprise, or that he lacked a full opportunity to meet in every particular the evidence so admitted, nor is there any showing that he was in any way prejudiced by the introduction of this evidence. The evidence tendered was in support of facts of which both parties had notice by the averments of the pleadings. The order of proof is largely a matter of discretion with the trial court, and hence evidence which is properly a part of plaintiff's case in chief may be permitted to be introduced out of its regular order, or the court in the exercise of a sound discretion may reopen the case for the introduction of relevant and material evidence, after both parties have rested; and, in the absence of a showing of surprise or prejudice or an abuse of discretion, such action will not be subject to reversal. *Hannem v. Pence*, 40 Minn. 127, 41 N. W. 657, 12 Am. St. Rep. 717; *Stephens v. Union Assurance Society*, 16 Utah, 23, 50 Pac. 628, 67 Am. St. Rep. 595; *Graham & Co. v. Davis & Co.*, 4 Ohio St. 362, 62 Am. Dec. 285; *West v. Cameron*, 39 Kan. 736, 18 Pac. 894. In the case of *West v. Cameron*, supra, the Supreme Court of Kansas on this proposition said: "The opening of a case

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for the purpose of receiving further evidence, after the case has been tried, but before any decision has been rendered therein, and the continuance of the case for such evidence, and the receiving of the same, are all within the judicial discretion of the court. * * *

The second proposition to which our attention is directed by counsel arises out of the following facts: The evidence shows that, at the election at which the parties to this action were candidates, three different and separate ballots were furnished the electors and cast; that on several occasions two or more voters were together in one booth; that on one occasion an elector, after having marked his ballots, brought them to one of the election officials, and asked him if he had voted right; that on numerous other occasions electors came from the booths with their ballots unfolded and exposed, so that those in the room were able to detect how some of them were marked. There is, however, no evidence in the record showing that the specific ballot on which the names of the county candidates for the different county offices were printed was exposed, nor is there any definite evidence showing that all of the ballots were exposed in any instance, or that any one in the room was able to and did detect how any elector voted on any county officer. To exclude these ballots defendant invokes the provisions of section 5, c. 17, p. 234, Sess. Laws Okl. 1905, which reads in part as follows: "If any elector shall intentionally expose his ballot or any part thereof to any person so as to disclose to him any of the candidates voted for or how said ticket has been stamped (except in cases where the ballot has been made out by the clerks as provided in section 44), such ballot shall not be deposited in the ballot box. A minute of such occurrence shall be noted on the poll lists and such person shall not be permitted to vote at said election. * * *". Under the foregoing statute counsel for the defendant contend in this court that the mere exposure of the ballots as above set forth, without definitely stating or fixing with precision that the ballot for county officials upon which the names of these parties were printed was exposed, was sufficient to require the exclusion of a sufficient number to give defendant the office. In this we cannot concur. The rule seems to be as stated in the contest election case of Harry White, 4 Pa. Dist. R. 363, that: "The presumption is in favor of the legality of the vote, and the burden is on the attacking party to show, either that the voter lacked some qualification of an elector, or had lost his right to vote at that election by failure to observe some positive requirement of the law, or had forfeited his right to vote by giving or receiving a bribe." This rule finds support in practically all of the authorities. See 10 Am. & Eng. Ency. of Law, p. 838; 10 Cyc. 416; Whippley v. McKune, 12

Cal. 352; Taylor v. Taylor, 10 Minn. 107 (Gil. 81); Boyer v. Teague, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547; Price v. Archuleta, 17 Colo. 288, 29 Pac. 460; Gumm v. Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312.

The purpose of the act is to make certain the secrecy of the ballot, and to require its rejection where this is violated. It is sought to have the county ballots rejected because of this alleged exposure. The trial court found the evidence insufficient, and we are not able to say it erred; hence the judgment must be affirmed.

TURNER, KANE, HAYES, and WILLIAMS, JJ., concur.

(26 Okl. 13)

Z. J. FORT PRODUCE CO. v. SOUTHWESTERN GRAIN & PRODUCE CO.
(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

1. PLEADING (§ 248*)—AMENDMENT—BREACH OF WARRANTY—CHANGE OF CAUSE OF ACTION.

Plaintiffs brought an action to recover damages resulting to them from a purchase of a car load of potatoes sold to them by defendant upon the representation and guaranty that they were sound and merchantable; whereas, a great portion of them were rotten, grubby, and unmerchantable. They were permitted to amend their petition to allege that defendant so loaded the car that plaintiff could inspect only the top of same before they were compelled to pay for the car, and that he fraudulently, with the purpose and design to deceive the plaintiffs, had placed upon the top of the car sound potatoes and in the bottom of the car rotten and unmerchantable potatoes, and because of said acts they were damaged, and prayed for damages resulting from the fraudulent acts of defendant. *Held*, that the court did not err in permitting the amendment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 701; Dec. Dig. § 248.*]

2. LIMITATION OF ACTIONS (§ 127*)—DISCOVERY OF FRAUD—AMENDMENTS TO PETITION.

The original petition having been filed within proper time, the cause of action was not barred, although the amended petition was not filed until after the expiration of two years from the discovery of the fraudulent acts complained of.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

Error from District Court, Kay County; W. M. Bowles, Judge.

Action by the Southwestern Grain & Produce Company against the Z. J. Fort Produce Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This action was begun in the lower court by defendants in error, who, for brevity and convenience, will be called "plaintiffs," against plaintiff in error, who will hereafter be called "defendant." The original petition was filed on December 18, 1905. In it plaintiffs allege that defendant is indebted to them in the sum of \$180.78 for damages

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on a car of potatoes which defendant sold to them on a guaranty that the potatoes would be good and merchantable. They allege that the potatoes were shipped in a car from Denver, Colo. to Arkansas City, Kan., and were received by them on or before Nov. 15, 1906; that at the time of the shipment of said potatoes defendant drew on plaintiffs a draft for the amount of the purchase price of the potatoes and sent said draft with bill of lading attached to one of the banks in the city of plaintiffs' residence; that they could not get or inspect the potatoes until they paid the draft; that they paid the draft, took the potatoes, and upon unloading the same from the car found that half of them were rotten, grubby, and unmerchantable and worth only one-half of what they had paid for them. Later an amended petition was filed, in which the allegations of the original petition are somewhat amplified; but the theory upon which plaintiffs seek to recover by the amended petition, as in the original petition, is for damages resulting from a breach by defendant of that portion of his agreement or representation to them that the potatoes would be good, merchantable potatoes. To the amended petition, an answer was filed, and the case was tried to a jury. After both parties had introduced their evidence, upon request of plaintiffs, the case was withdrawn from the jury, and they were given leave to file a second amended petition within 10 days thereafter upon the condition that the costs incurred to the date of said order be taxed to plaintiffs. Thereafter, on the 13th day of December, 1907, plaintiffs filed a second amended petition, in which they allege that in response to a telegram from defendant to plaintiffs which read, "Choice apples straight, course three-fourths Ben Davis, balance assorted varieties, dollar fifteen box delivered, potatoes dollar ten * * * advancing daily," they sent to defendant the following message: "Ship car choice pearl spuds as per quotations." They allege that defendant knew that "spuds" meant potatoes; that the potatoes were shipped and draft drawn therefor with bill of lading attached; that they could not get possession of the potatoes until they paid the draft and took up the bill of lading; that the only examination they could make of the potatoes was such as could be made while in the car, which was in the hands of the railroad company; that the potatoes were in sacks laid in tiers or rows piled one on the other; that they went to the car and made such inspection as they could, but they could inspect only such as were on top; that, from their examination of the potatoes, they considered them about as good a quality as they purchased, and, relying on all being as good as those on the top, paid the draft, got the bill of lading, and took the potatoes from the car; that, while unloading them, they discovered that more than half of the potatoes

were rotten, grubby, and worthless. They charged that defendant fraudulently, and with the purpose of deceiving, cheating, and defrauding them, had loaded the car so as to prevent them from learning the true character of the potatoes upon such examination as they could make of them while in the car, and that the bottom of the car was loaded with said worthless potatoes, with the design to defraud plaintiffs; and prayed judgment for their damages caused by the fraudulent acts of defendant. To the second amended petition, a motion to dismiss was interposed upon the grounds: First, that it sets up a new and different cause of action from that stated in the original petition; second, because it shows upon its face that the cause of action attempted to be stated therein is barred by the statute of limitation. Defendant also demurred to the petition, upon the same grounds. Both the motion and the demurrer were overruled. After an answer to the second amended petition was filed by defendant, a trial to a jury was had which resulted in a verdict and judgment thereon in favor of plaintiffs. Defendant demurred to plaintiffs' evidence, moved for peremptory instruction, and for judgment non obstante verdicto, in all of which he was overruled by the court.

D. S. Rose, for plaintiff in error. Tetrick & Curran, for defendant in error.

HAYES, J. (after stating the facts as above). Only two questions need to be considered in order to dispose of all specifications of error: First, does the second amended petition so substantially change plaintiffs' claim from that set up in the original and the first amended petitions that defendant's motion to strike and dismiss should have been sustained? Second, is the cause of action set up in the second amended petition barred by the statute of limitation?

Section 5679 of the Compiled Laws of Oklahoma of 1909 provides that: "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or conform the pleadings or proceedings to the facts proved, when such amendment does not change substantially the claim or defense. * * *" This section of the statute, with many other provisions of the Code now in force in this state, was brought into this jurisdiction by adoption from the state of Kansas. The Supreme Court of that state in 1892, just prior to the time of the adoption of the statute by the territorial Legislature, construed the foregoing section and applied it to a state of facts very similar to the facts in the case at bar. *Oulp v. Steere et al.*, 47 Kan. 746, 28

Pac. 987. That was an action commenced to recover damages resulting from the purchase and sale of a horse which had been purchased by the plaintiff under false and wrongful statements of the defendant as to the character and qualities of the horse, which adapted him to the particular purposes for which plaintiff purchased the horse. After the case had proceeded to trial and all the evidence of both parties had been introduced, the court in that case, as in the case at bar, discharged the jury and permitted the plaintiffs to amend their petition so as to show an express warranty by defendant that the horse was fit for the purpose for which he was bought and sold, and to ask for recovery for damages resulting from breach of the warranty. The appellate court held that the trial court committed no error in permitting the amendment. Mr. Justice Valentine in delivering the opinion said: "The statute does not provide that the amendment shall not change the form of action or cause of action; but it simply provides that the amendment shall not 'change substantially the claim of defense.' Now, we do not think that the claim of plaintiff in the present case was changed substantially by the amendment. The original petition attempted to set forth a cause of action for the recovery of damages resulting from the purchase and sale of a worthless horse, such purchase and sale being brought about by the wrongful statements of the defendant, and the amended petition sets forth a cause of action for substantially the same thing. The principal wrongs alleged in the amended petition were the wrongful statements made by the defendant, including a warranty that the horse was sound and good for the purposes for which he was bought and sold, when in fact he was not such a horse as he was warranted to be, and therefore that there was a breach of the warranty of the very time of the purchase and sale, for which breach the defendant was and is liable."

The foregoing case and the language of the opinion therein are directly in point. The only distinction between the facts in that case and the facts in the case at bar is that in the original petition in that case the action was founded upon the fraud of the defendant, and the amended petition was made to include a breach of the contract; whereas, in the case at bar, the original petition seeks to recover upon a breach of the contract by defendant, and it was amended so as to embrace his fraudulent acts in the same transaction as the basis of the action. When the amended petition was filed in that case, the statutory period within which to begin an action upon a contract had expired; but the court held that, since there was general identity of the transaction forming the cause of complaint in the original and amended petitions, and the original petition had been filed within proper time, plaintiff's right

of recovery was not barred. This case has since been cited with approval by the same court. *Snider v. Windsor et al.*, 77 Kan. 67, 93 Pac. 600. In the last-mentioned case, the original petition set up a cause of action for foreclosure of a mortgage, and the trial court permitted an amendment converting the action into one of replevin to replevy the property covered by mortgage. The action of the court permitting the amendment was held not error. *Stevens v. Matthewson*, 45 Kan. 594, 26 Pac. 38, was an action to recover a balance due on a contract for land. The defendant in his answer alleged that he was induced to enter into the contract by false representations respecting the land made by the plaintiff and his agent and pleaded a rescission of the contract. He was afterwards permitted to amend his answer so as to allege that the false representations were made with the intent to deceive him, and that he relied on them and was damaged by reason of the land not being as represented, and asked for judgment for his damages. This amendment was sustained by the appellate court. The identical provision of the Code here involved exists in a number of the states of the Union. Decisions construing and applying the same are not uniform, and some of the courts have held that an amendment changing the action from one *ex contractu* to one *ex delicto*, although growing out of the same transaction, is not permissible (*Hackett v. Bank of California*, 57 Cal. 335); but the tendency of all the courts is to give to said statute a liberal construction (*Spice & Son v. Steinruck*, 14 Ohio St. 213; *Williamson et al. v. Rock Island & Pac. Ry. Co.*, 84 Iowa, 583, 51 N. W. 60), and some courts have held that the limitation that the amendment shall not change substantially the claim or defense applies only to an amendment offered after judgment, and it does not have the effect to prevent an amendment changing the cause of action offered before the trial (*McDaniel v. Monroe Bros.*, 63 S. C. 307, 41 S. E. 456; *Murphy v. Plankinton Bank et al.*, 18 S. D. 317, 100 N. W. 614). We do not cite the last two cases *supra* for the purpose of approving the rule therein announced, but to show the liberality with which the courts have construed and applied this section of the statute.

It has been so often decided that the construction of a statute made by the Supreme Court of Kansas before the adoption of the statute by the territorial Legislature is binding upon this court that the citation of authorities is not necessary, and our decision upon the questions raised by this proceeding is concluded by the foregoing cases from that jurisdiction.

The judgment of the trial court is, accordingly, affirmed.

DUNN, C. J., and WILLIAMS, TURNER, and KANE, JJ., concur.

(25 Okl., 792)

BELLAMY v. WASHITA VALLEY TELEPHONE CO. et al.

(Supreme Court of Oklahoma. March 8, 1910.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 339*)—TIME FOR TAKING PROCEEDINGS.**

Where a petition in error is filed asking a review of a judgment upon the merits discharging the receiver, directing a return of the property to defendants and taxing plaintiff in error with the costs, and an order overruling his motion for a new trial, and an order modifying the first order, and an order requiring the clerk of the court to turn over certain moneys in his hands to J. C. H. "as acting president of" the defendant company, and it appears that more than one year has elapsed from the entry of all but the last order before the filing of the petition in error, this court is without jurisdiction to review said judgment and all but said last order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1885; Dec. Dig. § 339.*]

2. APPEAL AND ERROR (§ 343*)—TIME FOR TAKING PROCEEDINGS—EXTENSION.

The time for instituting a proceeding in error in this court to review a judgment of the district court declining to pass upon a question raised in the petition, and upon which judgment the bar of the statute has fallen, is not extended by a subsequent order declining to pass upon the same question raised by a subsequent petition based upon the same grounds.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 343.*]

3. JUDGMENT (§ 781*)—RES JUDICATA.

An adjudication upon the merits of a petition which declines to pass upon a question raised is a bar to another petition based upon the same ground raising the same question.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1259; Dec. Dig. § 731.*]

4. RECEIVERS (§ 146*)—VACATION OF RECEIVERSHIP — DETERMINATION OF RIGHT TO FUNDS.

A corporation being in the hands of a receiver, the sum of \$1,140 going into his hands in such capacity, and being paid by proper order of court into its registry, the receivership being vacated and the court ordering all funds to be paid or turned over to said corporation, H. demanding said fund from the clerk of the court as acting president and B. claiming to be a stockholder and president of said corporation, and entitled in said capacity to receive said fund, filed his motion in court asking that the clerk be ordered to pay said sum to him, the court, without hearing any evidence on said motion, ordered said fund to be paid to H. as acting president. *Held*, that the court should have heard evidence on such motion and found who the proper officer under the by-laws of said corporation was to receive said fund, and then ordered the clerk to pay same to such officer.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 253, 254; Dec. Dig. § 146.*]

Error from District Court, Canadian County; George W. Clark, Judge.

Action by George W. Bellamy against the Washita Valley Telephone Company and others. Judgment for defendants and plaintiff brings error. Reversed and remanded, with instructions.

See, also, 105 Pac. 340.

E. E. Blake and Don C. Smith, for plaintiff in error. Dale, Bierer & Hegler, for defendants in error.

TURNER, J. On February 27, 1905, George W. Bellamy, plaintiff in error, plaintiff below, sued the Washita Valley Telephone Company, J. C. Harrel, C. I. Petty, E. A. Harrel, F. H. Wright, G. H. Rowley, H. L. Rowley, and R. D. Reynolds, defendants in error, defendants below, in the district court of Canadian county and in his petition states, substantially, that he is a stockholder in the defendant company, and the capital stock thereof to be \$50,000, divided into 2,000 shares of \$25 each, of which plaintiff owned 48 and the defendant F. H. Wright 47; that the remainder thereof was pretended to be owned by the defendants J. C. Harrel, C. I. Petty, and E. A. Harrel, in amounts unknown to plaintiff; that on its organization plaintiff was elected president and another stockholder secretary; that thereafter said three defendants pretendedly purchased certain stock of said corporation then owned by defendants G. H. Rowley and H. L. Rowley, but the same was never transferred to them or from the sellers thereof on the books of said company, nor certificates of stock lawfully issued to them nor certificates for same ever executed to them by plaintiff as president of said company, that if said stock was ever purchased as pretended it was done in violation of an agreement entered into between G. H. Rowley and H. L. Rowley as parties of the first part, and plaintiff and said Wright parties of the second part in writing, to the effect that neither party would at any time acquire more than one-half of the joint holdings of the said four persons, and that in the event either of said parties desired to sell their stock the other party had the preference right to either buy or sell at the named price and that said three defendants took said stock with full knowledge of the rights of plaintiff therein; that by virtue of said assumed ownership of stock said three defendants were assuming to be stockholders in the said corporation, and notwithstanding the fact that no meeting of stockholders or directors had been held since the election of plaintiff as president thereof, said three defendants have assumed and pretended to be and act as officers of said corporation without authority of law, and had taken possession of the property thereof and assumed control and management of said corporation, and were dissipating its earnings and profits in the way of expenses and salaries to themselves, and prays for a receiver of its properties, and for judgment against each of the defendants, except F. H. Wright, determining and adjusting their interests in the stock of said company and that its affairs be wound up and said corporation dissolved. On the same day notice was served on defendant F. H. Wright, as vice president

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of said company, and, after answer filed, pursuant thereto on March 4, 1905, the judge of said court at the time mentioned in said notice heard the application of said plaintiff and appointed a receiver according to the prayer of his petition, who qualified and took possession of the property of the company and entered upon the discharge of his duties as such receiver. For answer, said three defendants, after interposing a general denial, denied specifically that plaintiff was president of said corporation or owned any stock therein, but alleged that he had parted with the same to the Topeka & El Reno Telephone Company; that they were stockholders therein in good faith to the extent of 105 shares, and had paid therefor a valuable consideration, and denied that the officers of said corporation had refused to permit persons interested as stockholders therein to examine the books and records thereof, or that they were guilty of the conduct charged in plaintiff's complaint, and asked to be discharged with their costs; that thereafter defendants, not disclaiming, filed a motion to vacate said appointment, which said motion was on June 20, 1905, heard and by the court overruled; that thereafter said receiver made report to the court of his trust, and on December 27, 1905, on his petition, was by the court allowed \$25 per month provisionally, and thereafter continued to act as such receiver until November 26, 1906, at which time the cause came on for hearing upon its merits; that on said day after the same was fully heard, the court, in substance, found "the issues in favor of the said defendants upon the facts and law applicable to said cause, except as to the ownership of the corporation stock mentioned and described in the pleadings herein, which the court does not pass upon," and ordered, in substance, that plaintiff take nothing by his suit, that the receiver be discharged, that the property of said company be restored to defendants, and that plaintiff pay all costs, to all of which plaintiff excepted, and on November 23, 1906, filed motion for a new trial which was overruled December 1, 1906, and exceptions saved, the receiver ordered to file his report on a day certain, and plaintiff given 90 days to make and serve a case-made. On December 27, 1906, the receiver filed his report, which was excepted to, and on April 13, 1907, the order of November 26, 1906, was modified by interlineation to the extent of disallowing him attorney's fees, and allowing him certain compensation, to be taxed as costs to plaintiff; with which said exceptions said report was approved, and said receiver ordered to pay over to the telephone company all moneys in his hands belonging to it, \$600 of which was to be secured by bond of said company conditioned to be by it returned in case it should appear on appeal that said order was erroneous in requiring plaintiff to pay the receiver's compensation; and which when done he was to stand discharged. To which said or-

der, so far as the same affected said attorney's fees, taxed plaintiff with the costs including the receiver's compensation, plaintiff excepted and was given time to make a case.

From subsequent proceedings, it appears that during the life of said receivership the same extended to certain notes in the hands of J. C. Harrel acting as president belonging to said defendant company, which were turned over to and by the receiver collected, and the proceeds thereof, some \$1,140, for some reason not appearing, ordered paid to the clerk of the court. To secure this fund, plaintiff on April 18, 1908, filed his petition in the cause, restated in substance his original contention that he was a stockholder and defendants' pretended stockholders in said company, alleged himself to be the president thereof, and as such entitled to said fund, and prayed the court to require said fund to be turned over to defendants, the court found that defendant "J. C. Harrel, as acting president of the said Washita Valley Telephone Company, is the proper person to receive said funds," and ordered the same turned over to him, to all of which plaintiff excepted, and was given 90 days in which to make and serve a case-made. This was signed and settled June 3, 1908, and proceedings in error brought in this court on June 8, 1908, by which he seeks to review and reverse said orders.

But it is contended by defendants in error that this cannot be done because they say that no proceeding in error for a reversal of said order of November 26, 1906, passing on the merits of the cause, nor of the order of December 1, 1906, overruling plaintiff's motion for a new trial, nor of the order of April 13, 1907, modifying the order of November 26, 1906, was filed in this court within one year from the rendition thereof. In this we concur. "Proceedings for the reversing, vacating, or modifying judgments or orders must be commenced within one year after the rendition of the judgment or order complained of." *Ryland v. Coyle*, 7 Okl. 226, 54 Pac. 456; *Hoffman v. Board of County Commissioners*, 8 Okl. 225, 57 Pac. 167; *Wedd v. Gates*, 15 Okl. 602, 82 Pac. 808; *Hebelson v. Hatchell*, 17 Okl. 280, 87 Pac. 643; *Porter et al. v. Brook*, 21 Okl. 885, 97 Pac. 645; *School District, etc., v. Fisher et al.* (Okl.) 99 Pac. 646; *Doorley v. Buford, etc., Mfg. Co.*, 5 Okl. 594, 49 Pac. 936; *Dick et al. v. Williams et al.*, 87 Wis. 651, 58 N. W. 1029; *Castle v. City of Madison et al.*, 113 Wis. 346, 89 N. W. 156; *Sanford v. Weeks et al.*, 50 Kan. 339, 31 Pac. 1088. But in said decree of November 26, 1906, it is specially provided: "Thereupon the court announced its finding and decision, and finds the issues in favor of said defendants upon the facts and law applicable to said cause, except as to the ownership of the corporation's stock mentioned and described in pleadings herein, which the court does not pass upon."

So it is clear that there was no adjudication as to the ownership of stock in said cor-

poration by said decree. If it was error in such proceedings to fail to pass thereon, such error cannot be reviewed in an appeal commenced after the expiration of one year from the rendition of the judgment or order complained of, such judgment having become final. However, the exception in said decree as to the ownership of said stock, becomes final, and consequently there was no adjudication as to such ownership. In the order of April 18, 1908, proceedings in error to review which were brought to this court within one year from the rendition thereof, it is contended that the district court of Canadian county erred by ordering the clerk of that court to pay the fund held by the clerk of the court to J. C. Harrel, as acting president of the Washita Valley Telephone Company, without the finding by that court that the said J. C. Harrel was a stockholder and officer of the said defendant corporation, the Washita Valley Telephone Company. It seems that the said sum of \$1,140 was held by the clerk of the district court as a fund belonging to said corporation. If the plaintiff in error was a stockholder of said corporation, he had a right to see that such fund was paid by the clerk as custodian under the order of the court to the proper officer of said corporation for receiving said fund. It appears from the record that the lower court refused to hear testimony in order to ascertain who the proper officer of the said corporation was to receive said fund, and made the order complained of without hearing any evidence. We do not intimate as to whether or not it was necessary for such officer to be a stockholder of said corporation. That would probably depend upon the by-laws thereof as well as the statutes of this state.

The case is accordingly reversed and remanded, with instructions to the district court to set aside said order, and to proceed to hear and determine who the proper officer of said corporation is for the purpose of receiving and retaining the custody of its funds. All the Justices concur.

(25 Okl. 726)

LOUISIANA REALTY CO. v. CITY OF McALESTER.

(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

1. TAXATION (§ 540*)—VOLUNTARY PAYMENT—RIGHT TO RECOVER.

In order to entitle one to recover taxes voluntarily paid, they must have been paid through mistake of fact and not of law, provided the mistake was not caused by his own neglect of duty.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 999-1001; Dec. Dig. § 540.*]

2. TAXATION (§ 540*)—PAYMENT—"MISTAKE OF FACT"—RECOVERY.

Section 748, Wilson's Rev. & Ann. St. Okl. 1903, provides, in part, that a mistake of fact is a mistake not caused by the neglect of a legal

duty on the part of the person making the mistake.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1001; Dec. Dig. § 540.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4542, 4543; vol. 8, p. 7723.]

3. RECOVERY OF TAXES PAID.

Conceding that plaintiff made a mistake of fact in paying its taxes, when it was not liable, the mistake was caused by its own neglect of duty, and, the payment being voluntary, the law will furnish no relief.

Error from Pittsburg County Court; R. W. Higgins, Judge.

Action by the Louisiana Realty Company against the City of McAlester. Judgment for defendant, and plaintiff brings error. Affirmed.

Eubanks & Elder, for plaintiff in error. Geo. M. Porter, for defendant in error.

KANE, J. This was a suit to recover taxes on town lots assessed and collected by the city of McAlester, prior to statehood. The petition of plaintiff below, plaintiff in error here, alleges, in substance, that the city of McAlester by its officials illegally assessed for taxes in 1905 and 1906 certain lots within its corporate limits, assessing them as the property of plaintiff; that the plaintiff did not own said lots during said years; that plaintiff was not aware of said fact, and through mistake paid the assessment, amounting to \$476.26; that immediately on learning the facts, as alleged, plaintiff petitioned the city council of McAlester to refund said sum, but the petition was denied. The answer amounted to a general denial. There was judgment for the defendant in the county court of Pittsburg county, to reverse which this proceeding in error was commenced.

The evidence and the agreed statement of facts show that the lots on which these taxes were paid were purchased from the Chickasaw Nation, and that at the time the taxes were assessed and paid there was a payment due and unpaid to said nation. On the trial in the court below the following agreement was entered into between counsel for the respective parties: "It is agreed, as a matter of law, that the said assessments on said lots above mentioned were illegal and erroneous, because the city had no power to assess property on which the last payment to the government had not been made." Counsel briefing the case for the defendant in error in this court rather doubts the soundness of the conclusion of law reached by counsel who tried the case; but for the purpose of this case we will treat it as sound. The only question, then, for this court to decide, is: Is the plaintiff in error entitled to recover the taxes thus voluntarily paid, upon the ground that it did not know the last payment to the Chickasaw Nation had not been made at the time it paid these taxes?

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In order to entitle one to recover taxes voluntarily paid, they must have been paid through mistake of fact, and not of law, provided the mistake was not caused by his own neglect of duty. *San Diego, etc., Co. v. La Presa School District*, 122 Cal. 68, 54 Pac. 528; *Cooley on Taxation* (3d Ed.) pp. 1495-1505. The syllabus to the California case reads as follows: "Where property was assessed in a district in which it was not situated, and the owner, having the means of discovering the mistake, voluntarily paid the tax, he could not recover it back, as being paid under a mistake of fact, under Civ. Code, § 1577, defining a 'mistake of fact' as one not caused by the neglect of a legal duty." Section 748, *Wilson's Rev. & Ann. St. Okl.* 1903, provides, in part, that: "Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: First, an unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or, second, belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed." This section of the Oklahoma statute seems to be identical with Civ. Code Cal. § 1577, above referred to. In the case the syllabus quoted is taken from, *Chipman, C.*, who delivered the opinion of the court, says: "It is the legal duty, we think, of the owner of property to see that it is properly assessed, and ample provision is made for correcting mistakes in the roll or list. The manager of the company did not testify that he paid the tax under mistake of fact, but that when the tax was paid he believed the property was inside the district. Conceding, however, that plaintiff made a mistake of fact in paying when it was not liable, the mistake was caused by its own neglect of duty, and, the payment being voluntary, the law will furnish no relief." The rule is stated by Judge *Cooley*, in his work on *Taxation* (3d Ed. p. 1497), as follows: "Every man is supposed to know the law, and, if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as a reason why the state should furnish him with legal remedies to recover it back." And "Mistake of fact can scarcely exist in such a case except in connection with negligence; as the illegalities which render such a demand a nullity must appear from the records, and the taxpayer is just as much bound to inform himself what the records show, or do not show, as are the public authorities. The rule of law is a rule of sound public policy also. It is a rule of quiet as well as of good faith, and precludes the courts being occupied in undoing the arrangements of parties which they have voluntarily made, and into

which they have not been drawn by fraud or accident, or by any excusable ignorance of their legal rights and liabilities."

It is quite plain that the plaintiff had means at hand easily accessible and convenient whereby it could have informed itself of the fact that it claimed to be ignorant of. The deed records of the Central judicial district, at McAlester, were located in the city of its principal place of business. These records would show whether or not the patent to the lots was on record, and would supply other facts sufficient to give one examining them a fairly good idea of the status of the property. The records of the Interior Department, at Muskogee, were also open to inspection, and a letter to the Indian agent would, no doubt, have called forth all the information the plaintiff lacked. That its officers and agents were familiar with conditions attending the town lots in the Indian Nation is quite apparent from the record, as it shows that the corporation had purchased and owned, at the time the taxes were assessed and paid, in the neighborhood of 100 lots in McAlester. Under the state of the record, the court below must have decided the case against the plaintiff on the theory that the mistake of fact complained of was caused by neglect of duty on its part.

As we quite agree with the court in this respect, its judgment is affirmed.

DUNN, C. J., and HAYES and TURNER, JJ., concur. WILLIAMS, J., absent and not participating.

(28 Okl. 48)

MOORE v. ADAMS et al.

(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

DEEDS (§ 211*)—EVIDENCE (§ 78*)—PRESUMPTIONS—FAILURE TO OFFER EVIDENCE—SUFFICIENCY OF EVIDENCE.

In cases where fraud is alleged in the procuring of the execution of written instruments or deeds, the proof must sustain the allegations by a preponderance of the evidence so great as to overcome all opposing evidence and repel the opposing presumptions.

(a) It should be of such weight and exigency as to satisfactorily establish the wrongful conduct charged; honesty and fair dealing as a rule being presumed.

(b) When it lies within the power of a party to an action to produce evidence upon an issue and he fails, the presumption follows that the evidence, if produced, would be unfavorable to the cause of such party.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 644, 645; *Dec. Dig.* § 211.* *Evidence*, Cent. Dig. §§ 98, 100; *Dec. Dig.* § 78.*]

Kane, J., dissenting.

Appeal from the United States Court for the Western District of the Indian Territory, at Muskogee; *Wm. R. Lawrence*, Judge.

Action by Zeke Moore against Richard C. Adams, trustee, and others. There was a di-

*For other cases see same topic and section NUMBER in *Dec. & Am. Digs.* 1907 to date, & *Reporter Indexes*

rected verdict for defendants, and plaintiff brings error. Affirmed.

Bailey & Kistler, Harry Miller, and T. L. Camp, for plaintiff in error. Zevely, Givens & Smith, for National Oil & Development Co. Hutchings, Murphey & German, for F. J. Boudinot and Richard C. Adams, trustee.

WILLIAMS, J. On March 12, 1906, Zeke Moore, the plaintiff in error, who was enrolled as a member of the Creek Tribe as Zeke Moore, and not as Ezekiel Moore, executed to Stella Moore his warranty deed to the 40 acres of land in controversy in the name of Ezekiel Moore, and on the 17th day of March, 1906, Stella Moore conveyed same to Franklin Miller, who, in turn, on the 30th day of April, 1908, conveyed the same to Wm. F. Seibold, he on the 30th day of April, 1908, conveying same to George Bixby. He on the same day conveyed the same to Horace M. Adams and Judson M. Adams. The said Judson M. Adams on the 23d day of August, 1906, conveyed his undivided half interest to Horace M. Adams, who on the 11th day of September, 1906, conveyed the entire tract to Richard C. Adams, trustee, and John D. Merry. On the 17th day of September, 1906, the said John D. Merry conveyed his undivided half interest to Frank J. Boudinot. On the 7th day of November, 1906, Earl Shoenfeldt went to the United States penitentiary at Ft. Leavenworth to procure a new deed in favor of Richard C. Adams, as trustee, and Frank J. Boudinot, from Zeke Moore, who at the time he executed the deed to his sister, Stella Moore, as well as on November 7, 1906, was confined therein as a prisoner. At the time Moore executed the deeds to the defendants in error Richard C. Adams, as trustee, and Frank J. Boudinot, the statement was made by the said Shoenfeldt that they desired to correct the name in the deed. There is no proof in the record showing that at that time the defendants in error or either of them had any information that there was any contention that Zeke Moore was not 21 years of age at the time he executed the deed to Stella Moore, or that Zeke Moore did not know his true age. At the time Zeke Moore conveyed this land to his sister it was undeveloped oil land. At the time the defendants in error Richard C. Adams, trustee, and Frank J. Boudinot, procured the last deed, the defendant in error oil company was making preparations to develop the same for oil, and, as far as this record shows, the only purpose in procuring these additional deeds was in order that the derangement of title might be the same in name. This was a reasonable precaution, and essential in having the abstract passed on with a view of using same as security either by the owners of the land or the holders of the oil lease, then proceeding to place improvements, etc., thereon.

The plaintiff in error selected his own forum, bringing this as an action at law in the United States Court of the Indian Territory at Muskogee, which was tried prior to the erection of the state. It is conceded by counsel for defendants in error Adams, trustee, and Boudinot, that this evidence was admissible under the original pleadings, and the only object of the request for the amendment by counsel for the plaintiff in error in the trial court was that such evidence might be considered in the trial of said cause. So, in the consideration of this case, this evidence will be considered as properly admitted under the original pleadings, and the question then arises as to whether the trial court was justified in directing a verdict in favor of the defendants in error. In the case of Myrick v. Jacks, 33 Ark. 429, the court said: "Fraud must be shown and proven at law. In equity it suffices to show facts and circumstances from which it may be presumed." This case was decided by the Supreme Court of the state of Arkansas at its May term, 1878. The same code of procedure relative to law and equity was in force then as was afterwards extended to the Indian Territory by acts of Congress of May 2, 1890 and March 1, 1895. The prior construction of such procedure by the Supreme Court of Arkansas was also brought over. *Nat. Live Stock Com. Co. v. Talliaferro*, 20 Okl. 177, 93 Pac. 983; *C. O. & G. R. Co. v. Burgess*, 21 Okl. 653, 97 Pac. 271; *Foreman v. Midland Valley Ry. Co.*, 7 Ind. T. 478, 104 S. W. 808.

We have searched the record and have failed to find any evidence tending to show that Zeke Moore did not understand the contents of the two deeds executed to Richard C. Adams, trustee, and Frank J. Boudinot on November 7, 1906, or that he did not know the effect of such instruments or of the proposed development for oil, or his true age at the time the deeds were executed. If plaintiff in error was a minor when the first deed was executed to his sister, Stella, he is presumed at such time to have known of such minority, and that such deed was absolutely void. There is not a scintilla of evidence in the record to rebut such presumption. If he, after becoming of age, for a separate, independent, and valid consideration, though the same may have been inadequate, with a knowledge of the invalidity of the former deed and the situation so as to judge for himself, willingly executed said deed, the same is valid. *Kerr on the Law of Fraud and Mistake*, p. 186. If the plaintiff in error did not know his exact age or that the former deed was invalid, or had no knowledge of the proposed development of said 40 acres of land for oil, and the then status, such evidence was peculiarly within his power to produce; and the same neither having been produced, nor any reason shown

why he did not give said evidence, the presumption of law is against him on that point.

As to what was said to him at the time he signed said deeds there is no dispute. There is no character of evidence showing that there was made to him any false or fraudulent representation, or that anything was done to ratify any prior act of plaintiff, or that defendant in error or their agent bore any confidential relation relative to the plaintiff in error. It appears that the plaintiff in error wrote his own name, and there is nothing tending to show that he was not an intelligent or educated negro. The plaintiff in examining Harper, the notary who took the acknowledgments of Zeke Moore to the two deeds, does not attempt to prove all that was said, but merely a statement as to the purpose of taking the deeds, to wit, to correct Zeke Moore's name in relation to the transfer to his sister, Stella. But he does not go further to show that Zeke Moore did not read the deeds or did not understand them, or thought he was signing deeds to his sister, nor is there anything to show that, as a result of said statement, said deeds were signed. As shown by the record, the sole consideration for executing the same was the sum of \$100 in cash in hand paid to him. True, it appears that at the time of the execution of the deeds and the receiving of the money he was confined in the United States penitentiary at Ft. Leavenworth in the state of Kansas, but there is nothing to show in what tribunal he was convicted, whether in a federal court sitting within the Indian Territory or some other territory, or the District of Columbia, or a state, or of what charge he was convicted. The fact that he may have been confined in the penitentiary and was not on an equal footing with the grantees at the time these deeds were executed, and the consideration received was grossly inadequate, he not having knowledge of such inadequacy or of the then status, these facts might, without more, have been sufficient for the question of fraud to be submitted to the jury. But there is no evidence in the record tending to show that Zeke Moore did not know the value of this 40 acres of land, and of the intention to prospect for oil thereon, nor is there anything to show that the agent of the defendants in error or the defendants in error bore such a relation to the plaintiff in error on account of his being confined in the United States penitentiary as to have any advantage over him in this transaction. It may be contended, however, that the plaintiff in error, being confined in the United States penitentiary at Ft. Leavenworth, was incompetent to testify, and for that reason he was unable to repel such presumption. But there is nothing to show that at the time of the trial he was confined in the penitentiary. His term may have terminated so far as the record goes. But, assume that it had not, if he was

incompetent to testify, the burden rested upon the party seeking to excuse him from testifying to establish such incompetency by evidence which would be by the judgment roll of conviction, and, if that showed a conviction of a disqualifying crime in the same jurisdiction, that would suffice, and then the burden would shift to show a reversal of the judgment or pardon or removal of such disqualification. 1 Wigmore on Evidence, § 523, p. 653; *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 431. Section 1974 (section 2859, Mansf. Dig. Laws Ark.) Ind. T. Ann. St. 1899, which controlled in the forum where this case was tried, to wit, United States Court for the Western District of the Indian Territory at Muskogee, provides that persons convicted of a capital offense or of perjury, subordination of perjury, burglary, robbery, receiving stolen goods, forgery, or counterfeiting, except by the consent of the parties, shall be incompetent to testify. Convictions for violations of the laws then in force in said territory against the sale, bartering, giving away, furnishing, or introducing of intoxicating liquors into said territory, manslaughter, assault with intent to kill, abduction, bigamy, maiming, kidnapping, removing property mortgaged or subject to other lien, and numerous other offenses defined as felonies by statutes then in force in said jurisdiction were punishable by imprisonment in the federal penitentiary, but such convictions did not per se render the convicted party incompetent as a witness. There was no effort on the part of the plaintiff in error to excuse himself from not testifying, and, so far as this record is concerned, it is to be assumed that he was a competent witness. It is a well-settled rule that when it lies within the power of a party in interest in an action to produce evidence upon an issue, and he fails, the presumption follows that same, if produced, would be unfavorable to his cause. *M., K. & T. Ry. Co. v. Ward*, 1 Ind. T. 670, 43 S. W. 954. In this case the burden is on the plaintiff to make out his case, and especially is it the plaintiff's duty by evidence to rebut every negative presumption when he presumably has peculiar knowledge enabling him to meet such presumption.

In the case of *Insurance Co. v. Rammelsberg*, 58 Kan. 531, 50 Pac. 446, Mr. Chief Justice Doster, in delivering the opinion of the court, said: "In all civil actions the party asserting the affirmative of an issue is entitled to prevail upon the production by him of a preponderance of evidence, but in cases where fraud in the execution of written instruments is charged the question may well arise: How greatly must the evidence of such fraud preponderate? Will the overbalancing of the scale by so much as a hair's weight suffice, or must the excess be decided, convincing and satisfactory? Considering that honesty and fair dealing are always presumed, and that fraud must always be proved, and that the writings of parties are

supposed to fully and correctly set forth their engagements, it cannot be that a barely appreciable overweight of evidence is sufficient to overcome such presumptions, together with the testimony of witnesses fortifying the same, convict one of the parties of moral turpitude, and set aside his deliberately executed agreements. It is true that the law in such cases requires nothing but a preponderance of evidence, but it requires that preponderance to be great enough to overcome all opposing evidence and repel all opposing presumptions. In order to do so, it should be of such weight and cogency as to satisfactorily establish the wrongful conduct charged. The authorities are uniformly to this effect, and it will be sufficient to cite only the approved text-books, where the statement of the rule will be found together with citations in its support. 2 Wharton on Evidence, §§ 932, 1019; 1 Rice's Evidence, p. 302; 2 Pomeroy's Equity Jurisprudence, §§ 850-862." In the case of *Lalane et al. v. United States*, 164 U. S. 255, 17 Sup. Ct. 74, 41 L. Ed. 423, Mr. Justice Peckham in delivering the opinion for that court said: "In all proceedings instituted to recover moneys or to set aside and annul deeds or contracts or other written instruments on the ground of alleged fraud practiced by a defendant upon a plaintiff, the rule is of long standing, and is of universal application, that the evidence tending to prove the fraud and upon which to found a verdict or decree must be clear and satisfactory. It may be circumstantial, but it must be persuasive. A mere preponderance of evidence which at the same time is vague or ambiguous is not sufficient to warrant a finding of fraud, and will not sustain a judgment based on such finding." In the case of *United States v. Maxwell Land Grant Company*, 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. Ed. 949, the court said: "We take the general doctrine to be that, when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition as thus laid down in the cases cited is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal." The *Maxwell Land Grant Case* is also quoted with approval by Mr. Justice Brewer in the case of *United States v. American Bell Telephone Co.*, 167 U. S. 224, 17 Sup. Ct. 809, 42 L. Ed. 144.

Now, in this case, the deed executed by the plaintiff in error to the defendants in error

was acknowledged before a notary public, the defendant in error signing his own name and presumably understanding the contents of the instrument and reading the same. No false representations being made to him, the question then arises as to whether or not, the fact being that he was confined in prison, the defendants in error should have disclosed to him that said 40 acres of land was to be prospected for oil. Assuming that it was the duty of the defendants in error or their agent to so inform him, such is presumed to have been done, wrong not as a rule being presumed to have been done (*Kerr on Fraud*, p. 384), and there is not one scintilla of evidence in this record that he was not so informed. Mr. Chief Justice Doster in the *Kansas case* lays down the rule that it requires that preponderance of evidence to be great enough to overcome all opposing evidence and repel all opposing presumptions. The plaintiff in error in this case was the party in interest, and it is to be assumed that, under the record in this case, he was competent to testify, and thereby overcome or repel such presumption; it thus being within his power to overcome it, and not doing so, under the circumstances, we are not prepared to say the lower court erred in directing a verdict in favor of the defendants. 4 *Wigmore on Evidence*, § 2493, p. 3535.

The judgment of the lower court is affirmed. All the Justices concur, except KANE, J., who dissents.

(26 Okl. 19)

SCULLY v. WILLIAMSON.

(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

1. BROKERS (§ 69*)—ACTION FOR SERVICES—COMPENSATION.

When a real estate broker sues to recover compensation for services rendered in procuring a purchaser under a contract which fails to fix his rate of compensation, he is entitled to recover a fair and reasonable compensation for the services rendered in compliance with his contract.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 55; Dec. Dig. § 69.*]

2. BROKERS (§ 64*)—RIGHT TO COMMISSION—INABILITY OF PURCHASER TO PERFORM.

Where a broker is employed to procure a purchaser for property, and presents to his principal a purchaser, it is for the principal then to decide whether the person presented is acceptable; and if, without any fraud, concealment, or other improper practice on the part of the broker, the principal accepts the person presented, and enters into an enforceable contract with him, the broker is entitled to compensation for his services, although it subsequently turns out that the purchaser is not able to comply with his contract, and on that account the sale is not consummated by a transfer of the property.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 97; Dec. Dig. § 64.*]

*For other cases see same topic and section NUMBER in Dec. & Am. D'gs. 1907 to date, & Reporter Indexes

Error from District Court, Custer County; C. F. Irwin, Judge.

Action by Jerry C. Scully against J. A. Williamson. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Geo. T. Webster, for plaintiff in error.
Henry Bulow, for defendant in error.

HAYES, J. Plaintiff in error brought this action in the court below to recover on a claim in favor of the Scully Land Company, a corporation, for commission for services rendered by said company to defendant in the sale of certain real estate and personal property, which claim or account is alleged to have been assigned to plaintiff. A demurrer to plaintiff's evidence was sustained by the trial court. Said action of the court is the only error urged for a reversal of the cause.

The Scully Land Company is a corporation, of which, during the year 1904, plaintiff was president. During said year plaintiff resided in Custer county. Some time before June 10th of that year, Mr. Williamson, the defendant, listed for sale with the Scully Land Company certain real estate and personal property located in Custer county. He visited the office of the company several times, insisting and urging that the company give the sale of his land special attention, and that it be preferred over other property listed with it for sale. The company took divers prospective buyers to look at his property, among whom was a man by the name of Remund from Minnesota, who liked the property, and stated to the officers of the corporation that he would endeavor to induce his son to come down from Minnesota and buy it. Plaintiff afterwards moved to Oklahoma City, to which place young Remund came, and was by plaintiff, who appears to have been still acting as officer of the corporation, shown various pieces of property in the country around Oklahoma City, and was later taken by plaintiff to Custer county to inspect the property of defendant. He was by plaintiff introduced to defendant. Defendant and he agreed upon the terms of a purchase and sale, and the same were reduced to a contract in writing by which defendant agreed and bound himself to convey to the purchaser by warranty deed certain real estate and certain personal property for the total sum of \$9,500, and the purchaser agreed and bound himself to pay for said property at the time and in the manner specifically stated in their contract. The contract, after having been executed by both parties, was placed in the hands of plaintiff, to be held by him until the performance of same. The evidence discloses that this contract was not performed by Remund, the purchaser, in accordance with the terms thereof, for the reason that the said Remund was unable to sell certain property owned by him, the sale of which was neces-

sary in order for him to secure funds with which to carry out said contract. The evidence does not disclose that any rate of commission was agreed upon between the corporation and defendant, but there is evidence that a reasonable commission for such services is 5 per cent. of the proceeds of the sale, and it is established that the claim of the corporation has been assigned to plaintiff. Demand was made by the corporation of defendant before the assignment of its claim against him for payment thereof, which was refused, and the same has never been paid. The foregoing statement states substantially the facts most favorable to plaintiff that are established by direct evidence or based upon inferences and conclusions that may be reasonably and logically drawn from the evidence. When a demurrer to the evidence is interposed, it must be taken that he who interposes it admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which may be reasonably and logically drawn therefrom, and the court will not weigh conflicting evidence, but will treat, as withdrawn, all the evidence which is most favorable to the party demurring. *Ziska v. Ziska et al.*, 20 Okl. 634, 95 Pac. 254, 23 L. R. A. (N. S.) 1; *Edmisson v. Drumm-Flato Commission Co.*, 13 Okl. 440, 73 Pac. 958.

Defendant contends that the testimony of plaintiff is deficient in three particulars, to wit: That it fails to show any contract of employment of the corporation by him; second, that the sale from defendant to the prospective purchaser was never consummated; and, third, that it does not show that the corporation furnished a purchaser who was ready, willing, and able to buy. The first of these contentions is without any merit. There is abundant evidence to show that the corporation was engaged in selling lands for commission; that defendant listed his property with it, and frequently thereafter visited that company, urging it to push the sale of his property. The evidence does not show what compensation the corporation was to receive for its services; but, in the absence of an expressed agreement relative thereto, there is an implied agreement on the part of defendant that he will pay a reasonable compensation therefor. 1 Amer. & Eng. Encyc. of Law, 115; 4 Amer. & Eng. Encyc. of Law, 790. It is true that a real estate agent who finds a purchaser for property without any request of the owner to act for him, and in the absence of any acts of the owner which may be construed as employing by implication the agent to act for him, is not entitled to a commission, and is to be treated as a mere volunteer without authority. *Johnson v. Whalen*, 13 Okl. 320, 74 Pac. 503; *Twelfth Street Market Co. v. Jackson*, 102 Pa. 269; *Stewart v. Pickering*, 73 Iowa, 652, 35 N. W. 690. But this rule has no application to the facts in this case.

Defendant's last two contentions may be

considered together. The evidence fails to show that the sale contracted for between defendant and Remund was ever consummated, but it is said in *Kalley v. Baker*, 132 N. Y. 1; 29 N. E. 1091, 23 Am. St. Rep. 542, that a broker employed to sell property becomes entitled to his commission when he finds a purchaser satisfactory to his employé, and they enter into a mutual contract of purchase and sale, though it subsequently turns out that the purchaser is unable to comply with his contract, and on that account the sale is not consummated by transfer of the property. In the case at bar the broker brought to the owner of the property a prospective purchaser, with whom the owner was satisfied, and with whom he executed a contract for a sale, thereby determining for himself the ability of the purchaser to purchase. For any violation of this contract by the purchaser defendant had his remedy for damages for the loss sustained by him by reason of the purchaser failing to fulfill his contract. In *Francis v. Baker*, 45 Minn. 83, 47 N. W. 452, the general rule is declared to be that: "Where a broker is employed, for a commission to be paid, to procure a purchaser for property, and presents to the principal a proposed purchaser, it is for the principal then to decide whether the person presented is acceptable; and if, without any fraud, concealment, or other improper practice on the part of the broker, the principal accepts the person presented, and enters into an enforceable contract with him for the purchase of the property, the commission is fully earned. * * *"

The rule announced in the foregoing cases is approved generally by both the courts and the text-writers. 19 Cyc. 271, and authorities there cited. It has received approval in this jurisdiction. *Yoder v. Randol et al.*, 16 Okl. 308, 83 Pac. 537, 3 L. R. A. (N. S.) 576. After Remund failed to make payment under his contract, the corporation had one of its agents to call upon him to ascertain why he was not carrying out his contract, and to endeavor to induce him to perform it. But this act on the part of the corporation in no way affects its right to recover its commission, which had become earned when the contract of purchase was executed, and defendant had accepted the purchaser as satisfactory to him. Had defendant embodied in his contract of employment with the corporation a stipulation that he should not be liable for any commission unless a sale was finally consummated and the property transferred, then the fact that the corporation, although it made effort to have the purchaser carry out his contract, failed to secure the performance thereof, would be fatal to plaintiff's right of recovery; but it is not made to appear by the pleadings of either party, or by evidence, that there was such stipulation in the contract of employment.

It follows that the judgment of the trial court must be reversed, and the cause remanded.

DUNN, C. J., and WILLIAMS, TURNER, and KANE, JJ., concur.

(28 Okl. 47)

WATSON v. REIN et al.

(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 351*)—DISMISSAL OF WRIT.

Where no summons in error is issued or præcipe filed therefor, and no general appearance is made by defendant in error within one year after the rendition of the judgment appealed from, a proceeding in error is not commenced within one year after the rendition of the judgment, as required by section 4748, Wilson's Rev. & Ann. St. 1903, although a petition in error and case-made have been filed within said period of one year, and the proceeding will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1915-1919; Dec. Dig. § 351.*]

Error from District Court, Kay County; W. M. Bowles, Judge.

Action by Mabel C. Watson against Henry Rein and others. Judgment for defendants, and plaintiff brings error. Dismissed.

W. K. Moore and Moss & Turner, for plaintiff in error. J. F. King and L. A. Maris, for defendants in error.

WILLIAMS, J. The judgment sought to be appealed from in this case was rendered on the 3d day of December, 1907, in the district court of Kay county, state of Oklahoma. On the 27th day of November, 1908, the petition in error with case-made attached, was filed in this court, but the præcipe for summons was not filed until the 7th day of January, A. D. 1909, on which date summons in error was issued. The defendants in error moved to dismiss this appeal on the ground that neither was any præcipe filed in this court nor any summons in error issued within one year from the date of the judgment sought to be reviewed.

In the case of *Williams v. Paullin et al.*, 104 Pac. 342, it was held by this court that "where no summons in error is issued or præcipe filed therefor, and no general appearance is made by defendant in error within one year after the rendition of the judgment appealed from, a proceeding in error is not commenced within one year after the rendition of the judgment, as required by section 4748, Wilson's Rev. & Ann. St. 1903, although a petition in error and case-made have been filed within said period of one year, and the proceeding will be dismissed." See to the same effect, *McMurtry v. Byrd et al.*, 101 Pac. 1117; *Court of Honor v. Wallace et al.*, 102

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Pac. 111. See, also, case of Kilgore v. Yarnell et al., 103 Pac. 698; School Dist. No. 39, Kiowa County, v. Fisher, County Treasurer (First Nat. Bank of Hobart, Intervener), 99 Pac. 646.

It follows that this appeal was not commenced in such time after the rendition of the judgment for this court to acquire jurisdiction, and the same is accordingly dismissed. All the Justices concur.

(25 Okl. 741)

THOMPSON et al. v. STATE ex rel. COOKSEY et al.

(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

1. MANDAMUS (§ 146*)—ISSUANCE OF WRIT—PROCEDURE—PARTIES.

It is the better practice to issue the writ of mandamus in the name of the state on the relation of the party or parties interested, although such writ may issue in the name of such party under the Code provision requiring the real party in interest to sue.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 287; Dec. Dig. § 146.*]

2. MANDAMUS (§ 141*)—JURISDICTION.

That part of section 10, art. 7, of the state Constitution, which provides that "the district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition, and other writs, remedial or otherwise, necessary or proper to carry into effect their orders, judgments, or decrees," constitutes a grant of distinct jurisdiction, not depending on other provisions defining classes of cases or amounts in controversy over which also jurisdiction is given, and gives the substantive power to issue the writs named in all cases where courts of law or equity under settled rules would have the power to issue them, whether they be necessary to enforce some jurisdiction given by the other provisions or not.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 276-278; Dec. Dig. § 141.*]

3. MANDAMUS (§ 141*)—JURISDICTION—ISSUANCE IN VACATION.

The judges of the district courts have authority, under that part of section 10, art. 7, of the Constitution, empowering the district courts and the judges thereof to issue writs of mandamus, etc., to issue in vacation a mandamus notwithstanding the right of trial by jury is preserved in the bill of rights, and, if it be conceded that a respondent in mandamus is entitled to a jury trial on disputed questions of fact, the only consequence is that the judge cannot then grant the writ in vacation.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 276; Dec. Dig. § 141.*]

(Additional Syllabus by Editorial Staff.)

4. WORDS AND PHRASES—"SAID COURT AND JUDGES THEREOF."

The well-settled construction of such a phrase as "said court and the judges thereof," as used in a statute conferring certain powers on the court, is that it means the court when in session, and the judges acting in vacation.

Error from District Court, Greer County; G. A. Brown, Judge.

Action by the State, on the relation of W. H. Cooksey and others, for writ of manda-

mus to J. F. Thompson and J. M. Lassiter. From an order granting the writ, defendants bring error. Affirmed.

Eagin & Eagin and Burford & Burford, for plaintiffs in error. Thacker & Thacker, for defendants in error.

KANE, J. This case in the court below was entitled State of Oklahoma ex rel. W. E. Cooksey et al., Plaintiff, v. J. F. Thompson and J. M. Lassiter, Defendants. The petition alleged, in substance, that the plaintiffs and defendants were all resident citizens, qualified electors, taxpayers owning both real and personal property, and public school patrons having children within scholastic years residing with them in and for school district No. 17 of Greer County; that defendant J. F. Thompson was and is the director, and that said J. M. Lassiter was and is the treasurer, and W. J. Miller, Jr., was and is the clerk composing the school board of said district; that an election was lawfully held within said district for the purpose of determining the question of issuing four bonds of said school district to the amount of \$2,000, for the purpose of purchasing a site for a school building, erecting a school building thereon, and purchasing school furniture for same; that more than three-fifths of the voters of said district voting at said election declared by their ballots in favor of and authorized the issuance of said bonds, which result of said election was duly ascertained and declared by the judges of said election, composed of J. C. Woody, instead of the said J. M. Lassiter, and of the said J. F. Thompson and W. J. Miller, Jr., and the said board made the same a matter of record, minus the signature of J. F. Thompson and J. M. Lassiter, so that the said board has long since been and is now in duty bound to issue said bonds, over the official signature of the said J. F. Thompson, as director and the said W. J. Miller, Jr., as clerk, and to sell and dispose of the same in accordance with said purpose and the law in this regard, after registering the same with a transcript of all proceedings in voting said bonds with the State Auditor and with the county clerk, and, as a further prerequisite to the sale of said bonds, said board should have made and certified copies thereof to the State Auditor, and the county clerk should have reported an order for the necessary tax to pay interest thereon, and provide a sinking fund to pay the principal; that, although often requested, the defendants and each of them have wholly failed and refused, and still fail and refuse, to perform such duties devolving upon them by virtue of the law and their official positions. A writ of mandamus was prayed for requiring the defendants to perform said alleged duties. Thereafter an alternative

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

writ was issued. The defendants filed their answer thereto, the averments of which it is not necessary to notice in reviewing the questions raised on appeal, and thereafter the cause came on to be heard before the Honorable G. A. Brown at his chambers and in vacation, and at a time when no term of his court was in session, and, after hearing the allegations of the parties and the testimony of witnesses and arguments of counsel, said judge took said cause under advisement, and afterwards, at his chambers and in vacation, and at a time when no term of court was in session in said county and district, found the issues in said action in favor of plaintiffs and against the defendants, and directed an order that a peremptory mandamus be issued against the defendants. To reverse this order of the court this proceeding in error was commenced.

The grounds upon which counsel for plaintiffs in error seek to reverse the judgment of the court below are stated by them in their brief as follows: (1) The plaintiffs and relators are not the real parties in interest. (2) "Section 10, art. 7, of the Constitution, vests in the 'district courts or any judge thereof' a limited power to issue writs of mandamus, 'where necessary or proper to carry into effect their orders, judgments or decrees,' and it would seem to follow that this exclusive grant of power to the Supreme Court to issue, hear, and determine writs of mandamus as an exercise of original jurisdiction operates as a denial of that function to any other court." (3) It was error to proceed with the trial of the disputed issues of fact in chambers and in vacation. (4) The parties were entitled to trial by jury, and did not waive the right by failing to demand a jury. Such demand in vacation would have been futile, as no jury could have been lawfully convened. (5) Final judgment cannot be rendered in vacation and at chambers.

On the first proposition, the Supreme Court of Oklahoma from a very early date has held that "it is the better practice to issue a writ of mandamus in the name of the territory on relation of the party interested, though, perhaps, such writ might issue in the name of such party under the Code provision requiring the real party in interest to sue." *Rider v. Brown et al.*, 1 Okl. 244, 32 Pac. 341. In *Collet v. Allison*, 1 Okl. 42, 25 Pac. 516, it was held that: "The writ of mandamus is one of the extraordinary remedies resorted to in cases where the usual modes of procedure cannot furnish the desired relief, and should be commenced in the name of the sovereign power on the relation of the party aggrieved." The general rule is stated in 13 Enc. P. & P. pp. 632-635, as follows: "In some instances a distinction has been made between public duties due the state in its sovereign capacity and those public duties affecting all or a large number of the citizens. When the duty is of the latter kind, it is held that a private

citizen may be the relator in a mandamus proceeding to enforce it. In some states it is held that a writ of mandamus may be granted upon the application of any person who is a citizen, resident, or taxpayer, though he may be affected no more than other persons. A citizen has been held to be a proper relator in cases relating to elections, the rescinding of appointments, taxation, the collection of assessments, highways, liquor laws, city ordinances, public schools, the selections of a county superintendent, municipal aid to a railroad company, the operation of street cars, location of county offices, the removal of a county seat, the appointment of a board of health, the publication of state laws, and the striking of an act of the Legislature from the register. A special interest has been held unnecessary to entitle a person to institute mandamus proceedings to revoke a license or a permit. * * *

All other questions raised by counsel for plaintiffs in error are fully discussed and decided to our satisfaction in *Thorne, Judge, v. Moore et al.*, 101 Tex. 205, 105 S. W. 985. That was an original application to the Supreme Court of Texas for a writ of mandamus to compel the Honorable Gordon Boone, judge of the Twelfth judicial district, to vacate an order made by him at chambers, in Madison county, on the 6th day of November, 1907, awarding a peremptory mandamus to relator, as county judge of Leon county, requiring him to make the statutory publication of the result of a local option election held in the town of Oakwood on the 23d day of September, 1907. The questions raised involved the construction of section 6 of article 5 of the Constitution of the state of Texas, which defines the power and jurisdiction of district courts and the judges thereof, and is identical in meaning with that part of section 10, art. 7, of our Constitution, which provides: "The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition, and other writs, remedial or otherwise, necessary or proper to carry into effect their orders, judgments, or decrees." Mr. Justice Williams, who delivered the opinion for the court, says: "Section 8 of article 5 of the Constitution, which defines the power and jurisdiction of the district court and the judges thereof, provides: 'And said court and the judges thereof shall have power to issue writs of habeas corpus, mandamus, injunction, and certiorari, and all writs necessary to enforce their jurisdiction.' This provision has been construed as giving the substantive power to issue the writs named in all cases when courts of law or equity, under settled rules, would have the power to issue them, whether they be necessary to enforce some jurisdiction given by the other provisions or not. This provision is in itself a grant of distinct jurisdiction and powers

which do not depend upon the other provisions defining classes of cases or amounts in controversy over which also jurisdiction is given. *County of Anderson v. Kennedy*, 58 Tex. 616. The well-settled construction of such a phrase as 'said court and the judges thereof' is that it means the court when in session, and the judges acting in vacation. The language, therefore, equally empowers the court when in session and the judge, when the court is not in session, to issue the writs. The power is conferred upon the judge in the same language that confers it upon the court. Unquestionably the court has power to issue the peremptory mandamus. Now, then, can the same words that grant it to the court be held not to have granted it to the judge? What these writs are and in what character of actions and under what circumstances they may be used the Constitution does not say. It assumes, which is true, that their scope and operation, the rights they may be used to protect, or the wrongs they may be used to prevent, or redress, are settled and defined by the already existing principles of law, and vests the power to employ them in accordance with these principles in the courts and judges. The provision must therefore be construed and applied in connection with the rules of law by which the use of the writs must be controlled. Upon this idea it may be argued that the power given to the judges was that to issue the alternative writ of mandamus, while the power to issue the peremptory writ was that vested in the court itself. The Constitution suggests no such distinction, but if, by reference to the law existing when it was adopted, we could see that such a difference had always been clearly made in this state, and that power in the judges to issue an alternative writ would possess some real efficacy would give some substantial force to the provision quoted, we might find some strength in the position. There has been a terminology brought into this state from that employed elsewhere which recognizes two writs of mandamus, the alternative and the peremptory, or absolute. But the alternative writ has no such real place in our procedure as it has elsewhere. With us all that need precede the final writ is a notice, whatever it may be called, sufficient to give opportunity for the hearing. *Griffin v. Wakelee*, 42 Tex. 513; *Houston v. Emery*, 76 Tex. 282, 13 S. W. 264; *Id.*, 76 Tex. 321, 13 S. W. 266; *Bradley v. McGrabb*, *Dallam*, Dig. 508, 509. In the first case Judge Moore points out the difference between the writ of mandamus and the procedure necessary to secure it, as they obtain in this state, and the common-law writ from which ours takes its name, and says: 'The relief sought to be effected through its aid is asked, as in any other case, by a petition alleging the facts by virtue of which it is claimed, with a prayer for such judgment as the facts warrant. The defendant is served and required to answer as in

any other suit, and the case proceeds to trial and judgment as any other action, and there is no distinguishable difference in principle in the course of proceeding and result attained in it and any other suit in the district court. When the judgment is rendered by the court, unless superseded or suspended by writ of error or appeal, it is carried into effect by the appropriate writ for this purpose, termed in the statute a 'writ of mandamus,' from analogy, no doubt, drawn from the nature of the matters complained of in the petition to cases in which relief is granted by this writ at common law. Plainly, then, unless we discard principles, and are controlled merely by names, it must be treated and regarded as a judicial writ, based upon and issuing by virtue of, and to carry into effect, a judgment of the district court. And so it has been in effect held by the Supreme Court of the United States.' With this definition of the writ and the procedure incident to it before them, the framers of the Constitution empowered not only the district courts, but the district judges, to issue it. It is apparent from this that no power but that to issue the absolute writ would be of any efficacy in the hands of the district judge, since that which was formerly called the alternative had been superseded by a mere notice to show cause or to answer. The power given by the Constitution to the judge to issue a mandamus cannot be frittered away by holding it to be a mere power to issue a notice which the clerk can issue as well as he. In the two cases in 76 Tex. 13 S. W., an ordinary citation was held to be sufficient. But it is said that the existence of such a power in the district judges would not consist with the right of trial by jury preserved in the bill of rights. The right of trial by jury exists only with respect to disputed questions of fact. It could not be said to exist in all cases of mandamus, many of which, as does this one, depend upon pure questions of law arising upon admitted facts. Therefore this right given its broadest scope does not conflict with the existence of the power in question. If it be conceded for the purposes of this case that a respondent is entitled to a jury trial whenever in such a case a disputed question of fact essential to its decision arises, and that the judge cannot lawfully provide such a trial in vacation. The only consequence would be that the judge could not then grant the writ because of the constitutional right thus arising as an impediment. It would also be true that the court, if in session, could not in such a case grant the writ until the facts essential to its issuance had been found by a jury. This court cannot issue the writ when the facts essential to the applicant's right are in dispute, but it nevertheless has the unquestioned power when the facts are admitted. The right of trial by jury, therefore, does not negative the existence of the power in question. The contention that it does would make one provi-

tion destroy another in the same Constitution. If it is true that as the statutes now stand the judge in vacation cannot provide for the trial of issues of fact in such cases, it is not true by reason of any provision in the Constitution; the Legislature, so far as we can now see, having full power to make provision for the case. The argument therefore loses its force as affecting the construction of the Constitution."

As the foregoing reasoning of the Supreme Court of Texas is satisfactory to us, as far as it pertains to the questions involved in the case at bar, we adopt its opinion.

The judgment of the court below is affirmed.

DUNN, C. J., and HAYES and TURNER, JJ., concur. WILLIAMS, J., absent and not participating.

(25 Okl. 704)

ST. LOUIS & S. F. R. CO. v. SHANNON
(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

1. RAILROADS (§ 481*)—FIRES SET BY LOCOMOTIVES—EVIDENCE.

In an action against a railroad company to recover damages on account of fire caused by sparks from one of its locomotives, evidence of the setting of other fires by other locomotives is competent where it is made to appear that they were practically identical in construction to the one supposed to have set the fire.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1719-1722; Dec. Dig. § 481.*]

2. RAILROADS (§ 482*)—FIRES—CIRCUMSTANTIAL EVIDENCE.

The fact that a fire, which destroyed property, originated from the sparks of a passing locomotive; may be shown by circumstantial evidence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1730-1736; Dec. Dig. § 482.*]

3. RAILROADS (§ 482*)—VERDICT CONTRARY TO EVIDENCE—SUFFICIENCY OF EVIDENCE.

A barn situated about 100 feet north of a railroad track was destroyed by fire, which caught at an opening in hay with which it was filled. An engine, running heavy and throwing sparks or cinders toward the barn, passed just prior to the time of the discovery, and no other cause for the fire is suggested than that it was set from this engine. Fires from sparks from this or other similar engines running on the same track had set fire to grass immediately around the barn on previous recent occasions. *Held*, that an order overruling a motion for new trial, for that the evidence did not reasonably sustain a verdict against the company, was not error.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1730-1736; Dec. Dig. § 482.*]

Error from District Court, Bryan County; D. A. Richardson, Judge.

Action by O. L. Shannon against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. A. Kleinschmidt and R. M. Campbell, for plaintiff in error. Hatchett & Ferguson, for defendant in error.

DUNN, C. J. March 24, 1908, defendant in error, as plaintiff, filed his action against plaintiff in error, as defendant, in the district court of Bryan county, Okl., wherein he sought to recover damages occasioned by the destruction of his barn by fire, which he alleges was set by a locomotive engine running and operated by defendant upon its railroad. A trial was had to a jury, which resulted in a verdict for the plaintiff, on which judgment was entered, and the case has been brought to this court for review.

Two propositions are presented by counsel for plaintiff in error for our consideration: First, that the court erred in permitting defendant in error to introduce evidence showing that other engines of plaintiff in error, prior to the time of the fire in question, were seen to emit sparks and cinders and to set out fires in the vicinity where this fire occurred. Second, that the evidence introduced was not sufficient to sustain the verdict and the judgment. Counsel place most stress upon their first proposition in view of the fact, as is contended, that the engine which was supposed to have set out the fire was identified and known. Counsel for both parties have briefed this question extensively, and an investigation of it disclosed that there is much conflict in the authorities. A most exhaustive and satisfactory note on this proposition is appended to the case of Florida East Coast Ry. Co. v. Welch (53 Fla. 145, 44 South. 250) 12 Am. & Eng. Ann. Cas. 210. Herein are collated the authorities from every jurisdiction in the United States, and, without a review thereof, we will say that it would seem that the weight of authority is to the effect that, where the engine which is alleged to have set out the fire is identified, then evidence of other fires by other engines and at other times is inadmissible. This states the general rule on the proposition, yet there are exceptions to it within which in our judgment the facts disclosed by this record cause this case to fall, and which relieve us of passing on it. The rule fixed by the exceptions seems to be that where the defense relied upon by the company is that the point at which the fire is set is beyond the limit locomotives of the company throw cinders or fire, or where it is established that the engines of the company are all practically identical in their construction and operation, then it is permissible, independent of the identification of the engine which it is asserted actually set the fire, to show that other fires, not too remote in point of time, have been set by other engines of the company. *Dunning v. Maine Central R. R. Co.*, 91 Me. 87, 39 Atl. 352, 64 Am. St. Rep. 208; *Big River Lead Co. v. St. Louis, Iron Moun-*

tain & So. R. R. Co., 123 Mo. App. 394, 101 S. W. 636; *Campbell v. Missouri Pacific R. Co.*, 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530; *Matthews v. Missouri Pacific R. Co.*, 142 Mo. 645, 44 S. W. 802; *Black v. Minneapolis & St. L. R. Co.*, 122 Iowa, 32, 96 N. W. 984; *Chesapeake & O. R. Co. v. Richardson (Ky.)* 99 S. W. 642; *Louisville & Nashville R. Co. v. Short*, 110 Tenn. 713, 77 S. W. 936; *Louisville & Nashville R. Co. v. Fort*, 112 Tenn. 432, 80 S. W. 429; *Sheldon v. Hudson River R. R. Co.*, 14 N. Y. 218, 67 Am. Dec. 155.

Witnesses for the defendant testify that engine No. 601, which was switching in the yards at the time of the fire, had been inspected shortly prior to that time, and that it was in good condition; that the fire-netting was perfect, and the netting to prevent the emission of sparks was the standard size without holes or defects; that this inspection was made both the day before the fire and also the day afterward; that the mesh made by the spark arrester was 3 to the inch; and that the sparks or cinders traveled a distance of 13 to 14 feet diagonally before they turned up to leave the smokestack. The engineer testified that he had never seen fire set to a house or anything except the right of way, and another witness testified that the defendant company keeps its engines up to the very highest standard; that the other engines were subjected to the same inspection and kept up to the same high standard as nearly as could be, as engine No. 601, and that it was no better than any of the rest.

In the case of *Dunning v. Maine Central Railroad Co.*, supra, the counsel for plaintiff contended that the locomotive which drew the Dover & Dexter train was the one which set the fire. Evidence was offered showing that other engines of the defendant corporation had set fires in that vicinity and had emitted sparks and cinders. On the admissibility of this evidence the Supreme Judicial Court of Maine said: "That other engines of the same company, under the same general management, passing over the same track at the same grade, at about the same time, and surrounded by the same physical conditions, have scattered sparks or dropped coals so as to cause fires, appeals legitimately to the mind as showing that it was possible for the engine in question to do likewise. Such testimony is illustrative of the character of the locomotive, as such, with respect to the emission of sparks or the dropping of coals." The same question was raised in the case of *Big River Lead Company v. St. Louis, Iron Mountain & Southern R. R. Co.*, supra, and in discussing its admissibility the St. Louis Court of Appeals said: "The reason for admitting such evidence was stated in *Sheldon v. Railroad*, 14 N. Y. 223 [67 Am. Dec. 155]. * * * The reason is that there is usually a uniformity of plan and construction in locomotives used by a railway company, so that, if some of them emit cinders,

presumably the others do. If they differ in construction, and some are less likely to throw out fire than others the company can prove these facts." And the Supreme Court of the state of Missouri has gone to yet a further extreme on this same proposition in its holding in the case of *Matthews v. Missouri Pacific Railway Company*, supra, wherein it is said: "In a suit under section 2615, Rev. St. 1889, against a railroad for destroying a barn by fire, a witness was permitted to testify to having seen, subsequently to the fire, a spark from an engine strike the center pole of a tent which had been erected on the site of the barn. It was not shown that the engine was of the same kind or in the same condition as the one from which it was alleged the fire originated, nor that the condition of the weather nor the direction of the wind was the same. Held, that the evidence was competent as tending to prove the possibility, and consequent probability, that the fire was communicated to the barn by one of the railroad's engines." The Supreme Court of Iowa, in the case of *Black v. Minneapolis & St. Louis R. R. Co.*, 122 Iowa, 32, 96 N. W. 984, said, with reference to testimony relating to other engines than the one which was supposed to have emitted the sparks which set out the fire, that, "as there was evidence that all the engines were in substantially the same condition, this testimony was admissible." To the same effect is the holding of the Court of Appeals of Kentucky in the case of *Chesapeake & Ohio Railroad Co. v. Richardson*, supra, wherein evidence was admitted of fire and cinders being thrown out by other engines than the one which was charged with having set the fire in that case; the court saying: "It is settled that as the engines are all under one management, and the same kind of screens are used in all, proof is admissible of cinders thrown out by other engines, or fires set by them about the same time." The Supreme Court of Tennessee, in the case of *Louisville & Nashville Railroad Co. v. Short*, supra, held on this question that: "In an action against a railroad for fire caused by sparks from one of defendant's locomotives, evidence of the setting of other fires by other locomotives is competent; it appearing that the other locomotives were of similar construction to the one in question."

On the second proposition urged by counsel for defendant, we are asked to reverse the case for want of sufficient evidence to sustain the verdict. The testimony of the train operators, especially the engineer, was to the effect that, at the time of the arrival of the engine in the vicinity of the barn, the grass in the immediate neighborhood was burning. Witnesses on the part of plaintiff, however, testified that the train was switching in the neighborhood of the barn before the fire was discovered, and there is a total absence of any evidence upon which to

found a conjecture that the fire was due to any other cause than the one claimed. The barn was filled with baled hay, with an opening in the east side, and was located less than 100 feet north of the railroad track. A wind was blowing toward it. An engine of the company, running heavy and throwing cinders, passed it prior to the time when the fire was discovered. The fire caught in this hay. Other fires at other times had been set in the grass which surrounded this barn by sparks from other engines, if not from this one, of the company. With these facts before the jury, we are not able to reverse the case on account of a want of evidence reasonably tending to sustain the verdict. The Supreme Court of Kansas, in the case of Kansas City, Ft. S. & M. R. R. Co. v. B. F. Blaker & Co., 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81, 1 Am. & Eng. Ann. Cas. 883, discussing the same question in that case as is before us in this one, said: "It is contended that the evidence of negligence of the railroad company in setting out the fire was insufficient, and that some of that received was incompetent. It was mainly circumstantial, but we deem it to have been sufficient to support the verdict. A heavy freight train passed the buildings destroyed shortly before the fire was discovered. It was running rapidly, working steam, and leaving a trail of smoke behind it. Within a few minutes after it passed, persons in the neighborhood saw a patch of fire on the roof of the elevator. No fire was kept in the elevator at the time. It had been locked up for two weeks before the fire occurred. The wind was blowing from the railroad track toward the elevator. As far as the testimony goes, no one saw sparks proceeding from the engine and lighting on the building, but there was nothing in the testimony to show that the fire could have arisen from any other source, and the facts recited, in the absence of proof of any other cause, tend to show that the fire was caused by the sparks from the engine, and whether the fire so originated was a proper question for the jury. The effect of circumstantial evidence of this character was before the court in the recent case of Kansas City, etc., R. Co. v. Perry, 65 Kan. 792, 70 Pac. 876. After a full consideration and a review of the authorities, it was there held: 'The fact that soon after the passing of an engine a fire starts near a railway track in an inclosed field, covered at the time with a growth of highly inflammable vegetation, and travels before a high wind in a direction away from the track, is sufficient to warrant a jury in finding that the fire was caused by the operation of the railroad, without its appearing that the engine emitted sparks or live cinders or was put to special exertion, and without further proof, excluding other possible origins.'"

We have carefully read the record made at

the trial, as well as counsels' briefs, and, from a consideration of the whole matter, we are unable to come to the conclusion that error was committed, and the judgment is, accordingly, affirmed.

TURNER, KANE, HAYES, and WILLIAMS, JJ., concur.

(25 Okl. 852)

ST. LOUIS & S. F. R. CO. v. WHALE et al.
(Supreme Court of Oklahoma. March 8, 1910.)

Error from District Court, Bryan County; D. A. Richardson, Judge.

Action by S. A. Whale and the Connecticut Fire Insurance Company of Hartford against the St. Louis & San Francisco Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

R. A. Kleinschmidt and Deck & Deck, for plaintiff in error. Hatchett & Ferguson, for defendants in error.

DUNN, C. J. Counsel for both parties in the above-entitled cause have agreed that the judgment rendered therein is supported by the same evidence as that in the case of St. Louis & San Francisco Railroad Company v. Shannon, 108 Pac. 401; the only difference in the two cases being that in the instant case the cause of action is for hay which was destroyed at the time the barn was burned for which the action above referred to was brought, and it is stipulated that the decision in this case shall follow the decision in the Shannon Case.

It follows, therefore, that the judgment of the trial court is affirmed.

TURNER, WILLIAMS, KANE, and HAYES, JJ., concur.

(25 Okl. 856)

JONES v. MONCRIEF-COOK CO.

(Supreme Court of Oklahoma. March 8, 1908.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 76*)—LEASE—WAIVER OF RESTRICTIONS—SUBLETTING.

The lessor may waive a breach of the restriction against the assignment or subletting imposed by the terms of the lease, in which event the matter stands as if the lessor had given his consent to the assignment or underletting.

(a) A clause in a lease restricting the right of the lessee to assign or sublet the premises is for the benefit of the lessor, and can be set up alone by him.

(b) The lessor, M., having entered into the lease with the restriction against assignment or subletting as to the lessees, M.-C. Co., and the same having been assigned and the lessor not having elected to forfeit same, but by his conduct and act recognizing said lease as valid, such restriction will be deemed as having been waived.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 229, 230; Dec. Dig. § 76.*]

2. CONTRACTS (§ 25*)—OPTIONS—DELAY IN ACCEPTING.

Courts will view any delay with great strictness where the party seeking to enforce the performance of a contract was not bound; the other party thereto being bound.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 109-111; Dec. Dig. § 25.*]

3. LANDLORD AND TENANT (§ 92*)—OPTION TO PURCHASE—WAIVER OF RIGHT.

M. having stipulated with M.-C. Co. that at any time during the term of a lease and prior to its termination, if any offer was made during such period by any proposed purchaser for the demised premises, that M.-C. Co. should have the preference to purchase at said price in the event M. desired to sell at such offer, M.-C. Co. being notified by M. of the offer, answer not accepting, but making a counter proposition, *held*, that that amounted to a rejection or waiver of the privilege to purchase under such option.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 293; Dec. Dig. § 92.*]

4. VENDOR AND PURCHASER (§ 75*)—CONTRACT—TERMS OF PAYMENT—PRESUMPTIONS.

It is a general rule that, when no express provision is made in a contract of sale or purchase for time to pay the purchase price, the same is presumed to be a cash transaction.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 116; Dec. Dig. § 75.*]

Error from District Court, Comanche County; F. B. Gillette, Judge.

Action by the Moncrief-Cook Company against Mattie Jones. Judgment for plaintiff, and defendant brings error. Reversed, with instructions to dismiss.

J. L. Hamon and Chas. Mitschrich, for plaintiff in error. Stevens & Myers, for defendant in error.

WILLIAMS, J. This was a suit to enforce the specific performance of a contract in relation to real estate commenced by Moncrief-Cook & Co., plaintiff below, against W. K. Melton and Mattie Jones, defendants below. Melton was never served with summons and never appeared in this cause, and the suit was prosecuted against Mattie Jones the same as if Melton had not been made a party defendant. It appears from the pleadings and the evidence that William K. Melton is the owner of lot 30 block 40 of the city of Lawton; that on the 19th day of January, 1905, he made a lease and contract concerning said lot to Moncrief-Cook & Co., a co-partnership, which lease and contract were in words and figures as follows: "This agreement made this 19th day of January, 1905, by and between W. K. Melton, of Cass county, Texas, party of the first part, and Moncrief-Cook & Co. of Lawton, Comanche county, O. T., parties of the second part, witnesseth: That, for and in consideration of the sum of \$180.00, the receipt for the payment of \$90.00 in cash and a note for \$90.00 due Sept. 1, 1905, is hereby acknowledged, the party of the first part leases to the second parties his lot known as lot 30, in block 40 in the original town of Lawton, Comanche county, O. T., for the term of one year, from Feby. 15, 1906, to Feby. 15, 1906, with the privilege of using said lot for one or more years thereafter at the same terms providing said lot is not sold. As a further consideration of the above agreement, the party of the first part hereby guarantees to the second

parties the privilege of purchasing the above lot at any time before the termination of this lease at the price offered by any other purchaser. It is also agreed by the first party that, in the event that he should sell said lot and demand possession, he will pay said second parties the sum of three hundred dollars for their building situated on the above said lot, unless said second parties arrange for the disposal of the said building to other parties. It is further agreed by the second parties that in consideration of the above agreements, in the event that they shall neglect or refuse to pay the above note or to otherwise comply with this contract, then the said first party may enter upon and take possession of his said lot, together with the above mentioned building, it being understood that any fire safe or fire proof vaults are not to be considered as any part of above said building. The second parties also agree not to use said lot in such a manner or for such purposes as will damage or in any way depreciate the value of the said lot. Signed and witnessed by second party the day and date above set forth."

This lease was not acknowledged, but was filed for record in the office of the register of deeds of Comanche county. Melton, the owner, lived at Atlanta or Bivins, Tex. After the lease was executed, Moncrief-Cook Company put a building thereon, 24 by 60 feet. On the 5th day of November, 1905, in response to an advertisement inserted in a local paper, advertising such lot for sale, D. D. Lindsley, a real estate agent at Lawton, wrote the owner, asking the price, and received a letter asking \$3,000. On the 9th day of November, 1905, he received another letter to the effect that the lease to the parties on the lot expired on the 15th day of February, 1906, that the building he bought belonged to them, and that the owner had no interest in the stone wall on the west. On the 15th day of November, 1905, Lindsley sold the lot to the defendant Mattie Jones, and on the same day wired the owner: "Have sold lot 30 block 40 thirty-one hundred net you thirty hundred, one thousand cash, thousand one year, one thousand two years, lot to be clear and possession Febr. 16th, 1906, terms satisfactory, wire me." On the 16th day of November, 1905, after receiving the Lindsley telegram, the owner telegraphed Moncrief-Cook Company: "I am offered \$3100 for lot 30, answer." On the same day he telegraphed Lindsley: "Accept per Moncrief-Cook contract notes draw 10 per cent. sent papers First National, Atlanta, Texas." On the same day Lindsley wired Melton: "We accept, subject contract, papers to follow by mail." On the 16th day of November, 1905, Moncrief-Cook Company, in answer to the telegram of the owner, wrote him a letter as follows: "We have your telegram and note that you have an

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

offer of \$3,100.00 for lot. We are rather surprised at such a price that is offered for such property here, but of course we may be able to make some arrangements with you for the purchase of the lot. One of my partners will be here the last of this week or the first of next, and if you will let us know by return mail your best terms for payment, we will take the matter up, at that time. Of course, a \$3,100.00 offer under the circumstances would mean \$3,800.00 to you, as according to terms of the lease, in case of sale to any one else, providing we do not take it at his price, you are to pay us \$300.00 for the building. This will leave you \$2,800.00 net. Doubtless you are to pay some commission too. Kindly advise us if you could take something like \$500.00 or \$800.00 down, the balance in 3 installments of one, two and three years each. If you could make us a good proposition, we might be able to handle the deal for you. As said above we will take the matter up with our partners, by which time we hope to again hear from you." On the 17th day of November, 1905, the owner and wife executed warranty deed to the defendant Jones, and on the next day caused the same to be sent by the First National Bank of Atlanta, Tex., to the First National Bank of Lawton, Okl., to deliver to Jones on the payment of the price. On the 20th day of November, 1905, the defendant Jones paid the purchase price, and on the same day the deed was delivered to her, and on the same day it was filed for record in the office of the register of deeds of Comanche county. On the 21st day of November, 1905, Moncrief-Cook Company wired the owner: "We will pay you thirty-one hundred dollars for lot thirty block forty, Lawton. Place deed in your bank and wire us, money ready." There was an allegation to the effect that the defendant had acquired her title to the land with full notice and knowledge of the contract between the owner and Moncrief-Cook & Co. and the prayer for a decree compelling the specific performance thereof. There was judgment for the plaintiff, for the reversal of which this proceeding in error was commenced.

From an examination of the brief of counsel for plaintiff in error we gather that the principal grounds upon which they hope to reverse the judgment of the court below are: (1) That under section 3330, Wilson's Rev. & Ann. St. Okl. 1903, which provides that "no tenant for a term not exceeding two years, or at will, or by sufferance, shall assign or transfer his term of interest, or any part thereof, to another, without the written assent of the landlord or person holding under him," it is clear that the firm of Moncrief-Cook & Co., a copartnership, the original lessees, having virtually retired from business on the 13th day of November, 1905, and transferred the possession and all the rights of said copartnership and the lease contract herein to Moncrief-Cook Company, a

corporation, without the written consent of the landlord, the lease became forfeited and the corporation acquired no rights thereunder; (2) that the letter of Moncrief-Cook & Co. amounted to a refusal to purchase at the price offered by another and absolved the owner from further liability under the contract; (3) that the defendant Jones had no notice of the contract between the owner and Moncrief-Cook Company; (4) that, Lindsley having received \$4,500 from Mattie Jones for the property, it would be inequitable to decree the conveyance by Mattie Jones to Moncrief-Cook Company on payment of \$3,100; (5) that, the Moncrief-Cook Company being a tenant, it cannot litigate the question of title with the landlord without first surrendering possession of the leased premises.

Upon the question of possession, section 3331, Wilson's Rev. & Ann. St. Okl. 1903, provides: "If any tenant shall violate the provisions of the preceding section, the landlord, or person holding under him, after giving ten days' notice to quit possession, shall have a right to re-enter the premises and take possession thereof, and dispossess the tenant, subtenant or undertenant." In the case at bar it does not appear that the lessor attempted to terminate the lease. On the contrary, it appears that the owner wished to observe the terms of the contract, and wired him to also observe it. So, unless the option was rejected or waived, it seems not to have been forfeited by such assignment; the lessor not having elected to declare the forfeiture. This he had a right to do. "The lessor may waive a breach of the restriction against assignment or subletting whether imposed by statute or by the terms of the lease, in which event the case stands as if no restriction had been imposed, or as if the lessor had given his consent to the assignment or underletting." 24 Cyc. p. 970. The Supreme Court of Illinois in the case of *Sexton v. Chicago Storage Company*, 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274, in an opinion by Mr. Justice Schofield, held that: "The objection that the written assent of appellant was not obtained to the assignment cannot be urged by appellees. The clause in the leases in that respect is for the benefit of, and can be set up by, appellant alone. He may waive it if he will; and, if he does not choose to set it up, no one else can." The same court in *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118, held: "The privilege to purchase was not lost because of failure of the lessee to pay his rent, in the absence of any individual act indicating an intention to forfeit the lease, and that the sending by the lessor to the lessee of a letter stating that the balance of the rent must be paid at a certain date, and asking as to the lessee's desire to continue was not such an act."

As to the second proposition, a construction of the following clause in the contract is necessary, to wit: "As a further consideration of the above agreement, the party of the

first part hereby guarantees to the second parties the privilege of purchasing the above lot at any time before the termination of this lease at the price offered by any other purchaser." The defendants in error seem to contend that this clause gave them the absolute right to purchase said lot at any time before the termination of the lease which began on the 15th day of February, 1905, to expire on the 15th day of February, 1906, at the price offered by any other purchaser. Does said clause mean that the party of the first part intends to bind himself to sell said lot to the parties of the second part at any time up to the close of the period of said lease term at such price as may be offered by any other proposed purchaser? That would mean, in effect, that the party of the second part by said clause contracted to sell said lot at any time during said lease term up to the time of its termination at the option of the said lessees or parties of the second part at a sum certain to be determined by the highest price offered by any proposed purchaser in the event that such offer was made. Suppose no offer was made by any proposed purchaser, what would be the result then? When said clause is construed with the remaining clauses of said contract, it is evident that the parties therein intended that at any time during the term of said lease and prior to its termination, if any offer was made by any proposed purchaser to purchase same at a sum certain, that the defendants should have the privilege of the preference in the event the party of the first part desired to sell said lot at such offer. In other words, that, if any offer to purchase said lot was made by any proposed purchaser at any time during the period of said lease and before its termination, he desiring to accept same, Moncrief-Cook Company should have notice from the said lessor of such offer, and within a reasonable time thereafter they must accept the same under the terms of such offer by the proposed purchaser, or the same would be considered as rejected, and the lessor, being released from such option, would be permitted to sell the lot to such party making the offer. As to the question of notice of the proposed offer, see *Austin v. Tawney*, 2 Chan. App. Cas. (Law Reports, 30, 31, Victoriae 1867) 143; *Lord Lilford v. Powes Keck*, 30 Beav. 295, 54 Eng. Rep. Full Reprint, 902; 21 Amer. & Eng. Enc. of Law (2d Ed.) p. 932, footnote 4. As to the acceptance within a reasonable time after such notice, see 21 Amer. & Eng. Enc. of L. (2d Ed.) p. 933, and authorities cited under footnote 4.

It is uncontroverted that the offer of purchase by the proposed purchaser was made to the lessor, and that notice of such offer was communicated by the lessor to the lessees. Did the defendants in error within a reasonable time elect to avail themselves of the privilege of purchasing said lot, after the notice of the offer for same prior to the termination of the lease at the price offered by the party proposing to purchase? It seems to us that

the answer amounted to a refusal to purchase at the price offered, to wit, \$3,100. How can it be construed as an intention to accept in the face of the statement: "We are rather surprised at such a price that is offered for such property here, but of course we may be able to make some arrangements with you for the purchase of the lot. One of my partners will be here the last of this week or the first of next, and if you will let us know by return mail your best terms for payment, we will take the matter up, at that time. Of course a \$3,100.00 offer under the circumstances would mean \$2,800.00 to you, as according to terms of the lease, in case of sale to any one else, providing we do not take it at his price, you are to pay us \$300.00 for the building. This will leave you \$2,800.00 net. Doubtless you are to pay some commission too. Kindly advise us if you could take something like \$500.00 or \$800.00 down, the balance in 3 installments of one, two and three years each. If you could make us a good proposition, we might be able to handle the deal for you. As said above, we will take the matter up with our partners, by which time we hope to again hear from you." The clause referred to did not contemplate the lessee's handling any deal for the lessor, but it was simply an option to purchase. In 21 Amer. & Eng. Enc. of Law (2d Ed.) at page 932, it is said: "There is, moreover, a strong inclination on the part of the courts to view any delay with great strictness, on the ground that the party seeking to enforce performance was not bound, while the other party was bound." In the case of *Meldling v. Trefz*, 48 N. J. Eq. 638, 23 Atl. 824, the court said: "When contracts are optional in respect to one party, delay on his part is viewed with especial strictness. *Fry, Spec. Perf. § 733.*" In this case the defendants in error were not bound at any time to purchase this property at the price offered at any time before the termination of this lease, but, if the lessor was offered a price by a proposed purchaser and he desired to sell, he was bound to notify the lessees, and in the event they accepted under the alleged option, in which they were not bound by the terms of the option to do, he was bound to sell to them and to no one else. Such unilateral contracts are construed strictly in favor of the party that is bound and against the party that is not bound. It might be that the proposed purchaser would not wait an indefinite or uncertain length of time, and if by a liberal construction the lessees, under such option, were permitted to carry on a system of diplomatic correspondence with the lessor with a view of determining whether they could arrange to handle the deal for him, or get more favorable terms, or hold the matter open in the meantime, the proposed purchaser might change his mind and the lessees or the defendant in error, not being bound to purchase, then declining to accept, the lessor would thereby lose a chance to sell same at what might seem to him to

be an advantageous offer. The option between the lessor and the lessees can only be construed to contemplate a sale for cash. *Masoner v. Bell*, 20 Okl. 618, 95 Pac. 239, 18 L. R. A. (N. S.) 166; *Burks v. Hubbard*, 69 Ala. 379; *Delafield v. Illinois*, 26 Wend. (N. Y.) 192; *School Dist. v. Aetna Ins. Co.*, 62 Me. 330; *Lumpkin v. Wilson*, 5 Helsk. (Tenn.) 555. The defendants in error, after notice, had a reasonable time within which to accept. In lieu of the letter sent, had they written that one of the partners was away, and that he would be back by a certain date, and within a reasonable time from the date of the offer they would answer, that would have held the question open for a reasonable time for acceptance or rejection. But we find that they write a letter which is tantamount to a rejection to ask for an offer, the terms of which are not cash, but suggested payments at different times, and saying, "we hope to hear from you by return mail relative to such offer, and, when a certain partner returns, we hope that we can handle this deal for you." A counter offer amounts to a rejection under the option or the terms proposed, being an effort to make a new contract. *Clark on Contracts*, pp. 53, 54; section 55, p. 72, *Beach on Modern Contracts*. The rejection of the offer was irrevocable. *Clark on Contracts*, p. 53. We think that amounted to a rejection and waiver of any privilege to purchase the lot prior to the termination of the lease at the price offered by the proposed purchaser. The conclusion here reached is decisive of this case, and the other questions raised are not essential to be determined.

The judgment of the lower court is reversed, with instructions to dismiss the petition. All the Justices concur.

(26 Okl. 12)

BARKER v. FORREST.

(Supreme Court of Oklahoma. March 8, 1910.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 773*)—BRIEFS—DISMISSAL ON FAILURE TO FILE.

Where no briefs have been filed by the plaintiff in error, in accordance with rule 7 of this court (95 Pac. vi), a motion having been made after notice that the appeal be dismissed on that ground, and no response having been made thereto giving a satisfactory reason for such failure to comply with such rule, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3108; Dec. Dig. § 773.*]

Error from District Court, Canadian County; Joseph G. Lowe, Judge.

Action between E. B. Barker and R. B. Forrest. From the judgment, Barker brings error. Dismissed.

W. A. Maurer and Don C. Smith, for plaintiff in error. R. B. Forrest, pro se.

WILLIAMS, J. The appeal in this case was lodged in this court on October 1, 1908, and the case was regularly assigned for trial at the regular January, 1910, term, which began January 11, 1910. Prior to the time that said case was reached on the calendar, to wit, on January 18, 1910, the defendant in error moved that the appeal be dismissed, for the reason that the plaintiff in error had not prepared and served a brief upon the defendant in error, in compliance with rule 7 of this court (95 Pac. vi). The plaintiff in error having had due service of the filing of said motion, and not having responded thereto, and no brief having been filed in this case, the motion is accordingly sustained, and the appeal dismissed. All the Justices concur.

(26 Okl. 866)

FT. SMITH & W. RY. CO. et al. v. STATE.
(Supreme Court of Oklahoma. March 8, 1910.)

(*Syllabus by the Court.*)

CORPORATIONS (§ 394*)—ORDERS OF CORPORATION COMMISSION—REVIEW BY COURT.

Where an order of the Corporation Commission is assailed on an appeal solely upon the ground that there was not sufficient evidence before the commission to entitle the order to the prima facie presumption of being reasonable, just, and correct, obtaining by reason of section 22, art. 9, of the Constitution, if there is any evidence reasonably tending to support the findings of fact and the order of the commission, its order will not be disturbed.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 394.*]

Appeal from the Corporation Commission of Oklahoma.

Action by the State against the Fort Smith & Western Railway Company and others. From an order of the Corporation Commission fixing a schedule of rates, defendants appeal. Affirmed.

Clifford L. Jackson, S. T. Bledsoe, C. O. Blake, and Edgar A. De Meules, for appellants. Chas. West, Atty. Gen., and Geo. A. Henshaw, Asst. Atty. Gen., for appellee.

HAYES, J. This case is an appeal from an order of the Corporation Commission promulgating a schedule of rates to be observed by all railroads operating in this state in making charges on shipments of goatskins, hides, sheep pelts, green or dry, between all stations in the state. The order was made by the commission after publication of notice thereof and after hearing had thereon. The commission has made and filed in the case its findings of fact and a full and clear statement of the reasons upon which it bases the order. The evidence establishes that hides are usually purchased in small quantities throughout a state, and shipped locally to some concentrating point, where they are assorted and classified, and each particular class or kind shipped in carload lots to that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

point in the market that consumes that particular quality or kind of hides. The commission finds, and the evidence tends to establish, that the local rates heretofore prevailing on hides in this state have been so high as to prevent the concentration of hides at any point in the state where they may be assorted and classified, and then shipped to that market which consumes that particular quality of hides; and the jobbers throughout the state are compelled, by reason of the high local rates, to ship the hides direct to Kansas City, where they are assorted and classified and shipped to St. Louis, Chicago, and other places where a market exists. That on account of said high rates it is practically impossible to establish a concentrating point within the state, as result of which there is a discrimination against the dealers in hides in this state. The schedule of rates proposed by the order is a reduction upon the rates heretofore existing. The commission finds the rates heretofore existing unreasonable and unjust and the proposed rates to be reasonable. The only argument made by counsel for appellants in their brief against the incorrectness of the order of the commission is: "There is nothing in the evidence in this case that justifies the theory of the presumption that this order is reasonable, just, and correct. There is an entire want of evidence upon which to base the order. The presumption that the Constitution raises in support of this order is based upon the evidence, and upon nothing else, and if the evidence will not support it then clearly the Constitution does not intend that the presumption shall exist."

In *M., K. & T. Ry. Co. v. State*, 103 Pac. 613, it is held: "On appeal from an order of the Corporation Commission, the presumption obtains, by reason of section 22, art. 9, of the Constitution, that the order is reasonable, just, and correct, and he who complains on appeal of such order has upon him the burden of establishing the unreasonableness, unjustness, or incorrectness of such order, which he may do by showing that the unreasonableness of the order appears affirmatively from the facts as certified by the commission, or that it is shown by evidence in the record, upon which the commission failed to make findings of fact, or upon which the commission erroneously found the facts." If there was no evidence in the record tending to support the facts found by the commission, the prima facie presumption of the reasonableness, justness, and correctness of the order of the commission, which obtains by reason of section 22, art. 9, of the Constitution, would not attach; but there is not wanting in the record evidence which supports the findings of the commission. It is shown by the evidence that the rates heretofore prevailing in the state upon commodities covered by the order have been so high as to practically prohibit the concentration of hides at any point in the state for as-

sortment and classification, and then to be shipped to those markets where the respective classes of hides are consumed; and it is cheaper under prevailing local rates to ship them to markets outside of the state, to wit, Kansas City, where they are classified, and then shipped to other markets, where they are ultimately consumed. It is also shown that said former rates are much higher than those prevailing upon the same commodities in some four or five other states where the transportation of such commodities is made under similar circumstances, and the evidence further established that the average rate under the schedule promulgated by the order is higher and more favorable to appellants than the average rate now prevailing upon the same commodities in Texas, Missouri, and Arkansas under similar conditions.

No effort is made by appellants to establish by testimony, and no contention has been made in this court, that the proposed rate is not equal to the cost of service or will not be remunerative; nor is it made to appear that such rates are so unreasonably low as to require that other commodities must be charged a higher rate, and made to contribute an unproportionable amount to the total revenues of the companies, in order to pay the cost of all services rendered to the public by the companies, and yield them a reasonable income upon their investment.

The power lodged in the commission to promulgate rates is a legislative power, and its exercise by the commission involves legislative discretion and policy. Any rule that would require the commission, before it promulgates any order fixing a rate, to have before it evidence that would establish to a mathematical certainty the reasonableness of the proposed rate, would greatly hinder, if not almost entirely prevent, the commission from exercising that power. A rate that is so high as to be practically prohibitive, in the absence of any explanation of a necessity for such a rate, must be presumed to be an unreasonable rate. The evidence discloses that the rates per ton mile prevailing in Arkansas is 20.6 mills, in Missouri, 23.1 mills, in Texas, 21 mills, in Virginia, 22.9 mills. It is true that it appears from the record that the rates in these states were not voluntarily made by the railway companies, and were promulgated by orders of the railway commissions of those states; but, since a railway commission cannot enforce an unreasonable and unjust rate, and the companies have operated under those rates, and the same have not been set aside by the courts as being unjust, and it not appearing that any effort has been made by railway companies to have the same set aside, they are not without probative value in this proceeding. The average rate per ton mile under the order of the commission which it is sought by this proceeding to reverse is 23.3

mills, being higher than in any of the states named. It appears that the interstate rate from Little Rock, Ark., to Chicago produces a revenue of 8.5 mills per ton mile; from Ardmore, Okl., to Chicago 9.7 mills per ton mile; from Austin, Tex., 9.8 mills per ton mile; from El Paso, Tex., 8.6 mills per ton mile—or an average of about 9 mills per ton mile on interstate shipments from these various points. These interstate rates upon which this average is made are for shipments over long distance it is true, and long hauls of freight can no doubt be made at a lower rate per ton mile than short hauls; but the average rate per ton mile under the proposed order is practically three times as great as the average rate per ton mile on interstate shipments from the points named. While this evidence could not be conclusive as to the reasonableness of the proposed order, in the absence of evidence on the part of the railway companies that the proposed rate does not afford a reasonable compensation for the service, such rates are not without probative value, and may be looked to for comparison in determining whether there is any evidence before the commission upon which the order is based; and, taken with the other evidence, is sufficient to entitle the order of the commission to the presumption of being reasonable and just, which obtains by reason of section 22, art. 9, of the Constitution. In this connection it may be stated that there is an admission in the record by the Missouri, Kansas & Texas Railway Company of the unfairness and unjustness of the rates heretofore prevailing, and the expression of willingness to readjust the rates upon some fair, reasonable, and equitable basis.

The evidence in the record fairly supports the conclusion of the commission that a new schedule of rates upon the commodity involved should be made, and there is sufficient evidence to entitle the order of the commission to the prima facie presumption of being just, reasonable, and correct, and to shift the burden upon the complainants in this case to overcome that presumption, which they have not undertaken to do.

The order of the commission is affirmed. All the Justices concur, except WILLIAMS, J., not sitting.

(28 Okl. 1)

PEACEABLE CREEK COAL CO. et al. v. JACKSON et al.

(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

1. MINES AND MINERALS (§ 112*)—OPERATION OF MINE—"IMPROVEMENT"—LIEN.

A coal mine is an improvement within the meaning of section 4817, Wilson's Rev. & Ann. St. 1903 (section 6151, Comp. Laws Okl. 1909).

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 112.*]

For other definitions, see Words and Phrases, vol. 4, p. 3460.]

2. MINES AND MINERALS (§ 114*)—MECHANICS' LIENS—STATEMENT OF LIEN.

As between a lienholder and the owner of the realty which has been improved and intervening creditors whose claims arose prior to the furnishing of the material or the performing of the labor for which the lien is sought, the realty and improvement thereon being in the hands of a receiver, and all of the parties in interest being brought into the district court in such action within four months after the date upon which the material was last furnished or labor last performed under the contract, the same will be deemed a sufficient compliance with the provisions of section 6152 of the Compiled Laws of Oklahoma of 1909, without otherwise filing, within the required period of four months in the office of the district clerk, an ex parte statement as prescribed by said section.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 114.*]

Error from District Court, Pittsburg County; P. B. Cole, Judge.

Action by Andrew Jackson and others against the Peaceable Creek Coal Company and others. From the judgment, defendants bring error. Modified and affirmed.

Boyd & Moore, Brewer & Andrews, F. H. Kellogg, and Clayton & Clayton, for plaintiffs in error. Eubanks & Elder, for defendants in error.

WILLIAMS, J. 1. The first question for determination is as to the right of certain plaintiffs and interveners to have recognized and enforced, by virtue of sections 4817, 4818 (sections 6151, 6152, Comp. Laws Okl. 1909) Wilson's Rev. & Ann. St. 1903, a claim for lien on a coal mine, machinery, equipment, and fixtures thereof. Section 3018 of the Code of Alabama of 1886 provides: "Every mechanic or other person who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler or machinery, for any building or improvement on land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor or sub-contractor, upon complying with the provision of this chapter shall have a lien therefor on such building or improvement and on the land on which the same is situated," etc.

In the case of Central Trust Co. of New York v. Sheffield & Birmingham Coal, Iron & R. Co., Watt Mining-Car Wheel Co., Intervener (C. C.) 42 Fed. 106, 9 L. R. A. 67, the Alabama statute was construed by Circuit Judge Pardee, wherein he said: "The first question presented is whether or not the coal mine, as set forth and described in the intervention and exhibits, is such an improvement upon land as comes within the meaning of the statute just quoted, it being contended on one side that the word 'improvement' in the statute must be limited in its meaning to buildings and things ejusdem generis; in other words, that an improvement upon land which is not in the nature of a building is not an improvement within

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the meaning of the statute. On the other hand, it is claimed that, in the proper construction of the statute, the word 'improvement' is not at all limited by the word 'building' preceding it, but that it is to be taken as extending the class of construction which may be the subject of a lien, rather than limiting such class. * * * If this word 'improvement' is given its ordinary meaning, the new law is extended to cover the construction of coal and iron mines, and thereby great help is given to the owners of mineral lands to develop their property, and such development increases the general prosperity of the state. There was no reason why capital and labor put into the coal and iron industries should not be encouraged and protected, as well as in other works and improvements. A going coal mine is not merely a hole in the ground. It is made up of shafts, drifts, slopes, engines, machinery, platforms, cars, tracks, scales, etc.; and, taken as a thing, if not a building, it is unquestionably an improvement, and an improvement on land. Taking into consideration the importance and condition of the mines and mining interests of the state in 1876, it is a fair presumption that the legislative intention in the act of 1876 was mainly to extend the lien of mechanics and materialmen for work and material so as to aid in the development of the state's mineral resources. However this may be, it clearly appears to me that the coal mine described in the intervention and exhibits is an improvement, within the meaning of the terms used in section 3018 of the Alabama Code, and that for material, fixtures, engine, boiler, or machinery furnished therefor, a lien results to materialmen on compliance with the requirements of the statute."

In the case of *Bates v. Harte*, 124 Ala. 427, 26 South. 898, 82 Am. St. Rep. 186, section 2723 of the Code of 1896, which is identical with section 3018 of the Code of 1886, was construed, wherein the court said: "The statute recognizes that improvements meriting the protection of a lien may be made upon land otherwise than by building, but as they may occur in unforeseen variety, the scope of the term 'improvement' is left for determination in particular cases as they may arise. It is well known that a supply of water is often one of the most convenient and useful of all appurtenances to land. Its development by means of drilling and casing a well may greatly enhance the permanent value of the land. We, therefore, hold that a well, designed and made for a permanent supply of water, is an improvement upon land within the meaning of the statute referred to."

The case of *Eufaula Water Company v. Addyston Pipe & Steel Company*, 89 Ala. 552, 8 South. 25, was an action brought to recover on an account for "piping" furnished by plaintiff to defendant under contract, for use in the construction of its works in Eu-

faula, and to have a lien, as for materials supplied, declared and enforced against a certain one-acre lot belonging to the defendant, situated just beyond the corporate limits of said city. This lot was the situs of defendant's pumping station, and on it were erected and placed buildings and machinery essential to forcing water into defendant's standpipe or reservoir—a half-mile distant—whence it was supplied, through a system of pipes, to the city and its inhabitants. The piping supplied by the plaintiff was used in making the conduit between the pumping station and the reservoir, a distance of about 3,000 feet, and extended from a point 25 feet within the lot in question, and outside of the buildings thereon, to the reservoir, being for its whole length, except said 25 feet, on land which did not belong to defendant, but in which the water company had an easement for this purpose only. Judgment for the amount in suit went for the plaintiff, and to this no objection was made, or exception reserved. The case was presented on appeal solely on exceptions to the court's general charge in favor of the plaintiff, and its refusal to give the general charge for the defendant, as to whether a lien existed on the one acre in question and the buildings thereon. The court said: "We do not doubt that the laying of pipe on the lot of land, for the purpose shown by this record, is an 'improvement' within the meaning of Code (section 3018), nor that the value of pipe furnished for such a purpose might ordinarily be charged on the land, under the law which provides a lien for mechanics and materialmen."

Section 6151, *supra*, is more comprehensive than the Alabama statute, in that it provides that: "Any person who shall, under oral or written contract with the owner of any tract or piece of land perform labor, or furnish material for the erection, alteration or repair of any building, improvement, or structure thereon; or who shall furnish material or perform labor in putting up any fixtures, machinery in or attachment to, any such building, structure or improvements; or who shall plant any trees, vines, plants or hedge in or upon such land; or who shall build, alter, repair or furnish labor or material for building, altering, or repairing any fence or footwalk in or upon said land, or any sidewalk in any street abutting such land, shall have a lien upon the whole of said tract or piece of land, the buildings and appurtenances, but if a homestead the lien shall be good on not to exceed five acres in a square form on which the building material, fixtures or machinery are located, in the manner herein provided, for the amount due him for such labor, materials, fixtures or machinery. If the title to the land is not in the person with whom any such contract was made, but is leased and unimproved, the lien shall be allowed on the buildings and improvements on such land separately from the real es-

tate." Every conceivable improvement in the constructing of a building, structure or planting of trees, vines, plants, or hedges, building or alteration in fences or footwalk or sidewalk, is provided for, and the general word "improvement" cannot be reasonably construed to have been used with the limitation in its meaning to buildings and things ejusdem generis. Said section being considered in connection with its general scope of application, it is reasonably clear that the word, "improvement" was used in its ordinary and general sense or acceptation, and includes any and every character of improvement upon realty. We accordingly conclude that the term "improvement," as used in section 6151, Comp. Laws Okl. 1909, includes a coal mine or a coal mining plant, comprising mine openings, with equipment and slopes from which entries and rooms have been turned, etc., coal being mined therefrom.

2. May such a lien be recognized and enforced without the provisions of section 6152, supra, being complied with as to the filing of the required statement with the district clerk within four months? It was conceded on the oral argument that these claims were presented to the court and heard by the referee on an agreed statement of facts, and report thereon made, and judgment rendered by the court within four months after the date upon which the material was last furnished or labor last performed under the contract; all parties having been brought in, and the property sought to be charged by the lien during this period being in the hands of a receiver.

In the case of *Murray v. Rapley*, 30 Ark. 568, the court said: "Had the plaintiff a mechanic's lien on the house and two acres of land on which it was situated? That the plaintiff was a mechanic, that he furnished materials, and did work upon the house, the property of the defendant, at her instance, and of the value of \$300, are questions out of dispute, nor is it questioned that the writing sued upon, in which a lien on the house and land is expressly contracted, was not acknowledged, filed, and recorded in the proper office, within the time required by the statute. But it is strenuously contended by the defendant's counsel that the instrument thus acknowledged and filed was not a compliance with the provisions of the statute; that this is a right given by statute, and to which the party is alone entitled, who complies fully with the statute requisites. Section 4060, Gantt's Digest, provides that: 'It shall be the duty of every person, who wishes to avail himself of this act, to file with the clerk of the circuit court in which the building, erection, or other improvement, to be charged with the lien is situated, and within ninety days after all the things aforesaid shall have been furnished, or the work or labor done or performed, a just and true account of the amount due or

owing to him, after allowing all credits, and containing a correct description of the property to be charged with said lien, verified by affidavit.' That in this instance there has been no technical compliance with the statute is evident. This the plaintiff does not deny, but insists that there has been a substantial compliance with the statute. It is true that this is a statute remedy, but it is one enacted for the protection of the mechanics, laborers, and furnishers of supplies to those desiring to erect buildings or to make improvements upon real estate, and that the statute which requires that the mechanic, or other claimant of a lien, should verify and file his account to entitle him to a lien was intended, not alone to identify and fix his right of lien upon the particular property upon which his labor and materials had been bestowed, but also to give notice to others who may contract for liens upon the same property of the nature and extent of his claim. And in cases in which there is a contest between lien claimants the mechanic should be held to such strict performance of the requirements of the statute as to entitle him to its benefits. But in an issue between the mechanic and the owner of the property upon which the labor has been bestowed we apprehend that less strictness in complying with the statute would be required, because, as he is a party to the contract, the owner of the property upon which the labor is bestowed, and may be presumed to know the character of the work performed, as well as the materials furnished, constructive record notice is not so necessary, indeed, scarcely at all necessary, for his protection."

In the case of *Anderson v. Seamans*, 49 Ark. 475, 5 S. W. 799, the court said: "Before the expiration of the 90 days the mechanic brought suit upon this instrument to enforce his lien. No account had ever been filed in the clerk's office, nor abstract entered. It was objected that no compliance with the statutory requirements had been shown. But the court rules that there had been a substantial compliance; that the neglect to comply fully and technically with directions which were intended for the protection of third persons, who might acquire rights in or liens upon the same property, could by no possibility tend to the defendant's prejudice, but might defeat the ends of justice." See, also, *Buckley v. Taylor*, 51 Ark. 302, 11 S. W. 281.

In the case of *Chauncey et al. v. Dyke Bros. et al.*, 55 C. C. A. 579, 119 Fed. 1, the United States Circuit Court of Appeals for the Eighth Circuit, in construing the mechanic's lien provisions of the statutes of Arkansas, said: "The lien law in question is a remedial statute. It was enacted to secure to laborers, artisans, and others who perform labor or furnish materials for the erection of buildings on the land of others payment for such services and materials, by giv-

ing them a lien on the structures which they have helped to create, instead of compelling them to rely merely on the personal security of the debtor. That such laws are fair and just, and that they also tend to encourage the erection of buildings by insuring payment for the labor and materials that are expended in their erection, has been generally recognized. *Davis v. Bilsland*, 18 Wall. 659, 661, 21 L. Ed. 989. As such laws are remedial in their nature, and are prompted by a wise policy, they should be liberally construed in favor of the class of persons for whose benefit they were intended."

Under the foregoing authorities we do not think the filing of such statement was necessary, in view of the commencement of the proceedings within the four months, and all parties within such time being brought in, and having the same legal notice thereby of such claim as they would have had, had such claims been filed *ex parte* by the lien claimants within the required time with the clerk of the district court. These claims and proceedings in this case were filed and had in the district court; such filings being with the clerk thereof, the same officer with whom the *ex parte* lien claim or statement was required to be filed. Under such status we think that the statute was sufficiently complied with.

It further appears from the opinion of the referee that, in making up his findings of fact and conclusions of law, he considered the report filed in said proceedings by the commission appointed by the judge of said court to report on said mine in order to enable him to determine upon the advisability of having the receiver operate the same. The agreed statement of facts nowhere refers to this report, or provides that the same may be considered for any purpose in determining the claims for the liens, nor were the other creditors bound by the statements or recitals in the report of this commission; the same being merely *ex parte* in its nature, for the information of the judge relative to the *rem*, which was in the custody of the court by virtue of the receivership. The same was neither competent evidence for nor against the claimants as to the determination of said liens.

As to mine No. 2, the agreed statement of facts entered into by the attorneys for the parties seeking to have recognized the alleged lien, as well as the attorneys representing the opposing interests, stipulated that "mine No. 2 consists of a slope from which two entries have been turned, and from these entries rooms have been turned, and from these rooms coal has been mined solely for the purpose of sale and for the regular commercial purposes of the said mine; the said mine having reached this stage prior to the period for which the employees, who worked therein, are claiming wages or earnings due." The referee in his opinion, states: "It is also claimed that the

men working in mine No. 2 were not doing development work, coal having been sold out of such mine; but I do not think that this mine was in such a state of development, as will be seen from the report filed in this case by the commission appointed to report on such mine, as to release the company from liability to the laborers on development work." Even if the report of this commission was competent evidence on this hearing, and its incompetency seems not to be controverted by the attorneys here, the agreed statement of facts excludes the same. Said statement recites: "It is agreed that, with reference to the hearing upon and determination of the claims of the various claimants hereinafter named, being the plaintiffs and certain of the subsequent interveners herein, the following shall constitute the facts upon which such claims shall be heard and determined." By the solemn agreement of the attorneys of the parties seeking to enforce the liens, the report of that commission was excluded from the consideration of the referee.

The referee also in his report states that, although the labor performed on mine No. 2 may not have been on development work, still "the laborers would have a lien just the same, because it is held that, where several mine openings are on one claim, and are owned and worked as one mine under a common name, they will be treated as one mine so far as mechanics' liens are concerned," citing the case of *Treddinnick et al. v. Red Cloud Construction Mining Co. et al.*, 72 Cal. 73, 13 Pac. 152. In that case, the court said: "The Code provides (section 1183, Code Civil Proc.): 'In every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must, at the same time, designate the amount due to him on each of such buildings, mining claims, or other improvements; otherwise the lien of such claims is postponed to other liens. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens, by judgment, mortgage, or otherwise, upon either of such buildings or other improvements or upon the land upon which the same are situated.' It was proved that the entire property known as the 'Red Cloud Mine' was made up of what were originally several mining locations, but that these locations or claims had been conveyed to the Red Cloud Consolidated Mining Company, and had been by it consolidated together, and held, worked, and treated as one mine or claim. Under the circumstances shown we do not think the section invoked applies. It has been common in this state to consolidate two or more mining locations into one claim, and thereafter to treat and work them as one claim. After such a consolidation, the different locations cease to constitute different claims, and become in law, as they are in fact, only parts of one claim. The

plaintiffs' labor was performed upon the property as a whole, and they were entitled as we think, under the proofs, to claim liens upon it as a whole." This might be an authority in holding that, the labor performed and material furnished on mine No. 3 having contributed to the construction of an improvement, a lien was thereby subject to be enforced, and in the event mines No. 2 and No. 3 constituted one mining claim, then the lien of the materialmen and laborers arising out of mine No. 3 would be fastened on both mines, but we cannot see how this is any authority by which a lien is to be fastened upon both or either of said mines in favor of the laborers in mine No. 2, when such labor did not under the admitted facts have anything to do with the creating of an improvement, which is necessary under section 4817 (section 6151, Comp. Laws, Okl. 1909) Wilson's Rev. & Ann. St. 1903, to create the lien. In the brief of the counsel for the parties seeking to establish the lien on account of the labor performed in mine No. 2 there is no contention for the recognition of any lien except by virtue of section 4817, supra.

Those claiming amounts due for labor performed in mine No. 2 in mining coal for commercial purposes, and not for developing the mine, not thereby making an improvement, are not entitled to a lien or a preference as to such claims. The claimants for liens for labor performed and material furnished in mine No. 3 are entitled to such allowance. For under the agreed statement of facts it is recited that "mine No. 3 consists of a slope, but had not, like mine No. 2, reached the stage of development and construction that rooms were turned and coal being mined therefrom for commercial purposes, and that the work of the employes in mine No. 3 was, for the period for which they claimed wages or earnings, still development work." The case is accordingly remanded, with instructions to enter an order allowing the claims as they apply to mine No. 3 as preferred, or as liens to be enforced prior to all other claims, and that the claims for labor as to mine No. 2 be disallowed as preferred claims, but allowed as nonpreferred claims.

Since this case arose the Second Legislature of the state of Oklahoma passed an act entitled "An act to protect the wages of persons employed in and around mines in the state of Oklahoma." Under its provisions employes engaged in mining coal seem to have a lien upon the mining plant, not only for the labor performed in its development, but also in taking out coal for commercial purposes. Sess. Laws 1909, c. 23, art. 3, § 1, p. 386.

The judgment of the lower court will be modified as above indicated. All the Justices concur.

(25 Okl. 802)

STANDIFER v. MORRIS et al.

(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

1. IMPROVEMENTS (§ 4*)—OCCUPYING CLAIMANT'S ACT.

M., after the execution to him of a void tax deed, in good faith went into possession of the lots conveyed and erected thereon improvements of the value of about a thousand dollars. After taking possession of the lots, he borrowed money from S. upon his promissory note secured by mortgage on said premises, which money he expended in placing said improvements on said lots. Afterward, and after the execution and recordation of said mortgage, M. removed from said premises and leased the same to H., who went into possession as the tenant of M. Afterward M. executed a warranty deed to said lots to H., who was and is still in possession. Held that, upon a suit to foreclose said mortgage, S., upon equitable grounds, was entitled to the benefit of the occupying claimant's act.

[Ed. Note.—For other cases, see Improvements, Dec. Dig. § 4.*]

2. LANDLORD AND TENANT (§ 63*)—ESTOPPEL TO DENY LANDLORD'S TITLE.

The general doctrine of estoppel precludes a tenant during the continuance of his possession under a lease from buying in and setting up an adverse title to defeat a lien on the improvements on the leased premises acquired by a mortgagee in good faith from the landlord of the lessee prior to the execution of the lease. This rule does not, however, prohibit the tenant during the tenancy from purchasing any outstanding title and from asserting the same against the landlord after the expiration of the tenancy and yielding up of possession.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 159, 176, 171, 177-180; Dec. Dig. § 63.*]

Error from District Court, Cleveland County; C. F. Irwin, Judge.

Action by Thomas Standifer against John W. Morris and others. Judgment for defendants, and plaintiff brings error. Reversed.

John H. Mosler and J. B. Dudley, for plaintiff in error. Newell & Jackson, for defendants in error.

KANE, J. Originally this was a suit commenced by the plaintiff in error, plaintiff below, against the defendants in error, John W. Morris and Mrs. John W. Morris, his wife, Chas. J. Howard and Mrs. Chas. J. Howard, his wife, to recover judgment against the defendant in error John W. Morris upon a promissory note, and to foreclose a real estate mortgage given by said Morris to secure the payment of said note, covering lots 27, 28, 29, 30, 31, and 32, in block 31, of the town of Noble, Cleveland county, Okl. Mrs. Morris, Chas. J. Howard, and wife were made defendants for the purpose of foreclosing whatever interest they may have had in the property. Ella A. Foster was made a party upon her petition in intervention, setting up title to lots 27, 28, 29, and 30. Howard and wife filed separate answers, claiming title to lots 31 and 32 by virtue of a deed executed to them by Samuel Lazarus, who deraigned title

from the town-site board of the town of Noble, and further alleged that plaintiff's mortgage was based upon a void tax deed, which purported to convey title to Morris. Ella Foster deraigned her title to lots 27, 28, 29, and 30 from the town-site commission, and she also claimed that the tax deed through which Morris claimed title to those lots was void.

It is conceded by all the parties that Morris claimed title through a tax deed, and that the tax deed was void, but the plaintiff by way of reply alleged, in substance, that on the 5th day of September, 1894, lots 31 and 32 were sold by the treasurer of Cleveland county for taxes to L. F. Weeks, and certificate of tax sale issued therefor, and thereafter a tax deed was also issued to Weeks; that the tax deed was never filed for record; that thereafter Weeks conveyed all her right, title, and interest in said certificate of tax sale and tax deed to F. W. Weeks, who in turn conveyed all his interest therein to R. F. Ellinger; that thereafter said lots were again sold for taxes to plaintiff, and a tax certificate issued to them therefor; that thereafter he sold and transferred his certificate of tax sale to said Ellinger, who in turn sold and conveyed his interest therein to said lots to Morris; that thereafter said Morris went into possession of said premises believing himself to be the owner thereof, and in good faith placed the improvements thereon of the value of \$800 or \$1,000; that while in the possession of said premises, and believing himself to be the owner thereof, he executed the mortgage in controversy to plaintiff; that the money borrowed from the mortgagee and secured by said mortgage was expended in placing said improvements on said lots; that, even if the tax deed is void, the plaintiff as the mortgagee and assignee of Morris, the mortgagor, is entitled to a lien on the improvements thereon under and by virtue of the occupying claimant's act. The defendants Morris and wife were duly served with summons, and made default, and judgment was rendered against them for the amount due upon the note, and a decree entered foreclosing the mortgage of plaintiff on said lots as against the Morrises. Thereafter the cause as to the other parties was tried to the court, without a jury, and a final judgment was rendered against the plaintiff, in favor of the defendants Howard and wife, canceling the mortgage so far as it affected lots 31 and 32, and quieting the title of the defendants Howard and wife, and a decree of like effect in favor of Ella Foster in relation to the balance of the lots. To reverse these judgments and decrees this proceeding in error was commenced.

Counsel for plaintiff in error state the questions presented to this court as follows: (1) Is Morris entitled to the improvements that he placed upon lots 31 and 32, as against Howard and wife, who are grantees of Lazarus, the original owner of said lots, under the

occupying claimant's act, and, if so, is Standifer, as the mortgagee and assignee of Morris, entitled to have his mortgage foreclosed as to these improvements under the occupying claimant's act? (2) Did Howard and wife occupy lots 31 and 32 in block 31 as tenants of Morris, and, if so, can they, without surrendering back the possession to Morris, dispute his title to said lots or acquire an adverse interest therein? (3) Did not Howard and wife, when they purchased these lots from Lazarus, buy them subject to the mortgage lien of Standifer, and are they not now estopped from defeating his mortgage?

Counsel for defendants in error contend that all of these questions should be answered in the negative, for the reason that a claimant must be in actual possession of the improvements and hold some kind of title at the very time the improvements are made, and must be in possession at the very time he is sought to be ousted, and make his claim to his improvements at the very time and while yet in possession. The facts upon which this contention is based are substantially as follows: It is admitted that Morris went into possession of the property under a void tax deed; that after the execution of the tax deed he went into possession of the lots involved and erected improvements thereon of the value of something like a thousand dollars; that after issuance of this tax deed to him he borrowed the money involved in this controversy from the plaintiff and executed his promissory note secured by the mortgage sought to be foreclosed; that the money borrowed from the mortgagee was expended in placing said improvements on said lots; that some time thereafter he removed from the premises and rented the same to Howard for \$8 per month; that while Howard was in possession as the tenant of Morris, and after the execution of the mortgage to the plaintiff, he secured a deed from the holder of the legal title, and afterwards, while yet a tenant of Morris, he purchased his (Morris') equity for the sum of \$50. Counsel for the defendants in error, in their brief, state their theory of their case as follows: "Our contention is that Morris himself, if he had not made the deed to Howard, could not have set up the claim of an occupying claimant after he had moved out of the house and had surrendered possession." With this contention of counsel we cannot agree. To our minds the possession of Morris, through Howard, his tenant, was sufficient to sustain his right as an occupying claimant against any one seeking to eject or throw him out of possession until he was paid the full value of all the valuable improvements made on the premises. Jones on Landlord & Tenant, § 689, states the rule governing the rights of Morris and his tenant as follows: "The general doctrine of estoppel precludes a tenant during the continuance of his possession under a lease from buying in and setting up an adverse title to defeat an action of ejectment or a suit for rent.

This rule does not, however, prohibit the tenant, during the tenancy, from purchasing any outstanding title and from asserting the same against the landlord after the expiration of the tenancy and yielding up of possession."

There is no pretense that Howard ever delivered possession of the premises to Morris, or that their relation of landlord and tenant was ever terminated. It is doubtful, though, even if he had delivered possession to Morris, if he could defeat the right of the plaintiff under his mortgage. At the time this mortgage was made, Morris undoubtedly had a right to possession, and a right to recover the value of the improvements placed on the lots under the occupying claimant's act. When he borrowed the money from the plaintiff for the purpose of erecting improvements on these lots, it would be but equitable to presume that he intended to mortgage all the interest of whatever kind he had in the property, and secure as fully as possible the mortgagees from whom he borrowed the money to make the improvements. The mortgage being of record, Howard was charged with notice of this condition at the time he went into possession as a tenant and when he secured the deed from Morris at a nominal figure it would be inequitable to hold that this deed also transferred to him, free of incumbrance, improvements of the value of something like a thousand dollars, which were largely placed upon the lots with the plaintiff's money. We think the beneficent principles of equity are broad enough to protect the plaintiff against an injustice of this kind without the aid of the occupying claimant's act. It has been held that: "The adjustment of the rights of occupying claimants is a matter of equitable cognizance; and courts may, in addition to the relief provided by statute, and as supplementary thereto, make such orders as are equitable and just in matters not specifically provided for by the statute." *Mercer v. Justice*, 63 Kan. 225, 65 Pac. 219; *Cleland v. Clark*, 123 Mich. 179, 81 N. W. 1086, 81 Am. St. Rep. 161. "It is a well-settled principle of equity, moreover, that when a bona fide possessor of property makes meliorations upon it in good faith and under an honest belief of ownership, and the real owner is for any reason compelled to come into a court of equity for relief, that court, applying the familiar maxim that he who seeks equity must do equity, will compel him to pay for those improvements, as far as they are permanently beneficial to the estate and enhance its value." *Story on Equity Jurisprudence* (— Ed.) § 779; *Pomeroy on Equity Jurisprudence* (2d Ed.) § 1241. We think an application of the occupying claimant's act will work substantial justice between the parties to this suit, and that upon equitable grounds the decree of foreclosure entered in this case ought to be set aside and one entered giving the plaintiff the benefit thereof.

It is therefore ordered that the decree of foreclosure formerly entered in this cause shall be set aside, and that one be entered in conformity with this decision.

DUNN, C. J., and WILLIAMS, HAYES, and TURNER, JJ., concur.

(3 Okl. Cr. 646)

TEELS v. STATE.

(Criminal Court of Appeals of Oklahoma.
April 16, 1910.)

(*Syllabus by the Court.*)

CRIMINAL LAW (§ 1130*)—APPEAL—FAILURE TO FILE BRIEFS—AFFIRMANCE.

Where the plaintiff in error was convicted, upon a trial by jury, of a violation of the prohibition law, and appeals from the judgment of conviction, and no briefs are filed or argument presented, this court will not search the record to discover errors, and the judgment of the trial court will be affirmed, where no prejudicial error appears upon the face of the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2970, 2985; Dec. Dig. § 1130.*]

Appeal from Washita County Court; L. R. Shean, Judge.

G. W. Teels was convicted of selling intoxicating liquor, and appeals. Affirmed.

Fred S. Caldwell, Counsel to the Governor, for the State.

DOYLE, J. Plaintiff in error was convicted in the county court of Washita county of the crime of unlawfully selling intoxicating liquor, and was on the 23d day of February, 1910, sentenced to pay a fine of \$200 and to serve a term of 90 days in the county jail, from which judgment and sentence he appealed by filing in this court on May 20, 1909, his petition in error, with transcript of record, duly certified by the clerk of the county court, together with proof of service of notice of appeal as required by law. On June 23, 1909, his attorneys of record, Massingale & Duff, filed their withdrawal as counsel, with the request that the firm of Holcombe & Bulow be substituted. It was so ordered, and an extension of 60 days was given to file briefs. On March 15, 1910, Holcombe & Bulow filed their withdrawal as counsel, "for the reason that plaintiff in error has failed and neglected to pay or secure them for their services and has failed and neglected to provide the necessary expenses for preparing and filing briefs." At this March, 1910, term of this court the cause was submitted on the motion of the attorney for the state that said appeal be dismissed for want of prosecution, on the ground that no briefs have been filed, or that said judgment be affirmed on the record.

No briefs have been filed, and no errors have been pointed out, except as shown by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the petition in error. In cases of this kind, where no briefs are filed by plaintiff in error, this court will not search the record to discover errors, but will only look to the jurisdiction of the court, the sufficiency of the information, and the regularity of the judgment. Following this rule, we have examined the record as shown, and we are unable to perceive any errors.

The judgment being in all respects regular, the judgment is hereby affirmed at the cost of plaintiff in error, and the case remanded to the county court of Washita county, with direction to carry the judgment and sentence into execution.

FURMAN, P. J., and RICHARDSON, J., concur.

(3 Okl. Cr. 647)

TEELS v. STATE.

(Criminal Court of Appeals of Oklahoma.
April 16, 1910.)

Appeal from Washita County Court; L. R. Shean, Judge.

G. W. Teels was convicted of an illegal sale of liquor, and appeals. Affirmed.

Fred S. Caldwell, Counsel to the Governor, for the State.

PER CURIAM. Plaintiff in error was convicted in the county court of Washita county of a violation of the prohibition law, and was on the 23d day of February, 1909, sentenced to pay a fine of \$150 and to serve a term of 75 days in the county jail, from which judgment he appealed by filing in this court on May 20, 1909, a petition in error, with duly certified transcript of the record attached.

The facts in this case are the same as in the case of *G. W. Teels v. State* (decided at this term) 108 Pac. 415. Upon the authority of that case, the judgment of the county court of Washita county is hereby affirmed, at the cost of plaintiff in error, and the cause remanded to the county court of Washita county, with direction to carry the judgment and sentence into execution.

(3 Okl. Cr. 639)

GILMORE v. STATE.

(Criminal Court of Appeals of Oklahoma. April 12, 1910.)

(Syllabus by the Court.)

1. PARDON (§ 6*)—GRANT AFTER CONVICTION—VALIDITY.

A pardon granted and accepted after conviction and pending an appeal in the Criminal Court of Appeals is valid under Const. art. 6, § 10, wherein the Governor is empowered to grant, after conviction, reprieves, commutations, paroles, and pardons.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. § 12; Dec. Dig. § 6.*]

2. PARDON (§ 6*)—"CONVICTION."

The term "conviction," in article 6, § 10, of the Constitution, denotes the final judgment of the trial court, upon a plea of or verdict of guilty.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. § 11; Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1584-1591.]

3. CRIMINAL LAW (§ 1131*)—APPEAL—PARDON—DISMISSAL.

Where a pardon is granted and accepted, and brought to the attention of this court pending an appeal, the appeal will be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2974; Dec. Dig. § 1131.*]

Appeal from Canadian County Court; H. L. Fogg, Judge.

Hollis Gilmore was convicted of gaming, and appeals. Dismissed.

R. B. Forrest, for appellant. Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for the State.

DOYLE, J. Plaintiff in error was convicted in the county court of Canadian county for the crime of conducting a public gambling house, and was sentenced to pay a fine of \$500, and to serve a term of 30 days in the county jail, from which judgment he appealed to this court.

While the case was still pending in this court, the acting Governor granted an unconditional pardon to the plaintiff in error, and he has filed a certified copy of said pardon in this court, the material part of which reads as follows: "Whereas, it appears from the court records that the said Hollis Gilmore was indicted by the grand jury on his own testimony in violation of his constitutional rights, and a pardon has been recommended by Judge John J. Carney and Hon. B. W. Riley: Now, therefore, I, George W. Belamy, acting Governor of the state of Oklahoma, by virtue of the authority vested in me by law, do hereby grant unto the said Hollis Gilmore a pardon of the said offense, to take effect immediately, restoring unto the said Hollis Gilmore all of the rights of citizenship. In witness whereof, I have hereunto set my hand and caused to be affixed the great seal of the state of Oklahoma, at Guthrie, this 1st day of April, A. D. 1910."

The question now presented in this case is: Has there been a conviction of the plaintiff in error within the meaning of the Constitution, so that executive clemency may be invoked?

Section 10, art. 6, of the Constitution, provides: "The Governor shall have power to grant, after conviction, reprieves, commutations, paroles, and pardons for all offenses, except cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to such regulations as may be prescribed by law. He shall communicate to the Legislature, at each regular session, each case of reprieve, commutation, parole, or pardon, granted, stating the name of the convict, the crime of which he was convicted, the date and place of conviction and the date of commutation, pardon, parole, or reprieve."

As we view it, an appeal pending in this court does not deprive the Governor of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

power to grant a pardon to the appellant. In its ordinary sense the term "conviction" is used to designate that particular stage of a criminal prosecution, when a plea of guilty is entered in open court, or a verdict of guilty is returned by a jury. But in a strict legal sense it denotes the final judgment of the court. Chief Justice Marshall defines "conviction" as a "technical term applicable to judgment in a criminal prosecution." A conviction within the meaning of the Constitution is an adjudication that the accused is guilty. It imports the final consummation of the prosecution, from the complaint to the judgment of the court by sentence. And where an appeal is taken to this court, and, pending appeal, a pardon is granted and accepted, the appellant thereby waives all his rights upon the appeal, and when brought to the attention of this court the appeal will be dismissed.

In the case of *Com. v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699, Justice Gray concluding a very learned and elaborate discussion of the question, wherein he cites many instances where the pardoning power has been invoked after conviction, and while the cases were pending in the court of review, said: "It was argued for the commonwealth that the defendant could not be said to be convicted at the time when this pardon was granted, because a bill of exceptions was then pending in this court to the rulings under which he had been found guilty, and that, after pleading the pardon, he might still prosecute his exceptions, and, if they should be sustained, have the verdict set aside. But it is within the election of the defendant whether he will avail himself of a pardon from the executive—he the pardon absolute or conditional. If he does not plead the pardon at the first opportunity, he waives all benefit of the pardon; if he does so plead it, he waives all other grounds of defense. *Staunf. P. C.* 150; *J. Kelying*, 25; 4 Bl. Comm. 402; *U. S. v. Wilson*, 7 Pet. 150 [8 L. Ed. 640]. The pleading of the pardon in the superior court would therefore be ipso facto a waiver of his exceptions."

In the case of *State v. Alexander*, 76 N. O. 231, 22 Am. Rep. 676, the court said: "At common law the crown exercised the power of pardon at any time. The consequence was that crimes were smothered. The facts were not brought to light. The person charged was not brought before the public and required to answer the charge, and, of course, the public were dissatisfied. But under our Constitution and statute, the person charged must be brought before the public in a public trial and face his accusers, and all the facts must appear, and the jury must find him guilty, and the court must sentence him. If then he will ask for pardon, he cannot deceive the pardoning power. The public are in possession of the facts and can resist his application. Nor is the pardoning power any longer irresponsible to the public, because he

has to report the facts and his reasons for exercising the power. It is not denied that a pardon granted under these circumstances is valid; but the objection made is that these prerequisites do not exist in this case, for although the defendant has been regularly charged, tried, found guilty by the jury, and sentenced by the court, thereby bringing his case within the constitutional provisions, yet he took it out of the provision by appealing to the Supreme Court, which appeal vacated the sentence or judgment; and so there was no 'conviction' remaining, and therefore the pardon is invalid as wanting a 'conviction' to support it. And this brings us to the construction of the Constitution as to what is meant by 'conviction.' Does it mean the verdict of the jury, or the sentence of the court, or the verdict and sentence both? The word is ordinarily used to denote the verdict of the jury, guilty. How did the jury find? Guilty; or, they convicted him. What did the judge do? Sentenced him to be hanged. This is the language ordinarily used in such matters, both in conversation and in books, law and literary. It is never said that the jury sentenced him, nor that the judge convicted him. * * * Nothing can be a conviction but the verdict of the jury. Take that to be so, still inasmuch as the Constitution, in the same section in which it authorizes the Governor to pardon 'after conviction,' requires him to report to the General Assembly not only the conviction but the sentence, is it not intended that there shall be a sentence to report, else how can he report it? And if the appeal vacates the sentence, then there is no sentence to report; and so there is no sentence to support the pardon. Technically that would seem to be so; but it is a refinement merely. Suppose the defendant in his application for pardon should say: 'I was convicted of murder and sentenced to be hanged. I appealed to the Supreme Court, but I abandon the appeal and pray for a pardon.' Might not the Governor pardon him and in his report say that the applicant had been convicted of murder and sentenced to be hanged and appealed to the Supreme Court, but abandoned his appeal and prayed for pardon, and that he had pardoned him because he was satisfied that he was innocent? Would not that substantially comply with the Constitution to say that he had been convicted and that he had been sentenced? It is insisted that the object is not to pardon him while he is making defense, nor until he surrenders and begs for mercy. If that were true, still does he not surrender and beg for mercy when he abandons his appeal and prays for pardon? But it is not always true that the defendant ought to be expected to surrender and beg for mercy. There are cases where he has been improperly convicted and asks, not for mercy, but for justice." See, also, *Com. v. Kiley*, 150 Mass. 325, 22 N. E. 55; *Smith v. State*, 74 Tenn. 639; *Hackett v. Freeman*, 103 Iowa, 296, 72 N. W. 528;

Manlove v. State, 153 Ind. 80, 53 N. E. 385; Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366.

Applying the principles of law stated in the foregoing cases to the question involved, we are of opinion that the restriction imposed in the constitutional provision upon the exercise of the pardoning power does not apply to cases where there has been a conviction in the trial court and an appeal taken therefrom.

The language of the statute providing for appeal is (section 6951, Snyder's St.): "If the crime of which the defendant is convicted be a ballable one, the court shall at the time of entering judgment notify the defendant of his right to an appeal, etc." There manifestly the judgment and sentence is considered to be the conviction.

Therefore, it is considered that the appeal be, and the same is hereby, dismissed, and the cause remanded to the county court of Canadian county.

FURMAN, P. J., and RICHARDSON, J., concur.

(3 Okl. Cr. 643)

CHAPMAN v. STATE.

(Criminal Court of Appeals of Oklahoma. April 12, 1910.)

Appeal from Canadian County Court; H. L. Fogg, Judge.

Shirley Chapman was convicted of having in possession intoxicating liquors, and he appeals. Dismissed.

R. B. Forrest, for plaintiff in error. Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error was convicted in the county court of Canadian county for the crime of having possession of intoxicating liquor, with the intention of violating the law, and was on the 27th day of November, 1909, sentenced to pay a fine of \$50 and serve a term of 30 days in the county jail; from which judgment he appealed to this court. On April 1, 1910, while said appeal was pending, Acting Governor Bellamy, granted him an unconditional pardon, and he has filed a certified copy of said pardon in this court. The facts as to the pardon in this case are the same as in the case of Hollis Gilmore v. State (decided at this term) 108 Pac. 416, and the principles of law are the same and the decision the same.

Therefore it is considered that the appeal be, and the same is hereby, dismissed, and the cause remanded to the county court of Canadian county.

(3 Okl. Cr. 629)

SMITH v. STATE.

(Criminal Court of Appeals of Oklahoma. March 31, 1910.)

(Syllabus by the Court.)

1. WITNESSES (§ 379*)—IMPEACHMENT—CONTRADICTORY STATEMENTS.

It is proper to show inconsistent statements of a witness, made out of court, to affect his credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1220-1222, 1247-1256; Dec. Dig. § 379.*]

2. CRIMINAL LAW (§§ 371, 673*)—EVIDENCE—OTHER OFFENSES.

Upon the subject of motive or intent, other transactions tending to prove its criminal existence, even though they may involve other offenses, may be given in evidence against the defendant, but such evidence must be so limited and restricted as to leave the jury only at liberty to use it to discover the motive or intent actuating the accused in the act for which he is on trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832, 1876; Dec. Dig. §§ 371, 673.*]

3. CRIMINAL LAW (§ 1159*)—APPEAL—EVIDENCE.

A judgment of conviction will be reversed on appeal, where the record shows that it is founded solely on perjured testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Appeal from Pittsburg County Court; R. W. Higgins, Judge.

S. G. Smith was convicted of selling intoxicating liquors, and he brings error. Reversed and remanded.

Stuart & Gordon, J. S. Arnote, and J. H. Wilkins, for plaintiff in error. Fred S. Caldwell, Counsel to the Governor, for the State.

DOYLE, J. Plaintiff in error, S. G. Smith (hereinafter designated defendant), was convicted in the county court of Pittsburg county upon an information charging him with furnishing intoxicating liquor to one Tom Lewis, and was on the 16th day of July, 1908, sentenced to imprisonment in the county jail for a period of 60 days, and to pay a fine of \$100 and costs, from which judgment the defendant appeals to this court.

The petition avers 22 assignments of error. We deem it unnecessary to consider the numerous questions presented, because, upon a careful examination of the case, we are convinced that the testimony does not establish defendant's guilt, and is so uncertain and contradictory that it is insufficient to support the verdict. It appears from the record that Tom Lewis, the complainant, is a self-confessed perjurer. He testified that he lived in Hughes county; that on July 2d he came to McAlester with one Edd Colbert; that while there he went with Henry Sealey to the law office of S. G. Smith, the defendant; that Smith had a half pint of whisky, from which he took three drinks, Henry Sealey three drinks, and Smith one drink, and that the bottle was still half full, and that he was pretty full; that he had not been drinking before his visit to the defendant's office; and that he was not indebted to the defendant for services rendered or for money borrowed. The prosecution was then permitted, over the objection of the defendant, to ask complainant whether or not he had any business dealings with Smith the day he got the whisky, and whether or not he had anything to do with some checks that day. Witness testified that he signed two checks, each for \$10; that on

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

one of the checks witness received \$6. These checks were protested, and the next day witness was arrested for issuing said checks. He further testified that he had signed a written statement denying that defendant did at any time furnish him whisky, and that he had sworn to said statement.

Henry Sealey, on the part of the prosecution, testified that he went with Lewis to Smith's office, and Smith had a half pint of whisky. Asked if Smith gave Lewis some whisky, he said: "No; I did not see him." He also testified that Lewis took three drinks and witness three drinks and Smith one, leaving about the length of a finger in a half-pint bottle. He was asked if he had signed a statement in part as follows: "I was with Tom Lewis all day. He was drinking. When he came in on the train from Calvin, I saw him as soon as he came up town. I first saw him in front of the Wells Fargo Express Co. office. I never did in my life see Mr. Smith with any whisky, and I never did at any time see Mr. Smith give Tom Lewis a drink of whisky. Mr. Smith never did at any time give me a drink of whisky nor did he ever at any time offer me a drink. Henry Sealey. Witnesses to signature: S. J. Small. O. C. Warner. John Elsing. R. P. Fay. A. E. Becker. G. S. Russell. S. S. Smith." He denied making this statement, and said that he never signed the same. After several witnesses had testified that the statement was read to him, and that he had signed the same, when called in rebuttal, he admitted that he had signed said statement.

G. E. Vining, a witness for the prosecution, testified: That he ran a secondhand store, and over the objection of the defendant he was permitted to testify that on the day charged defendant presented to him a check signed by Tom Lewis, payable to defendant, and indorsed by defendant for which he paid defendant \$10. At the same time Tom Lewis had another check for \$10, payable to defendant and indorsed by defendant. That he handed the money for the second check to Tom Lewis, but Smith took it and gave Lewis \$5.50, and kept the balance. That the checks were protested, and that he filed a complaint against Tom Lewis, and had him arrested for passing said checks.

On the part of the defense W. R. White testified that he knew Henry Sealey, that he read to him his statement before he signed it, and that he signed the same in his presence.

Wood N. Arnold testified that on July 2d he met Henry Sealey in front of his office, and talked with him, and that he seemed to be drinking and asked witness to have a drink; that he asked him if he knew where the defendant Smith was, and where he could find him, and said he had some business with Mr. Smith and wanted to see him.

Sam Small testified that he was asked to witness Henry Sealey's signature to said

statement; that he asked him if that was his signature and he said it was.

Tom Taylor testified that he was a member of the bar of Pittsburg county; that he saw Tom Lewis on the 2d day of July; that he had a half-pint bottle about half full of whisky; that Tom Lewis and Johnson Frasier and Edd Colbert came to his office, and, while there, Lewis gave Frasier a check for \$10, asking witness to write it for him. Witness then signed it.

The defendant testified he lived in McAlester 16 years, and denied that he ever gave any whisky to Tom Lewis or to Henry Sealey; that he saw them on or about the 2d of July; that Tom Lewis had visited his office on several occasions, and asked him to sell his surplus land and be his agent; that on various occasions he wanted a dollar or two, and the defendant let him have it; that on the day in question Lewis told him he had \$50 in the Bank of Guertie; that he gave him a check for \$10 for service rendered, and then asked him to cash a check for \$10; that he then went with him to Vining's secondhand store and cashed the checks; that Tom Lewis then paid to him \$4 that he had borrowed from him. On cross-examination the defendant was asked: "Have you ever been charged with any crime? (Objection made and sustained.)" He was then asked: "Q. Have you ever been arrested on any charge? A. No, sir. Q. Were you not arrested in this court, the central district? (Objected to as incompetent, irrelevant, and immaterial. Objection overruled and exceptions saved.) This in itself constitutes reversible error. This question was fully considered in the case of Slater v. United States, 1 Okl. Cr. 275, 98 Pac. 110. In an opinion written by Presiding Judge Furman, the third syllabus reads as follows: "For the purpose of affecting the credibility of a witness, he may be asked, on cross-examination, if he has been convicted of a felony or of any crime which involves a want of moral character; but it is improper to ask such witness if he has been indicted, arrested, or imprisoned, before conviction, for any offense whatever." The admission of evidence in relation to the checks was clearly erroneous and prejudicial to the rights of the defendant. It would seem that this evidence was introduced for the purpose of showing that the defendant had obtained money from Tom Lewis fraudulently.

Upon the subject of motive or intent, other transactions tending to prove its criminal existence, even though they may involve other offenses, may be given in evidence against the defendant, but such evidence must be so limited and restricted as to leave the jury only at liberty to use it to discover the motive actuating the defendant in the act for which he is on trial.

The palpable perjury of the two witnesses for the state should be condemned, and, in view of the character of this testimony, we

think it would have been a proper exercise of the power vested in the trial court to have advised the acquittal of the defendant upon the ground that the evidence was insufficient. A conviction founded upon such testimony should not be permitted to stand. In our opinion it would be destroying the presumption which arises in favor of the innocence of the defendant and permitting the subversion of the rule which requires the establishment of guilt beyond a reasonable doubt to allow this conviction to stand.

The judgment of the county court of Pittsburg county is therefore reversed, and the cause remanded.

FURMAN, P. J., and OWEN, J., concur.

(4 Okl. Cr. 194)

HOPKINS v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 31, 1910.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 197*)—"EX POST FACTO LAWS"—WHAT CONSTITUTES.

Within the meaning of the Constitution, any law is ex post facto which is enacted after the offense was committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 550; Dec. Dig. § 197.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2527-2533; vol. 8, p. 7657.]

2. INDICTMENT AND INFORMATION (§ 10*) — RETURN—CONCURRENCE OF GRAND JURORS.

An indictment charging a felony, where the offense was committed prior to statehood, must be returned on concurrence of 12 grand jurors.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 10.*]

3. CRIMINAL LAW (§ 1144*)—APPEAL—PRESUMPTIONS AS TO REGULARITY OF INDICTMENT.

When an indictment is duly returned as a true bill, properly indorsed and with the signature of the foreman, the presumption is that it was regularly found, on legal and sufficient evidence, with due deliberation, and by the concurrence of the requisite number of jurors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2747, 3018; Dec. Dig. § 1144.*]

4. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

A defendant cannot be heard to complain of the refusal of the court to give instructions on insanity, when there is no evidence offered even tending to prove insanity on part of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1821; Dec. Dig. § 814.*]

5. HOMICIDE (§ 309*)—INSTRUCTIONS—MANSLAUGHTER.

It is the duty of the trial court to instruct on the law of manslaughter if there is any evidence that the alleged crime might have been done under circumstances that would reduce it from murder to manslaughter, but it is no error to refuse such instructions if there is no such evidence offered.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.*]

6. CRIMINAL LAW (§ 1129*)—APPEAL—SPECIFICATION OF ERROR.

A specification of error in the following language: "The court erred in matters of law during the trial of this case, which ruling of the court was excepted to by the defendant and exception allowed," is too general; and when the counsel for the defendant does not point out the errors complained of, such assignment will not be considered by this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954-2964; Dec. Dig. § 1129.*]

7. GRAND JURY (§ 8*)—DRAWING—VALIDITY.

In this case the grand jury was drawn from a list of jurors delivered to the clerk of the court by the jury commissioners, but indorsed, "For the County Court"; there being no contention that the jurors were not in fact qualified to serve as grand jurors. *Held*, this was a substantial compliance with the act providing for the selection of grand jurors, and sufficient to prevent the setting aside of the indictment on motion to quash.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 8.*]

Error from District Court, Comanche County; W. M. Bolmes, Special Judge.

John Hopkins was convicted of murder, and brings error. Affirmed.

W. O. Henderson, for plaintiff in error.
Charles West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for defendant in error.

OWEN, J. The petition in error filed in this case contains 15 specifications or assignments. The first is to the action of the court in overruling the motion to quash the indictment, and in not permitting the defendant to offer proof in support of the motion. The motion is to the effect that the grand jury which returned the indictment in this case was composed of only 12 men, and that in impaneling the grand jury the court in its general instructions advised the grand jury that an indictment in any case might be returned on the concurrence of 9 of the jurors. The homicide in this case was committed prior to statehood. Under the law in force in Oklahoma Territory at that time, a grand jury was composed of 16 men, and an indictment could not be returned without the concurrence of at least 12 of the 16. This court agrees with the contention of counsel that all rights guaranteed to the defendant under the law at the time of the commission of the offense must be allowed him at the time of his trial. Under the Constitution of this state, adopted after the commission of the crime and before the trial, a grand jury is composed of 12 men. This would be ex post facto as to this defendant if the charge deprived him of any protection afforded under the law at the time of the commission of the offense. Any law is ex post facto which is enacted after the offense was committed, and which in relation to it or its consequences alters the situation of the accused to his disadvantage. The

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

right guaranteed to the defendant in this instance was the concurrence of 12 jurors before an indictment could be returned against him. If the reduction in the number necessary to compose a grand jury had been below the number necessary to concur in an indictment, then he would have been deprived of a substantial right. At the time of the homicide an indictment could not be returned except on the oaths of 12 jurors, and this right must be preserved to the defendant. If the number of the grand jury had been increased to a greater number than 12, he might have been deprived of a substantial right. In a jury of 16 a failure of 5 to concur would prevent an indictment. If the grand jury be increased, it would require a greater number to prevent an indictment. But when the number composing the jury has been reduced to 12, the failure of one man to concur would prevent an indictment. The motion to quash in this case does not allege that a less number than 12 did in fact concur; the motion is to the effect that the defendant had no knowledge that a less number than 12 did concur. Counsel for the defendant urges that, inasmuch as the court directed the jury that 9 concurring might return indictments, the presumption is that less than 12 did concur. With this contention we cannot agree. We understand the rule to be exactly the converse on this proposition. When an indictment is duly returned as a true bill, properly indorsed, and with the signature of the foreman, the presumption is that it was regularly found on legal evidence and by the requisite number of jurors. The presumption of regularity is in favor of the indictment. *Canard v. State*, 103 Pac. 737. In volume 22 Cyc., page 206, the rule is announced in accordance with our holding here; citing a number of authorities. In the case of *U. S. v. Wilson*, 28 Fed. Cas. No. 16,737, on this proposition, the United States court said: "Where the record shows that the grand jury found the bill of indictment on their oaths, the indictment and legal effect and presumption is that it was found on proper evidence, with due deliberation, and by the concurrence of 12 of their number." Specifications 2, 3, 4, and 5 refer to the action of the court in overruling defendant's motion for change of venue. The error complained of under these assignments consist in the court having permitted the county attorney to file counter affidavits. Counsel insists that, under section 5427, *Wilson's Rev. & Ann. St. 1903*, the county attorney is not permitted to file counter affidavits in a crime where the punishment may be death or imprisonment for life. Counsel has overlooked the fact that this statute was amended by the territorial Legislature in 1895. The statute as amended (section 6766, *Snyder's Comp. Laws 1909*) provides that the county attorney may introduce coun-

ter affidavits to show that the persons making affidavits in support of the application are not credible persons, and that the charge is not necessary. There was no error in permitting the county attorney to file counter affidavits. It was authorized by the statute in force at that time. The granting of a motion for change of venue is addressed to the sound discretion of the court, and unless it clearly appears that the discretion was abused, this court will not disturb the verdict for the failure of the trial court to the change. There is no contention here that there was an abuse of discretion.

Specifications 6, 7, and 8 are to the action of the trial court in refusing to give instructions on insanity. A careful reading of all the evidence in the record fails to disclose any evidence that even tends to prove insanity on the part of the defendant. Insanity is a question of fact, and since there was no evidence offered to prove it, there was no error on the part of the court in refusing such instructions. Counsel for defendant insists that the defendant's actions after he had murdered his wife were such as to authorize the instructions; that evidence is to the effect that for several days after the homicide defendant appeared to be in a stupor, and this fact counsel insists is some evidence of insanity, and on the oral argument it was urged that the brutal circumstances of the homicide were some evidence of insanity; that a sane man would not commit a homicide in that manner. The evidence is to the effect that the defendant and his wife had separated in Missouri; that he had threatened to kill her unless she returned and lived with him. He went to her father's house, where she was residing, and attempted to do her bodily injury, but was prevented by the interference of the county sheriff. After her removal to Lawton in this state, he appeared on the scene, and went to her residence, where he entered the room. She started to run out. He struck her across the head with a meat cleaver. The neighbors, hearing her screams, rushed to the scene, where they found her body prostrate on the floor, with evidence that carbolic acid had been forced down her throat. The defendant, bearing evidence that he had taken some of the same drug, was lying prostrate near her feet. He was immediately taken to the jail, and three or four days thereafter appeared in a stupor. The proof was undisputed that the defendant's lips and face were burned from carbolic acid. In all probability he attempted suicide after having brutally murdered his wife. The mere fact that he appeared sullen and was in a stupor after the commission of the offense would not authorize an inference of insanity. It occurs to us that even a partial realization of the horrible deed he had committed was amply sufficient to produce a stupor, and we find no error in the refusal of the court to instruct as to insanity.

The ninth assignment is to failure of the court to instruct on manslaughter. It is always the duty of the trial court to instruct on the law of manslaughter if there is any evidence that the alleged crime might have been done under circumstances that would reduce the crime from murder to manslaughter. There is no effort made in this case to point out any evidence that would have the slightest tendency to reduce the crime from murder to manslaughter, and we have been unable to find any such evidence in the record. The court is only required to instruct as to the law on the issues of fact raised by the proof. There not having been any evidence offered tending to reduce the crime to manslaughter, the court did not err in its failure to instruct as to the law of manslaughter.

Upon specifications 10 and 13 it is alleged that the court erred in matters of law during the trial and in passing judgment, because the verdict was contrary to law and not supported by the evidence. These assignments are too general. Counsel does not undertake to point out the errors complained of, and, if he has been unable to point them out, he certainly cannot expect this court to find them. We think the evidence abundantly sufficient to support the verdict. A different verdict would have been a travesty on justice.

Specifications 12 and 14 complain of the action of the court in overruling the motion for a new trial and the motion in arrest of judgment, and does not raise any questions other than those presented under the other assignments.

Specifications 11 and 15 are to the action of the court in overruling the motion to quash the indictment for the reason that the panel of the grand jury which returned this indictment was drawn from a list of jurors selected for the county court. It appears that the list of jurors selected for the county court was delivered to the clerk of the district court, and the list selected for the district court was delivered to the clerk of the county court.

Section 3985, Snyder's Comp. Laws, 1909, is as follows: "The board of jury commissioners shall make two separate certified lists, of the names drawn for the said court, showing the election precinct from which each juror was selected; one of said lists for the district court shall be delivered to the clerk of the district court and there retained, and the list for the county court to the judge of the county court of said county, and there retained."

The law requires the jury commissioners to draw the jury for the county court from the same body of electors from which they draw the jury for the district court. A juror in the county court must possess the same qualifications as a juror in the district court.

One list is delivered to the clerk of the district court, and one list to the clerk of the county court.

Section 3995 of Snyder's Comp. Laws 1909, is as follows: "A substantial compliance with the provisions of this Act shall be sufficient to prevent the quashing or setting aside of any indictment of a grand jury chosen hereunder, unless the irregularity in drawing, summoning or impaneling the grand jury resulted in depriving a defendant of some substantial right, but such irregularity must be specifically presented to the court on or before the cause is first set for trial. A substantial compliance with the provisions of this Act, shall be sufficient to prevent the setting aside of any verdict rendered by a jury chosen hereunder, unless the irregularity in drawing, and summoning or impaneling the same, resulted in depriving a party litigant of some substantial right; provided, however, that such irregularity must be specifically presented to the court at, or before, the time the jury is sworn to try the cause."

The mere fact that the jury commissioners delivered to the clerk of the district court the list of jurors selected for the county court did not prejudice the defendant in this case. There is no contention here that he was in fact prejudiced or deprived of a substantial right. The appointment of the jury commissioners and the selection of the names to compose the jury for the district and for the county court was in all things regular. This was a substantial compliance with the provisions of the act, and in the very language of the act is sufficient to prevent the quashing or setting aside of the indictment.

After a careful consideration of all the assignments of error and a careful reading of the entire record, we have been unable to find any prejudicial errors committed by the trial court, or any evidence that the defendant had been deprived of a substantial right guaranteed to him under the law.

The judgment of the lower court is therefore affirmed, with directions to the sheriff of Comanche county to carry out the judgment of the district court of that county, and that the defendant, John Hopkins, be executed on the 13th day of May, 1910, according to said judgment as rendered by that court.

FURMAN, P. J., and DOYLE, J., concur.

(3 Okl. Cr. 601)

SCRIBNER v. STATE.

(Criminal Court of Appeals of Oklahoma.

March 31, 1910.)

(Syllabus by the Court.)

1. JURY (§ 103*) — COMPETENCY OF JURORS — OPINION AS TO GUILT.

Persons called as jurors, who have heard and read detailed accounts of an alleged offense,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

from which they have formed such an opinion as to the guilt of the accused as will require evidence to remove, are not qualified jurors, although they believe and express their belief that they can and will fairly try the case upon the testimony produced.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 471-478; Dec. Dig. § 103.*]

2. JURY (§ 99*)—DISQUALIFICATION—OPINIONS.

The opinion necessary to disqualify a juror must be one based on what purports to be the facts and one that will combat the evidence.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 439, 444; Dec. Dig. § 99.*]

3. JURY (§ 133*)—DISQUALIFICATION OF JUROR—PREJUDICE.

The trial court is not limited to the answers made by the juror, but must be satisfied from all the circumstances as well as the examination that the juror is not prejudiced against the accused.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 565; Dec. Dig. § 133.*]

4. JURY (§ 131*)—EXAMINATION OF JUROR—OPINION.

Where the juror says he has an opinion, the accused should be given an opportunity to examine him fully as to the extent of his opinion.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 567; Dec. Dig. § 131.*]

Error from District Court, Pontotoc County; A. T. West, Judge.

Dan Scribner was convicted of murder, and brings error. Reversed.

J. F. McKeel and Crawford & Bolen, for plaintiff in error. Charles West, Atty. Gen., Chas. L. Moore, Asst. Atty. Gen., and Robert Wimbish, Co. Atty., for the State.

OWEN, J. There are numerous errors alleged in the petition filed in this case, the most important of which, and the only one necessary to notice here, is assignment No. 17. This assignment appears in the following language: "The court erred in not affording this plaintiff in error a fair and impartial trial before a fair and impartial jury, as provided in section 20 of the Bill of Rights, in this: That the court overruled this plaintiff in error's challenge to a number of jurors who stated on their voir dire examination that they had formed an opinion as to the guilt of this plaintiff in error, and that they then had such opinion, and that it would take evidence to remove it; that on said examination ten (10) jurors stated that they had formed an opinion, and still had an opinion, as to the guilt or innocence of the plaintiff in error, and the court held that they were not thereby disqualified, and overruled this plaintiff in error's challenge to such jurors, and this plaintiff in error was reduced to the necessity of using his peremptory challenge in excusing the most objectionable of such jurors, but was compelled to permit some of the said jurors so entertaining said opinion to sit on the jury and try said cause; wherefore, the plaintiff in error says that he

did not have a trial before a fair and impartial jury."

No case has been presented to this court with greater skill and energy than that displayed and exercised on part of the attorneys for the state in this case. The able county attorney, who prosecuted this case below, for his able and fair presentation of the matter in this court deserves the thanks of this court.

The question presented under this assignment of error is one that strikes at the very foundation of our jurisprudence. Two cardinal principles of our system are, that every man shall be clothed with the presumption of innocence, and that he shall have a fair trial by an impartial jury. Section 6 of our Bill of Rights provides: "Right and justice shall be administered without sale, denial, delay, or prejudice." Section 20 provides: "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury."

A fair sample of the examination of the jurors complained of as objectionable, and who sat in the case, is as follows: "John McKinney: Q. You have formed an opinion? A. Yes, sir. Q. That opinion, formed from what you have heard, you could not give this defendant the same fair and impartial trial as if you had not heard anything? A. I do not think that I could; if I had never heard anything about it, I would not have formed an opinion. Q. But now you have an opinion? A. Yes, sir. Q. In your present frame of mind, with what you have heard, you could convict the defendant on less evidence than if you had not heard anything? The state objects to the form of the question. Objection sustained, and excepted to. This juror challenged by the defendant for cause. Mr. Wimbish: Q. What you have heard about this case was based on rumor, wasn't it? A. Yes, sir. Q. You haven't talked to anybody who was a witness in the case? A. No, sir. Q. Regardless of this rumor that you have heard, can you and will you, if taken as a juror in this case, go into the jury box and take the testimony of the witnesses on the witness stand and the charge of the court, and give this man a fair and impartial trial, notwithstanding the opinion that you have, based upon rumor? A. Yes, sir. The court overrules the defendant's challenge. The defendant excepts." "J. W. Fuller: Q. You say that you have heard a good deal about this case? A. Yes; I have heard a good deal. Q. You have heard the facts in the case detailed? A. Yes; from rumor and reports, I have. Q. Have you heard a statement of what purported to be the facts in the case? A. Yes, sir. Q. And from that you have formed an opinion? A. Yes, sir. Q. You have that opinion at this time? A. Yes, sir. Q. It would take evidence to remove that opinion? A. Yes, sir."

In this case we are called upon to say

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

whether a man shall be deprived of his life by the verdict of a jury when the record discloses that 10 of the persons called and examined as jurors said under oath that they had formed an opinion as to the guilt of the defendant, and that it would require evidence to remove that opinion. The juror McKlinney frankly admitted that he could not give the defendant the same fair trial that he could have given if he had not heard of the case. He was asked if he would not convict on less evidence than if he had not heard of the case. The court sustained the state's objection to the question, and did not permit him to answer. This was error. The defendant had the right to know. The court should permit a full investigation when a juror says he has an opinion. If he would require less evidence to convict, he is not a qualified juror. The defendant exhausted his peremptory challenges allowed him by law, and was compelled to accept as jurors four persons who had formed an opinion as to his guilt or innocence.

It has been urged with much force in this case that under the statutes of this state a juror is qualified although he had an opinion, provided it appears to the court upon his declaration that he can and will, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him. This statute was construed by this court in the case of *Johnson v. State*, 1 Okl. Cr. 321, 97 Pac. 1059. The court in an opinion delivered by the presiding judge said: "But the enumerated causes of challenge in the statute are not exclusive of all others not enumerated. When the juror has any opinion as to the guilt of the defendant, it matters not how this opinion was formed, the closing paragraph of the statute provides that it must appear to the court that the juror can and will act fairly and impartially in the case. But if this provision was not in the statute, we would be forced to place this construction upon the first part of the statute, because section 29 of our Constitution (Bunn's Ed.) is in this language: 'In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury.' Const. art. 2, § 20. Any statute which would even tend to deprive a defendant of a trial by an impartial jury would be unconstitutional and void. Although a juror may know absolutely nothing about the facts of the case, and may not have the slightest opinion as to the guilt of the defendant, yet if from any cause or upon any ground it appears to the trial court that the juror is biased or prejudiced against the defendant, it cannot be said that he would be a fair and impartial juror, and he should be excluded from the jury; otherwise the Constitution of the state would be disregarded and trampled upon. The trial court should resolve all doubts upon this matter in favor of the defendant. Upon the other hand, when no personal, class, or race bias or prejudice

appears to exist in the mind of the juror against the defendant, but it does appear that from rumor, or reading the public press, or from notoriety, the juror has an opinion as to the guilt of the defendant, but that such opinion will not combat the testimony or resist its force, and the court is satisfied that the juror can and will lay this opinion aside, and base his verdict alone upon the testimony of the witnesses and the instructions of the court, then the juror is competent. To our minds this is the only rational construction which can be placed upon our statute."

In the case at bar we have reviewed at considerable length a great number of authorities on this proposition, and such research has convinced us that the weight of modern authority as well as reason is that, if from any cause the juror has such an opinion as will preclude a fair trial, he is disqualified, without regard to the causes enumerated in the statute. In the case of *State v. Start*, 60 Kan. 256, 56 Pac. 15, the Supreme Court of Kansas, in passing on a similar question, used this language: "Persons called as jurors who have heard and read detailed accounts of an alleged offense, from which they have formed fixed and positive opinions as to the guilt of the defendant that still remain with them, and who state on examination that they then have no doubt of the defendant's guilt, are not qualified jurors, although they believe and express their belief that they can fairly try the case upon the testimony produced." In the case of *Black v. State*, 42 Tex. 377, in passing on a similar question, the Supreme Court of that state said: "A general opinion, formed without any particular examination into the facts, and derived from a source in which the juror placed no great reliance, might be denominated a conclusion, and still it might generally not disqualify the juror. On the other hand, a satisfactory conclusion, from hearing and carefully considering the evidence, would certainly disqualify the juror. In this case the juror had read the report of the evidence in the *Walker Case*; Walker and the defendant being charged with the commission of the same offense, in the same indictment. The report referred to may be presumed to be the detail of the evidence at a former trial, as given in the newspapers of the city, which is usually published in cases exciting any general interest. He must have placed reliance in the report of the evidence which he read in order to have enabled him to have formed a conclusion at all, and the fact that, as he says himself, that it would require other and different evidence to change that opinion, shows, or at least renders it probable, that it was with some considerable attention to and consideration of the facts reported, that he had formed his conclusion. Under such circumstances, we are of opinion that the court below, in judging of the qualification of the juror, should not have been satisfied that he was an impartial juror. The juror

took his seat in the jury box with a conclusion formed, when the defendant had not been heard, and without the benefit of the instruction of the court as to the law applicable to the case. If his conclusion was in favor of the prisoner's guilt, it was as a weight put in the scale of justice before the trial commenced. Whatever of obstinacy of character and pride of opinion he possessed had to be overcome by other evidence. There are perhaps but few men who do not lean in favor of a preconceived opinion, founded on what they deem to be authentic source. They look favorably upon whatever will support it, and examine with increased caution whatever will oppose it. The love of consistency in the formation of their judgments requires this of them. No authority has been found for holding that this juror was qualified, and an abundance that is in opposition to it."

One of the best considered cases on this question we find reported in *Rothschild v. State*, 7 Tex. App. 519. In that case the court in an opinion delivered by Judge Clark said: "This juror, William Sanders, on his voir dire appeared to be qualified, and was accepted by the state. Upon examination by the defendant, he stated that he had heard the case talked about a good deal, had formed an opinion as to the guilt or innocence of the defendant from what he had heard, and that opinion was that he was guilty. He had not only formed the opinion, but had expressed it frequently, having heard the case talked about a good deal. This opinion was formed the first time he had heard the circumstances, and had continued until the present time, and was now his opinion. It was based upon what he had heard from outsiders, and he had never heard any particulars or read any evidence in the case, but he believed what he heard to be true, and still believed it. He would not take this opinion in the jury box if selected as a juror, but would throw it aside, and go by the evidence, as he could lay aside his opinions at will. * * * A mere impression, though derived from the testimony, does not disqualify if it be perfectly apparent, not from what the juror may say, but from all the evidence bearing on the issue, that such impression will not influence his action in finding a verdict; and, on the other hand, a disqualifying opinion may be formed from mere hearsay. * * * The fact that a juror may say that, notwithstanding his opinion formed from hearsay, he can try the case impartially, manifests in most instances a recklessness of judgment and a state of mind less prepared to receive and allow a fair defense than if he had believed on proof which furnishes at least *prima facie* evidence of guilt. * * * Mr. Bishop, our most thoughtful and philosophic writer on criminal law, after a full citation of the leading American authorities, deduces the true rule as follows: 'The true view would seem to be that, since the law presumes every man to be innocent until he is by judicial evidence

proved in a court of justice to be guilty, and since the burden is on the prosecuting power to make the guilt appear affirmatively by proofs produced at the trial, if a man leaps in advance of the law, and settles in his own mind the question of guilt against the prisoner, whether by reason of what he has read or heard, or by reason of an inner impulse which condemns before it hears, he is not a fit person to be a juror in the cause; for his mind, which ought at least to be a blank on which the evidence might write its conclusions, is already preoccupied. It is vain for a man to say, or even believe, that he can judge impartially of a matter which he has already determined. Human nature, as developed in the average of men, does not permit this. The juror is to hear, and then say what he believes; but, if he believes before hearing that only which can lawfully affect his belief—namely, the testimony of the witnesses in open court—he is, in legal reason, disqualified to hear and be swayed by the testimony. It is immaterial, therefore, whether the belief, which comes not according to the law, is derived from rumor, or from listening to statements of a more reliable sort. Likewise, if the juror has not expressed his belief, he is still unfit, though the expression of it might render him unfit in a yet higher degree. Such is the legal reason which should govern the question.' 1 Bishop's Cr. Proc. § 910. Judge Marshall, in passing upon the question in *Burr's Case*, used these words: 'I have always conceived, and still conceive, an impartial jury, as required by the common law and as secured by the Constitution, must be composed of men who will fairly hear the testimony which may be offered to them, and bring in their verdict according to that testimony, and according to the law arising on it. This is not to be expected—certainly the law does not expect it—where the jurors, before they hear the testimony, have deliberately formed and delivered an opinion that the person whom they are to try is guilty or innocent of the charge alleged against him.' *Burr's Trial*, 128. Judge Taney, in a criminal trial in 1854, held that: 'If the juror has formed an opinion that the prisoners are guilty, and entertains that opinion now, without waiting to hear the testimony, then he is incompetent.' Whart. Cr. Law, § 2981. Similar views were expressed by the Chief Justice in *Black v. State*, and it was there said that the fact that the juror himself said it would require other and different evidence to change his opinion showed, or at least rendered it probable, that it was with some considerable attention to and consideration of the facts reported that he had formed his conclusion. And it was further held that, if upon an examination of the juror it was doubtful whether he was impartial or not, it would be safer, and more in unison with the spirit of our Constitution and laws relating to the trial by jury, to decide against the qualification of the juror. 42 Tex. 382,

383. While we recognize the rule that the action of the lower court in passing upon the qualifications of a juror should not be reviewed except in a clear case (*Reynolds v. United States*, 8 Otto, 157 [25 L. Ed. 244]), yet, after a careful consideration of the law and the facts pertaining to the juror Sanders, we are constrained to say that he was not a fit person to pass upon the life of the prisoner. From his own testimony, he had formed an opinion that the prisoner was guilty at the time he had first heard of the occurrence, which opinion had remained with him from that time continuously to the time of trial—a period of nearly two years. He had heard the case talked about a great deal, believed what he had heard, and had frequently expressed the opinion that the defendant was guilty, and that he would take his seat upon the jury prepared to act upon it as an established opinion in case he heard nothing else to change it. In the language of Hawkins, the juror 'hath declared his opinion beforehand that the party is guilty'; and according to the doctrine accepted nearly everywhere in the United States, and probably in every other locality where the common law prevails, he was incompetent. 1 Bishop's Cr. Proc. § 909. Certainly the repetition of his examination as many as six different times by the respective parties and the court is most convincing that his qualifications were of so doubtful a character that he should have been rejected on a challenge for cause."

In the case of *Ward v. State*, 19 Tex. App. 684, in an opinion delivered by Judge Hurt, a more learned criminal lawyer than whom never wrote an opinion, the court said: "This conviction was for the killing of Robert Fly. We will treat the first and third assigned errors together. First error assigned: That the court erred in overruling the defendant's challenge for cause to the juror J. R. Scates, and compelled defendant to challenge him peremptorily. Upon his voir dire Scates answered: 'I have talked to witnesses about the case; have strong opinions as to his guilt or innocence; have expressed those opinions; it would take good, positive, and conclusive evidence of truthful men to change my opinions'; but his opinions would not influence his verdict. Third error: In overruling defendant's challenge for cause to W. W. Bailey. Upon his voir dire this juror answered: 'I have some opinion now as to his guilt or innocence. It would take evidence to change that opinion. I got that opinion from hearsay or general gossip. I heard about it through talk and newspapers. What I read purported to be the truth, as well as I remember it. It is a settled opinion now. If the evidence turned out as I have read it, I would be of the same opinion still. I think that opinion would not influence my verdict.' The juror Newton, on his voir dire, said: 'I have formed an opinion as to the guilt of defendant from hearsay. It would take evidence to remove that opinion. I could dis-

card that opinion, try the case on the evidence, but the opinion might have a bearing on me.' R. B. Ship said: 'I have formed and expressed an opinion as to the guilt or innocence of the defendant. I could not discard it in going into the jury box. It would take evidence to change it. I would render a verdict upon the evidence uninfluenced by that opinion. The parties who told me were not witnesses, but told me what purported to be the circumstances and facts of the case, and may have had other conversations since then with some parties.' All of these objectionable jurors, except Bailey and Ship, when defendant's challenges for cause were overruled, were challenged peremptorily, and did not serve on the jury. Defendant, however, exhausted his peremptory challenges. That each and every one of these jurors were obnoxious to challenge for cause there can be no doubt or question. We have had under consideration the questions presented in this record relating to the competency of the jurors for quite a long while. We have carefully examined and compared the authorities bearing upon this subject, with a view of making, if possible, a clearer statement of the principles of law applicable thereto than we have already done; but we are forced to concede our inability to make a clearer or more lucid exposition of the law than that already made. The opinion of Judge Clark in the *Rothschild Case* is not only a model for style and logic, but is, we believe, exhaustive of the subject. In support, therefore, of the position that the above-named persons were incompetent because they had formed an opinion of the guilt of defendant, which was calculated to influence their verdict, we submit the following authorities: *Rothschild v. State*, 7 Tex. App. 540; *Burrell v. State*, 18 Tex. 713; *Johnson v. State*, 27 Tex. 758; *Sharp v. State*, 6 Tex. App. 650; *Bejarano v. State*, Id. 265; *Krebs v. State*, 8 Tex. App. 1; *Loggins v. State*, 12 Tex. App. 65."

It has been urged in this case that on the evidence produced the jury could not have returned other than a verdict of guilty, and therefore the defendant was not prejudiced by reason of the fact that some of the jurors had formed an opinion as to his guilt. As to whether a different verdict could not have been returned on the evidence, we are not called upon to decide. We might concede that such is true; that being true, we cannot agree that the defendant was not deprived of the rights guaranteed to him under our Constitution. The fact remains that this jury fixed his punishment at death. In determining this case, although the evidence may show the defendant guilty beyond all peradventure of a doubt, and sufficient to support a verdict with the death penalty, we must nevertheless set a precedent under which a perfectly innocent man may be tried and have preserved to him his constitutional rights of the presumption of innocence, and a trial be-

fore an impartial jury. If a juror has prejudged the guilt of the defendant before hearing the sworn testimony, then it cannot be said that the defendant had a trial before an impartial jury. It is a physical impossibility for a juror, who has an opinion based on what he has understood to be the facts in the case, to weigh the evidence as though he had never heard of the case and had not already made up his mind. He may have an earnest and conscientious desire to do so and to deal out exact justice, but he will unconsciously attach a greater weight to the evidence which conforms to his preconceived opinion than he would otherwise do. He is not in that frame of mind which the Constitution contemplates, and which is necessary to enable him to fairly and impartially judge as to the weight to be given to the evidence of each witness appearing before him. The determination of the qualifications of a juror is a matter addressed to the discretion of the trial court, and the question to be determined here is whether the trial court in this case abused this discretion to the prejudice of the defendant.

After a careful review of the numerous authorities called to our attention by the counsel in the case, and those which we have been able to find by our own efforts, we are convinced that the court did abuse such discretion to the prejudice of the defendant. The principle that every reasonable doubt must be resolved in favor of the defendant applies in this instance as well as to the evidence offered before the jury on the final trial. The evidence offered as to the qualifications of the jurors enters into and becomes a material part of the trial, as much so as the evidence offered by the witnesses on the part of the state, and in this case the trial court should have resolved that doubt in favor of the defendant, and sustained his challenges for cause to these jurors.

We deem it unnecessary to review the other errors complained of. They are directed principally to the action of the court in refusing a change of venue and in drawing and summoning the panel of jurors from which the trial jury was selected. These are questions not likely to arise on the next trial of this case, and not necessary to be considered here.

For the refusal of the court to sustain the challenge made to the jurors who testified on their voir dire that they had formed such an opinion as to the guilt of the defendant as would require evidence to remove, the judgment of the lower court must be reversed.

FURMAN, P. J. (concurring). The record shows that John McKinney sat as a juror in this case, and that upon his examination as such juror, among other things, he said from what he had heard he had an opinion as to the guilt of the defendant, and that he did not believe that he could give the defendant the same fair and impartial trial as if he

had not heard anything about the case. The juror was then asked: "In your present frame of mind, from what you have heard, you could convict the defendant on less evidence than if you had not heard anything?" Objection being made, the juror was not permitted to answer this question. In answer to questions asked by the county attorney, the juror stated that he had never talked to a witness in the case, that his opinion was based upon rumor, and that if taken upon the jury he could and would give the defendant a fair and impartial trial notwithstanding this opinion, and would be governed alone in making up his verdict by the testimony of the witnesses on the stand and the charge of the court. Thereupon the court overruled the challenge of the defendant, and the juror was sworn in the cause over the protest and exception of the defendant.

When a juror states that he had an opinion as to the guilt of a defendant, he is not made competent to sit in the case merely because he may state that he can and will lay this opinion aside if taken on the jury, and give the defendant a fair and impartial trial, and be governed alone in making up his verdict by the testimony of the witnesses and the charge of the court. The juror is not the judge of his own competency, of his own impartiality, and of his own freedom from prejudice. No statute can clothe him with such judicial discretion and power. The competency of the juror is left to the discretion of the court, and the presiding judge is not bound by the answers of the juror. It is the judge and not the juror who is charged with the duty of passing upon the competency of the juror, and in the discharge of this duty the judge may have recourse to any means of information within his power. In fact he should carefully investigate every source which would be calculated to throw any light upon the competency of a juror, and if the judge is not entirely satisfied of the competency of the juror, he should be excused. In *Johnson v. State*, 1 Okl. Cr. 348, 97 Pac. 1070, this court said: "The question of the competency of jurors is addressed to the sound discretion of the trial court, and, in the absence of an abuse of that discretion, it is not subject to review; in other words, while the trial court must be clearly satisfied that a juror is fair and impartial before permitting him to sit in a criminal case, yet upon appeal to this court it must be clearly shown that the trial court abused its discretion before this court will review its rulings in this respect."

We think it clear that the trial court erred in two particulars in passing upon the competency of the juror McKinney: First, this juror frankly stated that on account of what he had heard he did not think that he could give the defendant the same fair and impartial trial as if he had not heard anything. This was stating, in effect, that the juror believed that the opinion which he then en-

tertain would influence his action in finding a verdict; that it might combat the evidence of the witnesses and resist its force. It is the nature of the opinion, and not the source from which it is derived, that we are considering. We do not claim that any impression which a juror may have as to the guilt of a defendant will necessarily disqualify the juror, but we do say that, when the juror is shown to have an opinion as to the guilt of the defendant, it matters not from what source it comes, then the burden is on the state to show that this opinion is such that it does not affect the fairness and impartiality of the juror. This is the letter and the spirit of our statute. Section 5475, Wilson's Rev. & Ann. St. Okl. 1903, is as follows: "In a challenge for implied bias, one or more of the causes stated in the second preceding section must be alleged. In a challenge for actual bias, the cause stated in the second subdivision of the third preceding section, must be alleged, but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon rumor, statements in public journals, or common notoriety, provided it appears to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him. The challenge may be oral, but must be entered upon the minutes of the court." So it is seen that according to the statute it is the court and not the juror who must be satisfied as to the fairness and impartiality of the juror, and that the judge is not bound by the answers of the juror, but may inform himself "otherwise." But even if this were not the statute, it is the plain meaning and intent of our Constitution, and as such it is our first duty to enforce it.

The juror McKinney, just after having expressed the opinion that he did not think that he could give the defendant the same fair and impartial trial that he could give him if he had never heard anything about the case, did, in answer to the question of the county attorney, state that if taken on the jury he could and would lay this opinion aside, and be governed as a juror alone by the testimony of the witnesses and the charge of the court. This shows that the juror was himself uncertain as to his mental condition, and was varying as to what his action would be if taken on the jury, and, of itself, should have caused the trial court to sustain the challenge for cause.

Second, counsel for the defendant asked the juror this question: "In your present frame of mind, with what you have heard, you could convict the defendant on less evidence than if you had not heard anything?" The court erred in not permitting this question to be answered. While it is true that the court would not be bound by the answers

of the juror, yet, when it is disclosed that a juror has an opinion, in all fairness the court should permit the most searching cross-examination of the juror as to the origin, extent, and probable effect of such opinion. This is especially true in capital cases. The graver the case and the more severe the punishment liable to be inflicted, the more cautious the court should be in safeguarding all of the substantial rights of a defendant. But it may be said that the defendant is guilty, and that therefore it is immaterial as to whether the law was complied with. Such a statement as this is the first step toward lynch law, and if recognized by this court, would wipe out and destroy every constitutional right, and would establish a precedent which, if followed, would result in arbitrary punishment in the name of the law; a consummation dangerous to liberty and innocence, and utterly inconsistent with the perpetuity of our free institutions. We heartily assent to the proposition that when a defendant has been properly indicted and fairly tried, and the evidence clearly shows that he is guilty, then a conviction should not be set aside on account of any mere matter of form or any exception which did not deprive the defendant of a substantial right. We have uniformly recognized and adhered to this rule, as our decisions will conclusively show. But it is an utter misapprehension of the doctrine of harmless error to suppose that when a defendant has been deprived of a substantial right, the error was or could be harmless. If this was correct, then the doctrine itself would become a mighty engine of wrong and oppression; in fact it would be the entering wedge of anarchy, for it would result in the destruction of all law, and substitute in its place the arbitrary will of the judges and jurors.

Section 5618, Wilson's Rev. & Ann. St. Okl. 1903, is as follows: "On an appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." This forbids this court from reversing a conviction upon any technicality or exception which did not affect the substantial rights of the defendant. This is the doctrine of harmless error in a nutshell. The converse of this statutory provision is that we must reverse convictions when the defendant has been deprived of a substantial right.

The court instructed the jury as follows: "In connection with the evidence in this case, you are instructed that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that commission of the offense or the circumstances thereof; that is, in this case, you cannot convict the defendant, Dan Scribner,

upon the uncorroborated testimony of the witness Ed Johnson, for the reason that the evidence shows him to be an accomplice. However, if you are satisfied that the witness Ed Johnson speaks the truth in some material parts of his testimony in which you see him corroborated or confirmed by other impeachable evidence, this may be ground for your believing that he also speaks the truth in other parts of his testimony in which there may be no confirmation, but this corroboration ought to be as to some fact which tends to connect the defendant with the commission of the offense." The vice of this instruction lies in the fact that the court tells the jury that the corroboration of the accomplice ought to be as to some fact which tends to connect the defendant with the commission of the offense. The law prohibits a jury from convicting a defendant upon the testimony of an accomplice, unless such testimony is corroborated by other testimony which tends to connect the defendant with the offense committed. The law is mandatory. This instruction is only advisory, and qualifies and is contradictory of the first portion of the instruction, which correctly states the law. When this is the case, no one can tell upon what portion of the instruction the jury acted in finding their verdict. Such instructions are universally condemned, both upon principle and by the authorities, without a single exception, so far as our investigations have gone.

For the reasons above given, I concur in the opinion that the judgment against the defendant should be reversed. While it is of great importance that every guilty man should be speedily brought to justice and punished for his crime, yet it is of still greater importance that the citizens of Oklahoma should know that the courts of the state will secure to each and every one of them, it matters not how poor, friendless, and unpopular he may be, the full protection afforded by each substantial privilege and right guaranteed to them by the Constitution and laws of the state. This court will discharge its full duty in this respect, without partiality, fear, or favor, let it please or displease whomsoever it may.

The judgment against the defendant is therefore reversed, and the cause remanded, with directions that a new trial be granted the defendant.

DOYLE, J. (concurring). I would be content with concurring in the opinions of my Brethren were it not that they reverse the conviction for bias and prejudice of jurors only, and the erroneous instruction on the necessary corroboration of an accomplice, while I believe they should have gone further, and held that the trial court erred in denying the application for a change of venue. The crime charged and the manner of

its perpetration was of a character to arouse the greatest public indignation, and, without going at large into a discussion of the affidavits and other evidence offered in support of the application, it is sufficient to notice the fact that to protect the defendant from mob violence he was removed by the sheriff from Pontotoc county, and that this state of feeling continued until and through the trial, and must have had such effect upon the jury as that their verdict was little else than the reflection of the common belief that the defendant was guilty, and as a means of carrying out the public purpose of having defendant pay the penalty with his life. The trial was not, and could not under the circumstances then and there existing, have been fair and impartial. A public trial by an impartial jury and that justice shall be administered without prejudice are the great constitutional safeguards against oppression and injustice, that must not be abridged or compromised. Prejudice and prejudgment are synonymous. That there was such prejudgment of the case as that defendant could not obtain a fair and impartial trial in Pontotoc county was clearly shown, and I believe that it was an abuse of discretion for the trial court to deny the application for a change of venue.

(3 Okl. Cr. 648)

JACOBS v. STATE.

(Criminal Court of Appeals of Oklahoma. April 21, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1028*)—APPEAL—RIGHT OF ACCUSED TO REVIEW—ESCAPE PENDING APPEAL.

Where a defendant has been convicted of murder and sentenced to imprisonment for life at hard labor in the state penitentiary, and perfects an appeal to this court, and while said appeal is pending makes his escape from the custody of the law, he thereby waives his right of having said conviction reviewed by this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2616; Dec. Dig. § 1028.*]

2. CRIMINAL LAW (§ 1131*)—APPEAL—DISMISSAL—ESCAPE BY ACCUSED.

The Criminal Court of Appeals will not consider an appeal, unless the defendant is where he can be made to respond to any judgment or order which may be rendered in the case, and where the defendant makes his escape from the custody of the law, or is at large, as a fugitive from justice, this court will on motion dismiss his appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2975; Dec. Dig. § 1131.*]

Appeal from District Court, Alfalfa County; M. C. Garber, Judge.

Melvin M. Jacobs was convicted of murder, and appeals. Dismissed and remanded.

Geo. W. Partridge, for plaintiff in error. Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for the State.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

DOYLE, J. Melvin M. Jacobs, plaintiff in error, was convicted of murder. His conviction was had upon an indictment returned at the March, 1909, term of the district court of the Twentieth judicial district, held within and for Alfalfa county, wherein said indictment charged that he did on the 1st day of February, 1909, with malice aforethought, kill and murder one Arthur L. Strohl, by shooting him with a pistol. Upon his trial the jury returned a verdict of guilty and assessed the penalty at imprisonment for life at hard labor in the state penitentiary. April 1, 1909, the court pronounced judgment and sentence in accordance with the verdict. From which judgment and sentence an appeal was taken by filing in this court petition in error, with case-made attached, July 28, 1909. In the meantime plaintiff in error was committed to the county jail of Garfield county. At this, the March term of this court, said cause was orally argued and submitted on briefs and argument. On April 4, 1910, there was filed in the case a motion of the Attorney General on behalf of the state to dismiss the appeal, which motion, omitting the formal parts, is as follows: "Comes now the Attorney General for and upon behalf of the state of Oklahoma, and informs the court that heretofore, to wit, on April 1, 1910, the plaintiff in error, Melvin M. Jacobs, being confined in the county jail of Garfield county, Okl., for safe-keeping, awaiting the disposition of his appeal herein, did then and there willfully and unlawfully effect his escape from said jail by forcibly breaking therefrom, and is now at large, a fugitive from justice, all of which appears from the affidavit of the sheriff of said Garfield county, the keeper of said jail, and having at the time the lawful custody of the accused, which said affidavit is hereto attached, marked 'Exhibit A,' and made a part of this motion. Wherefore the Attorney General says that, under the law and the rulings of this court, the plaintiff in error has forfeited his right to an appeal, and in legal effect has abandoned the same, in that he now refuses to submit himself to undergo such judgment as may be rendered herein." Attached to said motion, as "Exhibit A" is the affidavit of S. C. Campbell, sheriff of Garfield county, the material part of which is as follows: "S. C. Campbell, of lawful age, being first duly sworn, on his oath states: That he is the duly elected, qualified, and acting sheriff of Garfield county, Okl., and has been such at all times hereinafter mentioned. That on the 1st day of

April, 1909, one Melvin M. Jacobs was sentenced to life imprisonment by the district court of Alfalfa county, Okl., and thereafter was committed to the custody of affiant as sheriff of Garfield county, pending the appeal of said Melvin M. Jacobs. That on the 1st day of April, 1910, the said Melvin M. Jacobs, by sawing the clasp off of the window bars, escaped from the Garfield county jail and is now at large and has not yet by affiant been apprehended. That a copy of the commitment under which affiant has held the said Melvin M. Jacobs is hereto attached and made a part of this affidavit."

Upon the facts stated the principles of law are the same as in the case of *Tyler v. State*, 3 Okl. Cr. —, 104 Pac. 919, wherein this court said: "From a review of the authorities we are convinced that it is no part of our duty as an appellate court to consider or review the judgment, orders, and rulings of which he complains, while he is at large as an escaped convict. Such has been the uniform holding of the courts of last resort in other jurisdictions, and it meets our full approval. * * * The appellant, by escaping from jail, where he was being held pending a determination of his appeal to this court, has voluntarily withdrawn himself from the jurisdiction of the court. So far as he has any right to be heard under the Constitution, and the statute before this court, he must be deemed to have waived it by escaping from the custody of the law. Where a person convicted of a felony has escaped from the custody of the law, no order or judgment, if any should be made, can be enforced against him, and appellate courts will not give their time to proceedings which, for their effectiveness, must depend upon the consent of an escaped convict. While we find no express provision of our statute authorizing a dismissal of an appeal in a criminal case for the reason stated in the present motion, we are of opinion that the appellant by his own act has waived the right to have his case considered and determined. In this conclusion we are sustained by the authorities quoted, and many others."

The doctrine of the *Tyler Case* is approved, and on the authority of that case the motion of the Attorney General to dismiss the appeal is sustained, and the case remanded to the district court of Alfalfa county, with direction to have the judgment and sentence carried into execution.

FURMAN, P. J., and RICHARDSON, J., concur.

(3 Okl. Cr. 684)

BOYD v. STATE.

(Criminal Court of Appeals of Oklahoma. April 26, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 303*)—DEATH OF DEFENDANT—ABATEMENT OF PROSECUTION.

In a criminal action, the purpose of the proceeding being to punish the defendant in person, the action must necessarily abate upon his death.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 303.*]

2. FINES (§ 17½*)—DEATH OF DEFENDANT—ABATEMENT OF PROSECUTION.

A judgment of conviction against a defendant pending on appeal to the Criminal Court of Appeals is abated by the death of the defendant, and cannot be enforced against his personal representative.

[Ed. Note.—For other cases, see Fines, Dec. Dig. § 17½; * Criminal Law, Cent. Dig. § 2701.]

Appeal from Pottawatomie County Court; E. D. Reasor, Judge.

Pim Boyd was convicted of an illegal sale of liquor, and brings error. Order that the proceedings abate.

T. G. Cutlip, for plaintiff in error. Fred S. Caldwell, for the State.

DOYLE, J. Plaintiff in error was convicted in the county court of Pottawatomie county for a violation of the prohibition law and sentenced to pay a fine of \$200 and costs and be confined for 30 days in the county jail, and, failing to pay said fine and costs, that he be further so confined one day for each dollar thereof. From which judgment he appealed by filing in this court November 25, 1909, his petition in error with case-made attached.

Since the appeal was taken, and before the final submission of the cause, to wit, February 22, 1910, he departed this life. His death having been suggested, the proceedings abate, and no decision upon the merits of the appeal will be rendered. A civil action does not abate by the death of a party if the cause of action survive or continue, but in a criminal action the sole purpose of the proceedings is to enforce the criminal law and punish the person found guilty of a violation thereof. The personal representative of the deceased is not responsible for the alleged violation of the law by the defendant during his lifetime, and cannot be required to satisfy the judgment rendered against him. It is only the person adjudged guilty who can be punished, and a judgment cannot be enforced when the only subject-matter upon which it can operate has ceased to exist. *O'Sullivan v. People*, 144 Ill. 604, 32 N. E. 192, 20 L. R. A. 143; *Herrington v. State*, 53 Ga. 552. In each of these cases the defendant died after the cause had been submitted to the appellate court for decision, and the right to continue them in the name

of a personal representative of the deceased was denied; the courts refusing to proceed further in the matter or pronounce any decision in the case. In the case of *March v. State*, 5 Tex. App. 450, the court said: "We are of opinion, then, that in a criminal prosecution, when the accused has taken an appeal in the manner prescribed by law, the proceeding is still pending and undetermined until the appeal shall have been decided; and that, in case the appellant die whilst the appeal is pending and undetermined, the prosecution or the criminal action does not survive, but, on the death of the appellant pending the appeal, the prosecution abates in toto, whatever be the judgment appealed from." In a criminal action, the purpose of the proceeding being to punish the defendant in person, the action must necessarily abate upon his death.

It is therefore considered that the proceedings in this action do abate, and it is so ordered.

FURMAN, P. J., and RICHARDSON, J. concur.

(3 Okl. Cr. 590)

Ex parte MOODY.

(Criminal Court of Appeals of Oklahoma. March 28, 1910.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 39*)—JURISDICTION.

A justice of the peace is without jurisdiction to try any action against any officer for misconduct in office.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 137; Dec. Dig. § 39.*]

Application by W. O. Moody for writ of habeas corpus. Writ granted, and defendant discharged.

On the 12th day of January, 1910, the county attorney of Woodward county, Okl., filed the following information against W. O. Moody, before B. B. Smith, Esq., a justice of the peace for the city of Woodward: "State of Oklahoma, Woodward County. Information. In Justice Court, before B. B. Smith, Justice of the Peace for City of Woodward, Woodward County, Oklahoma. State of Oklahoma v. W. O. Moody, County Weigher. In the Name and by the Authority of the State of Oklahoma: Now comes B. F. Willett, county attorney, in and for the state and county aforesaid, and gives the court to know and be informed that one W. O. Moody, county weigher, late of the county of Woodward and state of Oklahoma, on the 11th day of January in the year of our Lord one thousand nine hundred and ten, at and within the said county and state, did then and there, being the duly elected, qualified, and acting county weigher of Woodward county, Oklahoma, unlawfully, willfully, while acting as county weigher, weigh one wagon load of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

eight hogs incorrectly for one K. D. Lively, by then and there weighing the said load of eight hogs at one thousand sixty-five pounds, when in fact and in truth the said load of eight hogs weighed only one thousand fifteen, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Oklahoma. B. F. Willett, County Attorney." A warrant was issued on this information and the said justice of the peace was preparing to place the defendant upon trial on said charge. A writ of habeas corpus was applied for upon the ground that said justice of the peace is without jurisdiction to try and determine said cause.

David P. Marum, for petitioner.

FURMAN, P. J. (after stating the facts as above). Section 12 of article 7 of the Constitution, among other things, provides that the county court shall not have jurisdiction in any action against officials for misconduct in office, and shall have appellate jurisdiction of the judgments of justices of the peace in misdemeanors. Section 14 of article 7 provides that upon such appeals from justice courts the trial shall be de novo on questions both of law and of fact. Section 18 of article 7 of the Constitution is as follows: "The office of justice of the peace is hereby created, and, until otherwise provided by law, courts of justices of the peace shall have, coextensive with the county, jurisdiction as examining and committing magistrates in all felony cases, and shall have jurisdiction, concurrent with the county court, in civil cases where the amount involved does not exceed two hundred dollars, exclusive of interest and costs, and concurrent jurisdiction with the county court in all misdemeanor cases in which the punishment does not exceed a fine of two hundred dollars or imprisonment in the county jail for not exceeding thirty days, or both such fine and imprisonment; but justices of the peace shall in no event have jurisdiction in actions for libel and slander. Until otherwise provided

by law, appeals shall be allowed from judgments of the court of justices of the peace in all civil and criminal cases to the county court in the manner now provided by the laws of the territory of Oklahoma governing appeals from the courts of justices of the peace to the district court. In cities of more than two thousand and five hundred inhabitants, two justices of the peace shall be elected."

The prohibition contained in the Constitution against the exercise by the county court of jurisdiction in actions against officers for misconduct in office is not limited to actions for the removal of such officers from the positions which they occupy on account of the official misconduct, but extends to and includes any and all actions against such officers for misconduct in office, it matters not what the nature of the action or the punishment inflicted may be. It certainly will not be claimed that the justices of the peace have superior jurisdiction to that enjoyed by county courts. If a justice of the peace can try an officer for official misconduct, what would become of the case in the event of a conviction and appeal to the county court? How could that court try a case de novo on appeal of which it had no jurisdiction? Any statute attempting to give jurisdiction to the county courts or justices of the peace to try such cases would be unconstitutional and void. Such jurisdiction is in district courts. Justices of the peace have the power to sit as examining and committing magistrates in felony cases only. As the act of official misconduct charged against this defendant is not a felony, the justice court did not have jurisdiction over the offense charged as an examining magistrate.

The writ of habeas corpus is therefore granted as prayed for, and it is ordered that the defendant be released from custody on said charge, and that said justice court be directed to dismiss the case therein pending against him.

DOYLE and OWEN, JJ., concur.

(58 Wash. 199)

In re STATLER'S ESTATE.

(Supreme Court of Washington. April 29, 1910.)

1. WILLS (§ 405*)—PROBATE—CONTEST—COSTS AND EXPENSES.

The costs and expenses of the contest of a will are not a claim against the estate in its broad sense, though they are collectible out of the estate, where the will is annulled, because the statute (Rem. & Bal. Code, § 1313) expressly makes them so.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 880; Dec. Dig. § 405.*]

2. WILLS (§ 411*)—PROBATE—CONTEST—COSTS—EXPENSES—COLLECTION.

Where a nuncupative will offered for probate was declared void, the costs and expenses of the proceeding could be entered as a judgment against the estate in the decree setting aside the will, and it does not make the proceeding to recover costs and expenses of the contest an independent action merely because the court set the matter down for separate hearing, and directed that the administrator be given notice and an opportunity to contest the amount of the allowance, if he so desired.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 889; Dec. Dig. § 411.*]

3. WILLS (§ 406*)—PROBATE—CONTEST—COSTS AND EXPENSES—BOND.

The proceeding being but a continuation of the proceeding to annul the purported nuncupative will, contestant was not required to furnish bond for costs.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 885; Dec. Dig. § 406.*]

4. WILLS (§ 405*)—PROBATE—CONTEST—COSTS AND EXPENSES—"BENEFIT."

Where a will offered for probate is contested, the "benefit" derived therefrom inures to the successful claimants, which is the benefit contemplated by the rule making the expenses payable out of the estate as a benefit thereto.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 879, 880; Dec. Dig. § 405.*]

For other definitions, see Words and Phrases, vol. 1, pp. 750-752.]

5. WILLS (§ 408*)—PROBATE—CONTEST—COSTS AND EXPENSES.

The allowance of expenses of the contest of a will offered for probate is governed by Rem. & Bal. Code, § 1313, which provides that, if a will be annulled, the party who shall have resisted the revocation shall pay the costs and expenses of the proceedings out of the property of decedent, and fixes no limitations, but contemplates the allowance of the actual costs, and such expenses incurred in the prosecution or defense of a will as are necessary and reasonable, and not by section 481, allowing certain costs as an attorney's fee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 886; Dec. Dig. § 408.*]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Proceedings for probate of a purported will of Lawrence Statler. The will was denied probate, and from an order awarding contestant costs and expenses, J. E. Mullen, administrator, appeals. Affirmed.

O. C. Moore and W. H. Winfree, for appellant. W. S. Lewis and Joseph Rossow, for respondent.

FULLERTON, J. Lawrence Statler died in Spokane county on January 24, 1908, leaving estate therein consisting of real and personal property. Shortly thereafter certain persons petitioned the court of that county to admit to probate what was alleged to be the nuncupative will of the deceased. After notice given one O. Lohan, as German consul and as attorney in fact for certain heirs of the deceased, appeared and contested the validity of the will and its admission to probate. On the hearing, the court adjudged and decreed the will to be null and void as the last will and testament of the deceased, and denied its admission to probate. In its decree the court ordered that "the matter of awarding costs and expenses, including attorney's fees, to contestants" be continued to a day certain, and that the contestant serve upon the administrator of the estate his application for such an order, and a citation to the administration requiring him to appear and show cause why the application should not be granted. The application and citation were filed and served as directed, and on the return day the administrator appeared specially, and moved to quash the same on the ground that the process by which it was sought to bring him into court was insufficient to give the court jurisdiction of his person or the subject-matter of the controversy. The motion to quash was denied by the court, whereupon the administrator, "reserving all rights under the special appearance heretofore made, and not waiving his special appearance, and protesting against being compelled to proceed further," moved that the applicant be required to furnish a bond as security for such costs as might be awarded against him should he be unsuccessful in his application. This motion was also denied. The administrator thereupon, still reserving his special appearance, demurred to the application, which demurrer being overruled, he answered to the merits. On the hearing the court awarded the contestant \$124 as costs, and \$750 attorney's fees, and the administrator prosecuted this appeal.

The appellant contends that the expenses and attorney's fees sought to be recovered by the respondent constitute what is denominated in the statute a claim against the estate of the deceased, and before a proceeding at law will lie to recover them, they must be presented to the administrator as a claim for allowance or rejection, and, further, that should the claim be rejected by the administrator, and a proceeding begun to establish the same, the proceeding must be an ordinary civil action at law, in which the administrator is brought into court by the service of a summons as in civil actions generally. But we are unable to agree with these contentions. The costs and expenses of contesting the probate of a will are not a claim

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

against the estate of the deceased in its broad sense. The deceased did not incur them, nor can they be in any sense his obligations. They are collectible out of his estate simply because the statute makes them so. Rem. & Bal. Code, § 1313; State ex rel. Richardson v. Superior Court of King County, 28 Wash. 677, 69 Pac. 375. In this instance they might properly have been entered as a judgment against the estate in the decree setting aside and annulling the will, and it does not make the proceeding an independent action merely because the court set the matter down for a separate hearing, and directed that the administrator be given notice and an opportunity to contest the amount of the allowance, if he so desired. There was therefore no mistake in the form of the proceeding, and the motion to quash was properly overruled. The cases of Barto v. Stewart, 21 Wash. 605, 59 Pac. 480, and In re Sullivan's Estate, 36 Wash. 217, 78 Pac. 945, cited by the appellant, do not sustain his position. In the first-cited case the court was speaking of claims that were incurred by the deceased in his lifetime, not expenses incurred after his death in protecting the estate against unfounded claims; and in the second the question was as to the validity of certain allowance made by the court ex parte, and the point decided could only be in point in case we should hold this order to be an ex parte order, made without jurisdiction on the part of the court. For the reason that this proceeding is but a continuation of the proceeding brought to annul and cancel the purported nuncupative will, it was not required that the respondent furnish a bond as security for costs.

The appellant next contends that the respondent's services were without value to the estate, and hence, since the claim is based upon benefits to the estate, there can be no recovery. Considering the estate as an entity apart from the interests of its beneficiaries, it is probably a legitimate argument to say that it can make no difference whether the property of the estate is taken by one set of claimants or by another. But we do not understand that this is what is meant by benefiting the estate. The contest is made by one set of claimants against another, and the benefit derived therefrom inures to the successful claimants, and this we think is the benefit contemplated by the rule. Since the expenses when allowed reduce the residuary share of the successful claimants, they might justly complain if no gain was derived by them by the contest, but when the contest results in their gain, clearly it furnishes a sufficient consideration for the allowance contemplated by the statute.

Lastly the appellant argues that the allowance when made cannot exceed the amount allowed as costs by the general statutes.

Rem. & Bal. Code, § 481. We think, however, that the allowance is governed by the special statute. Id. § 1313. True, the phrases used are general, "fees and expenses," "cost and expenses," etc., and no limitations are fixed, yet we think it contemplates the allowance of the actual court costs, and such expenses incurred in the prosecution or defense of the will as are reasonable and necessary. It is not argued, as we understand the record, that the allowances in this instance were not so.

The judgment is affirmed.

RUDKIN, C. J., and CHADWICK and GOSE, JJ., concur.

58 Wash. 163)

EICHBAUM v. CALDWELL BROS. CO.
(Supreme Court of Washington. April 22, 1910.)

1. SALES (§ 179*)—GOODS ORDERED AND DELIVERED—DIFFERENCE—ACCEPTANCE—WAIVER.

Where a pump weighing 35,000 pounds was ordered, and the one delivered only weighed 27,400 pounds, by accepting the latter pump the buyer only waived its right to insist upon the delivery of a pump weighing 35,000 pounds, but did not waive the right to any resulting damages sustained.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 456-468; Dec. Dig. § 179.*]

2. SALES (§ 428*)—GOODS ORDERED AND DELIVERED—DIFFERENCE IN VALUE—HOW RECOVERED—RECOMPENSATION.

In an action for the price of a pump, where the pump ordered was to weigh 35,000 pounds, and a pump only weighing 27,400 pounds was actually received, if it was less valuable than the one ordered, defendant could recover damages for such difference in value by recompensation, but if it was equally valuable, no damages resulted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1214-1223; Dec. Dig. § 428.*]

3. SALES (§ 358*)—ACTION FOR PRICE—EVIDENCE—COMPETENCY.

In an action for the price of a pump, where at the time the order was given the parties did not know the actual weight of a pump of the capacity ordered, evidence disclosing such lack of knowledge was competent, not to vary the terms of the written contract, but as bearing upon any information the parties had at that time as to whether a certain weight was necessary to insure the stipulated capacity and power.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 358.*]

4. SALES (§ 442*)—BREACH OF CONTRACT—DAMAGES—GAINS PREVENTED—LOSSES.

A buyer, injured by the breach of the seller's contract to manufacture, sell, and deliver personal property within a specified time, can recover damages, including gains prevented and losses sustained; but the damages must be actual and certain, and be such a loss as might be expected to actually follow or directly result from the breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.*]

5. SALES (§ 412*)—DELAY IN SHIPMENT—DAMAGES—RENTAL VALUE.

In an action for the price of a pump, where shipment was delayed 56 days, and defendant

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

demand the rental value of the pump for that time, where there was nothing to show that such damage could have been contemplated by the parties, or that damage was actually sustained, but the evidence showed that the pump was received before defendant was ready to or could use it, he sustained no actual loss as the result of the delay, and could not recover.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.*]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by J. V. Eichbaum against the Caldwell Bros. Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Shank & Smith, for appellant. Charles M. Baxter, for respondent.

CROW, J. This action was commenced by J. V. Eichbaum against Caldwell Bros. Company, a corporation, to recover \$3,890, and interest, for a turbine pump sold and delivered to defendant by H. R. Worthington, a corporation, plaintiff's assignor. From a judgment in plaintiff's favor, the defendant has appealed.

The claim was assigned to Eichbaum for collection; he being the agent of H. R. Worthington, the vendor corporation and real party in interest, hereinafter designated as the respondent. The appellant, after alleging, that the pump was to weigh 35,000 pounds, that it was to be shipped within eight weeks after August 11, 1906, that respondent failed to make any shipment until December 1, 1906, and that an inferior pump of lighter weight and construction, worth \$1,500 less than the one ordered, was then shipped, further alleged: "That because of the delay of the said Worthington in furnishing any pump at all and his then furnishing only a pump of the sort and value hereinabove set out, the defendant is damaged in the sum of \$4,300, which is in excess of the plaintiff's total claim." The appellant contends that the trial court erred in admitting evidence to show that it should be estopped from interposing any claim for damages; the respondent having failed to plead an estoppel. Although it appears that the trial court admitted the evidence and regarded it as material, we will not discuss its competency; for assuming, without deciding, that it was incompetent, and eliminating it from our consideration, we have nevertheless concluded that upon the competent evidence the judgment must be affirmed. The cause is now before us for trial de novo upon the competent evidence, and we will so consider it; there being no contention that any competent evidence was improperly excluded. We find that, on Monday, August 13, 1906, the appellant executed the following order: "The Caldwell Bros. Co. Machinery Merchants. Date of order Aug. 13, '06. To be shipped Seattle, Wash. Mr. J. T. Eichbaum, Mgr. H. R. Worthington Pump Co., Alaska Bldg., Seattle. Gentlemen: Please en-

ter our order for shipment upon above terms. Ship to ourselves at Seattle, Route N. Y. C., Lake Shore, C., M. St. P. & U. P. One 4-stage Turbine pump with a capacity of 4,000 gals. per minute, designed for head 430 ft. under conditions as explained to Mr. Eichbaum with brass impellers and shaft; Instructions later as to whether this pump will be belt or rope driven. Shipment eight weeks from Aug. 11th, 1906. Guaranteed weight 35,000 lbs. Confirmation of verbal order given you by Mr. Mather. The Caldwell Brothers Co., by John Mather, General Manager. GFK—J." That on the preceding Saturday the probable weight of the pump was discussed with reference to its capacity, and with reference to the freight charges. That the respondent had not theretofore manufactured a pump of the capacity contemplated. That not knowing its probable weight, the parties agreed upon 35,000 pounds as guaranteed in the order. That the respondent did not manufacture the pump within the time agreed. That on November 20, 1906, appellant's president called upon the respondent in New York City, and, learning that the manufacture of the pump had not yet been commenced, without expressly waiving any rights, then urged the respondent to manufacture and ship it as soon as possible. That respondent did so, making the shipment on December 1, 1906. That it reached Seattle 56 days later than it would had it been shipped at the time stipulated. That the appellant received the pump, but was unable to install or use it for several days thereafter, as a necessary concrete foundation had not been prepared to receive it. That before receiving the pump appellant learned from the bill of lading and other sources of information that it weighed not more than 27,400 pounds. That in a letter written to respondent on December 31, 1906, appellant complained of the light weight as affecting freight charges, but said: "If the pump will perform the work required of it, good and well." That the pump, although lighter in weight, did perform the work required of it. That it possessed the power, capacity, and functions contemplated by the written order. That it was not less valuable than a similar pump weighing 35,000 pounds, and that the appellant sustained no damage by reason of delay in shipment.

Although no estoppel was pleaded, the trial court held the appellant was estopped from claiming damages, because it knew the actual weight before receiving the pump, and because it urged the respondent to manufacture and ship the pump after the time for shipment had expired. If the appellant did in fact sustain damages resulting from light weight, it was entitled to receive the pump actually shipped, and when shipped, recoup its losses by pleading its damages in this action. By accepting a pump of lighter weight

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

it only waived its right to insist upon the delivery of a pump weighing 35,000 pounds as guaranteed, but did not waive its right to any resulting damages which it sustained. In other words, if the pump weighing 27,400 pounds, and actually received, was less valuable than a similar pump weighing 35,000 pounds, appellant was entitled to recover such difference in value by recoupment in this action. If, however, it was equally valuable, notwithstanding its lighter weight, no damages resulted, and no recovery therefor could be sustained. At the time the order was given the parties did not know the actual weight of a pump of the capacity desired and ordered. Evidence admitted disclosing such lack of knowledge was competent, not to vary the terms of the written contract, but as bearing upon any information the parties had, at the date of the order, as to whether 35,000 pounds weight was necessary to insure the stipulated capacity and power; appellant having waived the warranty as to weight by receiving the lighter pump. If the lighter pump actually performed every function required of a pump of the weight ordered, and was equally serviceable, durable, and sound, it was also equally valuable, and no damage resulted. Applying this test, it appears from the evidence that the pump received was as valuable as the one ordered. This being true, the appellant, having received it, cannot now recover damages for its shortage in weight; the warranty as to weight being waived.

Shipment of the pump was delayed for 56 days. Appellant offered evidence to show that the fair rental value of the pump was \$50 per day, and now claims \$2,600 damages for rentals lost. A vendee, injured by the breach of a vendor's contract to manufacture, sell, and deliver personal property within a specified time, is entitled to recover damages therefor, including gains prevented, as well as losses sustained; but such damages to be recoverable must be actual and certain, and must constitute such a loss as might be expected to naturally follow, or directly result, from the breach. Mr. Mechem, at section 1757 of his work on Sales, citing *Hadley v. Baxendale*, 9 Exch. 341, and *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, leading cases, says: "The general rule governing the allowance of damages for breach of contract generally has in view the two conditions referred to in the preceding section. As stated, in substance, in the famous English case of *Hadley v. Baxendale*, and in the American case of *Griffin v. Colver*, that rule is this: The party who has broken his contract is liable to make compensation to the other for all such losses resulting from that breach as are either: (1) The ordinary, the usual, the commonly to be expected consequences of such a breach of such a contract; or (2) the peculiar or unusual consequences of

the breach of the particular contract in question, if, under the circumstances, it can fairly be said that both parties had those consequences in their contemplation, at the time the contract was made, as a probable result of its breach, and if those unusual consequences are neither uncertain in their nature nor remote as to their cause." Appellant's claim for rentals comes within the second class, but there is not any competent evidence in the entire record showing, or tending to show, that the respondent was advised of, or had the least intimation of, the disposition or use the appellant intended to make of the pump. *Lowenstein v. Chappell*, 30 Barb. (N. Y.) 241; *Landsberger v. Magnetic Telegraph Co.*, 32 Barb. (N. Y.) 530.

In *Griffin v. Colver*, supra, the court said: "The broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented, as well as losses sustained; and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, must be such as might naturally be expected to follow its violation—and they must be certain, both in their nature and in respect to the cause from which they proceed." The theory upon which the appellant contends it is entitled to rents is that profits for the use of a pump could not be readily shown, but that the value of the rents could. Rents are therefore demanded as compensation in lieu of profits lost. There is nothing in the record to show that any such damage could have been within the contemplation of the parties when making the contract, or that they were actually sustained. The evidence does show that the pump was received before the appellant was ready to use it, or could use it. It is therefore manifest that appellant sustained no actual loss as a result of delay in shipment. Before it could recover rents as damages, it should in any event have shown an opportunity to actually rent the pump had it been promptly shipped. *Wagner v. Corkhill*, 40 Barb. (N. Y.) 175. We are unable to find that the appellant has sustained any damages in the actual value of the pump, or in the delay in shipment.

The judgment is affirmed.

PARKER, DUNBAR, and MOUNT, JJ., concur.

MacDONALD et al. v. O'SHEA et al.

(Supreme Court of Washington. April 28, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 92*)—PARTIES—PERSONAL REPRESENTATIVES.

It is presumed that parties to a simple contract intend to bind, not only themselves, but their personal representatives, who must perform the contract and who may sue thereon

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

though not named therein, unless the nature of the contract, such as requiring the personal skill of a party thereto, overcomes the presumption.

[Ed. Note.—For other cases, see *Executors & Administrators*, Cent. Dig. § 772; Dec. Dig. § 92.*]

2. EXECUTORS AND ADMINISTRATORS (§ 92*)—PARTIES—PERSONAL REPRESENTATIVES.

A building contract stipulating that the parties for themselves, their heirs, executors, administrators, and assigns agree to the performance thereof is binding on the administrator of the contractor; it not being contemplated that the building should be the product of the contractor's personal labor or skill either as a laborer, mechanic, or artist.

[Ed. Note.—For other cases, see *Executors & Administrators*, Cent. Dig. § 772; Dec. Dig. § 92.*]

3. PRINCIPAL AND SURETY (§ 91*)—OBLIGATION OF SURETY—DEATH OF PRINCIPAL.

Where the obligation of a building contract survived the contractor and was binding on his estate, his surety in a bond conditioned on the performance of the contract was bound to the performance of the contract after the death of the contractor.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 141; Dec. Dig. § 91.*]

4. PRINCIPAL AND SURETY (§ 91*)—OBLIGATION OF SURETY—DEATH OF PRINCIPAL.

Where the employment of a superintendent for the construction of a building was necessary in view of the character and size of the building, the administrator of the contractor could employ a superintendent, and the surety of the contractor was liable therefor.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 141; Dec. Dig. § 91.*]

5. PRINCIPAL AND SURETY (§ 185½*)—REMEDIES OF SURETY.

A surety on the bond of a building contractor, conditioned for the performance of the contract, stipulating that the contractor shall protect the property against liens, may pay lienable claims before the expiration of the time for filing the liens without waiting for the filing of the liens, and hold the contractor or his estate liable therefor.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 530; Dec. Dig. § 185½.*]

6. EXECUTORS AND ADMINISTRATORS (§ 431*)—FILING OF CLAIMS—NECESSITY—FORECLOSURE OF MORTGAGES.

A surety who obtains an indemnity mortgage from his principal may foreclose the mortgage after the death of the principal, though he does not file a claim with the administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1681; Dec. Dig. § 431.*]

7. APPEAL AND ERROR (§ 1001*)—REVIEW—FINDINGS—CONCLUSIVENESS.

A finding justified by the evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3928; Dec. Dig. § 1001.*]

Department 2. Appeal from Superior Court, Spokane County; Miles Poindexter, Judge.

Action by E. C. MacDonald, trustee, and another, against Edward O'Shea, administrator of John J. Walsh, deceased, and others. From a judgment for plaintiffs, certain of the defendants appeal. Affirmed.

John M. Gleason and Joseph F. Morton, for appellants. E. C. MacDonald and Donald F. Kizer, for respondents.

PARKER, J. This is an action to foreclose an indemnity mortgage. A trial resulted in findings and judgment in favor of the plaintiffs, and certain of the defendants have appealed.

The material facts are in substance as follows: The National Surety Company is a corporation authorized to transact the business of surety in this state. On April 27, 1905, John J. Walsh executed and delivered to E. C. MacDonald as trustee for the National Surety Company a mortgage upon real property in Spokane, which mortgage by its terms was given to secure the sum of \$3,500. This mortgage was intended to indemnify the surety company against any damage or loss which it might incur upon any bond thereafter executed by it at the request or for the benefit of John J. Walsh. On May 25, 1906, at the instance and request of John J. Walsh, the surety company executed and delivered its bond as surety in his behalf in favor of the Standard Furniture House, Incorporated, in the sum of \$7,500, whereby the surety company guaranteed that he would well and truly perform a certain building contract for the construction of a building, entered into on that day by him with the Standard Furniture House. By the terms of the building contract he was to furnish all material and labor for the erection and completion of the building according to certain plans and specifications, at an agreed compensation of \$15,050.75, and was to protect the property against all claims and liens occurring by reason of the construction of the building. It was provided in the contract that "the said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained." On July 21, 1906, John J. Walsh died. At that time a comparatively small part of the contract had been performed. Soon thereafter Edward O'Shea was appointed and duly qualified as administrator of the estate of John J. Walsh. The administrator under the sanction of the court proceeded with the construction of the building under the contract made by the deceased. Thereafter the administrator defaulted in the performance of the contract, in that he suffered and permitted liens to be filed against the property, and neglected to pay certain bills for material and labor used in its construction amounting in the aggregate to \$3,492.40. These claims were all lienable claims against the property, though not all of the claimants had actually filed liens. Thereupon the Standard Furniture House demanded that the surety company save it harmless from these claims. Thereupon the surety company, after investigating the claims and being satisfied of their validity, and that it was liable as surety upon the bond for their payment, complied with the demand of the Standard Furniture House and paid the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

claims on February 14, 1907. The appellants are heirs of John J. Walsh, and as such are interested in the mortgaged property. The court concluded that the claims paid by the surety company were valid claims against John J. Walsh, and the surety company as surety, upon the contract and bond; and that the surety company by virtue of its indemnity mortgage was entitled to have the sums so paid by it declared a lien upon the property described in the mortgage, and to have the mortgage foreclosed.

Learned counsel for appellants contend that the contract for the construction of the building constituted such a personal relation between Walsh and the Standard Furniture House that his obligation under the contract to construct the building did not survive, but died with him, and that there was no obligation cast upon his personal representative, or his estate, requiring the completion of the building; and hence the surety company was under no obligation to pay lien claims accruing after the death of Walsh in the construction of the building. The general rule governing the survival of contractual obligations as against the personal representative and the estates of deceased persons is stated in 2 Parsons on Contracts (9th Ed.) 685, as follows: "It is a presumption of law that parties to a simple contract intended to bind not only themselves, but their personal representatives; and such parties may sue on a contract, although not named therein. Hence, as we have seen, executors, though not named in a contract, are liable, so far as they have assets, for the breach of a contract which was broken in the lifetime of their testator. And, if the contract was not broken in his lifetime, they must not break it, but will be held to its performance, unless this presumption is overcome by the nature of the contract, as where the thing to be done required the personal skill of the testator himself." 18 Cyc. 239. This rule is elementary. The difficulty in applying it arises when the facts of the particular case are such as to render it doubtful as to whether or not the thing to be done requires the personal skill of the deceased himself. The Supreme Court of Pennsylvania in Billings's Appeal, 106 Pa. 558, 560, said: "Where a party agrees to do that which does not necessarily require him to perform in person, that which he may, by assignment of his contract or otherwise, employ others to do, we may fairly infer, unless otherwise expressed, that a mere personal relation was not contemplated. It is true also, perhaps, that a contract may involve matters of such a nature as to render the performance of them so incompatible with the settlement of a decedent's estate, and so inconsistent with the general duties of an administrator or executor that, in the absence of any express provision to the contrary, the parties may be presumed, as in the case of Dickinson v. Calahan's Administrator, [19 Pa.] 227, to have intended its dissolution at death. The whole

question in each case is one for construction, and depends upon the intention of the parties, that intention to be found under the rules regulating the construction of contracts in general." In the case before us, there is no doubt of the intent of the parties to make this building contract binding upon the administrator of John J. Walsh as his personal representative in the event of his death before the completion of the building, since the contract by its express terms so provides. Therefore the administrator was bound to complete the performance of the contract in so far as the assets of the estate would permit, unless we can say that the building contract imposed upon John J. Walsh such a personal duty as to render it practically impossible of performance by any one but himself. An exhaustive note citing many authorities relating to this subject may be found in 21 L. R. A. (N. S.) 915. See, also, note in 68 Am. Dec. 760. It is clear that the obligation of deceased under this building contract was that of an independent contractor, and was not a matter of rendering personal service. 16 Am. & Eng. Enc. of Law (2d Ed.) 187. There was nothing in the contractual relation existing between the deceased and the Standard Furniture House at all approaching the relation of master and servant; nor was it contemplated that the building or any part thereof when completed should be the product of his own personal labor or skill, either as laborer, mechanic, or artist. He no doubt expected to perform his contract through the labor and skill of others to a very large extent, and he had the right to so perform the whole of his contract if he so desired. We have not had our attention called to any authorities holding that the obligation of an independent contractor under an agreement to build a building does not survive him, if the contract is not performed at the time of his death, while there is eminent authority to the contrary. Judge Woerner in his American Law of Administration (2d Ed.) § 323, says: "If one agrees to build a house before a given time, and dies before that time, his executors are bound to perform the contract; and the completion by an administrator of a decedent's contract to build a house attaches to his work all the liabilities of the original contract, so that a subcontractor is entitled to his lien for materials furnished the intestate." See, also, 3 Williams on Executors (7th Am. Ed.) 224. Both of these eminent text-writers cite in support of their text among other authorities the early English case of Quick v. Ludburrow, reported in 3 Bulstrode's Reports, 30, in the year 1685, in which Coke, Chief Justice, said: "If a man be bound to build a house for another before such a time, and he which is bound dies before the time, his executors are bound to perform this." The following cases relating to building contracts support this view: Kadish v. Lyon, 229 Ill. 35, 82 N. E. 194; Janin v. Browne, 59 Cal. 37; Riblet v. Wallis, 1 Daly (N. Y.) 360, 365;

Bambrick v. Webster Presbyterian Church, 53 Mo. App. 225, 238; *Russell v. Buckhout*, 87 Hun, 48, 34 N. Y. Supp. 271. We are of the opinion that the obligations of John J. Walsh under this contract survived him and were binding upon his estate. It follows that the surety company was as much bound to the performance of this contract after the death of Walsh as it would have been had he lived to perform the contract in person.

One of the claims paid by the surety company was that of one Hutter, who was employed by the administrator to superintend the construction of the building. It is contended the administrator was not authorized to so employ Hutter, but it seems to us that the administrator was as much authorized to employ a superintendent as he was to employ mechanics and laborers. It is not seriously contended that a skilled superintendent was unnecessary. Indeed, the character and size of the building as indicated by the record would seem to render it plain that the employment of a skilled superintendent for its construction was reasonably necessary. We think that the surety company was as much bound to save the Standard Furniture House harmless from this claim as from the claims of other employes and materialmen; it being a lienable claim. 20 Am. & Eng. Enc. Law (2d Ed.) 342.

We have noticed that liens were not actually filed by all the claimants, and it is argued that the surety company was not warranted in paying claimants who had not actually filed liens. We think it is clear that all the claims paid by the surety company were lienable claims, and it seems plain from the evidence that at the time of the payment of them by the surety company, the time for filing such liens had not expired, and that they would have been filed had not the surety company paid them. We think under the circumstances it was the duty of the surety company to pay them without waiting for them to be actually filed.

It is contended that the surety company ought not to be allowed to maintain this action, because it did not file any claim against the estate with the administrator before commencing the action. If the surety company was seeking to charge the estate generally with its claim, there would be merit in this contention; but, since it is seeking only to enforce its lien against the mortgaged property which was expressly pledged to secure its claim, the failure on its part to file a claim with the administrator does not affect its right to foreclose the mortgage. *Scammon v. Ward*, 1 Wash. St. 179, 23 Pac. 439.

It is contended that the evidence does not support the court's finding as to the amount and validity of the claims paid by the surety company. In this connection some contention is made against the good faith of

the administrator, and also against Hutter, the superintendent; it being claimed that the building cost more than it would have cost by proper management in its construction. We have carefully read all of the evidence and conclude it was sufficient to justify the court's findings in the particulars complained of; nor do we find anything in the evidence which would warrant the conclusion that the surety company was in any way responsible for any excessive cost of the building, necessitating its payment of these claims.

We are of the opinion that the judgment should be affirmed, and it is so ordered.

RUDKIN, C. J., and DUNBAR, MOUNT, and CROW, JJ., concur.

(58 Wash. 191)

BERNARD et ux. v. BENSON et al.

(Supreme Court of Washington. April 29, 1910.)

1. VENDOR AND PURCHASER (§ 231*)—CONTRACTS FOR SALE OF REAL ESTATE—RECORD—NOTICE—"DEEDS, GRANTS AND TRANSFERS OF REAL PROPERTY."

Ballinger's Ann. Codes & St. § 410 (Pierce's Code, § 4074), requires the county auditor to procure such books for records as the business of the office requires. Section 411 (section 4075) makes it his duty to record separately in books "deeds, grants and transfers of real property," and all other papers or writings required by law to be recorded. Section 4535 (section 4441) provides that all deeds, mortgages, and assignments of mortgages shall be recorded in the office of the county auditor, etc. Section 4536 (section 4450) provides that every instrument in writing, purporting to convey or incumber real property which has been recorded in the proper office, shall import notice to third parties. *Held*, that contracts for the sale of real estate are included within the meaning of the words "deeds, grants and transfers of real property," so as to authorize their record and make the record notice to subsequent purchasers.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 535; Dec. Dig. § 231.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1919-1924; vol. 8, p. 7630; vol. 4, pp. 3152-3156; vol. 8, p. 7067.]

2. STATUTES (§§ 218, 225*)—CONSTRUCTION—ACTS IN PARI MATERIA.

In construing a statute, all acts in *pari materia* will be read together, and when the meaning of a statute is not clear, or it is ambiguous, obscure, or indefinite in any respect, contemporaneous construction may also be resorted to in arriving at the intention of the lawmakers.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 294, 303; Dec. Dig. §§ 218, 225.*]

3. EVIDENCE (§ 21*)—JUDICIAL NOTICE—RECORD OF INSTRUMENTS.

The court may take judicial notice of the fact that it has been the custom in Washington to record contracts for the sale of real property.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 25; Dec. Dig. § 21.*]

4. VENDOR AND PURCHASER (§ 231*)—CONTRACTS FOR SALE OF REAL ESTATE—RECORD—NOTICE.

Under Ballinger's Ann. Codes & St. § 410 (Pierce's Code, § 4074), requiring the county

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auditor to procure such books for record as the business of the office requires, and, in view of the uniform custom throughout the state, to record all instruments affecting the title to real estate in deed records, those creating an incumbrance against real estate in mortgage records, and those evidencing title to personal property in miscellaneous records, the recording of an executory contract for the sale of real estate in Miscellaneous Records does not import notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 535; Dec. Dig. § 231.*]

5. VENDOR AND PURCHASER (§ 244*)—CONTRACT FOR SALE OF REAL ESTATE—NOTICE—SUFFICIENCY OF EVIDENCE.

Evidence held insufficient to show that defendants had actual notice of plaintiffs' rights under a contract for the sale of real estate.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 606-611; Dec. Dig. § 244.*]

6. VENDOR AND PURCHASER (§ 238*)—RIGHTS OF VENDEE—NOTICE.

The grantee of a bona fide purchaser without notice takes title free from rights of those claiming under an executory contract of sale, regardless of notice in such grantee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 580; Dec. Dig. § 238.*]

7. SPECIFIC PERFORMANCE (§ 16*)—RIGHTS OF THIRD PARTIES.

Specific performance will be denied when rights of innocent third parties have intervened, so that the enforcement of the contract would be harsh, oppressive, or unjust to them.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 29; Dec. Dig. § 16.*]

Department 1. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by Joseph Bernard and wife against Andrew Benson and others. From the decree, plaintiffs appeal. Affirmed.

J. C. Cross, W. I. Agnew, and A. Emerson Cross, for appellants. W. H. Abel, for respondents.

GOSE, J. The plaintiffs in this suit seek specific performance of an executory contract, and have appealed from the decree. The record discloses the following material facts: On the 28th day of August, 1903, the Northwestern Lumber Company, the owner of the real estate in controversy, entered into a contract with the appellant Joseph Bernard, whereby it agreed to convey the property to him. The contract was filed for record in Chehalis county, where the land was situated, on September 2, 1903, and recorded in Miscellaneous Records. On May 31, 1905, the appellant Joseph Bernard filed for record a homestead declaration, which was recorded in Miscellaneous Records. On March 9, 1907, he contracted to convey a part of the land to one Sorenson. The contract was filed for record March 25, 1908, and recorded in Miscellaneous Records. On November 6, 1907, the appellant Joseph Bernard entered into a contract with the respondent Andrew Benson, whereby it was agreed that the latter should pay the balance due upon the contract with the lumber company, take a deed in his name,

and convey to Salme, Eberwine, and Sorenson, respectively, upon payment by them of the purchase price, specific tracts which appellant Joseph Bernard had contracted to them, retain for himself a tract which Bernard had contracted to him, and, upon payment of the balance of the purchase price, convey the remainder to the appellant Emma Bernard. The Salme and Eberwine contracts were not recorded. On November 8, 1907, the lumber company conveyed the land to the respondent Andrew Benson, and the deed was filed for record on November 13th following, and duly recorded. Benson conveyed to Salme and Eberwine, but did not convey to either Sorenson or Emma Bernard. On the 25th day of January, 1908, the respondents Benson and wife conveyed the land in controversy to the respondent Charles Knokey, by a deed of general warranty which was filed for record February 5, 1908, and duly recorded. The consideration for the conveyance of this tract of land was \$1,600, of which \$186 was paid in cash; Knokey agreeing to pay a mortgage on the land amounting to \$1,040, and assuming the payment of a note of \$350, which Benson was owing to another party. Before conveying to Knokey, the respondents Andrew Benson and his wife had mortgaged the land in controversy for the purpose of paying the purchase price to the lumber company. About March 1, 1908, the respondents Knokey and wife sold to the respondent Fred Lubbe a parcel of the land containing about six acres and a half for \$400, \$300 of which was then paid, and the balance of \$100 was paid on May 6th when the deed was delivered. The respondents Knokey and wife took possession of the land immediately after the purchase, and the respondents Lubbe and wife took possession of the tract which they had purchased about March 8, 1908, and before receiving the deed. The Knokeys and the Lubbes each began clearing the land, and the latter at once ordered lumber for a house, which they later built on their land. The entire tract was logged-off timber land, unimproved and uninclosed, when Knokey and Lubbe purchased. Other essential facts will be stated later in connection with the related subjects.

The appellants contend that the recording of their executory contract, declaration of homestead, and the Sorenson contract imparted constructive notice, and that the respondents Knokey and Lubbe are not innocent purchasers. The respondents assert that the recording did not import notice (1) because there is no statute in this state authorizing the recording of an executory contract for the sale of real estate; and (2) because the several instruments, including the declaration of homestead, were recorded in Miscellaneous Records. We will consider these points in the order suggested.

We think the first proposition is untenable.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The Code (1 Ballinger's Ann. Codes & St. § 410; Pierce's Code, § 4074) requires the county auditor to procure "such books for records as the business of the office requires." Section 411 (section 4075) makes it his duty to record separately, in "large and well-bound books," "deeds, grants and transfers of real property," and all other papers or writings required by law to be recorded. Section 4535 (section 4441) provides that "all deeds, mortgages, and assignments of mortgages shall be recorded" in the office of the county auditor of the county where the land is situated, and shall be valid as against bona fide purchasers from the date of their filing for record. Section 4536 (section 4450) provides that "every instrument in writing purporting to convey or incumber real property," which has been recorded in the proper office, shall import notice to third parties. It is true, contracts for the sale of real estate are not expressly mentioned in the recording statutes, but we think they are included within the meaning of the words "deeds, grants and transfers of real property." They are, within the spirit of the statute, liberally interpreted. 2 Am. & Eng. Enc. Law (2d Ed.) § 78. In construing a statute all acts in pari materia will be read together; and, where the meaning of a statute is not clear, or it is ambiguous, obscure, or indefinite in any respect, contemporaneous construction may also be resorted to in arriving at the intention of the lawmakers. We think we may properly take judicial notice of the fact that it has been the custom in this state to record such instruments. The construction contended for by the respondents would be productive of great mischief. Our construction is not in conflict with the points decided in *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746, *Fischer v. Woodruff*, 25 Wash. 67, 64 Pac. 923, 87 Am. St. Rep. 742, and *Dial v. Inland Logging Company*, 52 Wash. 81, 100 Pac. 157.

We think the respondents' second point that the recording of an executory contract for the sale of real estate in Miscellaneous Records does not impart notice must be sustained. As we have seen, the Code (1 Ballinger's Ann. Codes & St. § 410) requires the county auditor to procure such "books for record as the business of the office requires." The custom has been uniform throughout the state to record all instruments affecting the title to real estate in Deed Records, those creating an incumbrance against real estate in Mortgage Records, and those evidencing title to personal property in Miscellaneous Records. This custom has been so general, and has existed for so long a period of time, that it is our duty, not only to judicially notice it, but to apply it as well. In *Ritchie v. Griffiths*, 1 Wash. St. 429, 25 Pac. 341, 12 L. R. A. 384, 22 Am. St. Rep. 155, it was held that a deed must be properly indexed by the auditor, and recorded in the proper record, before operating as a constructive notice, and that constructive notice does not arise from an at-

tempt to comply with the registry laws. In *Ames v. Miller*, 85 Neb. 204, 91 N. W. 250, the court said that the registry law should mean something, and that one claiming an interest in real estate should comply with the letter and spirit of its provisions, and thus prevent injury and damage to those who deal with reference to the record title.

The appellants contend that the respondents Knokey and Lubbe had actual notice of their relation to the property through the possession of Sorenson and Mrs. Swedblum. In July or August, 1907, it is claimed that Sorenson slashed about two acres of land on the part of the tract which Bernard had contracted to him, and that his cattle were pastured on the entire tract. It is admitted that the slashing was done, but it is not certain that it is on the property in controversy. Moreover, the trial court was justified in finding that Sorenson had abandoned his contract. The record shows that Sorenson's cattle and the cattle of others ranged upon the property, but the testimony as to the land being inclosed is involved in too great doubt to make the pasturing of the cattle the basis for holding that it was sufficient to give notice, or put a purchaser upon inquiry. Mrs. Swedblum lived in a small house, but whether upon the land purchased by Lubbe or in the county road we cannot determine from the evidence. However, it is not important, as she is not making any claim, and did not make any claim to the property, or assert any right to the possession, in her conversations with Knokey and Lubbe. Nor did she inform them that Bernard made any claim to the property. "No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquire the rights of a purchaser in good faith." *United States v. Detroit Lumber Company*, 200 U. S. 321, 332, 26 Sup. Ct. 282, 285, 50 L. Ed. 499. What makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell. Benson was the owner of the record title, and there was no such possession as would impart notice or make it the duty of the purchaser to inquire.

It is next urged that, because Knokey received notice after paying \$186, and before paying the balance of the purchase price, equity will only protect him to the extent of the sum paid before receiving notice of Bernard's rights, and that, Lubbe having received notice before the property was actually conveyed to him, equity will not protect him even to the extent of the \$300 paid before he received notice. Knokey received actual notice of Bernard's claim about March 15, 1908, about two months after the property was conveyed to him, and Lubbe received no-

tice about the same time. It is fundamental that, if Knokey was a bona fide purchaser, Lubbe, his grantee, took the property freed from any rights of appellants, regardless of notice to him, and that, if he took without notice, it is not material whether Knokey, his grantor, was a bona fide purchaser. Knokey being a bona fide purchaser, it is material to consider the extent to which he will be protected. It cannot be questioned that there is authority to support the appellants' contention that he can only be protected to the amount of his payment before receiving notice. As applied to this case, however, such a conclusion would be highly inequitable. The appellants by their own acts made Benson the owner of the record title. It is true that in conveying to Knokey Benson violated his trust, but the fault is with the appellants, and not with the purchaser. We have seen that Knokey paid a part of the purchase price, and assumed the debt of his grantor for the remainder, which he later paid to the extent of \$1,040. His liability still exists for the payment of the \$350 note. He also went into the possession of the property, and in good faith made improvements. The appellants have tendered to Benson the purchase price of the property, but have tendered nothing to Knokey. Moreover, they allege in their complaint that Knokey colluded and connived with Benson to defraud them. When he assumed payment of the note and mortgage, he became liable to the payee. Whether in a suit to enforce payment against him he could have pleaded a failure of consideration it is not necessary to decide. If the appellants intended to seek specific performance against him, it was their duty to take such steps as would protect him. While the mortgage was given by Benson, the money derived from the loan was used in paying the purchase price of the land. The real benefit of the mortgage loan accrued to the appellants. The court directed a conveyance of the remaining land to the appellants. Benson derived no benefit from the mortgage. He used the proceeds to pay for the property. We think the true rule, and the one which best harmonizes with the broad principles of equity, is that specific performance will be denied when rights of innocent third parties have intervened so that the enforcement of the contract would be harsh, oppressive, or unjust to them. 6 Pomeroy's Eq. Jur. § 794; Curran v. Holyoke Water Power Co., 116 Mass. 90; Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; Carlisle v. Carlisle, 77 Ala. 339; Hale v. Bryant, 109 Ill. 34. The appellants cannot justly complain of this rule. By their own negligence they placed it in the power of Benson to sell the land, and now to permit them to set aside the sale would defraud innocent

parties. As against them the record should be held to import absolute verity.

The decree directs a conveyance to the appellants of that part of the land now held by the Bensons, except the tract contracted to them by Bernard in 1903, and finds that Benson has received from sales of the land \$7.85 in excess of the purchase price paid by him, and a judgment is entered in favor of the appellants and against the Bensons for that sum. The point is made that the court erroneously allowed Benson a credit of \$226.85. As we have seen, in 1903 the appellants contracted to Benson a part of the land embraced in their contract with the lumber company, and their trust agreement with Benson directs him to retain that tract. After receiving a deed for the land from the lumber company, it was discovered that a part of the land which the appellants had contracted to Benson was owned by a third party from whom Benson later purchased it. These facts are affirmatively pleaded in Benson's answer, and we think the evidence justified the trial court in allowing him this credit.

The decree is affirmed, without prejudice to the appellants' right to maintain an action at law against Benson for damages for breach of the contract.

RUDKIN, C. J., and FULLERTON and CHADWICK, JJ., concur.

(58 Wash. 212)

WOLFE v. SCHOOL DIST. No. 2,
COLUMBIA COUNTY.

(Supreme Court of Washington. April 29, 1910.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 90*)—
CONTRACTS—EMPLOYMENT OF TEACHER—
VALIDITY.

Under Laws 1893, c. 109, § 3, making it unlawful for the directors of a school district to contract an indebtedness against their district in excess of a sum equal to the last quarterly apportionment next following the date on which taxes become delinquent, etc., a contract by the board for the employment of a school teacher, made after the limitation of indebtedness was reached, was void.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 211; Dec. Dig. § 90.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 90*)—
INDEBTEDNESS—STATUTORY AND CONSTITUTIONAL LIMITATIONS.

The maintenance of a public school throughout a school year of eight months is not such a necessity as to warrant school directors in overriding statutory and constitutional limitations as to the amount of indebtedness a school district may lawfully incur.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 211; Dec. Dig. § 90.*]

Department 1. Appeal from Superior Court, Columbia County; Chester F. Miller, Judge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by Clara Wolfe against School District No. 2 of Columbia County, a public corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

Troy & Sturdevant, for appellant. Will H. Fouts, for respondent.

FULLERTON, J. On July 12, 1894, at a regular meeting of the board of directors of School District No. 2, Columbia County, the appellant was elected to the position of principal of the high school of that district to serve for a term of eight months beginning October 1, 1894, at a salary of \$50 per month. After being informed of her election by the clerk of the school district, she sent a formal letter to that officer accepting the position. No written contract was entered into such as the school law seems to have contemplated; but the appellant took up her duties at the commencement of the school year and performed them for a period of three months, when she was discharged by the school directors. It is agreed that the appellant was duly qualified to teach under the laws of the state, and that her discharge was not because of any fault of her own, but on account of the district's financial condition; the directors having found it necessary in order to continue the school to retrench in their expenditures. After her discharge the appellant in good faith sought employment elsewhere, and, failing to find it, brought this action against the district to recover as damages for a breach of the contract a sum equal to the salary for the unexpired term. To a complaint setting out the foregoing facts, the respondent answered by way of denials and affirmative defenses; the second of the affirmative defenses being the following: "(2) For a further and separate defense defendant alleges: First, that at the time said alleged contract was entered into by plaintiff and defendant the board of directors of defendant had incurred indebtedness against said School District No. 2, the defendant herein, which said indebtedness had been contracted during the year in which said alleged contract was made, and was payable out of the general fund of said district, the defendant herein, and was in a sum exceeding in the aggregate the amount apportioned to said district at the last quarterly apportionment next following the date on which taxes became delinquent prior thereto, and said indebtedness had not been authorized by a vote of the electors of said district, and there was no money in the treasury of said school district at said time." At the trial the principal facts were stipulated; it being stipulated, among other things, that the facts stated in the foregoing separate defense were true. The court entered judgment for the respondent, and this appeal is taken therefrom.

The statute in force at the time the appellant was hired as a teacher relating to the powers of school directors to enter into a contract when the effect of the contract was to create an indebtedness reads as follows: " * * * It shall be unlawful for any board of directors to contract indebtedness against their district in any one year, payable out of the general fund of said district, in any sum or sums exceeding in the aggregate the amount apportioned to said district at the last quarterly apportionment next following the date on which taxes become delinquent, unless said indebtedness be first authorized by a vote of the electors of said district." Laws 1893, p. 266, c. 109, § 3. This statute clearly forbids the board of directors of any school district to contract an indebtedness against their district in excess of a sum equal to the last quarterly apportionment next following the date on which taxes become delinquent, and just as clearly renders void any contract creating an indebtedness after that limitation is reached. The stipulation entered into between the parties covering the second separate defense above quoted brings the appellant's contract within the rule. It is void because made at a time when the school district was incapable of entering into a valid contract of its nature.

The appellant relies upon the case of *Rauch v. Chapman*, 16 Wash. 563, 49 Pac. 253, 36 L. R. A. 407, 58 Am. St. Rep. 52, in support of the validity of the contract. In that case we held that liabilities incurred by counties necessary to the maintenance of county government were not within the purview of the constitutional provision forbidding the incurrence of an indebtedness beyond a fixed limit. But this principle is not applicable to the case at bar. The maintenance of a public school throughout a school year of eight months is not such a necessity as to warrant school directors in overriding statutory and constitutional limitations as to the amount of indebtedness a school district may lawfully incur.

The court rested its decision in part on other grounds; but we shall not notice them, as we think the judgment may well rest on the ground that the contract was void as in violation of the statute cited.

The judgment is affirmed.

RUDKIN, C. J., and CHADWICK and GOSE, JJ., concur.

(58 Wash. 176)

CATHEY v. SEATTLE ELECTRIC CO.
(Supreme Court of Washington. April 28, 1910.)

1. STREET RAILROADS (§ 117*) — COLLISION WITH VEHICLE—PERSONAL INJURIES—QUESTION FOR JURY.

In an action against a street railroad company for personal injuries, sustained in a col-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lision between a street car and an ice wagon, under the evidence, the cause *held* properly submitted to the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239, 251; Dec. Dig. § 117.*]

2. JURY (§ 66*)—DRAWING JURORS—STATUTORY PROVISIONS—ABSENCE OF—COMMON-LAW METHOD.

In the absence of statutory provisions, the common-law method of procuring jurors by open venire directed to the executive officer of the court may be resorted to at the present time.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 283-290; Dec. Dig. § 66.*]

3. JURY (§ 66*)—DRAWING JURORS—STATUTORY PROVISIONS—ABSENCE OF—COMMON-LAW RULE.

Laws 1905, c. 146, as amended by Laws 1907, c. 63, made it the duty of the superior court to appoint jury commissioners in each county in June of each year, who were to select the names of all qualified jurors in their county and deposit them in a box, and on the second Saturday of each month as many names were to be drawn as the judge might direct to serve during the ensuing month. Laws 1909, c. 73, repealing all inconsistent laws, directed superior courts to divide their counties into not less than three nor more than six jury districts, and the clerks were directed during the month of July of each year to make up a jury list containing the names of all qualified jurors of each district. From this he was from month to month to draw the jury in a similar manner as under the previous law, except that the drawing was done by the clerk without the aid of the commissioners. Const. art. 4, § 6, provides that superior courts shall always be open except on nonjudicial days. Article 1, § 21, provides that the right of trial by jury shall remain inviolate. The present trial occurred June 24, 1909. The jurors in attendance were selected the preceding month under the Laws of 1905, as amended. Laws 1909 went into effect June 8, 1909. *Held*, that there being no statute law in force during the month of June, 1909, the superior court was not prevented from lawfully proceeding with the trial, since the jurors were in attendance in pursuance of the lawful statutory method, no other statutory method being then in existence, and, if no jurors were present, it could have summoned an open venire as at common law.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 283-290; Dec. Dig. § 66.*]

4. NEGLIGENCE (§ 93*)—IMPUTED NEGLIGENCE—DRIVER OF VEHICLE.

In an action against a street railroad company for personal injuries in a collision between a street car and an ice wagon upon which plaintiff was employed, but which was driven by another, the negligence of the driver could not be imputed to plaintiff, in the absence of a showing that it was any part of his duty to drive the team, or that he had any supervision or control over the driver.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 147; Dec. Dig. § 93.*]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by William W. Cathey against the Seattle Electric Company, a corporation. Judgment for plaintiff, and defendant appeals. *Affirmed*.

James B. Howe and Hugh A. Tait, for appellant. Milo A. Root, for respondent.

PARKER, J. This is an action to recover damages for personal injuries, alleged to have resulted to the plaintiff from the negligent operation of one of the street cars of the defendant. The defendant operates a double-track electric street railway upon First avenue in Seattle. First avenue runs approximately north and south. Battery street intersects First avenue at right angles. Bell street also intersects First avenue at right angles one block south of Battery street. The plaintiff was injured by a collision between a street car of the defendant and an ice wagon on which plaintiff was riding at a point on First avenue about halfway between Battery and Bell streets. On May 2, 1907, plaintiff and one Hans Roundstad were employed by the Standard Ice Company and were delivering ice. In the course of their duties they were proceeding north on the east side of First avenue. Roundstad was driving, being seated on the right, while plaintiff was seated on the left, both in the driver's seat. As they passed Bell street, the off horse became much frightened at a furniture van, and started to rear and jump and to crowd the other horse to the left towards the car tracks. At this time one of defendant's cars was proceeding south on Second avenue on the west car track, near Battery street. There was nothing to obstruct the view between the car and the wagon, which were then approximately a block apart and approaching each other. The horses continued to rear and crowd towards and upon the car tracks, the driver trying to pull them back upon the east side of the tracks, so as to miss the approaching car; but upon the nearer approach of the car the driver, believing that it would be safer and more likely to avoid a collision with the car, pulled the horses to the left across the track on which the car was approaching hoping to miss the car by passing it on the west side of the street. The horses and the front part of the wagon passed over the track, but the car struck the right rear wheel of the wagon, throwing it over; the plaintiff falling with one of his legs under it, causing the injuries for which he claims damages. The negligence charged against the defendant is that its motorman in charge of the car "needlessly and recklessly permitted his car to run against said wagon, which he could plainly see, and which he could easily have avoided by the exercise of ordinary care and prudence." The defendant denied all negligence on its part and that of its motorman, and alleged that the injuries sustained by plaintiff were caused by his own carelessness and negligence which contributed thereto, and were the approximate cause thereof. A trial before the court and a jury resulted in a verdict in favor of the plaintiff. The defendant moved for judgment notwithstanding the verdict, and also for a new trial. These motions be-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing denied, judgment was entered upon the verdict, and the defendant has appealed.

We will first notice appellant's contentions upon its motions for judgment and for new trial, in so far as they challenge the sufficiency of the evidence to sustain the verdict. There was evidence tending to show that the horses, by reason of their fright, especially the fright of the off horse, became uncontrollable so far as the driver being able to keep them on the east side of and off the track of the approaching car; that their frightened condition and the driver's efforts to control them and their tendency to go upon the track that the car was approaching upon could be plainly observed by a person situated as the motorman was upon the front platform of the car, from the time they were nearly a block away from the car until the collision actually occurred; that, if the car had been stopped at a very short distance north of where the collision occurred, the rear end of the wagon would have passed over the track and cleared the car without collision; that the motorman could have stopped the car sooner than he did after seeing the probability of the accident and avoided the collision, especially if he had the car under proper control; that the driver of the horses was a strong man and an experienced driver; that he did all that an experienced driver could do to avoid the collision; and that respondent did nothing, and could do nothing, to avoid the collision. There being evidence tending to show these facts, we think the cause was properly submitted to the jury.

It is contended that the trial court erred in denying the appellant's challenge to the panel of jurors. The challenge was based upon the ground that the jurors were not selected in accordance with chapter 73, p. 131, Laws 1909, but were selected under chapter 146, p. 270, Laws 1905, as amended by chapter 63, p. 102, Laws 1907. By the Laws of 1905 and 1907 it was the duty of the superior court to appoint jury commissioners in each county in June of each year. It was the duty of these commissioners to select the names of all qualified jurors in their county and deposit their names written on separate slips of paper in a box to be delivered to and remain in the custody of the clerk of the court. On the second Saturday of each month it was the duty of the jury commissioners and the clerk to assemble in open court and draw such number of names from the box as the judge might direct for petit jurors to serve during the ensuing calendar month. This trial occurred on June 24, 1909. The jurors then in attendance upon the court had been regularly selected on the second Saturday in May, 1909, under the Laws of 1905 and 1907 as above briefly outlined. At the time of so selecting the jurors for service during the month of June that law was in force. At the session of 1909 the Legislature enacted a new law for the selection of jurors, being chapter 73, p. 131, Laws 1909. This law went into force

June 8, 1909, as all laws of that session did, not having an emergency clause. By this law it is made the duty of the superior courts to divide their respective counties into not less than three nor more than six jury districts, each with equal population as near as may be. It is made the duty of the clerk of the court during the month of July in each year to make up a jury list containing the names of all qualified jurors in each district, to provide boxes for each district, write the names of the jurors upon slips of paper, and deposit the names in the boxes of the proper districts. From these boxes the jury is to be drawn from month to month in a similar manner as under the previous law, except the drawing is done by the clerk of the court without the aid of jury commissioners, and the names are to be drawn in equal numbers from each jury box. The jurors so drawn are to serve for the ensuing month.

We have, then, this situation: The jurors attending upon the court at the time of this trial were regularly selected for service for June, 1909, under a law that was in force on the second Saturday of May, the time of their selection, but was not in force at the time of the trial because the new law of 1909 had the effect of repealing the prior laws when it went into force on June 8, 1909. *State v. Superior Court*, 104 Pac. 1131. There could be no jury list made up by the clerk of the court under the law of 1909 from which a jury could be drawn to serve during June, 1909, since the first selection of jurors under that law could not occur until July, 1909, so there was no statute law in force during the month of June, 1909, that provided any method whatever for the selection of jurors to attend upon the superior courts of the state during that month. The effect of the argument of learned counsel for appellant is that the superior courts of the state were without power to proceed with jury trials at this time because of this want of statutory law providing for the selection of jurors. The superior courts are created by the state Constitution. They possess general original jurisdiction, both in law and equity. Section 6, art. 4, of the Constitution, wherein their jurisdiction and powers are defined among other things, provides that "they shall always be open except on nonjudicial days," and by section 21, art. 1, of the Constitution, it is provided that "the right of trial by jury shall remain inviolate." Clearly the Constitution contemplates that the superior courts of the state shall at all times, except upon nonjudicial days, have power to proceed with their business, and this, of course, includes trial by jury as well as their other business. These are powers which cannot be taken away from the superior courts by anything less than a change in the Constitution, unless it can be held that the absence of a statutory method for selecting jurors has the effect of depriving the superior courts of power to procure

jurors for the conduct of its jury business. For nearly 50 years the statute law of this state and territory has provided as follows: "The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state." Section 143, Rem. & Bal. Code. In view of the common-law source of our jurisprudence, it is more than likely that this would be the rule of decision in this state even in the absence of such a statutory provision. The power of procuring the attendance of jurors upon courts at common law was ample for that purpose before there were any statutes regulating the matter, both in England and America; and the authorities seem to clearly support the view that, in the absence of statutory provisions, the common-law method of procuring jurors—that is, by open venire directed to the executive officer of the court—may be resorted to at the present time. 12 Enc. of Pl. & Pr. 274; 24 Cyc. 208; 3 Blackstone, 352; Clawson v. United States, 114 U. S. 477, 486, 5 Sup. Ct. 949, 29 L. Ed. 179; U. S. v. Beebe, 2 Dak. 292, 11 N. W. 505; Carter v. Territory, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443; Berry v. United States, 2 Colo. 186, 197.

In the case last cited Chief Justice Hallet, in discussing the power of the court to summon jurors in the absence of statutory provisions, at page 198, said: "It will not be claimed that the powers possessed by courts are entirely derived from the written or statute law. As is well said in a late edition of a standard work, courts did not originate in Constitutions. They were known to the common law, and their powers are there well defined. If courts possessed only such powers as are granted in Constitutions and statutes, they could not protect themselves from insult and outrage; they could not compel the attendance of witnesses, or obligations to testify when present; they could not compel the attendance of jurors, nor punish them for improper conduct. Potter's Dwaris on Statutes, 340. In our own law, not only the method of proceedings, but the remedies given to suitors, are defined almost entirely by the common law. Of late the judicial power has been regulated by statute more fully than ever before, and still very much of it rests in the common law. That authority is not conferred by statute is no evidence that it does not exist, for the common law continually supplements the statute law supporting it at every point, and providing for all its deficiencies. Of this, the law relating to juries is a good illustration, for, although the qualifications and selection of jurors are now usually regulated by statute, the process for bringing them into court is given by the common law, and their powers and duties are derived almost entirely from the same source."

We have noticed this common-law power for the purpose of showing that it exists, and conclude that the superior courts of the state were not prevented from lawfully proceeding with jury trials during the month of June, 1909, simply because there was then no statute law in force providing for the manner of selecting and summoning jurors for service during that month. It is true the jurors in attendance upon the court at the time of this trial were not summoned by common-law process, but they were then in attendance upon the court in pursuance of a lawful statutory method which was in force at the time of their selection and coming into court, and no other statutory method was then in existence by which jurors could be selected for service at that time. We are of the opinion that the court could lawfully proceed to trial with the jurors then present, or, if there had been no such jurors present, it could have summoned a sufficient number to transact the jury business of the court by open venire as at common law. Appellant's right to challenge individual jurors either peremptorily or for cause was not impaired in the least, by the manner of selecting or summoning the jury, and this record fails to show the exercise of any such challenge by appellant.

Among other things, the court instructed the jury as follows: "A person riding in a wagon with another person who is driving a team which is hauling said wagon is not responsible for the negligence of such driver in a case of this kind, unless he caused said driver to be negligent, and unless plaintiff's negligence concurs with the negligence of the driver. In this case, if you believe that the driver of the ice wagon was negligent, but that plaintiff did not cause such negligence and was not responsible therefor and was not guilty of negligence on his part, then it would be no defense to plaintiff's right to recover against defendant." This instruction is claimed to be erroneous and prejudicial to appellant, in that it is too general and ignores the relation existing between respondent and the driver. It is argued by counsel for appellant that the negligence of the driver, if any, should be imputed to the respondent by reason of their relation at the time of the accident. There was no evidence tending to show that it was any part of respondent's duty to drive the team, or that he had any supervision or control over the driver. This being true, we think the instruction was not erroneous as applied to the facts of this case. In the case of Shearer v. Town of Buckley, 31 Wash. 370, 378, 72 Pac. 76, an instruction was approved by this court upon the same principle which we think will sustain this instruction. The only difference between that case and this is that the injured person in that case was riding in a wagon as the guest or companion of the driver of the horses, but as in this case he had no author

ity or control over the person driving, or the team, and that fact appears to be the principle reason assigned by the court for exempting the injured person from the effect of the negligence of the driver. In addition to the cases there cited, the case of *McBride v. Des Moines City Ry. Co.* (Iowa) 109 N. W. 618, and cases therein cited lends support to this view.

Other errors are assigned upon the rulings of the court in connection with the examination of witnesses. These we have examined and regard them all without merit. They all relate to matters within the discretion of the trial court. They are not such that we feel called upon to discuss them in detail.

We find no prejudicial error in the record, and the judgment is therefore affirmed.

RUDKIN, C. J., and CROW, DUNBAR, and MOUNT, JJ., concur.

(58 Wash. 203)

GILMORE v. CONTINENTAL CASUALTY CO.

(Supreme Court of Washington. April 29, 1910.)

1. PRINCIPAL AND AGENT (§ 43*)—TERMINATION OF AGENCY—DEATH OF PRINCIPAL.

The death of the principal terminates the agency unless the agency is coupled with an interest.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 67-71; Dec. Dig. § 43.*]

2. PRINCIPAL AND AGENT (§ 43*)—EVIDENCE (§ 243*)—TERMINATION OF AGENCY—DEATH OF PRINCIPAL.

The authority of one to represent insured in an accident policy and pay installments of the premium terminates on the death of insured, and statements made by the representative thereafter are not binding on the beneficiaries entitled to the insurance.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 67-71; Dec. Dig. § 43.* Evidence, Cent. Dig. § 915; Dec. Dig. § 243.*]

3. INSURANCE (§ 360*)—ACCIDENT INSURANCE—PREMIUM—PAYMENT IN INSTALLMENTS.

Where an accident policy did not fix the time for the payment of the installments of the premium, but only provided that they should be paid promptly out of insured's wages for a particular month, the insured, through his employer as agent, had a reasonable time within which to make payment, and a delay of three days after the end of the month was not so unreasonable as to forfeit the policy for nonpayment of the installments.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 913, 916-924; Dec. Dig. § 360.*]

4. INSURANCE (§ 349*)—ACCIDENT INSURANCE—PREMIUM—PAYMENT OF INSTALLMENTS.

An accident policy stipulated that the premium should be paid in installments out of insured's wages for designated months. It was understood that the earnings of insured for any particular month were not to be paid until the latter end of the succeeding month, and that no remittance would be made on the premium until the arrival of the pay day, though funds were in the hands of the employer applicable to that purpose on the 1st day of the succeeding

month. *Held*, that there was no default in the payment of an installment until the arrival of the pay day.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 891, 895-902; Dec. Dig. § 349.*]

Department 1. Appeal from Superior Court, Spokane County; D. H. Carey, Judge.

Action by Margaret Gilmore against the Continental Casualty Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Roche & Onstine and Manton Maverick, for appellant. Plummer & Latimer, for respondent.

FULLERTON, J. On September 16, 1907, the appellant issued to one Nate Gilmore, a freight brakeman in the employ of the Northern Pacific Railway Company, an accident insurance policy, whereby it promised, among other things, to pay to the respondent the sum of \$1,000 in case of the death of the assured by accident during the life of the policy. The life of the policy was fixed at one year, subject to lapse for the nonpayment of any premium installment. The assured did not pay any part of the premium at the time of the issuance of the policy, but to provide therefore gave to the appellant the following order directed to the paymaster of his employer:

"Please pay for me to the Continental Casualty Company the sum of forty and no/00 dollars and charge the same against my pay account for services rendered or to be rendered by me.

"This order is given to provide for the payment on a policy of insurance for which I have this day made application, and you are authorized and requested to pay the said sum in installments, as follows:

- 1st installment of \$10.00 to be paid from my wages for the month of October, 1907.
- 2nd installment of \$10.00 to be paid from my wages for the month of November, 1907.
- 3rd installment of \$10.00 to be paid from my wages for the month of December, 1907.
- 4th installment of \$10.00 to be paid from my wages for the month of January, 1908.

—and further, at the option of the Continental Casualty Company, to pay any installment, payment of which has been defaulted, from any reason whatever, from my wages from any month thereafter succeeding. It is understood and agreed, with respect to these installments: (1) That if each and every one of them be promptly paid as above specified, then and in that event only, they shall pay for my insurance under a policy to be issued to me by said company, bearing even date and number herewith, for respective periods, to wit: The first installment, two months; the second installment, two months; the third installment, three months; and the fourth installment, five months; in their successive order as herein given. (2) That

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said railway company is my agent for the purpose of making such deductions, and I will promptly notify its auditor of disbursements of any change in my employment, either as to class of service or location. (3) That I hereby release the said railway company from all liability on account of failure to make deductions arising from any cause whatever. And (4) that if for any reason whatever payment of any installment be not made as above specified then all my rights under said policy and the rights of my beneficiary thereunder shall at once terminate and be void. I hereby waive for myself and for my beneficiary under said policy any notice of payment or nonpayment of said installments, and I agree that should default be made in any payment of the above specified installments and the defaulted installment be afterwards paid as provided above, then and in that event such payment shall reinstate only from the time of the receipt of such payment at the general office of the Continental Casualty Company.

"I agree that should I be discharged from or cease to be in the service of said railway system before the first of said installments becomes due, then all my rights and rights of my beneficiary in said policy shall immediately cease, unless I notify the secretary of said Continental Casualty Company in writing within three days after leaving said service, and remit said installment with said notice.

"I understand that no agent of the company has any authority or power to waive or change any of the printed provisions herein.

"In consideration of the acceptance of this order or assignment of wages by the above-named railway company, the undersigned hereby agrees that the same shall not be revoked, canceled, and annulled by notice to said railway company, or otherwise."

The appellant at that time was doing, and had theretofore done, a large insurance business with the railway company's employes, from each of whom it had received an order similar to the foregoing. It had also entered into an agreement or understanding with the railway company by which the railway company had undertaken, for a consideration of 5 per centum of the amount collected, to deduct from the wages of the several employes the premiums due for each particular month in so far as the wages earned by the employe would permit of such deduction. The practice of the appellant was to turn over to the railway company's auditor of disbursements the several orders as fast as they were received. Towards the end of each month it would forward to the auditor a list or statement showing the names of the several persons assured with the amount of premium due for that month, together with such other data as would enable the auditor to identify the persons named, and that officer would, when making up the accounts of the assured, deduct from their wages the amount of the

premiums due and forward the amount to the appellant less the commission charged. The remittance was usually made about the 20th day of the month succeeding the month the premium fell due. This procedure was followed in the present instance. On receiving the order in September the appellant forwarded it to the railway company's auditor of disbursements. Towards the latter part of October a statement was sent the auditor containing a list of the names of the employes of that company who held insurance in the appellant company, and from whom premiums were due out of their October wages. In this list was the name of the assured in question here. The statement showed \$10 to be due from Gilmore for the month of October and this sum was deducted by the auditor from Gilmore's October wages and forwarded the appellant less the commission above mentioned; the remittance being made about the 20th day of November. Towards the end of November, the appellant forwarded to the auditor a similar statement showing the amounts due on November premiums. This was duly received by the auditor, who returned it about the 20th of the following month, after making up the November accounts, without remittance on the claim against Gilmore. The reason for the failure to make the remittance the auditor expressed on the statement, by the words: "Lapsed. Nothing due." In the meantime the assured had been killed by accident while in the performance of his duty. His death occurred on December 3, 1907, several days prior to the time the auditor made his return to the insurance company; but whether the auditor knew of his death at that time the record does not disclose.

The method adopted by the railway company for keeping the time of its several employes and making payment of their wages is not made very clear by the record. It can be gathered therefrom, however, that the trainmen's time, such as brakemen, was reported by the train conductor to the trainmen's timekeeper, who after tabulating it forwarded the tables to the auditor of disbursements. The conductor reported at the end of every run, usually by "railroad" mail, and owing to the distance of the conductor from the timekeeper it frequently happened that the reports of the conductor of work performed on the last days of the month would not reach the timekeeper in time to be included in the timekeeper's report to the auditor, which latter report included only the conductor's reports received up to 12 o'clock noon on the first of each month. The effect of this was that frequently a part of an employe's earnings for one month would be carried over and paid by the auditor as earnings of the succeeding month. It was so with Gilmore's earnings for the months of October and November. He was working on extras which were not upon the railway time card and had no special time,

but were run upon orders from station to station. He was paid on a mileage basis, both the distance traveled and overtime put in counting to make up the mileage. In October the assured made his last trip on the last day of the month, at which he earned \$6.22. This sum was not turned in to the timekeeper in time to be reported as October earnings, and was consequently carried into the November account. The only work the assured performed in November was on the last two days of the month, during which time he earned \$10.43. This sum likewise was reported to the timekeeper too late to be included in the November earnings, so was carried to the December account. Thus the account as it appeared in the office of the auditor of disbursements in December, when he made the report of nothing due to the insurance company, showed only \$6.22 to the credit of Gilmore.

There is a dispute in the evidence as to the amount of Gilmore's earnings in November which it may be well to notice here. The trial court found his earnings to be \$10.43, and we have accepted the finding as true. It is supported by the evidence of the conductor with whom Gilmore operated, and who reported his time to the timekeeper, and by the timekeeper who made up the time-tables and turned them over to the auditor of disbursements. That officer, however, testifying for the insurance company, states that Gilmore's earnings for that month were only \$9.92. His testimony, however, is in some respects unsatisfactory. For example, on cross-examination he gave the number of miles with which Gilmore was credited in November as 392; whereas, both the conductor who reported the mileage and the timekeeper who tabulated it say that he was credited with 413 miles; and no explanation of the difference is given. Again he testifies that he had the account of Gilmore's November earnings at the time he reported to the appellant in December. In this he is not only contradicted by the timekeeper, but it forced him into another dilemma. If he had that account, he also had the balance carried over from October, which would have made more than enough, according to his own figures, to pay the insurance premium. To escape this he gave the earnings carried over from October as earnings for December, testifying that the amount earned by Gilmore in the two days of that month preceding his death was \$11.40; whereas, the conductor's time slips as reported by the timekeeper show only \$4.55 earned for these two days. That is to say, the conductor's and trainmen's timekeeper of the railway company make up the amount due Gilmore in the hands of the company at the time of his death in the following manner:

Earnings in October, 1907.....	\$ 6 22
Earnings in November, 1907.....	10 54
Earnings in December, 1907.....	4 55
Total	\$21 31

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Whereas, the auditor makes up the account by the following credits:

Earnings in November, 1907.....	\$ 9 92
Earnings in December, 1907.....	11 40
Total	\$21 32

It will be noticed that the auditor has not materially changed the totals as returned by the timekeeper, but has simply revamped the tables on which the totals are based. The auditor makes clear another matter also, namely, that he was in error in his report made to the appellant in December to the effect that there was nothing due the assured from the railway company, as the company had in its possession at that time, according to his present computation, more than double the amount necessary to liquidate the November premium.

After the death of Gilmore, the respondent as his beneficiary obtained the necessary data, and was proceeding to make proofs of his death and her right to the benefits declared in the policy, when she was notified by the insurance company's officers that the company denied any liability under the policy because of the nonpayment of the November premium. This action was thereupon begun, resulting in a judgment in her favor.

The appellant relies chiefly for a reversal of the judgment on the fact that the November premium was not paid. It argues that by the express terms of the paymaster's order, given it by the assured, the railway company was made the agent of the assured, and that in consequence any statement made by that company through its officers, whether true or false, was binding on the assured, so that when the auditor of the railway company returned to it the November statement of premium due, without remitting the amount thereof, it released the appellant from all liability under the policy. But this argument overlooks the fact that the death of the assured had occurred prior to the time this return was made. It is the almost universal rule that the death of the principal puts an end to the agency; the only exception thereto being the case where the agency is coupled with an interest. 2 Enc. L. & P. 1256. Therefore at the time the return relied upon was made the authority of the railway company to represent the appellant had ceased, and its statements and acts, although purporting to represent the assured, were no more binding upon the heirs of the assured, or the beneficiary entitled to his life insurance, than would be the statements of any person not having legal authority to represent his estate.

The rights of the parties under the policy of insurance must be determined by the conditions existing at the time of the assured's death. If at that time he was in default in the payment of any installment of premium owing upon the policy, then, clearly, the beneficiary under the policy cannot recover thereon. On the other hand, it is just as

clear that if there was no default at that time there is such liability. This question must be determined by the terms of the contract between the appellant and the assured. By reverting to the paymaster's order, which was made to supersede the condition expressed in the policy with reference to payments of premiums due, it will be observed that no definite time is fixed for the payment of any one of the installments provided for. The only requirement is that they shall be paid promptly out of the assured's wages for a particular month. This, without further limitation or understanding, would mean that the assured, through his agent, had a reasonable time within which to make the payment. But we think a definite time of payment was implied by the agreement of the parties in this instance. Both the assurer and the assured were acquainted with the system adopted by the assured's employer for making payment to its employees. It was understood that the earnings of the employee for any particular month would not be paid until the latter end of the succeeding month, and that no remittance would be made on the premium until pay day arrived, even though funds were in the hands of the employer applicable to that purpose on the first day of the succeeding month. It must follow therefrom that there would be no default until pay day arrived. But the right to recover may rest on either ground stated. Since the premium was to be paid out of the earnings of a particular month, in the absence of an agreement fixing a definite time for the payment, a delay of three days after the end of the month would not be an unreasonable delay, and, since the assured was killed before the end of such third day, there could be no default in the payment at the time of his death.

The appellant contends further that the assured was in default if his earnings for the month of November in the hands of his agent at the time of his death were not sufficient to pay the premium for that month, and he argues that the evidence shows that such earnings were insufficient. But we have adverted to the evidence and findings in this respect, and have reached a contrary conclusion therefrom than that reached by the appellant.

The judgment is affirmed.

RUDKIN, O. J., and GOSE and CHADWICK, JJ., concur.

(58 Wash. 219)

SHAW v. LOBE.

(Supreme Court of Washington. April 29, 1910.)

1. ACCOUNT STATED (§ 5*)—REQUISITES.

To impart to an account the character of an account stated, it must be mutually agreed between the parties that the balance struck

thereon is the correct amount due from the one party to the other on the final adjustment of their mutual dealings, to which the account relates.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 16, 29; Dec. Dig. § 5.*]

2. ACCOUNT STATED (§ 5*)—NECESSITY OF ASSENT.

The mere rendition of an account by one party to another does not show an account stated. There must be some form of assent to the account; that is, a definite acknowledgment of an indebtedness in a certain sum.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 16, 29; Dec. Dig. § 5.*]

3. ACCOUNT STATED (§ 6*)—ASSENT—IMPLICATION.

An assent to an account to make it an account stated may be implied from circumstances and acts of the parties, but it must appear in some form.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 30-40; Dec. Dig. § 6.*]

4. ACCOUNT STATED (§ 19*)—SUFFICIENCY OF EVIDENCE.

In an action on an account, evidence held insufficient to show that the account rendered was a stated account.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. § 93; Dec. Dig. § 19.*]

5. WITNESSES (§ 139*)—TRANSACTIONS WITH DECEDENT—PARTNERS.

In an action on an alleged stated account by one partner against the estate of a deceased person, plaintiff is a party in interest, and disqualified from testifying, under Rem. & Bal. Code, § 1211.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 139.*]

6. ACCOUNT. ACTION ON (§ 22*)—SUFFICIENCY OF EVIDENCE.

In an action to recover the balance of an account, evidence held insufficient to show that there was any balance due.

[Ed. Note.—For other cases, see Account, Action on, Dec. Dig. § 22.*]

7. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXPERT TESTIMONY.

Error in excluding testimony of an expert witness is harmless, where, with his testimony in the record, the evidence would still be insufficient to change the result.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033; Dec. Dig. § 1056.*]

Department 1. Appeal from Superior Court, King County; John F. Main, Judge.

Action by R. W. Shaw against Rosa Lobe, executrix. From a judgment for defendant, plaintiff appeals. Affirmed.

G. Ward Kemp, for appellant. Richard Saxe Jones, for respondent.

FULLERTON, J. The appellant, as the assignee of one Lee D. Gilmer, brought this action against the respondent to recover a balance claimed to be due on an account stated between Gilmer and E. Lobe, the deviser of the respondent. The complaint carried a prayer in the alternative for a partnership accounting in case the court should fail to find the existence of an account stated. After issue had been joined, a trial was had before the court without a jury, which resulted

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in a judgment in favor of the respondent. This appeal is taken therefrom.

Two principal questions are presented, the first of which is that the court erred in failing to find an account stated between Gilmer and Lobe. The record discloses that these persons were partners from December, 1901, until March, 1905, engaged in the insurance, real estate, mining, and loan business, and the business of selling oil on commissions. They were not equal partners. Gilmer, by writing, executed June 24, 1902, expressly waived any interest in the real estate and mining business done by the firm, and it seems to have been orally understood that the commissions received from the insurance business were to be divided on a basis of two-thirds and one-third, the larger proportion to go to the partner at whose solicitation the insurance was procured. The active work of the partnership was done by Lobe, while Gilmer did the office work and kept the books. The firm as a firm had no joint bank account. All money received belonging to the firm was turned over to Lobe who deposited it in his own name, and drew checks thereon from time to time as the exigencies of the business required. On the dissolution of the partnership Gilmer made out a statement from the books by which he showed a balance in his favor of some \$2,986.51. The statement contained an account of the receipts of the firm during the time of the partnership from the various businesses in which it was engaged, the proportionate share thereof claimed by Gilmer, and the balance, after deducting certain losses of the firm, and the sums withdrawn by Gilmer on his personal account. No deduction was made for rents or operating expenses, although the books show that the latter amounted to a considerable sum. This statement was delivered to Lobe who afterwards paid Gilmer in installments the sum of \$1,150, the last payment being made on May 26, 1906. After the statement was received by Lobe he had it checked over by the bookkeeper who succeeded Gilmer, and that person testifies that he disputed a number of the items going to make up the account. The statement was found after Lobe's death among his effects, and it is this statement that the appellant contends constituted an account stated between Gilmer and Lobe, but manifestly the evidence was insufficient to make it such. To impart to an account the character of an account stated it must be mutually agreed between the parties that the balance struck thereon is the correct amount due from the one party to the other on the final adjustment of their mutual dealings to which the account relates. The mere rendition of an account by one party to another does not

show an account stated. There must be some form of assent to the account—that is, a definite acknowledgment of an indebtedness in a certain sum. 1 Enc. L. & P. 688-693. True assent may be implied from the circumstances and acts of the parties, but it must appear in some form. We are unable to find that there was such an agreement shown by the record here.

On the question whether the evidence shows a balance in the appellant's favor, disregarding the account stated, the record is not so satisfactory, still we think it justifies the conclusion of the trial court. Since Gilmer was a party in interest he was disqualified from testifying (Rem. & Bal. Code, § 1211), and the only evidence pertinent to the inquiry was the books of the partnership. These the court found were kept by Gilmer, and were so far incomplete as to fail in themselves to show the terms of the partnership or its status at the time of its dissolution, particularly whether or not there was a balance owing at that time from the deceased partner to Gilmer. Our own investigation of the books convinces us that no different conclusion could be reached without, at least, much explanation on the part of some one who was familiar with the partnership business. The record, however, fails to disclose any one having the requisite information to make this explanation other than the surviving partner, and, since he is disqualified from testifying, the case must fall for want of proofs.

The appellant complains that the court erred in excluding certain testimony offered by him in the course of the trial, particularly in excluding the statement on which he based his claim of an account stated, and testimony of an expert who had examined the books, and stated that he could testify as to certain balances shown by them. But while we think the court could have properly admitted the testimony, its refusal to do so was not error requiring reversal. The statement tended to support the appellant's allegation of an account stated, but with it in the record we still think the evidence insufficient to establish the fact. The evidence of the expert could but show what appeared in the books. This would not help the appellant's case. It is what the books fail to show that makes it impossible to determine the status of the partnership, and this could not be supplied by the testimony of the witness. While his evidence might have saved us some labor, we are unable to see how it could change the result.

The judgment appealed from will stand affirmed.

RUDKIN, C. J., and CHADWICK and GOSE, JJ., concur.

(58 Wash. 184)

BROWN v. KILDEA et al.

(Supreme Court of Washington. April 29, 1910.)

1. STATUTES (§ 241*)—"PENAL STATUTES."

A statute which subjects one person to the payment of money to another, without reference to any actual injury, and without requiring him either to allege or prove the actual injury, is a penal statute and hence Ballinger's Ann. Codes & St. § 4269 (Pierce's Code, § 7070), making it the duty of the trustees of a corporation to keep a book containing the names of stockholders showing the number of their shares, which book, during the usual business hours, shall be open for inspection of stockholders and creditors, and providing that any stockholder or creditor of the company shall have the right to make extracts from such book or demand from an officer a certified copy of any paper placed on file in the office of the company, and section 4270 (section 7071), providing that if the officer having charge of such book or of any papers of the company shall refuse or neglect to exhibit them or allow them to be inspected, he shall be guilty of a misdemeanor punishable by imprisonment in the county jail or by fine, or by both, under 2 Ballinger's Ann. Codes & St. § 7435 (Pierce's Code, § 1548), and shall forfeit a penalty of not less than \$100 or more than \$1,000, such penalty being not as compensation, but as a part of the punishment is a penal statute, and should be strictly construed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 323; Dec. Dig. § 241.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5269-5271.]

2. CORPORATIONS (§ 323*)—INSPECTION OF BOOKS—STATUTORY PROVISIONS—"BOOK"—"PAPERS."

The "book" referred to in Ballinger's Ann. Codes & St. § 4270 (Pierce's Code, § 7071), is the stockbook mentioned in section 4269 (section 7070), and the papers referred to in such section are the papers "placed on file" within the meaning of the preceding section, meaning some paper lodged with and kept by the corporation and pertaining to its corporate business, and, to subject an officer to the payment of the statutory penalty, there must be a demand for an inspection of the book named in the statute, or a designated paper or papers lodged with and kept by the corporation and pertaining to its corporate business, by a person having an interest in inspecting the paper, and there must be a refusal to comply with the demand, and a simple demand to "inspect the books and papers" is not sufficient to subject the officer refusing it, to the penalty.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 323.*]

For other definitions, see Words and Phrases, vol. 1, pp. 836-838; vol. 6, pp. 5161, 5162.]

Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by J. R. Brown against J. P. Kildea and others. Judgment for plaintiff, and defendants appeal. Reversed, with directions to dismiss.

C. S. Voorhees and Reese H. Voorhees, for appellants. Burcham & Blair and H. N. Martin, for respondent.

GOSE, J. This action was brought by the plaintiff as a stockholder of the Montana Scotch Bonnet Copper & Gold Mining Company, a corporation, against the defendants, its

officers and trustees, for the recovery of a penalty, and is based on sections 4269 and 4270, Ballinger's Ann. Codes & St. (Pierce's Code, §§ 7070, 7071), which are as follows:

"Sec. 4269. It shall be the duty of the trustees of every company incorporated under this chapter to keep a book containing the names of all persons, alphabetically arranged, who are or shall be stockholders of the corporation, and showing the number of shares of stock held by them respectively, and the time when they became the owners of such shares, which book, during the usual business hours of the day, on every day excepting Sunday and legal holidays, shall be open for the inspection of stockholders and creditors of the company, at the office or principal place of business of the company; and any stockholder or creditor of the company shall have the right to make extracts from such book, or to demand and receive from the clerk or other officer having the charge of such book a certified copy of any entry therein, or to demand and receive from any clerk or officer a certified copy of any paper placed on file in the office of the company; and such book and certified copy shall be presumptive evidence of the fact therein stated in any action or proceeding against the company or anyone or more of the stockholders.

"Sec. 4270. If at any time the clerk or other officer having charge of such book shall make any false entry, or neglect to make any proper entry therein, or having the charge of any papers of the company shall refuse or neglect to exhibit the same, or allow the same to be inspected or extracts to be taken therefrom, or to give a certified copy of any entry, as provided in the preceding section, he shall be deemed guilty of a misdemeanor, and shall forfeit and pay to the injured party a penalty of not less than one hundred dollars nor more than one thousand dollars, and all damages resulting therefrom, to be recovered in any action of debt in any court having competent jurisdiction; and for neglecting to keep such book for inspection as aforesaid, the corporation shall forfeit to the people the sum of one hundred dollars for every day it shall so neglect, to be sued for and recovered in the name of the people in the superior court of the county in which the principal place of business of the corporation is located."

The official dereliction charged is that the defendants, having charge of "the books and papers" of the corporation, pursuant to "a concerted and agreed course of action," refused the repeated demands of the plaintiff that he be allowed to inspect them. The prayer is for a judgment for \$1,000, the maximum penalty under the statute, and for costs. A general demurrer having been overruled, the defendants answered jointly, admitting that they are the officers and trustees of the corporation, and joining issue on the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

other averments of the complaint. The case was tried to a jury, which returned a verdict for the plaintiff in the sum of \$850. From a judgment entered on the verdict, the defendants have appealed.

The appellants objected to the introduction of any testimony, on the ground that the complaint does not state facts sufficient to constitute a cause of action, and at the close of the respondent's evidence moved the court to withdraw the case from the jury. After verdict, the appellants moved for a judgment notwithstanding the verdict.

The appellants contend that the statute is a penal one and should be strictly construed, whilst the respondent asserts that, in so far as it affects the case at bar, it is remedial, and should receive a liberal interpretation. We think the appellants have the correct view of the statute. Under the statute the officer who violates its provisions is deemed guilty of a misdemeanor, the penalty to the state being imprisonment in the county jail not more than one year or by fine not exceeding \$500, or by both such fine and imprisonment (2 Ballinger's Ann. Codes & St. § 7435 [Pierce's Code, § 1548]), and to the "injured party a penalty of" not less than \$100 nor more than \$1,000, and all damages which he sustains. We agree with the learned trial court that a statute may be penal in part and remedial in part. The remedial part of this statute, however, is the provision for the recovery of actual damages. The penalty is not imposed as compensation, but as a part of the punishment of the offending officer. A statute which subjects one person to the payment of a sum of money to another, without reference to any actual injury and without requiring him either to allege or prove an actual injury, is a penal statute. *Steam-Engine Company v. Hubbard*, 101 U. S. 191, 25 L. Ed. 786; *Derrickson v. Smith*, 27 N. J. Law, 166; *Southern Building & Loan Ass'n v. McCants*, 120 Ala. 616, 25 South. 8; *Casey v. St. Louis Transit Company*, 116 Mo. App. 235, 91 S. W. 419; *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006; *Hub Const. Co. v. New England Breeders' Club*, 74 N. H. 282, 67 Atl. 574. The respondent, among other cases, cites *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 38 L. Ed. 1123; *Aylsworth v. Curtis*, 19 R. I. 517, 34 Atl. 1109, 33 L. R. A. 110, 61 Am. St. Rep. 785; *Reed v. Inhabitants of Northfield*, 13 Pick. (Mass.) 94, 23 Am. Dec. 662; *Mansfield v. Ward*, 16 Me. 433.

We do not think these cases support the respondent's contention. In *Huntington v. Attrill*, a judgment was obtained in the state of New York against a director in a New York corporation, for the amount of the debts of the corporation for making oath to a certificate which he knew to be false. In a suit upon the judgment in the state of Maryland, the court of that state refused to enforce it, because the statute imposing the liability was penal in its nature. The Supreme Court held that it was not penal within the maxim of

the international law that "the courts of no country execute the penal laws of another," and that the full faith and credit clause of the federal Constitution require the courts of Maryland to give it effect. It was said, however: "As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal in the sense that it should be strictly construed." In *Aylsworth v. Curtis*, in discussing the distinction between penal and remedial statutes, it was said that, where an action is founded entirely upon a statute having for its object the recovery of a penalty or a forfeiture, the statute is clearly penal; but that, where it gives the injured party enhanced or double damages for a wrong suffered or a right violated, it is remedial. In *Reed v. Inhabitants of Northfield* the court, speaking through Mr. Chief Justice Shaw, said: "And where the statute gives a penalty, and the thing sued for is pursued as a penalty, although the right to sue is given only to the party grieved, and even though the whole penalty when recovered shall go to the party grieved, still the same rule may apply, because the form of proceeding is still for a penal sum, and the ostensible and real object of the suit, in form at least, is punishment"—but that a law which gives enhanced damages is remedial. In *Mansfield v. Ward* it was held that a statute was penal which provided for the recovery of a penalty without reference to the actual damages sustained. Statutes permitting recovery of double and treble damages have been usually classed by the courts as remedial, on the ground that they sustain a relation to the actual damages suffered. Under our statute a stockholder owning 100 shares of stock is allowed the same recovery as a stockholder owning 100,000 shares of stock. It is apparent, therefore, that the penalty was intended as a punishment and in no sense as indemnity or compensation.

Applying this rule of construction, it is apparent that the book referred to in section 4270 is the stockbook mentioned in section 4269, and that the papers referred to in section 4270 are the papers "placed on file" within the meaning of the preceding section. The statute does not define what constitutes the filing of a paper, but the reasonable interpretation is that it must be some paper lodged with and kept by the corporation and pertaining to its corporate business. If the clerk or other officer having charge of such paper refuses to exhibit it or refuses to allow it to be inspected or extracts to be taken from it, he is penalized in favor of the injured party. What is meant by the phrase "the injured party"? The variety and magnitude of the corporate business of the state forbids a construction which would impose a penalty upon an officer who refused an inspection where the demand was prompted by curiosity or a desire to vex or harass the management. It would hardly be contended that every stockholder in a banking corpora-

tion has the right to inspect all the checks of its patrons, or that he may demand as of right to inspect escrow contracts or other papers kept for the accommodation of third parties. To subject the offending officer to the payment of the statutory penalty there must be a demand for an inspection of the book named in the statute, or a designated paper or papers lodged with and kept by the corporation and pertaining to its corporate business, and the party making the demand must have an interest in inspecting the paper, and there must be a refusal to comply with the demand. Measured by this interpretation the demand pleaded to "inspect the books and papers" does not meet the requirements of the statute. A consideration of the evidence discloses that the respondent demanded of each of the appellants the privilege of inspecting "the books" in order that he might convince them that he was a stockholder, a fact which the appellants were denying. The court instructed the jury to disregard that part of the complaint and the evidence pertaining to a demand to see the books, and submitted the case upon the evidence of a demand and refusal for an inspection of the papers. There was no evidence showing a demand for any designated paper, and no substantial evidence showing a demand for any paper or papers, or showing that the appellants were in possession of any paper. The motion for a judgment notwithstanding the verdict should have been granted. What we have said must not be construed as modifying the rule announced in *State ex rel. v. Pacific Brewing, etc., Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208. That was a mandamus proceeding by a stockholder in a corporation to enforce his right to inspect the books of account in order that he might learn the condition of its affairs.

The judgment is reversed, with directions to dismiss the action.

RUDKIN, O. J., and CHADWICK and FULLERTON, JJ., concur.

(58 Wash. 215)

O'CONNER v. FORCE.

PAULSON v. SAME.

(Supreme Court of Washington. April 29, 1910.)

1. APPEAL AND ERROR (§ 15*)—CONSOLIDATED ACTIONS—SINGLE APPEAL.

Where two actions were consolidated for trial and a single judgment was entered for defendant dismissing the suit, defendants cannot urge that a single appeal from that judgment was erroneous as attempting to bring up two actions by one appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 59, 60; Dec. Dig. § 15.*]

2. JURY (§ 34*)—JUDGMENT NOTWITHSTANDING VERDICT—PRIMA FACIE PROOF.

Where the evidence is sufficient prima facie proof of a cause of action to be submitted to

the jury, and a verdict rendered is in favor of plaintiff, the judge may not give judgment for defendant notwithstanding the verdict, though he might have granted a new trial, since the right of trial by jury is a constitutional right not to be denied a litigant who insists on it, and complies with the statute relating thereto.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 367-375; Dec. Dig. § 34.*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Actions by Albert O'Conner and J. P. Paulson against R. C. Force, administrator. From a single judgment for defendant, plaintiffs jointly appeal. Reversed and cause remanded, with instructions to enter judgment on the verdict.

Alexander & Bundy and Cooley & Horan, for appellants. Richard Saxe Jones, for respondent.

FULLERTON, J. These actions were begun separately, some time in the year 1901, against one Sol G. Simpson to recover for services performed by the respective plaintiffs in doing assessment work on certain mining claims situated in Alaska. They were first tried in 1904 and resulted in judgments of nonsuit at the conclusion of the plaintiffs' evidence; the court holding the evidence insufficient to put the defendant on his proofs. An appeal was taken from one of the judgments and a stipulation entered into between counsel that the other should abide the result. The judgment appealed from was reversed by this court and remanded for a new trial. *O'Conner v. Simpson*, 37 Wash. 625, 79 Pac. 1102. Pursuant to the stipulation, the other case was reinstated. In the meantime Sol G. Simpson died, and R. C. Force, administrator of his estate, was substituted as defendant in his stead. The cases were thereupon consolidated for the purposes of this trial by the agreement of counsel and tried as one case before a jury. The jury returned a verdict in favor of each of the plaintiffs for \$542.52. The defendant thereupon moved for a judgment in his favor notwithstanding the verdict. This motion the court granted, entering a single judgment dismissing the actions with prejudice and allowing the defendant his costs. From the judgment the plaintiffs appeal. The respondent moves to strike the transcript and statement of facts and dismiss the appeal on the ground that it is an attempt to bring into the court two separate actions by one appeal in a manner not authorized by the statutes relating to appeals. But without following the argument of the respondent we do not think the motion well taken. The actions were consolidated for trial, and the respondent contented himself with one judgment entered in the consolidated action, and we think the appellants were well within the statute when they appealed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

therefrom as a single judgment affecting them jointly. *First National Bank v. Fowler*, 51 Wash. 638, 99 Pac. 1034.

On the merits of the controversy, we think the trial court was in error in granting a judgment notwithstanding the verdict. It is conceded by both the trial judge and counsel for the respondent that the evidence on the part of the appellants is substantially the same as it was in the former trial, which this court held was sufficient to make a *prima facie* case in their favor. Indeed, so far was the trial judge impressed with this belief that he overruled a motion for nonsuit made by respondent at the close of the plaintiffs' case in chief, stating as grounds for his ruling that the evidence was substantially the same as it was at the former hearing. And, again, when the motion was renewed at the close of all the evidence, he made a similar ruling, using this language: "The court is not called upon at this time to pass upon the weight of the evidence. A *prima facie* case has been submitted, and it is the duty of the court to submit the issue in the first instance, at least, to the determination of the jury. The Supreme Court, as far as I can see, has held that the proof in the former case which is also before the court on this trial was sufficient to submit it to the jury. * * * It is the province of the jury to pass upon any issue of facts tendered by the pleadings. The Supreme Court says the issue was proven *prima facie* by the evidence of the plaintiffs on the former trial, and there ought to be a final conclusion of this matter. If I should change in my ruling now, it would mean that it would go up to the Supreme Court and come back for another trial. I will submit the case to the jury."

Our own examination of the records convinces us that the testimony is substantially the same as it was in the former trial. We are still satisfied, also, that the appellants by their evidence made a *prima facie* case. This being so, the trial judge should not have denied them the right of trial by jury on mere contradictory evidence, no matter what his own conclusions may have been as to the weight of the evidence. If in his belief the evidence against the plaintiffs was so far overwhelming as to cause him to feel that the verdict of the jury amounted to a miscarriage of justice, it was his province to set the verdict aside and submit the question to a second jury, but he had no right to take the burden of deciding the facts upon himself. The right of trial by jury is a constitutional right, and is not to be denied a litigant who insists upon it and complies with the statutes relating thereto. In this instance, since no new trial was asked for, it was the duty of the court to enter judgments in favor of plaintiffs on the verdicts.

The judgment appealed from will therefore

be reversed, and the cause remanded, with instructions to enter judgments in favor of plaintiffs upon the verdicts.

RUDKIN, C. J., and GOSE, J., concur.

(32 Nev. 351)

JUDELL et al. v. GOLDFIELD REALTY CO.
(No. 1,869.)

(Supreme Court of Nevada. April 29, 1910.)

1. CORPORATIONS (§ 374*)—POWERS—"HOTEL."

A corporation incorporated to do a general hotel business has authority to take over the business of one operating a café in a hotel building owned by the corporation, together with the bar and cigar stand in connection therewith, for the power to do a general hotel business necessarily includes the authority to buy and sell refreshments, cigars, wines, etc.; a "hotel" being defined as a place for the accommodation of travelers with food and lodging.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 374.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3349, 3350; vol. 8, p. 7680.]

2. CORPORATIONS (§ 414*)—CONTRACTS—LIABILITY.

Where a corporation which took over the business of another, who was indebted to third persons, held out its secretary and general manager as possessing authority to make contracts with the third persons in settlement of their claims, and the corporation accepted the benefits of agreements entered into by the secretary and manager, a third person could enforce a note executed in the name of the corporation by the secretary and manager in payment of his claim.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1640-1646; Dec. Dig. § 414.*]

Appeal from District Court, Esmeralda County.

Action by H. L. Judell and another, copartners, doing business under the firm name of the H. L. Judell Company, against the Goldfield Realty Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Pyne & Douglass, for appellant. Jno. F. Kunz, for respondents.

SWEENEY, J. The plaintiff in this action brought suit to obtain a judgment against defendant in the sum of \$961.15, with interest and costs, on account of an indebtedness due plaintiff for goods, wares, and merchandise sold and delivered by plaintiff to the Goldfield Catering & Café Company, a California corporation, which indebtedness plaintiff alleges defendant assumed and agreed to pay. The defendant company interposes a defense to the complaint that its manager and secretary was not authorized to bind the company in the execution of said promissory note, evidencing the amount of the indebtedness in dispute, a determination of which issue is determinative of this appeal.

An examination of the record on appeal discloses that the Goldfield Realty Company is a corporation organized under the laws of the state of Nevada, and during the times

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mentioned was conducting the Goldfield Hotel at Goldfield, Nev. Among the various objects for which this corporation was formed, as disclosed by its articles of incorporation, we find: "(a) To purchase, sell and own real estate, to erect buildings thereon, and to engage in a general hotel business. (b) To engage in the business of buying and selling merchandise, wines, liquors and cigars either at wholesale or retail. (c) * * * (d) To engage in a general commission business, and to do all and anything necessary, suitable or convenient for the accomplishment of any of the purposes or attainment of any of the objects hereinbefore enumerated." The transcript further discloses that the Goldfield Catering & Café Company is a California corporation, and owned, operated, and conducted the café and restaurant in the Goldfield Hotel, as well as the bar and cigar stand in connection therewith; that in January, 1908, the Goldfield Catering & Café Company was indebted to various creditors, not only for furniture and fixtures, but also for goods, wares, and merchandise sold to it in conducting the said branches of business, and for part of which said indebtedness notes had been given to some of its creditors and indorsed by the appellant, Goldfield Realty Company. To secure the Goldfield Realty Company for indorsing these notes of indebtedness, a mortgage was executed by the Goldfield Catering & Café Company on January 17, 1908, to the Goldfield Realty Company, under the terms of which, however, the Goldfield Catering & Café Company was permitted to remain in possession of all of the personal property so mortgaged.

Pursuant to certain negotiations between the officers and agents of the Goldfield Realty Company and the Goldfield Catering & Café Company, the following resolution, prepared and drawn by J. F. Douglass, general manager and secretary of the Goldfield Realty Company, was passed on February 19, 1908, by the board of directors of the Goldfield Catering & Café Company:

"Whereas, the Goldfield Catering & Café Company is indebted to various merchants of Goldfield, San Francisco, Oakland and other places in large sums of money, aggregating many thousands of dollars, for the equipment and supplies used in the kitchen, dining room and bar room in the Goldfield Hotel; and whereas, owing to prevailing conditions it is unable to secure the money for payment of these bills either through profits of its café and bar, or by any other means; and whereas, the Goldfield Realty Company is desirous of purchasing said equipment and stock from the persons and concerns from whom the same was secured, providing the Goldfield Catering & Café Company releases all its claim, both in law and in equity, in and to said equipment and stock to said persons and concerns from whom the same was secured. Now, therefore, be it resolved, that in consideration of the surrender

of all promissory notes given by this company in payment for said equipment and stock, and the release of this company from all indebtedness on account of said equipment and stock where same is not secured by notes or otherwise by its several creditors, this company will surrender all its right and claim of whatsoever nature in and to said equipment and stock of goods to the persons from whom same was secured, and that this resolution be effective as to any individual instance of indebtedness as soon as this company is released from same. [Signed] O. Groppenglesser. Harry Cole, Acting Secretary. Approved: Harry Cole, Arthur Starkey, B. J. Sears."

Pursuant to this resolution, the business and assets of the Goldfield Catering & Café Company in the Goldfield Hotel were turned over to the appellant, which included all of its furniture, stock, etc., in bar, kitchen, and dining room, which the appellant accepted and received. Afterwards the Goldfield Realty Company leased the said business formerly owned and conducted by the Goldfield Catering & Café Company to the individual stockholders or part of them of the said Goldfield Catering & Café Company. In conformity with the understanding evidenced by the foregoing resolution, J. F. Douglass, the secretary and manager of the defendant company, while in San Francisco arranging the indebtedness with the creditors of the catering company, called upon the plaintiff, and proposed, executed, and delivered the note in dispute in behalf of the defendant company, and represented to the plaintiff that he was fully authorized to make the arrangements for an assumption of the indebtedness of the Goldfield Catering & Café Company for the defendant Goldfield Realty Company, and recited in the note given that he was duly authorized to make said note as evidenced by the following indenture:

"[Letterhead of Hotel St. Francis.] San Francisco, March 2nd, 1908. H. L. Judell & Company, San Francisco, Cal.—Gentlemen: For and in consideration of the substitution of the Goldfield Realty Company, as your debtor in the sum of nine hundred and fifty dollars (\$950.00), subject to correction, in the place of the Goldfield Catering & Café Company, and the further consideration of your extending the time for the payment of the said amount as hereinafter provided, we, the undersigned, Goldfield Realty Company, by J. F. Douglass, our secretary, first duly authorized, hereby agree to pay the said amount above named, at the times and in the manner following, to wit: One-half of said amount to be paid April first, 1908; and one-half of said amount to be paid May first, 1908. Respectfully, Goldfield Realty Company, By J. F. Douglass, Secretary."

It appears from the evidence that after the Goldfield Realty Company had taken over the furniture and fixtures of the Goldfield Catering & Café Company, it retained possession

of said property and was considered publicly to be the owner thereof. It publicly conducted the café and bar, bought supplies for both, paid for labor, and retained the benefits and receipts from the same, and paid a part of the said unsecured debts of the Goldfield Catering & Café Company as well as indebtedness for which notes had been given.

The evidence shows that J. F. Douglass was the general manager and secretary, and so represented himself, of the Goldfield Realty Company, and that he conducted the business without consultation with the board of directors; that he was held out by the company as the man having absolute control of the business, and the directors admitted at the time of the trial that J. F. Douglass was the sole manager to look after all of the business of the company within the scope of its powers as defined by its articles of incorporation, and that J. F. Douglass was in the entire charge of all of its business.

It appears that the Goldfield Catering & Café Company delivered possession of everything contained in the bar, kitchen, and dining room to the Goldfield Realty Company, and that thereafter the realty company conducted the business by leasing the same. By acceptance of the assets of the catering and café company the Goldfield Realty Company obligated itself to pay the debt owing to the respondent herein, and the catering and café company turned over to the realty company the bar and grill upon the telegraphic instructions of J. F. Douglass, with whom the understanding was had. While the witness Douglass testified that he was not specially authorized by the directors of the Goldfield Realty Company to enter into the arrangement wherein this debt was assumed, yet the evidence discloses that Douglass had been authorized by the defendant company as its sole representative to manage all contracts and expenditures for material necessary for the construction of the Goldfield Hotel, a building reputed to have cost from \$150,000 to \$200,000, and the evidence further discloses that Mr. Douglass had full charge of all the business affairs of the company, and had been permitted to transact all of its business, and was so held out to the public at Goldfield and elsewhere. Similar notes given under similar circumstances to other creditors of the catering and café company by J. F. Douglass in behalf of the realty company were paid by the realty company without objection from the board of directors.

In addition to all this the company received and retained the property of the catering and café company, and in view of the representations made by Mr. Douglass, the general manager and secretary of the realty company, that he had the authority to execute the promissory note in question, and informed the respondent that he was making similar arrangements with other creditors of the catering and café company to assume

their indebtedness, which was assumed and afterwards paid by the realty company, and the fact that the said Douglass was held out in the community as the sole representative of the realty company, which said company accepted the benefits of the agreement entered into by its general manager and secretary, and where it is clear the realty company had the authority, under its articles of incorporation, to purchase the property of the catering company for the benefit of the hotel owned by the realty company, we do not think it can be said, under these circumstances, that this corporation is not bound by the act of its general manager and secretary.

We believe that the Goldfield Realty Company had ample authority, under the scope of its enumerated powers in its articles of incorporation, to take over the business of the Goldfield Catering & Café Company, and its general manager was vested with ample authority to make this contract for and on behalf of the realty company with the catering and café company. The Goldfield Realty Company was incorporated to do a general hotel business, which necessarily included the authority to buy and sell merchandise, wines, liquors, and cigars, and such other materials as go to stock a hotel, café or restaurant. The word "hotel," which is synonymous with the word "inn," is defined as a place for the accommodation of travelers with food and lodging, and necessarily implies the right to purchase the business of the catering and café company in question, especially where, as in this case, said café and bar were in the hotel of the Goldfield Hotel, the main property of the realty company. 20 Cyc. 1070; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657.

After a careful review of the evidence in this case, we are of the opinion that it is conclusively shown that Mr. Douglass, as general manager and secretary of the Goldfield Realty Company, was vested with complete authority by the board of directors of the said realty company, in his capacity as general manager and secretary of said company, to execute the said promissory note in dispute for said company under the circumstances disclosed. Said secretary, J. F. Douglass, having been held out by said company to be its general manager, and having been shown to have done transactions of a similar nature in behalf of the realty company, and all of his actions accepted and none repudiated by the board of directors, except this especial act of Mr. Douglass, and that the said realty company having taken over the property of the catering and café company, and having received and retained the benefits of the agreement entered into by its representative with the said catering and café company, and the said general manager and secretary of the realty company having represented to respondent herein that he was authorized to bind the realty com-

pany, as it is shown he was authorized to do with other creditors of the catering and café company, we believe the respondent herein had the right, under the circumstances, to accept as it did the representations made in good faith, and that the Goldfield Realty Company is in no position to avoid the responsibility of the act of its general manager in this transaction, and that the judgment of the lower court should be affirmed. *Western Homestead Co. v. First National Bank*, 47 Pac. 721; *Colorado Springs Co. v. Am. Pub. Co.*, 97 Fed. 843, 38 C. C. A. 433; *Grelg v. Riordan*, 99 Cal. 316, 33 Pac. 913; *Union Gold M. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565, affirmed 98 U. S. 640, 24 L. Ed. 648; *Brown v. Crown Gold M. Co.*, 150 Cal. 376, 89 Pac. 88; *Allen v. Citizens' Steam Nav. Co.*, 22 Cal. 28; *Extension G. M. Co. v. Skinner*, 28 Colo. 237, 64 Pac. 198; *Meyer v. Va. & T. R. Co.*, 16 Nev. 341; *Bergtholdt v. Porter Co.*, 114 Cal. 681, 46 Pac. 738; *Whitaker v. Kilroy*, 70 Mich. 635, 38 N. W. 606; *Moss v. Averell*, 10 N. Y. 449; *Siebe v. Joshua Machine Works*, 86 Cal. 390, 25 Pac. 14; *Shaver v. Bear River Co.*, 10 Cal. 396; *Carey v. Phil.*, etc., *Petroleum Co.*, 33 Cal. 694; *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 34 Pac. 527; *Morawetz on Corp.*, §§ 630 and 633; *Kelsey v. Bank*, 69 Pa. 426; *Murray v. Lumber Co.*, 143 Mass. 250, 9 N. E. 634; 1 Beach, Corp. Dec. 195; *Sherman v. Fitch*, 98 Mass. 59; *Edwards v. Carson Water Co.*, 21 Nev. 469; *Bean v. Pioneer M. Co.*, 66 Cal. 451, 6 Pac. 86, 56 Am. Rep. 106; *Main v. Casserly*, 67 Cal. 127, 7 Pac. 426.

It is so ordered.

NORCROSS, C. J., and TALBOT, J., concur.

(13 Ariz. 136)

DAGGS et al. v. DAGGS et al.

(Supreme Court of Arizona. April 2, 1910.)

APPEAL AND ERROR (§ 1123*)—AFFIRMANCE BY DIVIDED COURT.

A judgment will be affirmed on appeal, on equal division of the court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4421-4427; Dec. Dig. § 1123.*]

Appeal from District Court, Maricopa County; before Justice Edward Kent.

Action between P. P. Daggs, administrator of Robert E. Daggs, deceased, and another, and Hugh R. Daggs and others. From a judgment for the latter, the former appeal. Affirmed.

Charles Woolf and J. B. Woodward, for appellants. Alexander & Christy and Alfred Franklin, for appellees.

PER CURIAM. In this case the justices sitting are equally divided upon the question of whether the trial court erred in rendering

judgment for the appellees. Therefore the judgment of the district court is affirmed, without a discussion of the assignments of errors made by appellants.

(13 Ariz. 150)

COCHISE COUNTY v. WILCOX.

(Supreme Court of Arizona. April 2, 1910.)

1. CLERKS OF COURTS (§ 63*)—COMPENSATION.

If the territorial Legislature has authority to regulate the collection of delinquent taxes, and require the services of the clerk of the district court in connection therewith, it may compel him to perform such services without compensation from the county or territory, by providing for collection of his fees as costs, as is done by Acts 1903, No. 92.

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. § 88; Dec. Dig. § 63.*]

2. TAXATION (§ 549*)—FEES OF CLERKS OF TERRITORIAL COURTS.

If the subject of compensation to a clerk of the territorial district court for services rendered in collecting delinquent taxes is regulated exclusively by federal laws, the fees recoverable for such services are those fixed by such laws, and not those fixed by the territorial Legislature (Acts 1903, No. 92).

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 88; Dec. Dig. § 549.*]

Appeal from District Court, Cochise County; before Justice Fletcher M. Doan.

Action by George B. Wilcox against the County of Cochise. From a judgment for plaintiff on demurrer, defendant appeals. Reversed and remanded, with directions to sustain demurrer.

John B. Wright, Atty. Gen., and John S. Williams, Dist. Atty., for appellant. Cunningham & Riggs, for appellee.

CAMPBELL, J. Appellee, as clerk of the district court of the Second judicial district of this territory, rendered services in actions brought to collect delinquent taxes under the provisions of Act No. 92 of the Twenty-Second Legislative Assembly. Provision is made in the act referred to for the collection of the clerk's fees as costs in the case; it being further provided that in no case shall the territory or county be liable for any such costs. In the cases in which the fees involved in this action were earned, the judgments are not collected, and therefore the clerk has received no compensation for his services, and seeks to collect from the county. The county demurred to the complaint upon the ground that it did not state a cause of action, which demurrer was overruled, and, the county electing to stand upon its demurrer, judgment was entered in favor of the clerk, whereupon the county brought this appeal.

The theory upon which the court overruled the demurrer was that the clerk is entitled to his fees under the provisions of the laws of the United States, and that it was not competent for the Legislature to require

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

him to perform services without paying for the same, evidently relying largely upon the holding of the Supreme Court of the United States in *United States v. McMillan*, 165 U. S. 504, 17 Sup. Ct. 395, 41 L. Ed. 805. But the clerk is not in a position to claim that the laws of the United States should govern as to this claim. An examination of the account presented discloses that in each instance the fees sought to be recovered are those provided by an act of the territorial Legislature, and not those provided by the laws of the United States. If the matter is one to be regulated by the Legislature, it is competent for the Legislature to require the clerk to perform the services without compensation from the territory or county, and the clerk, therefore, cannot recover. If, as contended by appellee, the subject is governed entirely by the laws of the United States, it is apparent that the fees that can be recovered are those fixed by Congress, and not by the territorial Legislature, and as claimed by the clerk. We express no opinion as to whether, in any event, the county, rather than the territory, would be liable for the fees. The demurrer of the defendant should have been sustained.

The judgment of the district court is reversed, and the cause is remanded to that court, with directions to sustain the demurrer.

KENT, C. J., and LEWIS and DOE, JJ., concur.

(13 Ariz. 140)

BAXTER v. DORRINGTON.

(Supreme Court of Arizona. April 2, 1910.)

1. LIBEL AND SLANDER (§ 6*)—WORDS LIBELOUS PER SE.

Defamatory words, to be libelous per se, must be such that the court can presume as a matter of law that they will tend to disgrace the party complaining, or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned or avoided, and to accuse one of being deficient in some quality which the law does not require him, as a good citizen, to possess, is not libelous per se.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 3-16; Dec. Dig. § 6.*]

2. LIBEL AND SLANDER (§§ 82, 86*)—WORDS LIBELOUS PER SE.

Words not libelous per se may be made to appear actionable by the averring of such extrinsic facts as will show that they were intended to be libelous, and were so understood, which averments must be applied to plaintiff by a proper colloquium, with the intended and understood meaning correctly set out in the innuendo, and connected with the circumstances set forth in the complaint, thereby defining the true meaning intended by the use of the words.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 187, 206; Dec. Dig. §§ 82, 86.*]

3. LIBEL AND SLANDER (§ 10*) — LIBELOUS PUBLICATION.

A newspaper publication stating that the council of a city adopted an ordinance prepared

by the city attorney, imposing a monthly license tax on keepers of houses of ill fame, and averring that the ordinance is vague in its limitations, and that the city attorney forgot to add to the ordinance the provision repealing a section of the Penal Code of the territory, is not per se libelous of the city attorney, and the complaint complaining of the article must set out in the charging part the facts that will render the article actionable.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 91; Dec. Dig. § 10.*]

Appeal from District Court, Yuma County; before Justice John H. Campbell.

Action by Frank Baxter against John W. Dorrington. From a judgment for defendant, plaintiff appeals. Affirmed.

W. F. Timmons and Ross & O'Sullivan, for appellant. Peter T. Robertson, for appellee.

DOAN, J. Appellant herein brought an action against the appellee in the lower court for libel. Defendant demurred to the second amended complaint on the ground that it did not state facts sufficient to constitute a cause of action. The lower court sustained the demurrer. The plaintiff elected to stand on his pleadings, and the court thereupon rendered judgment for the defendant. From this judgment plaintiff appealed, and has assigned as error the order of the lower court sustaining the demurrer. The complaint, after alleging the residence of the plaintiff and the defendant, and the fact that the defendant is the editor and proprietor of a newspaper, alleges:

"That defendant, with malice toward plaintiff, and with intent to injure the plaintiff, and to bring him into great contempt, ridicule, infamy, and disgrace, did on or about the 3d day of June, 1909, publish in said newspaper, the Arizona Sentinel, of and concerning plaintiff, the following false and defamatory words, to wit:

"City Council Overrides Territorial Statute.

"Having decided to confine the "Social Evil" to a certain district, the City Council Tuesday evening passed a remarkable ordinance, prepared by City Attorney Baxter, of which the following section is a brilliant example: "Section 17. There shall be collected a monthly license tax of fifteen dollars per month from each and every keeper of any room, apartment or any house of ill fame or ill repute or bawdy house, or house, room or apartment resorted to for the purpose of prostitution or assignation situated south of Fifth Street, north of Seventh Street, and east of Gila Street in the town of Yuma. Such license tax shall be paid monthly in advance on the first of each month, and fractions of a month shall be charged for and collected at the same rate as a month."

"The ordinance is a little vague in its prescribed limitations, etc., but it is understood to mean that the Red Light District is

to be restricted to Gila Street, between Fifth and Seventh Streets. It is further surmised that it was intended to collect license tax within the prescribed limits, though this is not very clear.

"Another little matter was evidently overlooked by the City Attorney. To make the city ordinance "legal" and complete, he should have added that "section 275 of the Arizona Penal Code—which absolutely prohibits prostitution in any room, apartment, house, etc.—is hereby repealed." That would have settled the question most effectually, and prevented conflict of authority between city and territory, and prevented future legal complications which might possibly arise. But the City Attorney probably forgot it."

"(3) That the 'City Attorney' and 'City Attorney Baxter' mentioned in said article is the plaintiff herein.

"(4) That the defendant caused the said issue of said newspaper containing said defamatory matter to be circulated among the people in the town of Yuma, county of Yuma and territory of Arizona.

"(5) That, by reason of the aforesaid publication and circulation, plaintiff has been damaged by the defendant in the sum of twenty-five thousand dollars."

The appellant urges in support of the error assigned that the words used are actionable per se, and therefore the only allegation necessary to constitute an action for libel is that the defendant, with malice, published them of and concerning the plaintiff. It would not be profitable to cite here the many definitions given of words actionable per se. The definition given in 25 Cyc. 253: "Defamatory words, to be libelous per se, must be of such a nature that the court can presume as a matter of law that they will tend to disgrace and degrade the party, or hold him up to public hatred, contempt or ridicule, or cause him to be shunned or avoided." "To accuse one of being deficient in some quality which the law does not require him, as a good citizen to possess, is not libelous per se"—expresses briefly the true test to be applied. We are satisfied that the language charged in the complaint cannot, under the construction ordinarily given to the words therein used, be held to be libelous per se.

It is the general rule of pleading that words not actionable per se may be made to appear actionable by averring such extrinsic facts as will show that they were intended to be libelous, and were so understood, but these averments must be distinctly stated in the complaint, and applied to the plaintiff by a proper colloquium, with the intended and understood meaning correctly set out in the innuendoes. The innuendo being used to point the meaning of the alleged defamatory words, by connecting them with the occasion and circumstances set forth in the declara-

tion or complaint, and thus in connection with the colloquium defining the true meaning intended by the use of the words. 13 Cyc. 51. The court in *Maynard v. Firemen's Fund Insurance Company*, 47 Cal. 207, states the rule in these words: "When words that are not libelous per se contain a covert meaning which makes them libelous, it is necessary for the plaintiff to aver in his complaint that the words were intended by the defendant to be understood in that covert meaning, and that they were, in fact, so understood by those who read them." The complaint in this case does not meet the requirements necessary to state a cause of action, even if the language used could, by the proper allegations, have been shown to be libelous.

The first paragraph of the publication complained of would appear to be a criticism upon the city council rather than upon the attorney, and the only language that could be complained of by appellant would be the statement that "Another little matter was evidently overlooked by the city attorney." This is apparently a statement of an opinion or conclusion on the part of the defendant. There is the further statement that "the city attorney probably forgot it." The words and charges appearing in these two statements could, under no interpretation that could be reasonably placed upon them, be considered libelous per se, and if, in fact, they did contain any libel, it would be necessary for the pleader to set out in the charging part of the complaint the facts that rendered them so. In *Clarke v. Fitch*, 41 Cal. 472, the court says in a case similar to this: "If it was intended to charge that the words were used in the alleged libel in the offensive sense, * * * and that the words were so understood by those who read them, there should have been a colloquium to explain the subject-matter, and by proper averment to show in what sense the words were libelous, and that they were used and understood in that sense." The failure to do this in the case at bar renders the pleading obnoxious to a general demurrer, and the ruling of the trial court was correct.

The judgment of the lower court is affirmed.

KENT, C. J., and LEWIS and DOE, JJ., concur.

(13 Ariz. 165)

INGERSOLL v. SCOTT.

(Supreme Court of Arizona. April 2, 1910.)

1. MINES AND MINERALS (§ 23*) — MINING CLAIMS—ASSESSMENT WORK—KEEPER.

A locator of a mining claim placed thereon engines, cars, tools, etc. The last actual work on the mine was done in July, 1903. From that time to March 29th following he made efforts to resume work, but did not succeed. During that time he necessarily employed a watch-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

man to preserve the personal property on the mine, which property was needed for the resumption of work. *Held*, that the expense in employing the watchman was properly a part of the assessment work during the year 1904.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 23.*]

2. APPEAL AND ERROR (§ 1008*)—FINDINGS—CONCLUSIVENESS.

A finding of the trial court on the evidence is conclusive on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

Appeal from District Court, First Judicial District; before Justice John H. Campbell.

Action by W. E. Scott against G. U. Ingersoll. From a judgment for plaintiff, defendant appeals. Affirmed.

Timmons & Baxter, for appellant. Peter T. Robertson and Clement H. Coleman, for appellee.

LEWIS, J. This was an action to quiet title to a certain mining claim. The defendant and appellant predicated his title to the ground in controversy upon a relocation thereof, under the theory that no assessment work was done upon the claim in the year 1904.

The sole question presented is the applicability of a keeper's services as assessment work for the year mentioned. The law applicable to the facts presented is fully set forth in the opinion of Sloan, J., in the case of *Kinsley et al. v. New Vulture Mining Co.* (Ariz.) 90 Pac. 438. The evidence tends to establish that no work was done upon the claim in controversy during the year 1904. Up to March 20th of that year, the predecessor in interest of the appellee (the company) employed a watchman to care for the personal property at the mine, paying him \$50 a month, which was a reasonable wage. This property cost approximately \$4,000, and consisted of two gasoline engines, one of 25 and the other of 40 horse power, the usual amount of buckets, ropes, cars, blowers, mining and blacksmith tools, kitchen utensils of every kind sufficient for 20 or 25 men; also what was known as the office tent, in which there was a desk, bedding, a library consisting of 75 or 100 books, and some drafting instruments. The last actual work of the company upon the mine was done July 18, 1903. From that date until March 29, 1904, the company was making efforts to resume work. The employment of a watchman was necessary for the preservation of the personal property, the claim being on the main road, but was not necessary for the purpose of preserving the shaft and workings, buildings, or other structures which were erected to work the mine. The workings upon the mine consisted of the main shaft 400 feet deep, with drifts, cross-cuts, and winzes. The buildings consisted of a hoist house, stone building,

blacksmith shop, and several other smaller houses.

While it is clear from this résumé of the testimony that the keeper was employed for the sole purpose of preserving the personal property upon the mine in question, it is equally clear that the preservation of such personal property was necessary for the resumption of work in contemplation during the time the watchman was employed. The question of the necessity for the keeper on the property during the year 1904 was fairly presented to the trial court for decision by the evidence in the case, and its determination of that question is conclusive upon this appeal.

The judgment is affirmed.

KENT, C. J., and DOAN and DOE, JJ., concur.

(13 Ariz. 120)

TEVIS et al. v. RYAN et al.

(Supreme Court of Arizona. April 2, 1910.)

1. CONTRACTS (§ 147*) — CONSTRUCTION — WORDS.

In determining the meaning of a word in a contract, it should not be separated from its context, nor considered apart from other provisions which may throw light upon its meaning, but the contract should be viewed as an entirety.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 743; Dec. Dig. § 147.*]

2. CORPORATIONS (§ 119*) — CONSTRUCTION — PARTICULAR WORDS — "INTEREST" — "REINVEST."

A corporation was involved financially; its property having been sold under execution, and the time for redemption being about to expire. Plaintiffs owned four-sevenths of the capital stock, and defendants three-sevenths. To give defendants a controlling interest, the parties contracted that plaintiffs should transfer their interest to defendants, with the exception of 279,500 shares, which were to be retained, defendants to have two years in which to comply with the contract, and should they fail to so comply, the "interest" of plaintiffs should reinvest in them in the same proportion as they held and were possessed of at the signing of the agreement. *Held*, that upon default of defendants, in view of the fact that the word "reinvest" implies a previous divestiture and the use of the phrase "in the same proportion and ratio as they were held and possessed of," whereas plaintiffs never had possession of the corporate property as such, plaintiffs were entitled to recover their interest conveyed in the stock only, and not in the property of the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 846, 847; Dec. Dig. § 119.*]

3. DAMAGES (§ 22*) — BREACH — DAMAGES — PROXIMATE AND REMOTE CONSEQUENCES.

The proximate damage resulting from breach of the contract was the loss of the value of the stock to be returned, and, plaintiffs having retained 279,500 shares of their four-sevenths interest, loss in value of such shares was a remote and indirect result of the breach, not such as the other parties must have contemplated; and plaintiffs' measure of damages for breach of the contract was the loss of value only of the stock to be returned.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 59; Dec. Dig. § 22.*]

4. EVIDENCE (§ 113*)—VALUE OF CORPORATE STOCK.

In the absence of any other evidence of value, the par value is presumptively the value of corporate stock, but evidence of the insolvency of the corporation, the value of its property, and its liabilities, is admissible to show the value of its stock.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 262, 263; Dec. Dig. § 113.*]

5. APPEAL AND ERROR (§ 854*)—REVIEW—RIGHT RESULT BY WRONG METHOD.

Where the result is right, though the method of reaching it is wrong, and though the jury may have found their verdict on an incorrect theory of the case, the error is harmless, and the judgment will not be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3408; Dec. Dig. § 854.*]

6. APPEAL AND ERROR (§ 853*)—REVIEW—CONSTRUCTION OF PLEADING.

Where the construction placed upon a complaint by the trial court accords with the evidence introduced and the instructions given, the Supreme Court will adopt such construction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3405; Dec. Dig. § 853.*]

7. APPEAL AND ERROR (§ 171*)—RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW—NEW THEORY ON APPEAL.

A party cannot on appeal abandon the theory of the case to which he has assented upon the trial and substitute another.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1053; Dec. Dig. § 171.*]

8. EVIDENCE (§ 246*)—ADMISSIONS OF COUNSEL—EFFECT.

On trial, as bearing upon the issue involved, admissions of counsel may be the ground of the court's procedure equally as if established by clearest proof, but mere unguarded expressions of counsel or ambiguous statements may not be the basis of the court's action.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 945; Dec. Dig. § 246.*]

9. TRIAL (§ 109*)—ADMISSIONS OF COUNSEL—CONSTRUCTION.

In an action for breach of contract, whereby plaintiffs conveyed their four-sevenths interest in a corporation less an amount of stock retained, statements of defendants' counsel that the suit was simply to recover the value of four-sevenths of the stock of the corporation, and not the value of the stock retained, were merely an admission of counsel's view of the theory of plaintiffs' claim as set forth in their complaint, and not an admission of the theory or fact that, if plaintiffs were entitled to damages, the extent thereof should be the value of four-sevenths of the capital stock.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 91, 270; Dec. Dig. § 109.*]

10. APPEAL AND ERROR (§ 1140*)—DISPOSITION OF CAUSE—AFFIRMANCE UPON CONDITION OF REMITTITUR.

Where the evidence and the verdict afford the Supreme Court a basis for the computation of the correct sum to be awarded plaintiffs, but an excessive amount has been allowed, the Supreme Court may render judgment for plaintiff on condition that remittitur be made under Civ. Code 1901, par. 1588, providing that, if a judgment be for excessive damages, and is removed to the Supreme Court, the successful party may remit the excess, and judgment may be rendered for the proper amount.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4464, 4466; Dec. Dig. § 1140.*]

Appeal from District Court, Maricopa County; before Justice Edward Kent.

Action by Jepp Ryan and others against W. S. Tevis and others. Judgment for plaintiffs, and defendants appeal. Judgment affirmed on condition that a remittitur be made.

Ben Goodrich, A. O. Baker, and Charles Bowman, for appellants. Eugene S. Ives, Neale & Sutter, and J. T. Kingsbury, for appellees.

LEWIS, J. This is an action brought to recover damages for breach of contract. The facts in so far as essential to determination of the case are as follows:

In November, 1902, the Turquoise Copper Mining & Smelting Company, a corporation, was the owner of certain mining claims in Cochise county, Ariz. At that time its property had been sold for approximately \$23,000, upon an execution in aid of a judgment, to one T. B. McPherson. The time for redemption was to expire January 31, 1903. Upon November 29, 1902, a conference was held between W. H. McKittrick, one of the appellants, and the appellees, which resulted in the execution of an agreement between the appellants and the appellees, the alleged breach of which is the subject-matter in suit. This agreement may be summarized thus:

Whereas, the parties above mentioned represent all the stock in the Turquoise Copper Mining & Smelting Company, a corporation; and, whereas the first parties (the appellants) now own and control three-sevenths of the capital stock of said corporation, and parties of the second part (the appellees) four-sevenths of the capital stock thereof, and whereas the first parties are desirous of securing the controlling interest of the said capital stock of said corporation, and thereby obtaining the full management of the affairs of the said corporation: Now, therefore, in consideration of the conversion of the capital stock from its original capitalization to one million shares of the par value of one dollar (\$1) each and the placing of 240,000 shares of said capital stock in the treasury of the company to be sold in whole or in part by the said first parties at such price or prices as the board of directors of said corporation may deem advisable, the moneys to be used first to pay off a certain judgment held by T. B. McPherson, and second to develop the claims of the company, the second parties agree that the officers of the company now representing the second parties shall resign, permitting the first parties to choose officers as they may desire. Said second parties further agree to give the first parties as their interest in the company 280,500 shares of the capital stock; the second parties to receive 279,500 shares, the remaining 200,000 shares to be issued to W. H. McKittrick, as trustee, and to be divided between the parties

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

in the proportion of 101,000 to the first parties and 99,000 shares to the second parties. All of the parties agree to use their best endeavors to sell the trust stock at not less than par, the proceeds to be divided pro rata until reimbursed for the money then expended upon the property, when the remaining shares shall be divided between them according to their respective interests in the ratio aforesaid. It is further agreed that none of the individual holdings shall be sold until the trust stock has been sold or apportioned, and that the second parties shall not be liable for any expense connected with the operation of the company, excepting the expense of selling the trust stock.

The contract then concludes: "It is further agreed that the parties of the first part shall have a term of two years in which to comply with all the requirements of this contract. Should they fail or refuse to comply with all the agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void and of no effect, otherwise to remain in full force and effect. Should this contract be annulled by any failure of the parties of the first part to do any and all things herein required of them, then the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement." This clause has been denominated by counsel as the "reinvestment clause," and for convenience will be so referred to hereinafter.

Pursuant to the terms of this contract, the appellees resigned from the management. The appellants thereupon assumed control, and selected directors and officers. The articles of incorporation were amended, changing the capital stock from 100,000 shares at \$10 each to 1,000,000 shares at \$1 each. The old certificates of stock were surrendered, canceled, and new certificates issued; the appellees receiving and ever since holding 279,500 shares. The reorganization of the company was not effected until January 26, 1903, and in order to obtain the necessary funds with which to redeem from the sale to McPherson, the corporation borrowed \$30,000 upon its note from W. S. Tevis, one of the appellants. This note was subsequently transferred to the Western Company. McKittrick, acting for the corporation, redeemed the mines from the sheriff's sale to McPherson. Thereafter 32,000 shares of the treasury stock was sold for 25 cents a share, netting the corporation \$8,000 which funds were used by the corporation for further development of the mines. The interest upon the \$30,000 note in the hands of the Western Company was met by additional funds borrowed from Tevis, for which notes were given, and these notes transferred to the Western Company. On May 18, 1904, the balance of the treasury stock, 208,000 shares, was sold for three-fourths of a cent a share. Some

time subsequent to November 29, 1904, an action was commenced by the Western Company in Kern county, Cal., to recover upon the promissory notes given by the corporation, and upon May 24, 1905, judgment was by it obtained for \$44,078.05. The evidence tends to show that, prior to the obtaining of such judgment, a demand was made upon the appellants by the appellees to be reinvested with their interests in the property. This demand was ignored by the appellants. Shortly thereafter an action was commenced upon the judgment of the Western Company in Cochise county, in which judgment was rendered against the Turquoise Company for \$44,549.43 upon July 20, 1905. At the same time W. H. McKittrick obtained a judgment against the corporation in Cochise county for \$9,975 for services rendered to the corporation as general manager. This judgment was transferred to the Western Company. On August 12, 1905, the sheriff of Cochise county sold the properties of the corporation on an execution issued upon the Western Company's judgment to the judgment creditor, and, the property not being redeemed, on July 11, 1906, a sheriff's deed, conveying the property to the Western Company, was issued. On July 20, 1908, the Western Company deeded the properties to the Tejon Mining Company, incorporated by the appellants. A written demand, the date of which does not appear, was made upon the appellants by the appellees some time after the issuance of the sheriff's deed to the Western Company. Thereafter the appellees filed suit in the court below to recover damages arising from the refusal of appellants to reinvest them with a four-sevenths interest in the property, in the sum of \$200,000. The case was tried to a jury, and a verdict returned in favor of the appellees. Judgment was entered on the verdict against the appellants Tevis and McKittrick in the sum of \$132,000, and also against the Pacific Surety Company, surety for the appellants upon a bond theretofore given in said cause, for the sum of \$104,000. Motion for new trial was made, which motion was denied, and thereupon this appeal was taken and perfected.

The principal question is as to the correctness of the instruction of the trial court as to the measure of damages: "You shall ascertain the value of the property at the time that the plaintiffs demanded that defendants reinvest them with their interests therein. You should deduct therefrom the amount of the claim of the Western Company with interest, to wit, \$39,000 and then award the plaintiffs four-sevenths of the balance remaining." The true measure of damages is dependent upon the interpretation of the words in the contract contained in the reinvestment clause: "The interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement." Counsel for appellants argue that the

word "interest" necessarily means stock, and could not under any circumstances mean property. Counsel for appellees urge that the word "interest" is more comprehensive than "stock"; that the ownership of an interest may or not be ownership of stock, and that the meaning to be attached to it must depend entirely upon the conditions prevailing at the time when it became the duty of Tevis and McKittrick to reinvest the Ryans. In interpreting the word "interest," we should not separate it from its context, nor should we consider it apart from other provisions which may throw light upon its meaning. We are called to view this contract as an entirety, and determine from the internal evidence it affords the meaning to be attached to the word. *O'Brien v. Miller*, 168 U. S. 287-297, 18 Sup. Ct. 140, 42 L. Ed. 469; *Pressed Steel Car Co. v. Eastern Ry. Co.*, 121 Fed. 609, 57 C. C. A. 635.

Reviewing the contract, we find the parties represent all of the capital stock; the parties of the first part (appellants) own and control three-sevenths of the capital stock; the parties of the second part (appellees) four-sevenths of the capital stock; the parties of the second part are desirous of securing the controlling interest of the said capital stock; the appellees give to the appellants part of their stock holdings upon certain conditions and agreements to be by them performed, and it concludes: "Should this contract be annulled by any failure of the parties of the first part to do any and all things herein required of them, then the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement." To give the word "interest" the meaning of interest in property in preference to interest in the capital stock is to deprive the word "reinvest" of force, for it implies a previous divestiture. It is to destroy the significance of the concluding clause "in the same proportion and ratio as they held and were possessed of," for there was never a holding or possession by them of the property of the corporation as such. We give a proper legal meaning to the word "interest" by interpreting it as interest in the capital stock. If the word be used in a sense less accurate, we must still deem it to be used in its proper legal sense, unless such interpretation as tested by the specific circumstances under which it is used would result in the absurdity of rendering it unmeaning. In that case by construction it would be proper to place upon it the less accurate meaning evidently intended by the parties, as shown by the circumstances giving rise to its use. The circumstances in evidence under which the contract was executed may be briefly stated. The corporation was involved financially; its property had been sold under execution; the time for redemption was about to expire; the purchaser under the execution sale was taking his certifi-

cate of sale in trust for the holders of the majority of the stock of the corporation. A corporate meeting was being held. The holders of the minority interest in the capital stock accused the holders of the majority interest of an attempt to "freeze them out." This was denied, and as evidence of good faith the majority interest entered into this agreement. Applying the language of the contract to the situation as it then existed, its construction is the same as the interpretation heretofore given.

The contract contemplated selling stock of the corporation to the public. It would have been impossible for the appellants, acting in good faith with the stockholders so secured, to have, upon the failure of their plans, divested the corporation of the title to the mines and invested appellees with a four-sevenths interest therein. To hold that the contract required a return of a four-sevenths interest in the property would call for the assumption that the parties had it in mind, if the scheme failed, that the appellants would invest the appellees with title to a four-sevenths interest in the property as against a corporation of which they were majority stockholders, as well as directors and officers. This would contemplate placing the appellants in a position where their pecuniary interest would clash with their duties. The reasoning of the cases which hold that all agreements for pecuniary consideration to control or influence the conduct of directors, stockholders, or agents of corporations charged with duties of a fiduciary character to private parties are against the true policy of the state, which is to secure fidelity in the discharge of such duties, is applicable. *Woodstock Iron Co. v. Richmond & Danville Extension Co.*, 129 U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819. We, therefore, refuse to adopt a construction which would tend in any wise to so influence the action of the appellants in their fiduciary relation, where we have the reasonable alternative of so construing the contract as to enable the appellants to act free from such malign influence. Nor in reaching this conclusion have we lost sight of the further contention of the appellees that, even though the word "interest" be not construed to mean "property," it should be construed to include a restoration to the appellees of the management and control of the corporation. The placing of this meaning upon the word "interest" is inconsistent with the distinction which the parties themselves have made in the contract itself, wherein the appellees agree "that the officers of said corporation representing their interests" should resign and allow the appellants to select such officers as they may desire. The holding of office is not identified with interest, but is clearly distinguished therefrom.

The appellants contend that the trial court, by adopting the measure of damages at a four-sevenths interest in the property of the

corporation, construed the reinvestment clause to extend to the property or the mines of the corporation. Such result does not necessarily follow. There are various tests for determining the value of stock in a corporation. In the absence of any other evidence of value, the par value is presumptively the value of the stock. *Appeal of Harris* (Pa.) 12 Atl. 753; *Brinkerhoff v. Savings Bank*, 118 Mo. 447, 24 S. W. 129. In this case, however, evidence was introduced tending to show the insolvency of the corporation, the value of its property, and its liabilities. This evidence may be properly looked to for the purpose of determining the value of the stock of the corporation. "There is no better or safer criterion to determine the value of stock of an insolvent corporation than a comparison of the value of its assets with the amount of its liabilities." *Nelson v. First National Bank*, 69 Fed. 798, 16 C. C. A. 425. The instruction of the trial court is tantamount to an instruction that the appellees were entitled to the value of four-sevenths of the capital stock of the company, which was the equivalent of and was to be ascertained by determining from the evidence the value of four-sevenths of the net assets of the corporation. That this was the meaning of the trial court appears clear from reading the oral instructions, wherein frequent reference is made to the duty of appellants to reinvest appellees with their interest in the company. When the result is right, though the method of reaching it is wrong, and though the jury may have found their verdict on an incorrect theory of the case, the error is harmless, and the judgment will not be reversed. *Decatur Bank v. St. Louis Bank*, 88 U. S. 294, 22 L. Ed. 560; *Chicago, M. & St. P. Ry. Co. v. Ross*, 112 U. S. 877, 5 Sup. Ct. 184, 28 L. Ed. 787; *Dry Goods Co. v. Malcolm*, 58 Fed. 670, 7 C. C. A. 426, 19 U. S. App. 229.

It is urged, however, that there is manifest error in this instruction as so construed, for the reason that the complaint does not allege that the plaintiffs have been deprived of their four-sevenths interest in the capital stock of the Turquoise Company, but that the plaintiffs have been defrauded of their four-sevenths interest in the property of the said company. We find no difficulty in this. A reading of the entire third cause of action in the complaint upon which the case was tried makes it clear that the appellants have defined their interest in the property to be a four-sevenths interest in the capital stock of the company. This is the fair and reasonable intendment of the pleading. It is the construction evidently placed upon it by the trial court. It accords with the evidence introduced and the instruction given. We, therefore, adopt such construction. *Phillips v. Smith*, 95 Pac. 91.

Another and more serious question as to the true measure of damages arises upon the evidence showing that, at the time of the

alleged breach, May, 1905, the plaintiffs were in the possession of 279,500 shares, which had been retained by them under the terms of the contract. We have already held that the sole breach consisted in the failure to reinvest the Ryans with their former interest, namely four-sevenths of the capital stock. Was the measure of damages fixed by the court erroneous in not eliminating from the instruction given, the 279,500 shares so held by the Ryans? The appellees' reply to this question is twofold:

First. That the avowals by counsel concerning the theory upon which the case was tried precludes them from objecting now to the court's instruction in accordance with such avowal and theory. This avowal occurred at the threshold of the trial upon an objection to proffered testimony as to the amounts advanced by the respective parties for the benefit of the properties, and was elicited by the suggestion of the court that in its opinion it was competent under the pleadings to show the interest these people had in the property. Counsel for appellants, in further urging the objection to this evidence, stated: "This suit is simply for the purpose of recovering the value of four-sevenths of the stock of the corporation. There is nothing said about \$160,000. The Court: It is referred to in the complaint. Counsel: But this action is not to recover any part of that [the \$160,000]. The damage is simply as to the value of four-sevenths of the stock only." There is an abundance of authority, and it is a familiar rule of appellate practice, that a party will not be permitted on appeal to abandon the theory of a case to which he has assented upon the trial and substitute another. The reason of the rule is to be found in the injustice of permitting a case, tried and determined on assumptions adopted and acquiesced in as proper by both parties and followed by the court, to be retried upon appeal without regard thereto. In the trial of a cause, the admissions of counsel are constantly received and acted upon. In fact, as bearing upon the issue involved, admissions of counsel may be the ground of the court's procedure equally as if established by the clearest proof. Of course nothing should be taken against the party making the statement or admission when made, without full consideration. Mere unguarded expressions of counsel, or ambiguous statements, should never be the basis of the court's action. Otherwise this salutary rule would become a medium of injustice. There is a marked difference between the theory of a case and the extent of recovery to be allowed under a given theory. While it is true that the court subsequently indicated an adoption of the value of the stock as the measure of damages, nowhere, after a careful examination of the record, do we find a concession by the appellants that, if the appellees are entitled to damages, they are entitled to such damages to the extent of the value of four-

sevenths of the capital stock. There is naturally but little in the record with reference to the stock retained by the Ryans. It is conceded that it was so retained. We do find, however, cross-examination of Jepp Ryan tending to show that the stock was still owned by the Ryans, and that it has been deposited as collateral for loans obtained by them. A fair interpretation of counsel's language is that it is an admission of his view of the theory of appellees' claim as set forth in their complaint. It is not, however, reasonably to be construed as an admission of the theory or fact that, if they were entitled to damages, the extent of such damage was the value of four-sevenths of the capital stock. We, therefore, hold that there is no such admission as to the measure of damages as would preclude the appellants from questioning here the instruction given.

Second. The appellees further urge that the trial court was correct, because the appellants deliberately refused to fulfill their contractual obligation, and wrongfully continued to control and manage the property, and as a result thereof the assets of the corporation were wholly lost and the value of the entire stock destroyed. They say it does not lie in the mouth of the appellants to assert that, if they had passed the control to the Ryans, the same loss would have occurred. They rely upon the principle that where a party has breached a contract, he will not be permitted, in the action to recover damages therefor, to defend upon the ground that the party would not or could not have availed himself of the contract, and cite the cases of *Hampton Stave Co. v. Gardner*, 154 Fed. 805, 83 C. C. A. 521, and *Griggs v. Day*, 158 N. Y. 1, 52 N. E. 697, 698. This contention, however, is based upon a premise which has already been eliminated. There was no duty upon the part of the appellants to restore to the appellees the management and control of the corporation, except in so far as a right to management and control would flow from a restoration to them of a majority of the capital stock, and there is no showing that a corporation election would have been held in the interval between the breach and the loss of the assets.

But, assuming that the right to control and manage the corporation would flow from a reinvestment of the appellees with such majority of the capital stock, and that such election might have been held, the principle applied in the cases cited has no application here. A consideration of one will distinguish the line of cases cited. In the case of *Hampton Stave Co. v. Gardner*, supra, the stave company broke a contract wherein they had agreed to sell Gardner certain land. Gardner sued to recover damages in the amount of the difference between the purchase price and the value of the property at the time of the breach. Judgment was recovered by Gardner. It was contended by the vendor that Gardner would not have taken and paid

for the land if the contract had been fulfilled. The court refused to admit evidence offered by the vendor to this effect, and says: "But that evidence was immaterial. What the parties would have done if the vendor had not violated its agreement was a speculative and irrelevant issue. It had committed the first breach of the contract, and had thereby given the vendee the right to recover the legal damages which resulted from its wrong. * * * The measure of damages for its breach of this covenant in the contract was the natural and probable loss which the vendee would sustain on account of that breach, and that was the value of the option, the difference between the value and the contract price of the land, and the vendor could not lawfully take advantage of its own wrong, with proof that the vendee would not have realized this value if it had performed its covenant." This statement of the court is correct, and had the appellants in the case at bar sought to prove that, if they had returned this stock, the appellees would not have assumed control, but would have permitted the property to be lost, as it was lost, such evidence would have been immaterial, and would properly have been rejected by the trial court. This they did not seek to do.

The appellants' contention is that they are only answerable under the pleadings in this action for the value of the stock withheld by them; the direct and proximate damage resulting from their breach of the contract. The proximate damage resulting from the breach of this contract was the loss of the value of the stock to be returned. This was contemplated by the contract, and appellants should answer therefor. The loss of the value of the 279,500 shares of stock was a remote and indirect result of the breach, and not such as the appellants must have had in contemplation, at the time of the execution of the contract, as the probable result of such breach. *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540-544, 23 Sup. Ct. 754, 47 L. Ed. 1171. It cannot be said that the mere retention of the stock by the appellants in and of itself caused the loss of the assets of the corporation. The loss of the assets of the corporation was due, not to the breach of the contract, but to independent acts of the appellants subsequent to such breach. The court was in error in instructing the jury so as to permit a recovery of this remote damage. We do not hold, nor is it to be implied, that the appellees have no remedy for such loss, but such remedy is not to be found in the case as now before us.

The remaining questions presented by the assignments of error do not require a reversal of the judgment of the trial court. The sole error found to exist consists in the instruction permitting the jury to find a larger amount of damages than was warranted. The evidence and the verdict of the jury affords us a basis for the computation

of the correct sum to be awarded appellees. The jury by its verdict found, in effect, that the value of the entire capital stock of 1,000,000 shares of the Turquoise Copper Mining & Smelting Company, at the time of the breach of the contract, was \$231,000. We have held that the appellees were entitled to recover the value of four-sevenths of this stock less the 279,500 shares retained by them, namely, the value of 291,928 shares, which, being computed upon the basis afforded by the verdict of the jury, is \$67,435.37. Under the provisions of paragraph 1588 of the Revised Statutes of 1901, and the practice approved in *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110, it is therefore ordered that should the appellees elect to file a remittitur in this court within 20 days hereafter, in the amount of \$64,564.63, judgment shall be entered in this court in favor of the appellees and against the appellants and the sureties upon the bond on appeal, and against the Pacific Surety Company, surety upon the bond given in the court below, in the sum of \$67,435.37, with costs in the trial court, and that the costs of this appeal be awarded to the appellants; otherwise let the judgment be reversed, and the cause be remanded for a new trial.

CAMPRELL and DOE, JJ., concur. DOAN, J., not sitting.

(13 Ariz. 186)

SANTA FÉ, P. & P. RY. CO. v. GRANT BROS. CONST. CO.

(Supreme Court of Arizona. April 2, 1910.)

1. CARRIERS (§ 4*)—"PRIVATE CARRIERS."

A common carrier may become a "private carrier," when, as a matter of accommodation or special engagement, it undertakes to carry something which it is not its business to carry.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1, 462; Dec. Dig. § 4.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5569, 5570.]

2. CARRIERS (§ 4*)—COMMON OR PRIVATE CARRIER—TESTS—"COMMON CARRIER."

The tests whether a carrier is a "common carrier" are: First, he must be engaged in the business of carrying goods for others as a public employé, and so hold himself out; second, he must undertake to carry goods of the kind to which his business is confined; third, he must undertake to carry by the methods by which his business is conducted and over his established roads; fourth, transportation must be for hire; and, fifth, an action must lie against him if he refused without reason to carry such goods for those willing to comply with his terms.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1, 462-478; Dec. Dig. § 4.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1313-1319; vol. 8, p. 7607.]

3. CARRIERS (§ 63*)—SPECIAL CONTRACTS—CONTRACTORS—CONSTRUCTION—"POINT."

Under a contract providing that a carrier would return the outfit of a railroad contractor

to point of shipment from any point on the carrier's line, the word "point" would be construed to mean a station or point where the carrier was doing its regular business as a common carrier.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 63.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5419, 5420.]

4. CARRIERS (§ 4*)—PRIVATE CARRIERS—CONTRACTOR'S OUTFIT—DESTRUCTION OF GOODS.

Under a contract providing that a carrier would return the outfit of a railroad contractor to point of shipment from any point on the carrier's line, where a loss occurred at a place which was between two regular stations on the carrier's line, the carrier could not escape liability on the theory that he was a private carrier, in that the outfit had been picked up at a place which was beyond any station of the carrier, where, after the goods arrived at a station, they were billed through to point of destination, as any other goods, though at the contract rate.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 4.*]

5. CARRIERS (§ 4*)—PRIVATE CARRIERS—CARRIAGE OF CONTRACTOR'S OUTFIT—REDUCED RATES.

Where a common carrier agrees with a contractor for an extension to carry at a reduced rate to and from the place of construction the necessary grading outfit, supplies, etc., loss to be at contractor's risk, and the goods which were actually carried were the goods commonly carried by it and for which it had a tariff rate, and the movement of the train on which the goods were was directed like other trains, it is a common carrier as to such goods, and not a private carrier, and hence is liable for destruction of the goods caused by its negligence.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 4.*]

6. CARRIERS (§ 149½*)—LIMITATION OF LIABILITY.

A common carrier may, by an agreement to that effect, based on proper consideration, limit its liability for loss of or damage to goods of a shipper, except such as may be caused by its own negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 651; Dec. Dig. § 149½.*]

7. CARRIERS (§ 163*)—LOSS OF GOODS—BURDEN OF PROOF.

In an action for loss by fire of goods in transportation, loss to be at shipper's risk, the burden is on the shipper to show that the fire was caused by the negligence of the carrier.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 725; Dec. Dig. § 163.*]

8. TRIAL (§ 141*)—QUESTION FOR JURY—UNDISPUTED EVIDENCE.

Where evidence, though undisputed, might be differently construed and considered by different conscientious intelligent men in determining the ultimate fact of negligence, it is for the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 336; Dec. Dig. § 141.*]

9. CARRIERS (§ 136*)—LOSS OF GOODS—QUESTION FOR JURY.

In an action for destruction of goods by fire, whether the carrier was negligent in leaving the shipment at an out of the way station, where there was neither station agent, nor water, no inhabitants, and no one to look after the safety of the cars containing it, held for the jury.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 136.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

10. CARRIERS (§ 112*)—RATES—INTERSTATE COMMERCE—RAILROAD CONTRACTORS.

Where an agreement for a reduced rate for the shipment of a railroad contractor's outfit is included in the specifications and contract, under which a contractor was the successful bidder, his action for damages for loss of goods shipped cannot be defeated because he was given a preference in rates under the interstate commerce law, since such right was expressly recognized by the commerce commission in an administrative ruling.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 112.*]

Appeal from District Court, Maricopa County; before Justice Edward Kent.

Action by Grant Brothers Construction Company against the Santa Fé, Prescott & Phoenix Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Paul Burks, A. H. Van Cott, and L. H. Chalmers, for appellant. A. C. Baker and Isadore B. Dockweller, for appellee.

DOAN, J. This is an appeal from a judgment for \$9,061, rendered by the district court of Maricopa county as damages for the loss by fire of the property of the appellee while in transit on the road of the appellant company.

The facts in the case appear to be that prior to June 5, 1907, the construction company had been engaged in grading a railroad for the appellant. The contract under which this road was constructed (composed of 18 subheads or paragraphs) contained, among other conditions and provisions, the following, to wit: "(14) Water will be delivered in cars at the end of the track at the rate of one dollar and fifty cents (\$1.50) per 1,000 gallons, and supplies will be hauled to end of track, both in the usual manner of construction trains, subject to delays, etc., incident thereto. All risk of loss or damage to be borne by the contractor. (15) The company will furnish a rate of one cent per ton mile from all points on the Santa Fé, Prescott & Phoenix Road, and leased roads to the contractor on camp and grading outfit and supplies, etc., except explosives and commissary goods, and return to original shipping point at same rate on completion of the work. All movements of goods at less than tariff rates to be at consignee's risk of loss and damage. (16) The company will also furnish the contractor's employes * * * a rate of one cent per passenger mile * * * and return those who have worked until completion of contract at the same rate. Passengers carried at less than tariff rates will be required to assume all risk of accidents to person and baggage. The plan of movement of these employes and freight is to be according to the rule of the general freight and passenger agent." This contract was based upon a proposal for bids made by the appellant under which the appellee was the accepted bidder.

The proposal contained the stipulations as they appear in the above quotation from the contract. On June 5, 1907, upon the completion of the construction of the roadbed, the appellants, at the request of the appellee, placed certain cars at the end of the track some 12 miles west of Bouse (the last regular station west on the Arizona & Colorado Road), and appellee loaded thereon its camp and grading outfit, and several of its workmen, and the cars were hauled by appellant to Bouse. The appellee unloaded a quantity of powder and hay, and purchased transportation for the workmen. The said cars and contents were waybilled to Phoenix, Ariz., and the cars were then and there cut into and became a part of appellant's regular freight train No. 12. Appellant's freight train No. 12 then proceeded from Bouse towards Phoenix, via Wickenburg. About 11 o'clock on the night of June 5, 1907, at a point between Bouse and Wickenburg known as the A. & C. Junction, the conductor in charge of train No. 12 cut out therefrom ten cars, and left them upon a side track. Six of these cars were loaded with the outfit of the appellee, one was a commercial car of ore, and three were empty cars. Train No. 12 then proceeded to Wickenburg with its remaining cars. These consisted of a combination or caboose car, two cars of live stock, being part of the shipment of appellee, and one empty car. On the morning of June 6, 1907, four of the cars loaded with the grading outfit and other property of the appellee that had been left upon the side track were, with their contents, destroyed by fire. There was no station agent of the appellant at the side track at the A. & C. Junction where the fire occurred; no water tank, nor any water supply there; no inhabitants there; and no one was left in charge to look after the cars thus sidetracked by the appellant. The appellee brought suit in the district court of Maricopa county to recover for the loss of that portion of the camping outfit, and other property that was destroyed by the burning of the cars and their contents. The case was tried to a jury, and a verdict returned for \$9,061 damages, and judgment rendered thereon. A motion for a new trial was denied. From the judgment and the denial of the motion for a new trial, this appeal has been taken.

The appellant, in support of its various assignments of error, has presented and urged five legal propositions: "(1) That the contract for the movement of appellee's goods, in connection with the construction by it of appellant's road, was valid, and it relieved appellant from liability for the loss of appellee's goods, no matter how caused." Appellant contends that, in handling appellee's goods under the contract, it acted as a private carrier, and, if so, would have a right to protect itself by the exemption contained in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the contract from liability, even if occasioned by its own negligence. This was the theory upon which the appellant tried the case in the lower court, while the theory on which the case was tried by the appellee was that the appellant acted as a common carrier, and would therefore, even under the terms of the contract, be liable for loss occasioned by its negligence.

It is conceded that a public carrier may, under some circumstances, act as a private carrier. A common carrier may become a private carrier when "as a matter of accommodation or special engagement he undertakes to carry something which it is not his business to carry." *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *L. N. A. & C. R. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348; *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627. 4 Elliott on Railroads, p. 11, states the rule: "Where there is a right to refuse to perform the services requested, there is a right to contract for their performance in a different capacity from that which rests upon a railroad company as a public or common carrier."

Mr. Hutchinson, in his excellent work on Carriers, submits (1 Hutchinson, § 48), as a test by which we can determine whether a party assumes the duties and responsibilities of a common carrier, five characteristics: "(1) He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally as a business, and not as a casual occupation. (2) He must undertake to carry goods of the kind to which his business is confined. (3) He must undertake to carry by the methods by which his business is conducted, and over his established roads. (4) The transportation must be for hire. (5) An action must lie against him if he refuses, without sufficient reason, to carry such goods for those who are willing to comply with his terms."

Applying these tests to the appellant in the case at bar, we find that:

(1) It is engaged in the business of carrying goods for others as a public employment.

(2) It undertakes, as a business, to carry goods of the kind now under consideration. The appellant's witnesses testified that the rate charged the appellee in the contract is less than tariff rates; that one cent per ton mile was less than the established rate charged to the public. It was conceded that it had a rate for the carrying of this particular kind of goods, and that it held itself out as a common carrier thereof.

(3) The appellant agreed to carry by its usual methods and over its established road the property, goods, and commodities in question. The contract provides that: "The company will furnish a rate of one cent per ton

mile from all points on the Santa Fé, Prescott & Phoenix road, and leased roads for contractors on camp and grading outfit and supplies, etc., except explosives and commissary goods, and return to original shipping point at same rates on completion of the work. All movements of goods at less than tariff rates to be at consignee's risk of loss and damage." It has been urged, in this connection, that the cars were spotted by appellant, loaded by the appellee, and afterwards picked up by the appellant at the end of the track several miles west of Bouse, its last regular station, and that they were brought to Bouse for appellee's accommodation, and that such service could not have been compelled by the appellee. It is not necessary to determine the relation that existed between the parties, or where would have rested the liability for loss if any had occurred while the cars and goods were being brought from the end of the track to the station. The contract on which the appellant relies in this instance does not provide for picking up the cars at the front, but only for returning to original shipping point on completion of work from all points on the Santa Fé, Prescott & Phoenix Railway or leased roads. The word "points" would, by a fair construction, mean station or point where appellant was doing its regular business as a common carrier. The acts made obligatory on the appellee by the contract are to be considered in this connection, rather than acts that may have been voluntarily performed by it. The test we are applying says: "When it undertakes to do," etc. The provision in paragraph 14 for hauling water and supplies to the end of track during construction does not provide for hauling camp and grading outfits, either to or from the end of the track, but seems to be a provision for hauling water and supplies during the course of construction, while the shipment of the camp and grading outfit after completion of the work appears to have been had under the provisions contained in paragraphs 15 and 16 of the contract. It would not be material whether the appellee had brought in its camp and grading outfit to the station at Bouse, and there shipped it to the point from which it had been shipped in at commencement of work, or whether, the cars being furnished at the front, the appellant had picked up these cars for it, and brought them into Bouse. Neither is it material whether in so doing the appellant acted as a private or common carrier; whether it was done for hire or gratis. The fact is established that at Bouse, a point on the railroad operated by the appellant, the camp and grading outfit was received. One provision of the contract excepts explosives and commissary goods. The record discloses that, on arriving at Bouse, the party in charge of the outfit unloaded some powder and hay; purchased transportation from Bouse to Phoenix for the employees at the rate provided by the

contract; the cars were waybilled by appellant's agent (presumably at the rate of one cent per ton mile) and cut into and became a part of appellant's regular freight train No. 12, the plan of movement of which was admittedly according to the rules of the general freight and passenger agent of the appellant company.

(4) The transportation must be for hire. This point is conceded as definitely established by the facts, as well as by the wording of the agreement.

(5) An action must lie upon a carrier's refusal, without sufficient reason, to carry such goods, if the party is willing to comply with its terms. When the freight and passengers in question were tendered to appellant at Bouse, from which point we have just stated the goods were waybilled by its agent, and transportation for the passengers was purchased from its agent, although at the reduced rates provided in the contract, there is no question but that a duty rested upon the appellant to transport the goods and employes at the rate named in the contract, and an action would lie for its refusal to do so.

The appellant, under the above rule, was a common carrier, and was, as such, transporting the goods at the time they were sidetracked at the point where they were afterwards destroyed by fire. It is conceded that a common carrier may, by an agreement to that effect, based upon proper consideration, limit its liability for loss of or damage to goods of a shipper, except such as may be caused by its own negligence. *Adams Exp. Co. v. Carnahan*, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279. "When a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier is a corporation created for the purpose of carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character." *Liverpool, etc., St. Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *Railroad Co. v. Lockwood*, 17 Wall. 376, 21 L. Ed. 627; *Mears v. N. Y., N. H. & H. R. Co.*, 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192; *Richmond v. Southern Pacific*, 41 Or. 54, 67 Pac. 947, 57 L. R. A. 616, 93 Am. St. Rep. 694. The foregoing principle is so well established by weight of authority that it is considered elementary in the law of carriers. Under this rule, the limitations in the contract will protect the appellant against liability for any loss or damage, except that caused by its own negligence.

This leaves us to consider whether the loss in this instance was caused by the negligence of the appellant. The second proposition urged by the appellant is that, "assuming for the sake of argument that the contract did not in law relieve the appellant

from liability for the loss of the goods caused by its negligence, yet the burden was upon the appellee to show by a preponderance of evidence that some negligence of appellant was the proximate cause for the loss of the goods. This burden appellee totally failed to carry." It is conceded that the burden was upon the appellee to prove by a preponderance of the evidence that the loss was occasioned by the negligence of the appellant, and the court instructed the jury to that effect. Appellant states that the appellee totally failed to carry this burden. The question as to whether or not the appellee met this requirement was a question of fact for the jury. The learned court carefully instructed the jury on this point as follows: "The vital question in this case is to determine whether these goods were lost or destroyed by reason of the neglect of the railroad company. Because if they were not, Grant Bros. have to stand the loss. If they were lost through the railroad company's negligence, then the railroad company must stand it. Now the question of whether the goods were lost through the railroad company's negligence or not is one of fact for you to determine, and the burden of proving it is upon the Grant Bros. Construction Company, the plaintiff in this case. They must satisfy you by a preponderance of the evidence that this loss of these goods was brought about by negligence of the railroad company; if you are satisfied by a preponderance of the evidence that the loss was caused by negligence of the railroad company, then you ought to award the damages for the value of the goods; if you are not so satisfied by a preponderance of the evidence that the loss was caused by the negligence of the railroad company, then you should not award any damages at all, and you should in that event find for the defendant." The court likewise defined "negligence" at considerable length, and then states: "The jury in this case, taking this as a definition of negligence, is to find from the facts surrounding the transaction in question whether or not the defendant company has committed negligence, and, if they so find, and further find that such negligence was the proximate cause of the destruction of plaintiff's property by fire, then the verdict shall be for plaintiff."

The facts in the case are undisputed. There is no conflict in the testimony in regard to the facts and circumstances surrounding the shipment of the goods from Bouse, and the setting out on the side track at the A. & C. Junction, of the cars and contents that were afterwards destroyed by fire; but the effect of these circumstances and facts in establishing negligence on the part of the appellant might be differently construed and considered by different conscientious intelligent men in determining the ultimate fact of negligence. For that reason, a submission of the question to the jury by the trial court was eminently proper, and for that reason it can-

not be said that the appellee failed to carry the burden of proof. The determination of this question disposes of the next proposition urged by the appellant, that the court erred in denying the appellant's motion for a directed verdict.

The fourth proposition urged is the error of the court in instructing the jury. An examination of the court's charge to the jury discloses no reversible error.

The last proposition urged is the error of the court in denying the motion to set aside the verdict and grant a new trial. In support of this no argument is offered, and it may be disposed of by saying that if the question of negligence was one of fact for the jury, and there was evidence in the record to sustain their verdict, the denial by the trial court of the motion to set aside the same was fully sustained by the record.

The appellant, although it based its first legal proposition upon the statement that "the contract for the movement of supplies and goods in connection with the construction of appellant's road was valid," has in the latter part of its brief urged that such contract would, by offering a different rate than that offered to the public generally, be invalid by reason of coming within the inhibition of the interstate commerce law. In reply to this, it may be said that this was not a private contract to Grant Bros. as a corporation, but was included in the appellant's proposal for bids, the benefit of which would accrue to any one who would be the successful bidder. The right, however, of a railroad, as a common carrier, to grant such terms, was recognized by the Interstate Commerce Commission as quoted by appellant on pages 73 and 74 of its brief: "On October 12, 1906, the commission announced an administrative ruling as follows: 'Issuance and use of free passes. * * * But the commission does not construe the law as preventing a carrier from giving. * * * Nor does the commission construe the law as preventing a carrier from giving free or reduced rate carriage over its line to contractors for materials, supplies and men for use in construction, improvement or renewal work on the line of that carrier; provided such arrangements for such free or reduced rate carriage are made a part of the specifications upon which the contract is based, and of the contract itself.'" The arrangements for reduced rate carriage of men, material, and supplies were, in the case at bar, made a part of the specifications on which the contract was based, and of the contract itself.

The record discloses no reversible error, and the judgment of the lower court is therefore affirmed.

LEWIS and DOE, JJ., concur. CAMPBELL, J., did not participate in the decision of this case.

(13 Ariz. 217)

BROOKLYN MIN. & MILL CO. v. MILLER
et al.

(Supreme Court of Arizona. April 2, 1910.)

1. JUDGMENT (§ 251*)—ISSUES.

Where a portion of a complaint for specific performance, relating to an accounting, is dismissed without prejudice, the court has no power in making an interlocutory decree on the rest of the complaint to make any decision as to the right of plaintiff to an accounting.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.*]

2. SPECIFIC PERFORMANCE (§ 94*)—COMPROMISE AGREEMENT—ACTS OF COMPLAINANT.

Under a compromise agreement providing that several suits between the parties to an agreement should be dismissed, and a conditional sale of the property theretofore entered into by defendants with another, consummated within a certain time, complainant in a suit to specifically enforce the compromise agreement has no standing in equity, where he refused to dismiss his suit against defendants as agreed, thereby causing a cloud on the title to the property, and preventing the consummation of the conditional sale at the time named.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 249-256; Dec. Dig. § 94.*]

3. APPEAL AND ERROR (§ 1073*)—HARMLESS ERROR—SPECIFIC PERFORMANCE—GRANTING UNAUTHORIZED RELIEF.

Complainant in a suit for specific performance of a compromise agreement was not, at time of trial, entitled to relief because of his failure to, in good faith, dismiss a suit against defendants as agreed, whereby the performance by defendants of their agreement to consummate a conditional sale of property at a certain time could not be carried out. The court, instead of dismissing the complaint for want of equity, entered an interlocutory decree granting complainant the relief sought, on condition that he consent to a sale of the land unhampered by the pending litigation, etc. Held that, where complainant did not consent, it was not prejudiced by the action of the court, though such action was beyond its power, since, by failure to consent, the case was left where the record showed that it should be; that is, dismissed for want of equity.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1073.*]

4. STIPULATIONS (§ 14*)—ESTOPPEL BY.

Where, on a motion for continuance, it is stipulated that the continuance would be granted if a judgment rendered in a former pending suit would not be pleaded in the suit as a bar, the stipulation estops the parties from pleading such judgment.

[Ed. Note.—For other cases, see Stipulations, Dec. Dig. § 14.*]

Appeal from District Court, Yavapai County; before Justice Richard E. Sloan.

Action by the Brooklyn Mining & Milling Company against Charles C. Miller and others. From a judgment for defendants, plaintiff appeals. Modified.

John J. Hawkins, Thomas C. Job, and Frank S. Howell, for appellant. Norris, Ross & Smith and R. M. Ling, for appellees.

DOAN, J. This was an action brought in February, 1908, by the appellant against the appellees herein in the district court of Yavapai county for the specific performance of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a contract made between the several parties on August 27, 1907. The case was tried to the court in March, 1909, and on April 24, 1909, the judgment was rendered against the plaintiff, from which this appeal is taken.

The record is voluminous. The facts in the case are as follows: Prior to December, 1906, the Brooklyn Mining & Milling Company, a corporation, was the owner of the Brooklyn mining claim in Yavapai county, Ariz. Charles W. Pearsall was then, and at all times since has been, president of that corporation and a stockholder therein. Alonzo V. Miller, George B. Lasbury, and Charles C. Miller were also stockholders in said company, and prior to December, 1906, had located in their own name, together with one Thomas H. Ensor as co-locator, three mining claims adjoining the Brooklyn claim, known as the "West Brooklyn," the "East Brooklyn," and the "South Brooklyn" claims. In August, 1906, Lasbury acquired Ensor's interest in the three claims by deed recorded September 18, 1906, after which date Alonzo V. Miller, George B. Lasbury, and Charles C. Miller were the record owners of said claims. In September, 1906, Miller and Lasbury gave an option to the United Verde Copper Company for the purchase of the West Brooklyn claim and the White Rock claim (which does not figure in this suit), for the sum of \$20,000. The term of this option does not definitely appear, but it was extended at different times and kept in force up to January 1, 1908. In December, 1906, Pearsall, in behalf of himself and other stockholders, instituted a suit (No. 4,541) in the district court of Yavapai county against the Millers and Lasbury for the purpose of having it declared that the Millers and Lasbury held the title to the West, East, and South Brooklyn claims in trust for the Brooklyn Company, and to require them to convey said claims to the company. An amended complaint was filed on July 7, 1907, in this action naming the Brooklyn Mining Company as plaintiff. In May, 1907, Charles C. Miller brought suit against the Brooklyn Company for \$5,000, claimed to be due him for work done upon the Brooklyn claim. While both suits were yet pending, a compromise agreement was made between the parties on August 27, 1907, as follows:

"Whereas, an action is now pending in the district court of Yavapai county, Arizona, entitled Brooklyn Mining & Milling Company et al. v. Charles C. Miller, Alonzo V. Miller and George B. Lasbury, which action relates to the title of the West Brooklyn, East Brooklyn and South Brooklyn mining claims located in said county and territory, and relates to an accounting for ores and minerals taken therefrom; and whereas, the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury have made a conditional sale of the above-named West Brooklyn mining claim for the sum of ten thousand dollars to the

United Verde Copper Company; and whereas, an action is pending in the district court of Yavapai county, Arizona, entitled Charles C. Miller v. Brooklyn Mining & Milling Company for several thousand dollars claimed to be due and owing to the said Charles C. Miller for services performed by him and Alonzo V. Miller for the said Brooklyn Mining & Milling Company; and whereas, it is the desire of the parties connected with the foregoing causes of action to settle the same, and to adjust the matters of difference between the parties in connection therewith: Therefore, in consideration of the dismissal and settlement of the foregoing causes of action it is hereby stipulated and agreed by and between the Brooklyn Mining & Milling Company and Charles C. Miller, Alonzo V. Miller and George B. Lasbury that if the sale of the West Brooklyn mining claim to the United Verde Copper Company is consummated on or before the first day of January, 1908, the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to transfer and deliver to the said Brooklyn Mining & Milling Company one hundred and seventy-five thousand shares (175,000) of stock in said Brooklyn Mining & Milling Company, free and clear of all liens and incumbrances whatsoever; it being understood that said transfer of stock is to include all of the holdings of the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury in the Brooklyn Mining & Milling Company, and the said parties are to receive therefor the sum of 3 (three) cents per share for said stock; and in addition thereto Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to pay to the Brooklyn Mining & Milling Company the sum of eight thousand, five hundred dollars (\$8,500.00) out of the proceeds derived from the sale of the said West Brooklyn mining claim; in addition thereto the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey all of their right, title and interest in and to the East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and said transfer shall contain the warranty that the assessment work has been done for the year 1907 upon the Empress, Midway and North Brooklyn, and the said Brooklyn Mining & Milling Company shall pay the said assessment work at its reasonable value. The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury agree to do the assessment work for the year 1907, on the East and South Brooklyn mining claims, and said assessment work so to be performed is to be paid for by the Brooklyn Mining & Milling Company at its reasonable value. It is further stipulated and agreed by and between the parties hereto that if for any reason the sale of the West Brooklyn claim to the United Verde Copper Company by the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury shall not be consummated on or be-

fore the first day of January, 1908, then the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey to the Brooklyn Mining & Milling Company all of their right, title and interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907 is to be paid by the said Brooklyn Mining Company at its fair and reasonable value. It is understood by and between the parties hereto that the foregoing does not concede or admit any of the allegations contained in the pleadings of said causes of action, but the agreement is entered into for the purpose of adjusting the matters of difference between said parties and avoiding further costs and expenses to the parties hereto. In witness whereof, we have hereunto set our hands this 27th day of August, A. D. 1907. C. C. Miller. A. V. Miller. G. B. Lasbury. Brooklyn Mining & Milling Company, by Chas. W. Pearsall, President."

On December 17, 1907, Alonzo V. Miller executed, acknowledged, and delivered to Ada M. Miller a deed, conveying to her his interest in the West Brooklyn claim. On December 18, 1907, Alonzo V. Miller died, leaving a widow, Ada M. Miller, and two sons, viz., Charles C. Miller No. 2 and George M. Miller, a minor. In December, 1907, counsel for Lasbury and the Millers requested a dismissal of action No. 4,541, and directed a dismissal of No. 4,608 (the case of Miller v. The Company). Counsel for the company declined to dismiss the case against the Millers, and the formal dismissal of the Miller Case was not entered of record until January 2, 1908. On January 2, 1908, the case of Miller against the Brooklyn Company, No. 4,608, was dismissed. Consummation of the sale of the West Brooklyn to the United Verde Company was claimed, and a tender of performance of the obligation of the Millers and Lasbury, under the agreement of August 27, 1907, was made. This tender was refused by counsel for the appellant on the ground that it did not fully comply with the terms of the agreement, and counsel again declined to dismiss the suit No. 4,541. On January 28, 1908, the Brooklyn Company brought suit in the district court of Douglas county, Neb., against Charles C. Miller, George B. Lasbury, and the survivors of Alonzo V. Miller, viz., Ada M. Miller, Charles C. Miller No. 2, and George M. Miller, a minor, for the specific performance of the agreement of August 27, 1907, and George B. Lasbury and Ada M. Miller were personally served with process in Nebraska. On February 15, 1908, the Brooklyn Company dismissed action No. 4,541 involving the title to the West Brooklyn claim, being the action, the dismissal of which was stipulated in the agreement of August 27, 1907, and on the same date, immediately thereafter, filed another action,

No. 4,923, of the same general character. On February 18th, at 9 o'clock a. m., the Brooklyn Company dismissed action No. 4,923, and on that date, at 9:10 a. m., filed the case at bar, No. 4,927. The actions numbered 4,541—in which a lis pendens was filed—4,923, and 4,927, and the suit brought in Nebraska on January 28, 1908, all involved the title to the West Brooklyn claim. On December 23, 1908, the case at bar came on for trial in Yavapai county, and the plaintiff asked for a continuance. This was contested by the defendants, and the pendency of the action in Nebraska urged by them as ground for a trial at that time. It was then stipulated that if the case was continued no judgment which might be secured in Douglas county, Neb., should be pleaded in this action. Thereupon the continuance was granted on the motion and at the cost of the Brooklyn Mining & Milling Company, plaintiff. The Nebraska case was tried on February 8, 1909, and decided in favor of the company. The Nebraska court held that the sale of the West Brooklyn had not been consummated as provided for in the agreement of August 27th, and decreed that Charles C. Miller and Ada M. Miller specifically perform the obligations devolving upon them under the compromise agreement by reason of the nonconsummation of the said sale, and decreed that Charles C. Miller and Ada Miller convey to the Brooklyn Company the West Brooklyn claim, and the five other claims named in the compromise agreement, and in default of their so doing a master be appointed by the court to make such conveyance. No parties to the Nebraska suit were served with process or appeared except Ada M. Miller and Lasbury. The master appointed by the court thereafter executed and delivered a conveyance of the claims mentioned to the Brooklyn Company.

On March 25, 1909, the case at bar came on for trial in the district court of Yavapai county, and on April 24th judgment was rendered therein. Immediately prior to the trial of the case, the plaintiff filed a reply to the amended answer and cross-complaint, in which reply it pleaded the judgment and decree of the Nebraska court and the conveyance by the commissioner thereunder. In a written decision filed on April 24th the court found that the sale of the West Brooklyn to the United Verde by the defendants had not in fact been consummated on or before January 1, 1908, but that the failure to consummate such sale was caused by the failure and refusal of the plaintiff to dismiss the action (No. 4,541) brought by the plaintiff against the defendants in December, 1906, which involved the title to the West Brooklyn claim, and the dismissal of which was made obligatory upon the plaintiff by the terms of the agreement. The court found from the record that this suit was not dismissed until February 15, 1908,

and that another similar suit was brought by the plaintiff before an opportunity was afforded the defendants to consummate said sale; that the defendants, prior to January 1, 1908, endeavored to effect the sale to the United Verde, and that the pending litigation prevented such sale; that the United Verde had ever since been willing to make the purchase at the price of \$10,000 if pending litigation was dismissed, and a clear title could thereby be given them. The court then held that the plaintiff was not then in a position to enforce specific performance on the part of the defendants for the reason that it was itself at fault in not dismissing the litigation, thus removing the obstacle to the negotiation and consummation of the sale. The court further held that as all the parties were before the court, and the agreement was regarded by the parties as still in force, that he would not dismiss the action, but would grant to the defendants reasonable time to consummate the sale under the terms of the agreement. The judgment of the court therefore was that an interlocutory order and decree be entered, giving the defendants 90 days from that date to make the sale and comply with the other terms of the agreement. Thereupon the court caused an interlocutory decree to be entered as follows:

"This cause came on regularly to be heard on the 25th day of March, 1909, plaintiff appearing by John J. Hawkins and T. C. Job, Esqs., its attorneys, and F. S. Howell of counsel, and defendants, Charles C. Miller, Ada M. Miller, Charles C. Miller No. 2 and George Miller, a minor, by Charles C. Miller No. 2, his guardian ad litem, appearing by Reese M. Ling, Esq., and Messrs. Norris & Ross, their attorneys. A jury being expressly waived by both parties, the cause was tried to the court upon plaintiff's amended and supplemental complaint, the amended answer and cross-complaint of defendants Charles C. Miller, Ada M. Miller, Charles C. Miller No. 2 and Charles C. Miller No. 2 as guardian ad litem of George Miller, a minor, and plaintiff's reply to said amended answer and cross-complaint, together with said defendants' motion to strike and replication addressed to said reply. Evidence both oral and documentary was introduced on behalf of the respective parties, and the parties rested, and the cause was submitted to the court for its decision and judgment. Thereafter it was argued to the court by counsel of the respective parties through written briefs. The court having considered the evidence in said cause, the argument of counsel, and the principles of law and equity applicable thereto, and being fully advised in the premises, on the 24th day of April, 1909, made and filed its written decision herein, and orders that a judgment and decree be entered in accordance therewith: Now, therefore, for the purpose of giving defendants an opportunity to consum-

mate the sale of the 'West Brooklyn' mining claim to the United Verde Copper Company, or make a binding contract for such sale free and clear of all claims and litigations on the part of plaintiff touching or questioning said title, and in accordance with said written decision and for the purpose of fully determining the rights of the parties hereto under the contract sued upon, an alternative decree is hereby made and entered herein as follows, to wit:

"(1) That within thirty (30) days from the date hereof plaintiff shall file herein its written consent that this decree conditional upon a sale of the 'West Brooklyn' mining claim to the United Verde Copper Company as hereinafter provided shall become final, irrevocable and nonappealable, and consenting that said defendants within the time hereinafter stated may make a sale or a binding contract therefor of the 'West Brooklyn' mining claim to the United Verde Copper Company free and clear of all claims and litigations on the part of plaintiff questioning or affecting the title to said claim.

"(2) That if plaintiff shall fail, or refuse to file herein within said period of thirty days from the date hereof its written consent and waiver as provided herein, then and in such event plaintiff's action herein shall stand dismissed as of this date, and plaintiff shall take nothing thereby.

"(3) Ordered, adjudged and decreed that if within ninety days from the date hereof said defendants shall consummate or make a binding contract for the sale of 'West Brooklyn' mining claim to the United Verde Copper Company, and shall deliver and pay over or tender to plaintiff herein the money, stocks, deed and proof of assessment work which is provided by the contract of August 27th, 1907, shall be paid over and delivered by defendants to plaintiff, then and thereupon this decree shall forthwith become final, irrevocable and nonappealable as of this date, and plaintiff shall be forever barred and estopped from claiming any right, title or interest in or to said 'West Brooklyn' mining claim.

"(4) Ordered, adjudged and decreed that if plaintiff within the period aforesaid shall file its said written consent and waiver as above provided, and defendants shall fail to make such sale or binding contract therefor to the United Verde Copper Company, and to pay over and deliver or tender the money, stocks, deed and proof of assessment work aforesaid within the said period of ninety days, then and thereupon defendants shall forthwith execute and deliver to plaintiff a valid and sufficient deed conveying to plaintiff all their right, title and interest in and to the 'West Brooklyn' mining claim as mentioned and provided in said agreement of August 27th, 1907, and said agreement shall be fully carried out by all the parties hereto.

"(5) Ordered, adjudged and decreed that plaintiff is not entitled to have or recover anything hereinafter, by virtue or by rea-

son of that certain decree described in plaintiff's reply to defendants' cross-complaint herein rendered by the district court of Douglas county, state of Nebraska, that the commissioner's deed made under and pursuant to said decree is void and of no force or effect, and that said deed does not constitute a cloud upon the title of the 'West Brooklyn' mining claim.

"(6) Ordered, adjudged and decreed that plaintiff is not in any event entitled to an accounting herein, or to have or recover in this action on account of silica heretofore sold or shipped by defendants or any of them from the 'West Brooklyn' mining claim, and defendants shall have and recover from plaintiff their costs herein taxed at \$37.35.

"Done in open court this 24th day of April, 1909. Richard E. Sloan, Judge."

The plaintiff failed and refused to file within 30 days thereafter its consent as provided in paragraphs 1, 3, and 4 of the alternative decree. The failure and refusal of plaintiff to file its consent as provided for in the decree renders the decree as set forth in paragraphs 1, 3, 4, 5, and 6 inoperative, and leaves as a final and substantive decree of the court only paragraph 2 dismissing the plaintiff's action, which would naturally carry with it the costs in the case.

The denial of an accounting in paragraph 6 was inadvertently ordered, for the dismissal without prejudice on March 26th of that part of the complaint which called for an accounting would prevent the court from an adjudication of that question in this case.

In presenting its appeal, appellant presents some 26 assignments of error. Assignments 1, 2, 3, 4, 5, 10, 11, and 12 are grouped together by the appellant, and may be so considered by us, and are to the effect that the decree of the court is not supported by sufficient evidence, but is contrary to law, equity, and the uncontroverted evidence under the issues as presented and joined. Appellant argues in support of this contention that it was entitled to a decree for specific performance compelling defendants to convey to it the West Brooklyn and the other five claims, by reason of their failure to consummate prior to January 1, 1908, the sale of the West Brooklyn to the United Verde, and make the stipulated tender of money and stocks that should follow said sale. It is conceded that the sale of the West Brooklyn to the United Verde was not consummated prior to January 1, 1908. It is likewise conceded that the action No. 4,541 entitled "The Brooklyn Mining & Milling Company v. Charles C. Miller, Alonzo V. Miller, George B. Ladd," which related to the title of the West Brooklyn, was not decided prior to January 1, 1908. The appellant argues that notwithstanding this suit was rendered in any event, the failure of the defendants to consummate the sale of the West Brooklyn to the United Verde was a failure to consummate the sale, and not a failure to consummate the sale of the West Brooklyn to the United Verde.

We cannot see how this contention, if sustained, would prevent the trial court from making proper

that the failure by appellant to dismiss the action indicated in the contract prevented appellees from consummating a sale to the United Verde Company within the period allowed them by the contract. Certainly it would be inequitable to permit appellant so to take advantage of its own wrong. Therefore, upon the state of facts existing at the time of trial, appellant was not entitled to specific performance. But the trial court conceiving that equity might be done by fixing a period within which appellees, unhampered by pending litigation, might effect a sale to the United Verde Company, undertook to secure to appellant relief to which, upon the record at the trial, it was not entitled. If we concede appellant's view that the court's action was beyond its power, and in effect undertook to make a new contract for the parties, still we are unable to see how appellant was prejudiced thereby. The failure to accept the terms offered by the court leaves the appellant in the position where strictly the record puts it—with its complaint dismissed for want of equity.

The appellant groups the assignments of error 6, 7, and 19, and, under them, argues that the trial court erred in not giving force and effect to the judgment of the Nebraska court. The effect of the Nebraska decree presents an interesting question. The decision of the United States Supreme Court in *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. —, 23 L. R. A. (N. S.) 924, would indicate that the ruling of the lower court on that subject was correct, but this question was only raised in this case by the reply of the appellant to the cross-complaint of the appellees, and as the lower court gave no relief to appellees on such cross-complaint, and dismissed the action for specific performance on other grounds, that feature of the case was never reached. We do not think that the point here attempted to be made will avail the appellant, for the reason that the continuance in December, 1908, was granted to the appellant on the stipulation that, if the case were continued, no judgment that might be secured in Douglas county, Neb., should be pleaded in this case. This estops the appellant from pleading the Nebraska judgment, and sustains the court's ruling that it was "not entitled to recover anything hereinunder, by virtue or by reason of" such decree. The appellant does not contend that the commissioner's deed is valid or of any effect in this jurisdiction.

The decree that the commissioner's deed is void, and does not constitute a cloud upon the title to the West Brooklyn claim, while not a declaration of law, was not necessary to the determination of the question decided by the court, and for that reason has no place in the decree.

The record sustaining the trial court in dismissing the action, the judgment of the lower court is affirmed. For the full protection of appellant from any prejudicial effect

of any portion of the decree other than that of dismissal, the judgment of this court is that the judgment and decree of the lower court be modified to read: "It is ordered, adjudged, and decreed that plaintiff's action shall stand dismissed, and plaintiff shall take nothing thereby, and that defendants shall have and recover from the plaintiff their costs herein, taxed at \$37.35." As so modified, the judgment of the lower court is affirmed.

KENT, C. J., and CAMPBELL, LEWIS, and DOE, JJ., concur.

(13 Ariz. 152)

DEAL v. TERRITORY ex rel. WILLIAMS,
Tax Collector, et al.

(Supreme Court of Arizona. April 2, 1910.)

1. APPEAL AND ERROR (§ 383*)—BOND—AMBIGUITY—VALIDITY.

An appeal bond, which did not properly describe the cause in which the orders complained of were made, and recited separate and distinct appeals from a judgment and from two orders, but which was conditioned that appellant should prosecute "her appeal" with effect, was invalid for ambiguity, since it could not be determined which appeal the bond intended to secure.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2042; Dec. Dig. § 383.*]

2. APPEAL AND ERROR (§ 373*)—BOND—NECESSITY.

A sufficient appeal bond is necessary to give the Supreme Court jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2001; Dec. Dig. § 373.*]

3. APPEAL AND ERROR (§ 395*)—BOND—SUFFICIENCY—REVIEW.

Though no motion was made to dismiss appeals because of the insufficiency of the bond, the Supreme Court will decline to consider the case on its merits, since the question of the defects in the appeal bond may be raised upon rehearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3127; Dec. Dig. § 395.*]

Appeal from District Court, Graham County; before Justice Ernest W. Lewis.

Actions by Margaret Ellen Deal against the Territory of Arizona, on the relation and to the use of John D. Williams, as Tax Collector, and others. Judgment for defendants, and plaintiff appeals. Appeals dismissed.

John McGowan, for appellant. Rawlins & Little, for appellees.

PER CURIAM. Appellant, as plaintiff below, filed an original and three amended complaints. The third amended complaint was, upon motion, stricken from the files. Thereupon a demurrer was presented to the second amended complaint, which was sustained. and, plaintiff declining to amend, judgment was rendered dismissing the action at her costs. Thereafter she moved for a correction of the judgment in some particulars, which motion was denied. Notice of appeal to this

court was given "from the judgment of the court heretofore entered herein on the 9th day of October, A. D. 1909, and from the order of the court denying plaintiff's motion to correct the judgment." A bond on appeal was filed, which was conditioned as follows: "Whereas said plaintiff has appealed to the Supreme Court of the territory of Arizona from the order of said district court striking from the records thereof the plaintiff's third amended complaint; also from the order sustaining the demurrer to the second amended complaint, and has also appealed from the judgment rendered and entered on or about the 9th day of October, 1909, dismissing said cause and for costs against the plaintiff: Now, therefore, we, the said principal and said sureties, hereby undertake and promise that said appellant shall prosecute her said appeal with effect, and shall pay all costs which have accrued in said district court, or which may accrue in said Supreme Court."

Aside from the fact that the bond does not properly describe the cause in which the orders complained of were made, it is fatally defective because of uncertainty. It recites separate and distinct appeals from a judgment and from two orders, but obligates the principal and sureties to the payment of the costs but upon one, since it requires only that the appellant "shall prosecute her said appeal with effect." It is impossible to determine which of the appeals the bond is intended to secure. Because of its ambiguity, it is a nullity, and does not operate as an appeal bond. *Creek v. Bozeman Waterworks Co.*, 22 Mont. 327, 56 Pac. 362; *Washoe Copper Co. v. Hickey*, 23 Mont. 319, 58 Pac. 866; *Wallace v. McKinlay*, 6 Idaho, 95, 53 Pac. 104; *Corcoran v. Desmond*, 71 Cal. 100, 11 Pac. 815; *Centerville, etc., Co. v. Bachtold*, 109 Cal. 111, 41 Pac. 813. A sufficient appeal bond is necessary to give this court jurisdiction. There not being such in this case, we have no authority to review the judgment and orders of the district court. While no motion was made to dismiss the appeals, we feel it our duty to decline to consider the case on its merits, since the question of the defects in the appeal bond may be raised upon rehearing. *Shattuck v. Costello*, 8 Ariz. 255, 71 Pac. 940.

The appeals are dismissed.

KENT, C. J., and DOAN, CAMPBELL, and DOE, JJ., concur. LEWIS, J., not sitting.

(13 Ariz. 229)

SULLIVAN v. JONES.

(Supreme Court of Arizona. April 2, 1910.)

1. WATERS AND WATER COURSES (§ 143*)—APPROPRIATION—RIGHT TO CONSTRUCT DAM.

One who had a prior appropriation of surplus and flood waters in a gulch or wash could construct a dam above a subsequent appropriator, and impound so much of the water falling

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

above it as he required for beneficial purposes, but must maintain the dam so as to permit such water as he does not require to pass to the lower appropriator, and so construct the dam as not to endanger the dam of the other appropriator.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 193, 195; Dec. Dig. § 143.*]

2. WATERS AND WATER COURSES (§ 152*)—APPROPRIATION—RIGHTS OF APPROPRIATOR.

Where a prior appropriator of surplus and flood waters in a gulch had previously maintained a dam below a subsequent appropriator, which dam had been destroyed, and, at the time the subsequent appropriator had initiated his rights, was making no use of the water flowing to the lower dam, and had not reconstructed the dam at the time his action was brought to be decreed entitled to all the water in the gulch, and though, from the evidence, it could not be said that he had abandoned his rights to use the water at the lower dam, yet a further failure to use it might entail such result, the court could not practically fix a time within which he should resume its use or suffer its loss, and adjust the parties' rights growing out of the prior appropriation of water to be impounded by his lower dam, because of the many circumstances that might arise in connection with the rebuilding and maintenance of the dam.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 200; Dec. Dig. § 152.*]

3. WATERS AND WATER COURSES (§ 142*)—APPROPRIATION—RIGHTS OF APPROPRIATOR.

The mere notice of appropriation of waters does not make the appropriation effectual, but the appropriator must make use of the water within a reasonable time, and will then be protected only to the extent that he makes a beneficial use thereof.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 152; Dec. Dig. § 142.*]

4. WATERS AND WATER COURSES (§ 75*)—POL- LUTION OF WATER—INJUNCTION.

An appropriator making no use of water below another appropriator's dam is not entitled to an injunction restraining the other from polluting the water by allowing sheep to go into it.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 66; Dec. Dig. § 75.*]

5. INJUNCTION (§ 260*)—WRONGFUL INJUNCTION—RECOVERY BY CROSS-COMPLAINT.

Damages from the issuance of a temporary injunction cannot be recovered in the injunction suit by cross-complaint.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 608; Dec. Dig. § 260.*]

Appeal from District Court, Yavapai County; before Justice Richard B. Sloan.

Action by Albert M. Jones against J. W. Sullivan. From a decree granting a temporary injunction, defendant appeals. Modified and affirmed.

Ross & O'Sullivan, for appellant. Reese M. Ling, for appellee.

CAMPBELL, J. Appellee, as plaintiff below, by his complaint in this action alleged an appropriation of all of the surplus and flood water carried by what is described as a gulch or wash, having its head or source in the vicinity of Table Mountain, in Yavapai county. He further alleges that, to im-

pound the said surplus and flood water, he had constructed a dam across said gulch or wash, and that the defendant was constructing a dam some two miles above, which would prevent the water reaching plaintiff's dam, and in such a manner that it would be a menace to plaintiff's dam in the event of heavy rains falling above it, causing it to break, and permitting a large quantity of water suddenly to be thrown against plaintiff's dam. An injunction was prayed for, and it was further asked that the plaintiff be decreed entitled to the water carried by the gulch or wash. A temporary injunction was issued, restraining the defendant from constructing his dam, which injunction shortly thereafter was modified so as to permit the defendant to proceed with the construction under certain conditions. In his answer, the defendant alleges an appropriation of the surplus and flood waters of the gulch or wash at a time prior to plaintiff's appropriation; that he had constructed a dam which, by reason of heavy floods, had been partially destroyed; and that he was engaged in reconstructing it. By way of cross-complaint, he alleges that prior to the plaintiff's appropriation he appropriated all of the flood waters of a creek into which the gulch or wash in which plaintiff's dam is situated empties, and had constructed a dam some miles below plaintiff's dam, to impound the waters; that about three years before plaintiff built his dam defendant's lower dam was destroyed by floods, and has not yet been rebuilt, but that he has not abandoned his rights, and expects to reconstruct his said dam, and impound and use the waters. He asks that the court decree him entitled to all of the water carried by the gulch.

As a second cause of action, by way of cross-complaint, the defendant alleges that the plaintiff waters several thousand sheep at his dam, and that the sheep are permitted to go into the water, and that they so pollute the water as to render that which flows to defendant's lower dam unfit for his use. He asks the court to decree that the act of plaintiff in permitting the pollution of the water constitutes a nuisance, and that he be enjoined from so permitting the water to be polluted.

As a third cause of action, by way of cross-complaint, he alleges that by reason of the wrongful suing out of the injunction he has been damaged in the sum of \$150.

At the trial the evidence disclosed the facts relative to the plaintiff's dam, and the defendant's upper dam, to be substantially as above set forth. It also appears that there is no permanent flow of water in the gulch or creek in which the dams are situated; that when heavy rains come the surface water is rapidly carried from the mountains through gulches or washes, and the floods at times assume considerable proportions;

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that none of the dams, nor all of them together, are sufficient to impound all of the water which is likely to flow against them in flood seasons; that, when the rains are light, the lower dam of defendant, when properly repaired, will impound all the water that gathers in the gulch between it and his upper dam; and that the water impounded by the several dams is principally used for the watering of sheep and cattle.

It is apparent that appellant is entitled to maintain his upper dam and impound so much of the water falling above it as he requires for beneficial purposes. It is further apparent that he should maintain his dam in such a manner as to permit so much of the water as he does not require for his uses to pass to appellee, and to construct it with reasonable care, so as not to endanger appellee's dam. The trial court so decreed. The court, however, refused to make any findings of fact relative to the rights of the parties to the water which, without plaintiff's dam, would flow to appellant's lower dam, since appellant is not using it, and for a number of years has not made any use of the water; and refused, also, to decree any relief against the alleged nuisance. Of the court's action in these respects appellant complains.

We do not think the court erred in refusing to attempt to adjust the rights of the parties growing out of the appropriation, by the appellant, of water to be impounded by his lower dam. At the time appellee initiated his rights, appellant was making no use of the water flowing to his lower dam, nor had he reconstructed his dam at the time of the trial. From the testimony in the case it cannot be said that he has abandoned his rights to use the water, but further failure to use it may entail that result. It was not practicable for the court to fix a time within which he should resume its use or suffer its loss, because of the many circumstances that may arise in connection with the rebuilding and maintenance of the dam in the mountainous country where it is situated. The mere fact that by his notice of appropriation he sought to appropriate all of the flood waters of the stream does not entitle the appellant to relief against the appellee. To make his appropriation effectual, he must make use of the water within a reasonable time. He may then be protected only to the extent that he makes a beneficial use of the water. Whenever there is water in excess of his needs, others may appropriate it.

It is somewhat speculative whether the maintenance of appellee's dam will injure appellant, and, if so, to what extent it will injure him. There may be sufficient for his uses, without that which appellee impounds. All of these matters can be satisfactorily determined only when the lower dam is reconstructed. It may then be necessary for the court to formulate rules, and perhaps ap-

point a commissioner to see to their enforcement, governing the conduct of the parties in connection with the conservation of the waters. The impounding and use of flood waters in this territory is so important to its prosperity that too much care cannot be exercised in safeguarding the rights of all who seek to make a beneficial use of such waters.

From the testimony before the court, and under the circumstances disclosed, it would be impracticable so to frame a decree at this time as to do exact justice between the parties. Therefore it was more equitable to refuse to attempt to adjudge the rights of the parties until such time as appellant was ready to make use of any rights he may have in the premises.

Since the appellee is now making no use of the water, he is not entitled to a decree restraining appellee from polluting the water. We express no opinion as to the merits of this branch of the case were he making use of the water.

It appears that during the pendency of the suit an injunction was obtained by appellant against the appellee, which injunction was subsequently modified by the trial court. At the trial both parties sought to prove damages by reason of the wrongful issuance of the injunctions, although appellee had no pleadings alleging damages. The decree gives neither party damages. Appellant complains because the trial court found that he had sustained no damages. We think the testimony in the record does disclose that damages were sustained by appellant, by reason of the issuance of the injunction, but we do not think that such damages may be recovered by way of cross-complaint. We held, in *Buggeln v. Cameron*, 90 Pac. 324, that damages suffered by reason of the wrongful issuance of an injunction might be recovered in the injunction suit, upon proper supplemental pleadings and notice to the sureties upon the injunction bond. Until the court has passed upon the merits of the case, it is not made to appear that the injunction was wrongfully issued. Upon rendering judgment upon that issue, the court may hold the case open for the purpose of assessing damages, permit proper supplemental pleadings to be filed, and, upon such reasonable notice to the sureties as it may direct, try and determine the question of damages upon the issues raised by the supplemental pleadings; or, if the injunction bond is so conditioned as to permit, may leave the party to recover his damages in a separate action upon the bond.

The decree of the district court is amended to show the several cross-complaints of appellant dismissed without prejudice, and, as so modified, is affirmed.

KENT, C. J., and DOAN, LEWIS, and DOE, JJ., concur.

(12 Ariz. 258)

HALLADAY et al. v. HALL et al.

(Supreme Court of Arizona. April 2, 1910.)

APPEAL AND ERROR (§ 381*)—BOND—JUSTIFICATION—STATUTORY PROVISIONS—FAILURE TO COMPLY—DISMISSAL.

Civ. Code 1901, par. 1516, providing that a bond on appeal shall be of no effect, unless accompanied by an affidavit of justification of each of the sureties, etc., is mandatory, and where the sureties did not justify in accordance therewith, or at all, the appellate court acquired no jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2020-2035; Dec. Dig. § 381.*]

Appeal from District Court, Yuma County; before Justice John H. Campbell.

Action between W. D. Halladay and another and M. B. Hall and another. From the judgment, W. D. Halladay and another appeal. Appeal dismissed.

Wupperman & Wupperman and H. J. Forgy, for appellants. Fred L. Ingraham, for appellees.

PER CURIAM. This case must be dismissed, for the reason that the sureties upon the appeal bond have not justified in accordance with the requirements of paragraph 1516 of the Revised Statutes of 1901, or at all. This statute is mandatory. This court has, therefore, acquired no jurisdiction. McDonald v. Ellis, 4 Ariz. 189, 36 Pac. 37.

The appeal is dismissed.

CAMPBELL, J., not sitting.

(13 Ariz. 235)

TOLAND v. BOARD OF SUPRS OF COCHISE COUNTY.

(Supreme Court of Arizona. April 2, 1910.)

INTOXICATING LIQUORS (§ 66*)—LICENSES—APPLICATIONS—CONSENT OF OWNERS.

Civ. Code 1901, pars. 2874, 2875, requiring the applicant for a liquor license to file the written consent of the owners of a majority of the real estate located within a radius of three miles from the point where the saloon is to be conducted, etc., do not apply where the saloon is to be conducted within an unincorporated town having a population of more than 500 inhabitants.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 66; Dec. Dig. § 66.*]

Application for mandamus by J. T. Toland, against the Board of Supervisors of Cochise County, composed of G. J. McCabe and others, to compel the issuance of a liquor license. Demurrer overruled, and alternative writ issued.

Neale & Sutter, for petitioner. John B. Wright, Atty. Gen., for respondent.

PER CURIAM. The demurrer to the application for a writ of mandamus in this matter raises the question whether paragraph 2874 of the Revised Statutes of the Territory of Arizona is applicable. The

board of supervisors, according to the allegations of the petition, refused to consent to the issuance of a license to the petitioner on the ground that the saloon for which the petitioner desired a license was situated within the unincorporated town of Lowell, and within one mile of the corporate limits of the city of Bisbee, and that the petitioner had failed to file with the clerk of the board of supervisors the written consent of the owners of a majority of the real estate located within a radius of three miles from the point where such saloon is to be conducted, as provided in paragraph 2875 of the Revised Statutes. A majority of the court are of the opinion that these provisions of the statute do not apply, for the reason that the saloon was within the limits of a town having a population of more than 500 inhabitants. The board of supervisors, therefore, had no authority to withhold the consent for the license solely upon the ground of non-compliance with such law. The demurrer that has been interposed is overruled.

As, however, there may exist other reasons for the refusal to consent to the issuance of such license, properly cognizable by the board of supervisors, and within their discretion, we do not at this time order that a peremptory writ of mandamus issue as prayed for in the petition; but the order will be that an alternative writ of mandamus issue, returnable at the next sitting of this court, requiring the respondent to consent to the issuance of the license prayed for, or show cause at that time why such consent should not be given, if other grounds within the discretion of the board exist for the refusal so to grant such consent.

(13 Ariz. 236)

MEADE v. DEMUND.

(Supreme Court of Arizona. April 2, 1910.)

1. APPEAL AND ERROR (§ 591*)—TRANSCRIPT OF REPORTER'S NOTES—SUBSTITUTION FOR ABSTRACT.

The transcript of the reporter's notes does not serve the purpose of the printed abstract on appeal, required by Supreme Court rule 1 (71 Pac. vi).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2616, 2617; Dec. Dig. § 591.*]

2. APPEAL AND ERROR (§ 592*)—DISMISSAL OF APPEAL—ABSENCE OF ABSTRACT AND SUFFICIENT ASSIGNMENTS.

In absence of a printed abstract required by Supreme Court rule 1 (71 Pac. vi), and sufficient assignments of error, an appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2618-2620; Dec. Dig. § 592.*]

Appeal from District Court, Yuma County; before Justice John H. Campbell.

Action between Jennie Meade and A. L. Demund. From a judgment in favor of the latter, the former appeals. Appeal dismissed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Wupperman & Wupperman and Thomas D. Molloy, for appellant. Clement H. Coleman and C. H. Brown, for appellee.

PER CURIAM. In this cause the appellant has failed to file the printed abstract required by rule 1 of this court (71 Pac vi). The transcript of the reporter's notes does not serve the purpose of the abstract required by the rule. The purpose of the abstract is to enable each of the Justices sitting to have a copy of the record before him, and the requirement of the rule must be complied with. Furthermore, none of the assignments of error is sufficiently alleged.

The appeal is dismissed.

CAMPBELL, J., not sitting.

(13 Ariz. 144)

**ATCHISON, T. & S. F. RY. CO. v.
COFFIN et al.**

(Supreme Court of Arizona. April 2, 1910.)

1. CARRIERS (§ 218*) — CARRIAGE OF LIVE STOCK—NOTICE OF CLAIM OF LOSS—VALIDITY.

A stipulation in a contract for the shipment of live stock, made in consideration of a reduced rate, requiring written notice by the shipper to some officer of the company or to the nearest station agent of the initial or delivering carrier, before the stock are removed or mingled with other stock, of any claim for loss or damage en route, is reasonable and valid in absence of a showing that it works hardship in the particular case.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 938, 947; Dec. Dig. § 218.*]

2. CARRIERS (§ 227*) — CARRIAGE OF LIVE STOCK—ACTIONS FOR LOSS—COMPLAINT—ALLEGING PERFORMANCE OF CONDITIONS PRECEDENT—NOTICE OF CLAIM OF INJURY.

Since a stipulation in a contract for the carriage of live stock, requiring notice of claim of loss to be given the carrier before the stock are removed or mingled, is valid if reasonable in the particular case, in an action against the carrier for loss en route, the complaint should allege the giving of such notice if the stipulation is not invalid as a matter of law, or allege facts showing that it would work hardship in the particular case so as to excuse nonperformance.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 953; Dec. Dig. § 227.*]

Appeal from District Court, Yavapai County; before Justice Edward M. Doe.

Action by G. H. Coffin and another, partners as Bayless & Coffin, against the Atchison, Topeka & Santa Fé Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded with instructions to sustain demurrer to complaint.

Paul Burks and John M. Ross (E. W. Camp, of counsel), for appellant. E. S. Clark, J. E. Russell, and H. H. Linney, for appellees.

CAMPBELL, J. This action was brought to recover damages alleged to have been caused by the negligence of the railroad compa-

ny in transporting sheep from Del Rio, Ariz., to Kansas City, Mo. The complaint sets forth that the sheep were transported according to the terms of a bill of lading, a copy of which is attached to the complaint and made a part thereof. The instrument so attached is a special shipping contract, which recites that the shipper assents to its terms in order to obtain the lower of two rates, and is signed by the consignor. The eighth clause of this contract provides: "In order that any loss or damage to be claimed by the shipper may be fully and fairly investigated and the fact and nature of such claim or loss preserved beyond dispute and by the best evidence, it is agreed that as a condition precedent to his right to recover any damages for any loss or injury to his said stock during the transportation thereof, or at any place or places where the same may be unloaded or loaded for any purpose on the company's road, or previous to the loading thereof for shipment, the shipper or his agent in charge of the stock will give notice in writing of his claim therefor to some officer of said company, or to the nearest station agent, or, if delivered to consignee at a point beyond the company's road, to the nearest station agent of the last carrier making such delivery, before such stock shall have been removed from the place of destination above mentioned, or from the place of the delivery of the same to the consignee, and before such stock shall have been slaughtered or intermingled with other stock, and will not move such stock from such station or stockyards until the expiration of three hours after the giving of such notice; and a failure to comply in every respect with the terms of this clause shall be a complete bar to any recovery of any and all such damages."

The complaint does not allege any notice of loss or injury to the sheep given prior to the time they were intermingled with other stock. The defendant demurred to the complaint upon the ground, among others, that it appeared therefrom that the giving of notice under the eighth clause of the contract sued upon was a condition precedent to the maintenance of plaintiff's action, and the giving of such notice should therefore be alleged. The demurrer was overruled. The case went to trial, and at the close of plaintiff's evidence, notice not having been proven, the defendant moved the court to direct a verdict in its favor. This motion was denied. The court was then asked to instruct the jury that such notice was necessary, and that unless it was shown to have been given they must find for the defendant. The court declined to give this instruction. A verdict was returned in favor of the plaintiff, and from the judgment entered thereon, and from the ruling of the court denying a new trial, this appeal is brought.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The assignments of error requiring our attention raise the question as to the necessity of pleading and proving the notice required by the eighth clause of the contract. The trial court, it appears, held the stipulation contained in this clause to be unreasonable. The action is brought upon the contract. The performance of the condition is not alleged, nor is any excuse shown for nonperformance. If it may be said as a matter of law that the stipulation is invalid, it is not necessary that the complaint should contain the allegations indicated, but if it may not be so said, then it would seem logically to follow that where, as here, the action is based upon the special contract, the complaint should either show performance or excuse for nonperformance. *World's Fair Mining Co. v. Powers* (Ariz.) 100 Pac. 957. Authority is not lacking upon the precise point here involved. "If the stipulation is valid, then the giving of notice in accordance with its requirements is a condition precedent to recovery by the owner, and compliance or excuse for non-compliance should be alleged." 8 Cyc. 506.

In *Case v. Railroad Co.*, 11 Ind. App. 517, 39 N. E. 428, where a stipulation to give notice was involved, it is said: "That such a provision as we are considering, where reasonable, must be regarded as a condition precedent, performance of which must be alleged to make the complaint good, was decided in *Express Co. v. Harris*, 51 Ind. 127, followed by this court in *Railroad Co. v. Widman*, 9 Ind. App. 190, 36 N. E. 370. To the same effect is *Railroad Co. v. Simms*, 18 Ill. App. 68."

In *Metropolitan Trust Co. v. Railroad Co.* (C. C.) 107 Fed. 628, the court had under consideration a stipulation in a shipping contract, providing for notice of damage. The court says: "In the complaint there is no allegation that the petitioner made a claim in writing, verified by affidavit, and delivered the same to some proper officer or agent of the receiver, Hunt. Nor does the complaint show any waiver or excuse for a failure so to do. An averment showing the making of the claim under oath, and the delivery of it, as required by the contract, is a condition precedent, and is necessary to constitute a good cause of action." See, also, *Osterhoudt v. Southern Pacific Co.*, 47 App. Div. 146, 62 N. Y. Supp. 134, *Kalina v. Railroad Co.*, 69 Kan. 172, 76 Pac. 438, A., T. & S. F. Ry. Co. v. Means, 71 Kan. 345, 80 Pac. 604, and *St. Louis & S. F. Ry. Co. v. Pearce*, 82 Ark. 353, 101 S. W. 760, 118 Am. St. Rep. 75.

Stipulations in shipping contracts, requiring notice to be given of loss or damage to live stock before permitting the stock to be intermingled with other stock, have been upheld as reasonable in cases too numerous to cite here. They have been collected in exhaustive notes in the ninth and fourteenth volumes of the American and English Annotated Cases, at pages 17 and 416, respectively.

In some states, such stipulations have been held invalid as an attempt upon the part of the carrier to limit its common-law liability. There are cases in which particular stipulations, involving uncertainty as to the agent of the company to whom notice was to be given, have been held unreasonable; and, generally, where to give effect to the stipulation would serve to work a hardship upon the shipper, it is held inapplicable. Many of the cases cited by appellee are of the character first indicated. But it has been held by the Supreme Court of the United States, by whose views upon the subject we are bound, that stipulations requiring notice of damage do not limit the common-law liability of the carrier, and, when reasonable, are valid. *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556; *The Queen of the Pacific*, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419. By the great weight of authority such a stipulation as the one involved in this case is held to be reasonable, in the absence of a showing that in the particular case it serves to work a hardship. In the *Queen of the Pacific*, supra, the court say: "The question is whether, under the circumstances of the particular case, the requirement be a reasonable one or not." Again, in discussing an opinion of the Supreme Court of Texas, in which that court held a stipulation unreasonable, it is said: "The court seemed to assume that the stipulation imposed a restriction which in many cases would deny a right of action, and thereby permit the carrier to contract against his negligence, which is never allowed. The opinion seems to have gone off upon the point that, while the notice as applied to the facts might have been reasonable, it would be unreasonable when applied to a different state of facts. It is unnecessary to say that if, under the circumstances of a particular case, the stipulation were unreasonable, or worked a manifest injustice to the libelants, we should not give it effect."

The purpose of the stipulation is to prevent fraud upon the carrier, to enable the carrier to investigate the claim of the shipper, and, if proper, to adjust it at once. As is said in *Owen v. Railroad Co.*, 87 Ky. 626, 9 S. W. 696: "If executed in good faith, this stipulation must result in a benefit to both the owner of the stock and the carrier."

It follows that a stipulation which is not inherently unreasonable, but which is unreasonable when applied to a certain state of facts, should be met in the complaint by a recital of those facts which would make its application to the case unreasonable, as an excuse for nonperformance; and, in the absence of such a statement of facts, the complaint should be held bad. We are of the opinion that the court erred in overruling the demurrer to the complaint in this case. The judgment of the trial court is therefore reversed, and the case is remanded to the district court, with instructions to sustain

the demurrer; costs in both courts to be paid by appellees.

KENT, C. J., and LEWIS, J., concur. DOAN, J., did not participate in the decision of this case.

(13 Ariz. 266)

VERONDA & RICOLETTO v. DOWDY.

(Supreme Court of Arizona. April 2, 1910.)

1. MINES AND MINERALS (§ 38*) — ADVERSE CLAIMS—DESCRIPTION OF PROPERTY.

In ejectment to recover a mining claim, the complaint, alleging ownership of the claim, subject to the paramount title of the United States, properly describing it by name, giving the mining district, the county and territory where located, and the book and page where the location notice thereof is recorded in the office of the county recorder, sufficiently describes the claim, under the express provisions of Civ. Code 1901, par. 3249.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

2. MINES AND MINERALS (§ 38*) — ADVERSE CLAIMS—DESCRIPTION OF PROPERTY.

A general description being sufficient, such a description is not defective because portions of the claim alleged to be unlawfully withheld are described as "lots 1 and 3 in block B and lot 3 in block A" of the claim, though there be no such legal subdivisions of a mining claim.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

3. MINES AND MINERALS (§ 38*) — ADVERSE CLAIMS—DESCRIPTION OF PROPERTY.

Where premises are known by a particular name or designation, they may be sufficiently described by such name or designation in a complaint in ejectment.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

4. MINES AND MINERALS (§ 38*) — ADVERSE CLAIMS.

Where one has made a valid location on public land after discovery of mineral thereon, mere trespassers, making no claim to the ground under the public land laws, cannot oust him from possession by showing that the land is more valuable for some purpose other than mining.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

Appeal from District Court, Yavapai County; before Justice Richard E. Sloan.

Action by J. T. Dowdy against Veronda & Ricoletto. Judgment for plaintiff, and defendants appeal. Affirmed.

Ross & O'Sullivan, for appellants. Robert E. Morrison, for appellee.

CAMPBELL, J. Appellee located a placer mining claim upon the unoccupied public lands of the United States. Thereafter appellants moved into and occupied some buildings situated within the limits of the claim. This action of ejectment was brought to recover possession of the premises and for rent.

Appellants complain of the overruling of their demurrer to the complaint, insisting that the description of the property is insufficient. The complaint alleges ownership of the mining claim, subject to the paramount

title of the United States, properly describing it by name, giving the mining district, the county and territory where situated, and the book and page where the location notice thereof is recorded in the office of the county recorder. This is a sufficient description of a mining claim. Paragraph 3249, Rev. St. 1901.

The particular portions of the claim, the possession of which is alleged to be unlawfully withheld, are described as being "lots 1 and 3 in block B and lot 3 in block A" of said claim. It is contended that, there being no such legal subdivisions of a mining claim, the description of the premises sought to be recovered is insufficient. It is sufficient to give a general description of the premises. Barclay v. Howell, 6 Pet. 498, 8 L. Ed. 477.

Where further particular description, by designations by which the premises are known and may be identified by proof, are given, it benefits, rather than prejudices, the defendant. If such particular description should be held essential, the description here given is sufficient, since, where premises are known by a particular name or designation, they may be sufficiently described by such name or designation. Castro v. Gill, 5 Cal. 40; Doll v. Feller, 16 Cal. 432; Hildreth v. White, 66 Cal. 549, 6 Pac. 454; Beard v. Federy, 3 Wall. 478, 18 L. Ed. 88; 15 Cyc. 93. The demurrer was properly overruled.

Error is assigned that the trial court found against appellants' contention that the ground covered by the claim does not contain valuable mineral deposits, and counsel cite various decisions of the Land Department and of the courts bearing upon the rights of a mineral claimant as against persons claiming the land for other purposes. The authorities cited have no application to the facts of this case, but are confined to the rights of claimants of different classes claiming under the public land laws. Appellee made a valid location, after a discovery of mineral. The appellants, being mere trespassers, making no claim to the ground under the public land laws, cannot, by showing that the land is more valuable for some purpose other than mining, oust him from possession.

The judgment of the district court is affirmed.

KENT, C. J., and DOAN, LEWIS, and DOE, JJ., concur.

(13 Ariz. 237)

HICKS, County Treasurer, et al. v. KRIGBAUM (O'CONNELL, Intervener).

(Supreme Court of Arizona. April 2, 1910.)

1. STATUTES (§§ 61, 174, 175, 181*) — CONSTRUCTION.

The court in construing a statute should aim to give it a sensible construction, and such

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as will effectuate the legislative intent, and, if possible, avoid an absurd conclusion, and avoid making the statute invalid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 56, 254, 259; Dec. Dig. §§ 61, 174, 175, 181.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—BONDS—ELECTIONS—QUALIFIED VOTERS—"TAXPAYER OF THE DISTRICT."

Civ. Code 1901, par. 2182, authorizing in any school district the submission to the "taxpayers of the district" the question of the issuance of bonds, when read, as it must be, in connection with paragraph 2185, providing that the election shall be held, except as otherwise provided in the title, in conformity with the general election laws, and in connection with paragraph 2186, providing that the money for the redemption of the bonds shall be raised by taxation on the taxable property in the district, and, in connection with paragraph 2176, making every adult person, who is a citizen of the United States, and who has been a resident of a school district for 30 days, and who is a parent or guardian of a child of school age residing in the district, or who has paid a tax during the preceding year, entitled to vote at any school district election, etc., is not ambiguous and uncertain for failing to provide whether taxpayers include only residents of the district, or non-residents who are taxpayers, and the persons qualified to vote at such an election are those possessing the qualifications prescribed in paragraph 2176, and the phrase "taxpayer of the district" is limited to those who pay taxes on property within the district, and the paragraph so construed is not in conflict with the organic act (Rev. St. U. S. 1873, § 1800), relating to the qualifications of voters.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226; Dec. Dig. § 97.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6890, 6891.]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—NOTICE OF ELECTION—STATUTORY REQUIREMENTS.

A substantial compliance with the statute prescribing the notice of an election is all that is required.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226; Dec. Dig. § 97.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—ELECTIONS—NOTICE—SUFFICIENCY.

Where notices of an election in a school district were posted in three public places in the district, and by publication once a week for three weeks in a newspaper, there was a substantial compliance with Civ. Code 1901, par. 2183, providing that an election shall be called by posting notices in three public places, and by publication in a newspaper not less than once a week for three successive weeks; and the fact that there was a defective publication in another newspaper did not affect the validity of the election.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226; Dec. Dig. § 97.*]

5. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—ELECTIONS—STATUTES.

Civ. Code 1901, par. 2184, authorizing the board of supervisors to give notice of a school district bond election, which notice shall contain the hours during the day, not less than six, in which the polls will be open, authorizes the board to designate the hours during the day on which the election shall be held, without regard

to the general election laws, or to the law relating to the elections of school trustees.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226; Dec. Dig. § 97.*]

6. PLEADING (§ 34*)—CONSTRUCTION OF ALLEGATIONS—"MORE THAN ONE."

An allegation, in a pleading contesting the validity of an election in a school district, authorizing the issuance of bonds, that "more than one" person voted in favor of the bonds who was not a taxpayer of the district is tantamount to an allegation that two votes were cast by persons who were not taxpayers of the district.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 34.*]

7. ELECTIONS (§ 239*)—"VOTES CAST."

Blank ballots are not "votes cast."

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 218; Dec. Dig. § 239.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7360, 7361.]

8. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—CONTESTS—SPOILED VOTES.

A complaint, in a suit to contest the validity of a school district election, authorizing the issuance of bonds, which alleges the number of votes cast, of which four were "spoiled," requires the deduction of the spoiled ballots in determining the number of votes cast for and against the issuance of bonds, for the word "spoiled" in the complaint must be construed in the light of Civ. Code 1901, par. 2340, providing that spoiled ballots returned by a voter shall be canceled.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 97.*]

Appeal from District Court, Cochise County; before Justice Fletcher M. Doan.

Action by J. C. Krigbaum against O. W. Hicks, as County Treasurer of Cochise county, and others, constituting the board of supervisors of the county, in which J. M. O'Connell intervened and prayed for the relief prayed for by plaintiff. From a judgment granting the relief prayed for, defendants appeal. Reversed and remanded.

The Attorney General, for appellants. Neale & Sutter and J. M. O'Connell, for appellees.

LEWIS, J. This is an appeal from a judgment entered in favor of the plaintiff and the intervener, joined as appellees, against the defendants and appellants, enjoining and restraining the defendant C. W. Hicks, as treasurer of Cochise county from delivering certain bonds of school district No. 2 within said county, in the aggregate sum of \$92,000, to the purchaser thereof, and enjoining and restraining the defendants O. J. McCabe, J. J. Bowen, and J. Scheerer, members of the board of supervisors of said county, from authorizing such delivery or proceeding further with the issuance, sale, or delivery of said bonds, and from the further levy of any taxes for the payment of the interest or redemption of said bonds, or any part thereof, and further decreeing said bonds void. J. G. Krigbaum, one of the appellees and a taxpayer of school district No. 2,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

commenced this action in the court below by his complaint, praying for the relief subsequently granted. Thereafter J. M. O'Connell, also a taxpayer of the district, upon leave granted filed his complaint in intervention, praying for similar relief. To these complaints the defendants interposed general demurrers, which demurrers were by the trial court overruled, and, the defendants electing to stand thereon, judgment was duly entered in favor of the plaintiff and intervenor and against the defendants. The appellants assign error in the overruling of the general demurrers to the complaint, and to the petition in intervention, and error in rendering judgment in favor of the complainant and intervenor.

The most important question presented is the validity of paragraph 2182 of the Revised Statutes of 1901, under which the school bond election at which these bonds were authorized was held. It reads: "Sec. 2182 (sec. 53). The board of trustees of any school district, may, when in their judgment it is advisable, and must upon petition of a majority of the heads of families residing in the district, call an election and submit to the taxpayers of the district whether the bonds of such district shall be issued and sold for the purpose of raising money for purchasing or leasing school lots, and for building one or more school houses, and supplying the same with furniture, necessary apparatus, and improving the grounds, and for liquidating any indebtedness already incurred for such purposes." Appellees contend that this statute is void for the reason that, by the use of the phrase "taxpayers of the district," it permits the submission of the question to persons not qualified to vote under the organic act (Rev. St. U. S. 1878, § 1860), irrespective of age, residence, or citizenship, and for the further reason that it is ambiguous and uncertain, in that it does not appear whether taxpayers include only residents of the district, or whether it includes nonresidents who are taxpayers of the district, or whether it includes residents of the district who pay taxes on property outside the district.

If a meaning involving the conflict, as well as the absurdities and ambiguities thus suggested, must be adopted, then the law is void. We should, however, hesitate before accepting such an interpretation, and endeavor to discover an alternative consistent with the organic act and in itself reasonable. "It must not be lost sight of that the attitude of courts is not one of hostility to acts whose constitutionality is attacked. On the contrary, all the presumptions are in their favor, and courts are not to be astute in finding or sustaining objections." *In re Sugar Notch Borough*, 192 Pa. 353, 43 Atl. 985. "Where any particular construction which is given to an act leads to gross injustice or absurdity, it may generally be said that there is fault in the construction, and that such an

end was never intended or suspected by the framers of the act." *Peckham, J.* (dissenting), in *People v. Board, etc.*, of Onondaga County, 129 N. Y. 395, 445, 29 N. E. 327, 14 L. R. A. 624. "Nothing is better settled than that statutes should receive sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." *Lau Ow Bew v. U. S.*, 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340, and cases there cited. "Where any particular construction would lead to an absurd consequence, it will be presumed that some exception or qualification was intended by the Legislature to avoid such conclusion." *Com. v. Kimball*, 24 Pick. (Mass.) 366, 370, 35 Am. Dec. 326; 1 Bl. Comm. 91. "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law, in such cases, should prevail over the letter." *U. S. v. Kirby*, 74 U. S. 482, 19 L. Ed. 278. "Such construction ought to be put upon a statute as may best answer the intention which the makers had in view. * * * The intention * * * is sometimes to be collected from the cause or necessity of making a statute; at other times, from other circumstances. Whenever this can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute. * * * A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter. * * * A thing which is within the letter of a statute is not within the statute, unless it be within the intention of the makers." *Bac. Abr.*, Statute, 1, 5, and authorities there cited; *People v. Insurance Co.*, 15 Johns. (N. Y.) 358, 380, 381, 8 Am. Dec. 243; *Riggs v. Palmer*, 115 N. Y. 506, 509-511, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819; *State v. Boyd*, 2 Gill & J. 365, 374; *Chesapeake & Ohio Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. 1, 152; *City of Baltimore v. Root*, 8 Md. 95, 105, 63 Am. Dec. 696; *New England Car Spring Co. v. Baltimore & O. R. Co.*, 11 Md. 81, 90, 69 Am. Dec. 181; *Oates v. Bank*, 100 U. S. 239, 244, 25 L. Ed. 580. "A rigid and literal reading would in many cases defeat the very object of the statute. * * * Every statute ought to be expounded, not according to the letter, but according to the meaning. * * * And the intention is to govern, although such construction may not in all respects agree with the letter of the statute. The reason and object of a statute are a clue to its meaning, and the spirit of the law and the intentions of its makers are diligently to be sought after, and the letter must

bend to these." *Tracy v. Railroad Co.*, 38 N. Y. 433, 437, 98 Am. Dec. 54; *Rutledge v. Crawford*, 91 Cal. 528, 533, 27 Pac. 779, 13 L. R. A. 761, 25 Am. St. Rep. 212; *In re Opinion of the Justices* (1891) 66 N. H. 629, 33 Atl. 1076. "In the construction of a statute, it is the intent and purpose of the law, not the letter, that must control, and the whole statute must be considered." *Leibes v. Steffy*, 4 Ariz. 11, 32 Pac. 261.

Paragraph 2182, the one in question, occurs in title 19 of the Revised Statutes, treating the subject "Education." Paragraph 2183 provides the method of the calling of the bond election. Paragraph 2184 provides the form of notice of such election. Paragraph 2185 provides: "Such election shall be held, except as otherwise provided in this title, in conformity with the general election laws of the territory of Arizona." Conceding for the moment, that paragraph 2182 is in terms in conflict with the organic act, and so ambiguous and uncertain as to render the law void, we here have other matter which must be looked to in placing upon it a true construction. We have a right, in fact it is our duty, to read into the paragraph such other portions of the act as properly explain and qualify it. If by so doing the general term "taxpayers of the district" be limited so as to free it from the intrinsic absurdity and ambiguity suggested, and to harmonize it with the requirements of the organic act, it is then a valid statute. Reading paragraph 2185 in connection with paragraph 2182, we are of the opinion that it furnishes a reference to other provisions of the statutes limiting and defining the expression "taxpayers of the district." The words "except as otherwise provided in this title," in paragraph 2185, exclude the application of the general election laws as the test of the qualification of voters at a school bond election. Paragraph 2176, tit. 19, restricts the general expression "taxpayers of the district." Paragraph 2176, in conjunction with paragraph 2182, prescribes the qualifications of voters at a school bond election. Thus interpreted, paragraph 2182 is not in conflict with the organic act. Nor have we in so determining lost sight of the argument of the appellees, to the effect that paragraph 2176 occurs in those sections of the title which particularly relate to the election of school trustees. A reading of the section discloses that the qualifications therein laid down are not merely for elections at which school trustees are to be chosen, but for any school district election.

For the reasons already stated, the expression "taxpayers of the district" in paragraph 2182 is not ambiguous and uncertain in that it does not appear whether it includes only residents of the district or whether it includes nonresidents who are taxpayers of the district. There remains the suggestion that, even so interpreted, it is ambiguous in that it may mean a taxpayer residing in the dis-

trict who pays taxes upon property within the district, or one who pays upon property without the district. We are of the opinion, in view of the provisions of paragraph 2186, providing that the money for the redemption of said bonds and the payment of interest thereon shall be raised by taxation upon the taxable property in said district, that both the legislative intent and a reasonable construction require us to read the phrase to mean those who pay taxes upon property within the school district.

The case of *Cronley v. City of Tucson*, 6 Ariz. 235, 56 Pac. 876, is relied upon by appellees. In that case this court had under consideration section 2, Act No. 76, Laws Ariz. 1897, which reads: "At any city election, every taxpayer shall be entitled to vote, without distinction of sex, but nothing herein shall be considered as abridging the right of elective franchises possessed by any person." A reading of the entire act discloses that section 2 is nowhere aided, construed, or limited by reference either to other portions thereof, or to other laws of the territory. Nor can there be an implied limitation upon the term used without making the section meaningless and inoperative. The decision holding this section invalid as in conflict with the organic act is correct, and is distinguished from the case at bar. For the foregoing reasons, and upon the following authority, we hold that paragraph 2182 of the Revised Statutes of 1901 is valid: *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526; *Hannibal v. Fauntleroy*, 105 U. S. 408, 26 L. Ed. 1103; *Elkin v. Deshler*, 25 N. J. Law, 177.

Our attention is next called to the insufficiency of the publication of the notice of election. Paragraph 2183 of the Revised Statutes of 1901 provides: "Such election must be called by posting notices signed by the board, in three of the most public places in the district not less than 20 days before the election; and if there is a newspaper published in the county, by publishing such notice therein, not less than once a week for three successive weeks." The order of the board of trustees required "that notices of holding said election be given by posting in three of the most public places in said district No. 2 and by publishing at least once a week for three successive weeks, beginning April 4, 1908, in the *Review and Miner*, daily newspapers published in the city of Bisbee." It is conceded that the posting was sufficient. It is also conceded that there was a sufficient publication in the *Miner*. The publication in the *Review* was insufficient. "It is not an unusual provision that notice of a coming election shall be published in one or more newspapers for a certain time before election day. The sole purpose of this being to warn the electors that an election is to be held, it is generally held that a substantial compliance with the statute is all that is required." 15 Cyc. 324. We hold that the elec-

tion was not vitiated by the irregular publication in the Bisbee Review; publication in one newspaper being a sufficient compliance with the statute. *Jordan v. Hayne*, 36 Iowa, 9; *Waycross v. Youmans*, 85 Ga. 708, 11 S. E. 865.

The appellees further contend that the election is invalid for the reason that the trustees in their notice of election specified that the polls should remain open from 9 o'clock a. m. to 5 o'clock p. m. They urge that paragraph 2185 of the Revised Statutes of Arizona, relating to elections for issuance of bonds, provides: "Such election shall be held, except as otherwise provided in this title, in conformity with the general election laws of the territory of Arizona," and that the hours fixed by the board were neither in conformity with the hours specified in the general election law (paragraph 2354), nor in conformity with paragraph 2174, providing for elections for school trustees. Paragraph 2184 of the statute relating to school bond elections expressly authorizes the board of trustees to give notice of such election, and in subdivision 3 thereof provides that said notice shall contain "the hours during the day, not less than six in which the polls will be open." We are of the opinion that under this statute the board may designate the hours during which the election shall be held, without regard to the general election laws, or to the law relating to the election of school trustees.

There remains for our consideration the question as to whether or not there are sufficient allegations in the complaint and petition in intervention to show that less than two-thirds of the votes cast at the said bond election were in favor of issuing such bonds. The allegations in the complaint and petition in intervention are substantially the same. The complaint alleges that thereafter the return of said election having been made, the said board of trustees met and canvassed said returns, and it appeared therefrom that 427 votes had been cast at said election with the following results: Spoiled, 4 votes; blank, 2 votes; bonds, yes, 285 votes; bonds, no, 136 votes. That at said election more than one person voted in favor of the issuance of said bonds who was not a taxpayer of said school district No. 2. We agree with the contention of the appellants that the latter allegation is tantamount to an allegation that two votes were cast by persons who were not taxpayers of the district. Counsel have argued the question as to the proper meaning of the words "votes cast," and as to whether or not illegal votes and votes which were unintelligible, or marked in such manner as to subject them to rejection, should be included in the aggregate and considered as votes cast. We do not find it necessary to decide this question. The allegation of the complaint is that four votes are "spoiled."

We must construe the expression "spoiled," as used in the complaint, in the light of the provision of paragraph 2340 of the general election law, which provides: "No person shall take or remove any ballot from the polling place before the close of the polls. If any voter spoil a ballot, he may successively obtain others, one at a time, not exceeding five in all, upon returning each spoiled one. The ballots thus returned shall be immediately cancelled, and, together with those not distributed to the voters, shall be reserved and shall be secured in sealed packages and returned to the clerks from whom originally received." It is conceded by counsel upon both sides that the two blank ballots should not be considered as votes cast; they being in no sense the expression of the will of an elector. We must also deduct the four spoiled ballots. The number of votes cast in favor of the bonds exceed, after the rejection of the two illegal votes alleged, more than two-thirds of the votes cast at such election.

The judgment of the trial court is reversed, and the cause is remanded, with instructions to sustain the demurrers to the complaint and petition in intervention, with leave to amend within such time as the trial court may determine.

KENT, C. J., and CAMPBELL and DOE, JJ., concur.

(13 Ariz. 245)

SHANNON COPPER CO. v. POTTER.

(Supreme Court of Arizona. April 2, 1910.)

1. CORPORATIONS (§ 116*)—SALE OF STOCK—CONTRACTS—CONSTRUCTION—RIGHTS OF SELLERS.

A contract of sale of corporate stock, which recites that the corporation and an individual are parties of the first part, and which provides that the parties of the first part agree to sell the stock of the corporation, and that the buyer agrees to pay therefor a specified sum at specified times, with semiannual interest, etc., executed when the individual was the legal owner of most of the stock of the corporation, and the equitable owner of the remainder, shows that the rights of the corporation and the individual are several and not joint.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 116.*]

2. EVIDENCE (§ 451*)—PAROL EVIDENCE—CONTRACTS—AMBIGUITY.

The patent ambiguity of a written contract which cannot be explained by parol is that which remains uncertain after the court has received evidence of the surrounding circumstances throwing light on the intent of the parties, and where the court, after placing itself in the situation of the parties at the time of executing the instrument, and with full understanding of the words, cannot ascertain the intent of the parties from the language of the instrument, it cannot be sustained by the introduction of evidence adding new terms.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2085-2092; Dec. Dig. § 451.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. EVIDENCE (§ 459*)—PAROL EVIDENCE—CONTRACTS—AMBIGUITY.

Where a contract of sale of corporate stock recited that the corporation and an individual were parties of the first part, and provided that the parties of the first part agreed to sell the stock of the corporation, and that the buyer agreed to buy at a specified price, and that the first partial payment should be made to a specified bank, and that the balance should be paid in installments at the same bank, but was silent as to whom payment of the semi-annual interest provided for should be made, parol evidence of the situation of the parties at the execution of the contract showing that the individual was the legal owner of most of the stock and the equitable owner of the remainder, and that the bank, with the knowledge of the buyer, applied the money received from the buyer to the personal use of the individual, was admissible to explain the ambiguity resulting from the failure to provide to whom payment of the interest should be made, and showed that the individual was entitled to the interest.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2109-2114; Dec. Dig. § 459.*]

4. SALES (§ 54*)—CONSTRUCTION—LIBERAL CONSTRUCTION.

A seller in a contract of sale reduced to writing by a stenographer of the buyer is entitled to a favorable construction of the contract, under the rule that one who takes an agreement prepared by another and on its faith incurs obligations, or parts with his property, should have a construction given to the instrument favorable to him.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 54.*]

5. APPEAL AND ERROR (§ 1054*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where a cause was tried by the court without a jury, the error in admitting incompetent evidence was not reversible because the court on appeal will presume that the trial court ignored such evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.*]

Appeal from District Court, Graham County; before Justice E. W. Lewis.

Action by Dell M. Potter against the Shannon Copper Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A written contract was entered into in which the Clifton Northern Railroad Company, a corporation, and Dell M. Potter were recited to be the parties of the first part, and Shannon Copper Company the party of the second part. By the terms of the contract, among other matters, the party of the first part agreed to sell the Shannon Copper Company 51 per cent. of the capital stock of the railroad company; the entire capitalization being \$50,000, divided into 500 shares of the par value of \$100 each. And the Shannon Copper Company agreed to pay therefor the sum of \$10,000 in specified installments, through a specified bank. A further provision of the contract is as follows: "And the party of the second part, for and in consideration of the faithful performance of the covenants herein contained by the parties of the

first part, hereby agrees to pay an amount equal to ten per cent. (10%) per annum from January 1, 1909, on the capital stock of the aforementioned Clifton Northern Railroad Company, i. e., five thousand dollars (\$5,000.00) per annum, for a period of ten (10) years; such interest to be paid semiannually." The \$10,000 was paid and received by Potter, and the 51 per cent. of the capital stock of the railroad company delivered to the copper company. The first two semiannual interest charges were paid into the treasury of the railroad company, instead of to Potter, and were expended in betterments and maintenance of the road.

Potter brought suit against the corporations, alleging, among other things: "That in fact the words 'parties of the first part' are frequently used in said contract where they refer to and mean plaintiff only; that the said contract recites 'that the parties of the first part are owners of the majority of the capital stock of the Clifton Northern Railroad Company,' whereas, in truth, as was well known prior to and at the time of the execution of the said contract to all the parties thereto and was intended by them to be expressed therein, the plaintiff was then the legal owner of all but 4 shares of the capital stock of the Clifton Northern Railroad Company, to wit, of 496 shares thereof, and was the equitable owner of the remaining 4 shares thereof, while the Clifton Northern Railroad Company was not the owner, legal or equitable, of any of the capital stock of the said company; that the said contract recites 'that the said parties of the first part hereby agree to sell, assign and transfer to the said party of the second part, fifty-one per cent. (51%) of the capital stock of the said Clifton Northern Railroad Company,' whereas, in truth, that was the agreement only of the plaintiff, as was then and theretofore well known to all the parties to the said contract"—and recovered judgment for the amount of the said interest installments so paid into the treasury of the railroad company, this appeal being from such judgment.

Ben Goodrich and M. J. Egan, for appellant. Frederick S. Nave, for appellee.

DOE, J. The contract expressly provided that the first payment should be made to a specified bank, and, at the conclusion of the recitals providing for the payment of the several installments to be made before the delivery of the stock, they are expressly required to be made to the same bank, yet that portion of the contract providing for the payment of the semiannual interest installments is silent as to whom they shall be paid, and is, to that extent, ambiguous.

Assuming the correctness of the finding of the lower court that at the time of the execution of the contract Potter was the legal

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

owner of most of the stock of the railroad company and the equitable owner of the remainder, the recital in the contract "that the parties of the first part were the owners of a majority of the stock of the railroad company" is only a partial truth. Although Potter and the railroad company are recited to be "the parties of the first part," it by no means follows that their liability or interest is joint. *Consolidated Canal Co. v. Peters*, 5 Ariz. 80, 46 Pac. 74; *Berry Harvester Co. v. Wood M. & R. Mach. Co.*, 152 N. Y. 540, 46 N. E. 952; *Goldsmith v. Sachs* (O. C.) 17 Fed. 728. In the light of the surrounding circumstances as disclosed by the evidence, we think the interest of the parties of the first part was several rather than joint.

The rule, as stated by Lord Bacon, that parol evidence is inadmissible to explain a patent ambiguity, has generally been thought too broad, and, even where followed, has usually been limited in its application. The rule is, we think, correctly stated as follows: "The true rule with regard to patent ambiguities must be taken to be this: The patent ambiguity which cannot be explained by parol evidence is that which remains uncertain after the court has received evidence of the surrounding circumstances and collateral facts which are of such a nature as to throw light upon the intention of the parties. In other words, and more generally speaking, if the court, after placing itself in the situation in which the parties stood at the time of executing the instrument, and with full understanding of the force and import of the words, cannot definitely ascertain the meaning and intention of the parties from the language of the instrument thus illustrated, it is a case of incurable and hopeless uncertainty, and the instrument is so far inoperative and void; and it cannot be sustained or rendered operative by the introduction of evidence which would necessarily have the effect of adding new terms to the writing." 17 Cyc. 682, and see authorities there cited. There are many cases which entirely ignore the distinction and hold that a patent as well as a latent ambiguity may be explained by parol evidence. *Jenny Lind Co. v. Bower*, 11 Cal. 199; *Ripon College v. Brown*, 66 Minn. 179, 68 N. W. 837; *Osborne v. Stringham*, 1 S. D. 406, 47 N. W. 406; *Conservative Realty Co. v. St. L. Brewers' Association*, 133 Mo. App. 261, 113 S. W. 231; *Meyers v. Maverick* (Tex. Civ. App.) 28 S. W. 716; *Gentile v. Crossan*, 7 N. M. 589, 38 Pac. 247. We think it entirely immaterial whether the ambiguity in the contract under consideration be patent or latent, as by the aid of extrinsic evidence the true intent of the parties can and has been made to clearly appear.

It is urged that the evidence does not sustain the findings and judgment of the lower

court. While the parties met and agreed upon the terms of the contract, the phraseology in which it was expressed was left to a stenographer in the employ of the copper company. Under such conditions Potter is entitled to a favorable construction of the contract. "A party, who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him." *Noonan v. Bradley*, 76 U. S. 394, 19 L. Ed. 757.

It seems apparent from the evidence that Potter received the money paid through the bank and applied the same to his personal use, and that this must have been known to and expected by the copper company, and this practical construction of the contract by the parties is entitled to great weight as tending to throw light upon the intention of the parties as to who should receive the remaining payments. *Powers v. Worlds Fair M. Co.*, 10 Ariz. 6, 86 Pac. 15.

It seems clear that the semiannual payments were a part, and the principal part, of the consideration for the sale of the railroad stock, and, as all the stock sold to the copper company was the sole property of Potter, we can only conclude that it was the intention of the parties that such payments should go to the stockholders in proportion to their several holdings.

No suggestion is made that proper evidence was excluded, and, if any immaterial or incompetent evidence was admitted, it will be presumed in this court, the case having been tried below before the court without a jury, that the court ignored such improper evidence. *Abernathy v. Reynolds*, 8 Ariz. 173, 71 Pac. 914; *Miller v. Green*, 3 Ariz. 207, 73 Pac. 399; *California Development Co. v. Yuma Valley Co.*, 9 Ariz. 366, 84 Pac. 88; *Seaverns v. Costello*, 8 Ariz. 308, 71 Pac. 930; *U. S. v. Marks*, 5 Ariz. 405, 52 Pac. 773; *Boston Co. v. Lewis*, 3 Ariz. 5, 20 Pac. 310.

No error appearing in the record, the judgment is affirmed.

KENT, C. J., and DOAN and CAMPBELL, JJ., concur.

(13 Ariz. 253)

UNITED STATES v. WONG LEE FOO.

(Supreme Court of Arizona. April 2, 1910.)

1. ALIENS (§ 32*)—EXCLUSION—CHINESE PERSON—NATURE OF PROCEEDINGS.

Exclusion proceedings under the Chinese Exclusion Acts are not criminal in their nature, so that a defendant therein cannot demand bail as one accused of crime; its allowance being at most discretionary.

[Ed. Note.—For other cases, see *Aliens*, Dec. Dig. § 32.*]

2. ALIENS (§ 32*)—EXCLUSION—CHINESE—PROCEEDINGS—BAIL PENDING APPEAL—RIGHT.

Act Cong. Nov. 3, 1893, c. 14, § 2, 28 Stat. 8 (U. S. Comp. St. 1901, p. 1322), providing

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that an order of deportation of a Chinese person shall be executed by the United States marshal with all convenient dispatch, and pending the execution of such order such person shall not be admitted to bail, does not prevent the District Judge from granting bail in his discretion, pending appeal to him from an order of deportation of a commissioner; the commissioner's order not being necessarily final, though such discretion should be sparingly exercised, in view of the object of the Chinese exclusion law, which was to prevent competition of Chinese labor with American labor.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.*]

Campbell, J., dissenting.

Appeal from Order of Justice Fletcher M. Doan.

Wong Lee Foo, a Chinese person, was ordered deported by an order of a United States commissioner. An appeal from the order of deportation was taken to the judge of the district court of the Second judicial district. Pending the appeal the appellant applied for and was admitted to bail by an order of the judge of the district court. From such order admitting to bail an appeal has been taken to this court by the United States. Affirmed.

J. L. B. Alexander, U. S. Att., and George D. Christy, Asst. U. S. Att. Ben Goodrich and D. L. Cunningham, for appellee.

KENT, O. J. The question raised by this appeal is whether the judge of the District Court has the right to enlarge on bail pending appeal a Chinaman who has been ordered deported by a United States commissioner as being unlawfully within the United States. It is contended by the appellant that such judge is prohibited from granting bail by the provisions of the act of Congress approved November 3, 1893 (Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 8 [U. S. Comp. St. 1901, p. 1322]), reading as follows: "Such order of deportation shall be executed by the United States marshal of the district within which such order is made, and he shall execute the same with all convenient dispatch; and pending the execution of such order such Chinese person shall remain in the custody of the United States marshal, and shall not be admitted to bail." Proceedings under the Chinese Exclusion Acts are not criminal in their nature. *Fong Yue Ting v. United States*, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905. It follows, therefore, that a Chinaman whose deportation is sought by the United States has not the right to demand bail as has a person accused of a crime. The allowance is at most discretionary with the judge. *United States v. Fah Chung (D. C.)* 132 Fed. 109; *In re Ah Tai (D. C.)* 125 Fed. 795.

In the case last cited the District Court for the District of Massachusetts held that the statute in question did not operate to prevent the District Judge from admitting the Chinaman to bail pending an appeal to him

from the order of deportation. The court recognized the fact that in the deportation of Chinese the proceedings are *sui generis*; that in many jurisdictions it is the practice to take bail at some stage of the proceedings, both before the commissioner's hearing and after the appeal to the District Judge, and that the taking of bail at some stage of the proceedings is impliedly recognized in the prohibition contained in the clause of the statute in question. The court then proceeded to say, referring to the statute: "But this clause applies only where the order of deportation is final, and it is inapplicable while an appeal from the decision of the commissioner is pending. That an appeal from the judgment of the commissioner is analogous to an appeal from the judgment of an inferior court was said in 22 Op. Attys. Gen. 340. Pending an appeal it is not the duty of the United States marshal to deport the Chinaman with all convenient dispatch, and so there is no sufficient reason why 'pending the execution of such order, the Chinese person shall not be admitted to bail.' Even after judgment of deportation by the judge, a Chinaman was temporarily discharged from custody because the marshal was without means of deporting him. *Ny Look (C. C.)* 56 Fed. 81. To prevent a release upon bail under those circumstances, the prohibition just quoted was inserted by Congress." We agree with the conclusion reached by the learned court. But for the statute the judge has the inherent power to admit to bail in such a proceeding, and it seems to us, while the construction is not entirely free from doubt, that the language of the statute does not in terms prohibit it after the order of deportation has been issued when an appeal has been lodged. The commissioner's order is not then necessarily final. It is true that, under the practice as it exists in some jurisdictions, when the appeal is dismissed, the commissioner's order is then carried into effect, and in such case the practical result is that the execution of the commissioner's order is merely suspended, and no new order of deportation is made; but, on the other hand, where the matter is heard by the District Judge upon the merits, the case is tried *de novo*, and not upon the record before the commissioner, and if the result of such trial is an order of deportation, a new order is made by the District Judge, and the commissioner's order is not suspended, but becomes inoperative. *Liu Hop Fong v. United States*, 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888. The precise question before us has been decided by two courts adversely to the contention of the appellee, but no reasons for the decision in either case were given, except that the statute was prohibitory. *Chan Gun v. United States*, 9 App. Cas. (D. C.) 290; *United States v. Loy Too (D. C.)* 147 Fed. 750. The question has not been passed upon as yet by the Supreme Court of the United

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States. We believe that, as the statute does not in terms prohibit the taking of bail pending the appeal, it is within the power of the District Judge to grant bail in his discretion; but, as the general purpose of the exclusion laws is to prevent the competition of Chinese labor with that of our citizens, the discretion so vested should be exercised sparingly, and with regard to the circumstances of the particular case, so that Chinamen may not be able to defeat the purpose and policy of the law by giving bond and having their liberty after the order of deportation has been made, and pending the appeal.

The order appealed from is affirmed.

LEWIS and DOE, JJ., concur. CAMPBELL, J., dissents.

(13 Ariz. 253)

JUNG GOON JOW v. UNITED STATES.

(Supreme Court of Arizona. April 2, 1910.)

1. ALIENS (§ 32*)—EXCLUSION—CHINESE PERSONS—HEARING.

In deportation proceedings under the Chinese exclusion act (Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 8 [U. S. Comp. St. 1901, p. 1322]), in which defendant was arrested and brought before a United States district judge, the case could not be referred to a United States commissioner, and judgment of deportation rendered upon the evidence in his report; defendant being entitled to a judgment upon a hearing of the witnesses before the District Judge personally.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 94; Dec. Dig. § 32.*]

2. BAIL (§ 47*)—AUTHORITY TO ALLOW.

The power to allow bail pending appeal is inherent with courts of general jurisdiction, unless prohibited by statute.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 165; Dec. Dig. § 47.*]

3. ALIENS (§ 32*)—EXCLUSION—PROCEEDINGS—APPEAL—BAIL.

Under the Chinese Exclusion Act (Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 8 [U. S. Comp. St. 1901, p. 1322]), providing that an order of exclusion shall be executed by the United States marshal with convenient dispatch, and, pending its execution, defendant shall not be admitted to bail, a Chinese person is not entitled to bail pending appeal from an order of deportation of a district judge to the territorial Supreme Court; the case not being tried de novo on such appeal, so that the order is merely suspended pending appeal, leaving the statutory provision operative.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.*]

Appeal from District Court, First Judicial District; before Justice John H. Campbell.

Deportation proceedings by the United States of America against Jung Goon Jow. From an order of deportation, defendant appeals. Reversed.

The appellant, a person of Chinese descent, was arrested and brought before the District Judge of the First Judicial District, charged with being unlawfully in the United States. The judge referred the case to a United States court commissioner to take testimony and report to him. The commissioner re-

ported, recommending the discharge of the appellant, to which report exceptions were filed, and upon the testimony contained in the report, and without further examination of witnesses, the judge ordered the appellant deported. From which order this appeal is taken.

Edwin F. Jones, for appellant.

DOE, J. Three questions are raised by the assignments of error; the first being whether the judge had the power to refer the case and to render judgment upon the evidence contained in the commissioner's report. Because a reference to take testimony and report is unauthorized in cases where trial by jury is a matter of right, it does not follow that the reference may be made when such right does not exist. In the absence of statutory authority therefor, the classes of cases which may be referred are well defined, and include none analogous to this. Our attention has been called to but one decision directly in point. In *U. S. v. Lee Lip* (D. C.) 100 Fed. 842, this question was directly involved, and Mr. District Judge Coxe said concerning it: "Unless my attention is called to some authority which I have not yet seen, I shall hold: (1) That the statute directing that Chinese persons shall be brought before the United States commissioners clothes those officers with jurisdiction. (2) So far as I have been able to observe, there is not, from the beginning to the end of legislation on Chinese immigration, a single word which authorizes a judge of the United States courts to refer these cases to the commissioners as referees." In a case where a Chinaman was ordered deported by a United States commissioner, and appealed to the District Judge, who determined the appeal upon a transcript of the proceedings before the commissioner, the United States Supreme Court, in determining the case upon a writ of error, says: "In this case the Chinaman did prosecute his appeal from the commissioner to the District Judge. The statute is curiously silent as to how the appeal is to be heard; it says nothing as to what papers are to be filed, or as to what testimony shall be given. In our view, in giving the Chinaman an appeal, the law contemplates that he shall be given the right of a hearing de novo before the District Judge, before he is ordered to be deported. * * * There being no provision of the statute that the hearing shall be upon a transcript of the proceedings before the commissioner, we think when a party demands it Congress intends he shall have the right to a hearing and judicial determination before the District Judge." *Liu Hop Fong v. United States*, 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888. By the terms of the Chinese exclusion act (Act Nov. 3, 1893, c. 14, 28 Stat. 8 [U. S. Comp. St. 1901, p. 1322])

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

United States District Judges and commissioners are vested with co-ordinate original jurisdiction in this class of cases. In this case the District Judge might have ordered the warrant returnable before either himself or the commissioner; in the latter case the appellant would have been entitled, upon appeal, to a trial *de novo*, and in the former, we think, was entitled to a determination by the District Judge upon a hearing where the witnesses produced might be seen and heard by him. In view of the conclusion we have reached upon this question we deem it needless to consider the objection that the evidence is insufficient to support the judgment.

The remaining question raised touches the right of appellant to bail pending this appeal. The act of Congress provides that when an order of deportation has been made by a United States District Judge or commissioner: "Such order of deportation shall be executed by the United States marshal of the district within which such order is made, and he shall execute the same with all convenient dispatch; and pending the execution of such order such Chinese person shall remain in the custody of the United States marshal, and shall not be admitted to bail." While the allowance of bail pending appeal is within the inherent power of the courts of general jurisdiction, the statute in question has been held to prohibit its exercise, upon the theory that the order of deportation is final; its execution merely being suspended and the order becoming effective in event of the appeal being unsuccessful. See *U. S. v. Wong Lee Foo* (decided at the present term) 108 Pac. 488, and authorities therein cited. In that case we held that upon appeal from a commissioner's order of deportation the hearing before a district judge must be *de novo*, and for that reason the order of the commissioner became vacated by the perfection of the appeal and the statutory provision inoperative, but upon appeal to this court the case is not tried *de novo*; the order of the district judge is only suspended and becomes operative upon an adverse determination of the appeal here.

It follows that bail was properly denied; but, as we are of the opinion that the District Judge erred in his mandatory reference for the purpose of taking testimony, and basing his order of deportation upon the evidence contained in the report, the order appealed from is reversed.

KENT, C. J., and DOAN and LEWIS, JJ., concur.

(13 Ariz. 100)

BRANDT v. SCRIBNER et ux.

(Supreme Court of Arizona. April 2, 1910.)

LIS PENDENS (§ 21*)—CONSTRUCTIVE NOTICE—AMENDMENT OF PLEADING.

Under Civ. Code 1901, par. 1313, providing for the filing of a *lis pendens*, and that from

the time of filing such notice a purchaser or incumbrancer of the property affected thereby shall be held to have constructive notice of the pendency and claims therein made, makes the recording of the *lis pendens* constructive notice of all that is claimed in the action, regardless of whether such claims are sufficiently pleaded; and hence a *lis pendens* filed in a partition suit dates from the complaint, though it is thereafter amended so as to include the necessary allegation of the value of the property.

[Ed. Note.—For other cases, see *Lis Pendens*, Dec. Dig. § 21.*]

Appeal from District Court, Maricopa County; before Justice Edward Kent.

Action by M. D. Scribner and wife against T. R. Brandt. From a judgment for plaintiffs, defendant appeals. Affirmed.

This is an action brought by the appellees against the appellant to quiet title to an undivided two-thirds interest in certain real property situate in the city of Tombstone, the appellees basing their title upon a decree of partition and sale of said property in a suit wherein appellees were plaintiffs and W. K. Meade defendant, and upon a deed from a commissioner appointed by the court to make such sale. Plaintiffs, in the partition suit, on the same day on which they filed their complaint, filed a notice of *lis pendens*, which was substantially in the form provided by the statute. A demurrer was interposed to the complaint, but no ruling was made upon the demurrer until the case was called for trial, when it was sustained with leave to forthwith amend by inserting an allegation required by statute, namely, "an allegation of the estimated value of the property in question," which was thereupon made by interlineation. Appellant claims title to an undivided two-thirds interest in the property under a sheriff's deed made in pursuance of a decree foreclosing a mortgage upon such interest, the mortgage having been taken by appellant from W. K. Meade, the defendant in the partition suit, between the date on which the complaint and notice of *lis pendens* were filed and the date of the amendment of the complaint.

Pickett, Bowman & Pickett, for appellant. W. P. Miller and Ben Goodrich, for appellees.

DOE, J. The only question presented by this appeal is whether appellant was bound by the decree in the partition suit. Counsel for appellant advance the theory that the court, by sustaining the general demurrer to the complaint in the partition suit, held that no cause of action was stated by the complaint, and that in consequence no constructive notice was imparted to him until after the amendment, at the date of which his rights under the mortgage had become fixed and determined. In most of the numerous cases holding that, where a cause of action is for the first time stated by the amendment, the doctrine of *lis pendens* only becomes applicable from the date of the amendment, it

will be found that either new parties were brought in or new and independent causes of action were set up by the amendment, and the theory is adopted that the doctrine of *lis pendens* is based upon the principle that constructive notice is imparted by the pleadings, and that, in view of the hardship sometimes worked by it upon purchasers *pendente lite* without actual notice, therefore the rule should not be enforced until a valid cause of action is disclosed by the pleadings. "The doctrine of *lis pendens*, as generally understood and applied by the courts of this country, is not based upon presumption of notice, but upon a public policy, imperatively demanded by a necessity which can be met and overcome in no other manner." It is careless "use of language which has led judges to speak of it as notice because it happens to have in some instances similar effect with notice." *Freem. Judgm.* § 191, and authorities cited. Judge Story defines the rule as follows: "A purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit." *Eq. Jur.* § 405. The rule, says Chancellor Kent, "would not have existed, and have been supported for centuries, if it had not been found in great public utility." The necessity for its existence is apparent, for, without it, after courts have acquired jurisdiction over and are proceeding to determine conflicting interests in the property, litigants may readily render the final decree entirely ineffectual for any purpose by aliening or incumbering their interests.

The Supreme Court of the United States in *Tilton et al. v. Cofield et al.*, 93 U. S. 163, 23 L. Ed. 858, held directly contrary to the view herein taken by counsel for appellant. In that case the appellants attached real property and recovered judgment which was reversed by the Supreme Court of the territory of Colorado. Thereafter, by leave of court, the appellants amended their declaration and affidavit in attachment, and again recovered judgment in pursuance of which the property was sold to appellees. During the pendency of the action and prior to the amendments, the appellees purchased the property and brought an action to set aside the sale, and from a decree in their favor the appellants appealed to the United States Supreme Court. The court says: "There is another objection to the case of the appellees which must not be overlooked. They are not subsequent attaching creditors, nor creditors at all. They are purchasers *lite pendente*. The law is that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset. *Inloe v. Lessee v. Harvey*, 11 Md. 524; *Sallsbury v.*

Morss, 7 Lans. [N. Y.] 362; *Harrington v. Slade*, 19 [22] Barb. [N. Y.] 162; 1 Story's *Eq.* § 406. The appellees voluntarily took the position they occupy. They chose to buy a large amount of property, including that in controversy, from the fugitive debtor. This was done after the latter had been seized under the writ of attachment, and while the suit in which it was issued was still pending. They took the title subject to the contingencies of the amendments that were made, and of everything else, not *coram non iudice*, the court might see fit to do in the case. The attachment might be discharged, or the judgment might be larger than was then anticipated. They took the chances, and must abide the result. Having obtruded themselves upon the property attached, they insist that their purchase narrowed the rights of the plaintiffs and circumscribed the jurisdiction of the court. Such is not the law. After their purchase, the court, the parties, and the res stood in all respects as they stood before; and the judgment, sale, and conveyance have exactly the same effect as if the appellees and the facts upon which they rely had no existence."

In *Cotton v. Dacey* (C. C.) 61 Fed. 481, the court says: "The equities of the plaintiff are such as to appeal strongly to the conscience of a chancellor, and I am clearly of the opinion that he is entitled to the relief prayed for as against Evans and those claiming to be innocent purchasers of the lands in controversy. But much stress is laid on the fact that, after the sale of the lands under Evans' judgment, a demurrer was sustained to the bill filed by the plaintiff herein, with leave to amend, and that for that reason the claim of Evans is paramount and superior. If the bill in this case was sufficiently amended, after demurrer and leave to amend was given, to afford the plaintiff the relief he asks for, the amendment relates back to the institution of the suit, and neither Evans nor those holding under him can take anything by this objection or this contention." In *Norris v. Ile*, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233, the Supreme Court of Illinois says: "It is still further insisted by the appellant that by reason of the amended bill filed on January 17, 1870, a new *lis pendens* was created from that time, which would not affect the interests acquired by the grantee in the previous deed of 1868. There are cases where the *lis pendens* will begin with the filing of the amendment, and will not relate back to the commencement of the action so as to affect intervening rights. This, however, is only true where the amendment sets up a new equity, or where the party making the amendment brings forward a new claim, or a different and distinct ground of relief, not before asserted. *Benn. Lis Pend.* pp. 97, 160; *Tilton v. Cofield*, *supra*; *Bank v. Sherman*, 101 U. S. 403 [25 L. Ed. 866]; *Stoddard v. Myers*, 8 Ohio, 203; *Gibbon v. Dougherty*, 10 Ohio St. 365; *Lum-*

ber Co. v. Gustin, 54 Mich. 624, 20 N. W. 616; 1 Freem. Judgm. § 199; Bradley v. Luce, 99 Ill. 234; Stone v. Connelly, 1 Metc. (Ky.) 652 [71 Am. Dec. 499]; Wortham v. Boyd, 66 Tex. 401, 1 S. W. 109. Purchasers pendente lite must take notice of everything averred in the pleadings pertinent to the issue or to the relief sought. Center v. Bank, 22 Ala. 757; Allen v. Poole, supra [54 Miss. 323]; Wortham v. Boyd, supra; 13 Am. & Eng. Enc. Law, p. 886." See, also, Burt v. Gamble, 98 Mich. 402, 57 N. W. 261; McClaskey v. Barr (C. C.) 48 Fed. 130; Turner v. Houpt, 53 N. J. Eq. 526, 33 Atl. 28; Turner et al. v. Babb et al., 60 Mo. 342.

While the subject under consideration is regulated by statute in this territory, the condition of the law in this regard at the time of its enactment must be considered as tending to throw light upon the legislative intent. Our statute provides (paragraph 1318, c. 6, tit. 17): "In an action affecting the title to real property the plaintiff at the time of filing the complaint, or at any time thereafter, and the defendant at the time of filing his answer when affirmative relief is claimed in such answer, or at any time thereafter, may file in the office of the recorder of the county in which the property is situated, a notice of the pendency of the action or defense, or the matter constituting defendant's claim for affirmative relief, the relief demanded by the defendant, and a description of the property affected thereby. * * * From the time of filing such notice a purchaser or incumbrancer of the property affected thereby shall be held to have constructive notice, of the pendency of the action, and claims therein made." The decision in Tilton et al. v. Cofield et al., supra, is conclusive in this jurisdiction unless inapplicable by reason of the foregoing statutory provision.

In Bennett on Lis Pendens, § 318, c. 15, the writer says: "That under the lis pendens acts the res litigiosa is brought into efficiency and force by the filing or recording of the notice, so that, as a rule, under these statutes, it commences with the filing or recording of the notice and its scope is governed by the terms of the notice itself." In construing the California statute, which is identical with ours, the Supreme Court of that state says: "The new Code of Practice provides that plaintiff or defendant may file a notice of the pendency of the action with the recorder of the county in which the property is situate, and then provides that from the time of filing only shall pendency of the action be constructive notice to the purchaser or incumbrancer of the property affected thereby. In no other respect are

the rules of law relating to this subject changed by the statute. A purchaser or incumbrancer of property, instead of being required to examine all the suits pending in the several courts to ascertain whether any of them relate to or affect the real estate he is negotiating about, has now only to examine the notice of lis pendens filed in the recorder's office of the county where the real estate is situate, and he is only bound by constructive notice of what may there appear." Sampson v. Ohleyer, 22 Cal. 210. In Richardson v. White, 18 Cal. 106, the court says: "The qualification of the doctrine made by the statute is such that a purchaser is not affected unless notice of such lis pendens be filed with the recorder. The common-law doctrine of lis pendens rests upon the fiction of notice to all persons of the pendency of suits, and to remedy the evils which might grow out of the transfer of apparent legal titles or rights of action to persons ignorant of litigation respecting them this provision was inserted in our statute. If no lis pendens be filed, the party acquiring an interest or claim pendente lite stands wholly unaffected by the suit. The object of the statute evidently was to add to the common-law rule a single term, to wit, to require for constructive notice, not only a suit, but filing a notice of it so that this rule is as if it read: The commencement of a suit and the filing of notice of it are constructive notice to all the world of the action, and purchasers or assignees, afterward becoming such, are mere volunteers and bound by the judgment." In McNamara v. Oakland B. & L. Ass'n, 132 Cal. 249, 64 Pac. 278, the court says: "The object of the notice is to give the opportunity of defense to any one acquiring subsequent rights. Another object of the statute was to give notice in this way of litigation that third persons might not purchase except advisedly."

The statute is obviously intended to make the recording of the lis pendens constructive notice of all that is claimed in the action regardless of whether such claims are sufficiently plead, in so far as their nature and extent are disclosed by the pleadings, and is in entire accord with and in furtherance of the doctrine declared in Tilton et al. v. Cofield et al., supra; its only effect being to mitigate the harshness of the rule in its application to purchasers and incumbrancers pendente lite by affording increased facilities to them for acquiring the information necessary to their protection.

For the foregoing reasons, the judgment is affirmed.

CAMPBELL and LEWIS, JJ., concur.
DOAN, J., not sitting.

(13 Ariz. 185)

LUKE et al. v. SMITH.

(Supreme Court of Arizona. April 2, 1910.)

1. EXECUTION (§ 269*)—SALE—TITLE OF PURCHASER—OUTSTANDING EQUITIES.

At common law, and in absence of statute, a purchaser on execution takes title subject to all outstanding equities of which he had notice at the time of the sale.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 768; Dec. Dig. § 269.*]

2. EXECUTION (§ 272*)—SALE—RIGHTS OF PURCHASER—PARTNER'S LIEN—PRIORITY—JUDGMENT LIEN.

Civ. Code 1901, par. 749, making all conveyances of land void as to creditors and subsequent purchasers for value, unless acknowledged and recorded, does not cover the case of equitable liens, evidence of which need not be recorded, so that a partner's equitable lien for money advanced to purchase and improve land used in the firm business, is superior to the lien of one purchasing upon a subsequent execution sale under a judgment against the partner in whose name the legal title was, if the execution purchaser bought with actual or constructive notice of the partner's lien.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 781-788; Dec. Dig. § 272.*]

3. VENDOR AND PURCHASER (§ 220*)—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE—WHAT CONSTITUTES.

One having notice of a fact affecting property which he contemplates purchasing so as to put him on inquiry with reference thereto is chargeable with knowledge which such inquiry would have shown; and notice of a claim inconsistent with the title he seeks to obtain will require him to exercise due diligence to discover the facts upon which such claim is based.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477-484; Dec. Dig. § 229.*]

4. EXECUTION (§ 272*)—SALE—BONA FIDE PURCHASER—NOTICE—JUDICIAL PROCEEDINGS—FILING OF COMPLAINT.

Plaintiff sued his partner, R., to foreclose his partner lien on land standing in R.'s name, and joined as defendants, creditors of R. who had attached the land. Pending the suit, the attaching creditors obtained judgment against R. and bought in the land at the execution sale. Held that, though the complaint did not state the facts supporting the partner's lien claimed by plaintiff, yet where it stated the substance of a part of the partnership agreement as to the land under which the lien was claimed, it was enough to put the attaching creditors on inquiry, and charge them with constructive notice thereof so as to postpone their rights as purchasers at the execution sale to the plaintiff's lien as partner.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 781-788; Dec. Dig. § 272.*]

5. EXECUTION (§ 268*)—SALE—RIGHTS OF PURCHASER—CONSTRUCTIVE NOTICE—RECORDS—MORTGAGE RECORDS.

Recording of a mortgage executed with warranty of title by one who had the legal title to land upon which another had a partner's lien, was not constructive notice to the latter of its execution, so as to constitute a waiver by him, by acquiescence, as to his rights as lienor, as against subsequent purchasers of the land under execution; he having no actual notice of the record.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 762-767; Dec. Dig. § 268.*]

6. PARTNERSHIP (§ 43*)—LIABILITY AS TO THIRD PARTY.

Civ. Code 1901, par. 2703, providing that if one transacts business as a merchant or trader with the addition of the words "agents," "company," etc., and fails to disclose his partner's name by a sign, etc., or transacts business in his own name, the firm property shall, as to his creditors, be treated as his property, provided this title shall not apply to copartners, complying with Civ. Code 1901, pars. 3520-3524, relates only to merchants and traders, and does not apply to a joint venture in the purchase and improvement of realty.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 60; Dec. Dig. § 43.*]

Appeal from District Court, Maricopa County; before Justice Edward Kent.

Action by Jesse Hoyt Smith against Frank Luke and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Kibbey, Bennett & Bennett, for appellants. C. F. Alnsworth (Lewis M. Ogden, of counsel), for appellee.

CAMPBELL, J. The second amended complaint in this action was before us in *Smith v. Rainey et al.*, 9 Ariz. 362, 83 Pac. 463, and was held by us not to state a cause of action. Upon appeal to the Supreme Court of the United States, that court held that the agreement between Smith and Rainey constituted them partners, and gave to Smith a partner's lien upon the land, as a partnership asset; reversed the judgment of this court, and remanded it for trial. 209 U. S. 53, 28 Sup. Ct. 474, 52 L. Ed. 679.

The opinions above indicated set forth the substance of the complaint and of the agreement attached to it. By their answer, the defendants Luke allege that on June 11, 1902, Rainey was the owner of and held in his own name the title of record to, and was in possession of, an undivided one-third interest in the land described in the complaint; that on that day, Rainey being indebted to the Lukes in the sum of \$2,500, with interest, they commenced an action to recover the said sum and interest, and sued out an attachment which was duly served and levied upon Rainey's interest in said land, and thereafter duly recorded in the office of the county recorder of Maricopa county; that, thereafter, such proceedings were had in the cause that on June 11, 1903, the Lukes recovered a judgment against Rainey for the amount of his indebtedness to them, and which judgment foreclosed the lien of attachment; that on the 6th day of August, 1903, an order of sale was duly issued out of the court, and that on the 8th day of September, 1903, the premises were sold to the Lukes, who, after the expiration of the period of redemption, received a deed therefor from the sheriff. It is further alleged that neither of the Lukes had any knowledge or any notice, actual or constructive, of the existence of the agreement attached to the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

complaint of the plaintiff, prior to the filing of plaintiff's second amended complaint, which said second amended complaint was filed on the 31st day of December, 1903. The action was tried by the court without a jury, and resulted in a judgment for Smith. The trial court found that the land described in the complaint was purchased by Smith and Rainey in March, 1897, for the sum of \$18,000; that Smith advanced and paid the purchase price; that the title to the land was taken, an undivided two-thirds in the name of Smith and an undivided one-third in the name of Rainey; that at various times between March 20, 1897, and May 23, 1903, Smith, under the terms of the contract attached to the complaint, advanced the further sum of \$32,473.35, and that one-third of such payments and advances so made by Smith, together with interest, amounts to the sum of \$21,772.17, which said sum was due to Smith from Rainey, under the terms of the contract, on May 23, 1903; that since May 23, 1903, and prior to the 28th day of November, 1903, Smith advanced the further sum of \$1,085, and that the total amount due at the time of the trial of the action from Rainey to Smith, for principal and interest for such advances, under the terms of the contract, is the sum of \$28,224.02. The trial court further found the allegations of the answer of the defendants Luke to be true, with the exception of the matter of notice. As conclusions of law, the court found that Smith is entitled to a judgment against Rainey for the amount due from him to Smith; that the contract, a copy of which is attached to the complaint, constituted Smith and Rainey copartners in respect to the property described in the complaint, and thereby constituted Rainey a trustee in favor of Smith, with respect to the undivided one-third interest in the premises standing in his name; and that by virtue thereof Smith has a lien upon said land for the payment of the amount found due him from Rainey. There is another conclusion of law drawn by the court, to which we will hereafter call attention. Judgment was in favor of Smith, against Rainey, in the sum of \$28,224.02, and the lien of Smith was adjudged prior in right to that of the defendants Luke. From this judgment the defendants Luke have appealed.

At the common law, the purchaser at an ordinary execution sale takes subject to all outstanding equities of which he had notice at the time of the sale, and this must be considered the rule in this territory, except as it may have been changed by statute. Therefore, the first question to be considered is the effect to be given our recording statute (paragraph 749, Rev. St. 1901) which provides: "All bargains, sales and other conveyances whatever, of any lands, tenements and hereditaments, whether they may be made for passing any estate of freehold or inher-

itance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing, and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged and filed with the recorder, to be recorded, as required by law, or, where record is not required deposited and filed with the recorder; but the same, as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof, or without valuable consideration, shall nevertheless be valid and binding."

Counsel agree that the statute was adopted from the laws of Texas by the Legislature of this territory. The Supreme Court of that state, while uniformly holding that a prior unrecorded conveyance or mortgage creates no rights as against creditors who have obtained liens, had, prior to our adoption of the statute, construed it as not affecting resulting trusts or equitable liens evidence of which is not required or permitted to be recorded. Thus, in *Blankenship v. Douglas*, 26 Tex. 226, 82 Am. Dec. 608, it is said: "It seems to be well settled that a judgment lien on the land of a debtor is subject to every equity which existed against the land in the hands of the judgment debtor at the time of the rendition of the judgment. And courts of equity, it is said, * * * will limit that lien to the actual interest which the judgment debtor has in the estate. * * * If the property in controversy was purchased by John J. Blankenship with the funds of David Blankenship, and for him, then the equitable estate in the land was in said Blankenship, and, upon proof of the facts, the land might have been sold under execution for the debts of David Blankenship. * * * This kind of an equity is beyond the contemplation of our statute of registration respecting the rights of creditors."

In *Senter v. Lambeth*, 59 Tex. 259, the controversy was between an attaching creditor who was without notice at the time his attachment was levied and at the time when judgment was rendered, but who had notice at the time he purchased at his own execution sale, and the claimant of a vendor's lien. The question involved is thus stated by the court: "The sole question in the case is whether, under the admitted facts, the lien and rights acquired by virtue of the writ of attachment, judgment, and sheriff's sale are superior to those of the appellees, who hold the unrecorded vendor's lien, of which appellants had notice at or before the sale, but of which no notice was had when the writ of attachment was levied or when the judgment was obtained."

The previous decisions of the court are examined, and it is held (quoting from the

syllabus, which correctly states the ruling of the court): "As against a purchaser with notice of a vendor's lien before sale under a judgment which judgment constituted a legal lien on land, a court of equity will confine the operation of the legal lien of the judgment creditor to the actual interest which the judgment debtor had in the estate at the time such legal lien was fixed. The vendor's lien will be protected, though the purchaser, who had notice before his purchase at execution sale, had no actual notice when the judgment lien attached."

Again, in *Calvert v. Roche*, 59 Tex. 463, it is said: "As a general proposition, a judgment lien only attaches to the actual interest of the debtor in the land; but on account of our registration laws, ordinarily, if the judgment lien attaches before the creditor has notice of the existence of the unrecorded deed, then such deed is subordinated to the lien, and subsequent notice of the existence of the deed would work no change in the rights of the parties. But when the debtor holds the legal title in trust for others, with whose funds and for whose use it was purchased, then if the purchaser at sheriff's sale, made by virtue of such judgment, has notice of the rights of the cestui que trusts before his purchase, he would acquire no title to the property as against them. This distinction results from the fact that such an equitable right is not subject to or governed by the registration statutes."

This doctrine has repeatedly been affirmed, and as late as *Paris v. Burks*, 101 Tex. 106, 105 S. W. 174, it is said: "It is true that the statute operates only against claims dependent on instruments which are required or permitted to be recorded, and rights to which the law gives rise in certain states of fact and of which it requires no evidence upon the records or in writing, such as vendors' liens, certain kinds of trusts, and, perhaps, others that might be instanced, are not postponed to the rights of creditors resulting from the mere acquisition of liens by legal process."

We perceive no difference in principle between the equitable rights involved in and protected by the decisions of the Supreme Court of Texas, and the equitable rights of a partner to a lien for money advanced for the purchase and improvement of lands used in carrying out the joint venture. We feel constrained to follow the construction given the statute by the Supreme Court of Texas prior to our adoption of it, and to hold that Smith's lien is prior to that of the Lukes, and must prevail over it, if they had notice, actual or constructive, of such lien at the time of the sale.

The trial court found that the Lukes, at the time of the sale, had no actual notice, but that they did have constructive notice of Smith's lien. The original complaint in this action was filed July 18, 1903. The

sale under the Lukes' judgment occurred September 8, 1903; and on December 31, 1903, this second amended complaint was filed. To the second amended complaint, for the first time, was attached a copy of the agreement between Smith and Rainey, and it will be observed that this complaint was filed subsequent to the sale. The original complaint did not set forth sufficient facts to show that Smith was entitled to a partnership lien. It purported to state the substance of a portion of the agreement between Smith and Rainey, and disclosed that the basis of whatever rights Smith had was evidenced by a written contract, and that by reason of that contract, and operations under it, he claimed a lien upon the land. Did this pleading convey to the Lukes sufficient information to put them upon inquiry as to Smith's rights, and charge them with constructive notice of the existence of his lien, prior to the sale? There is not so much difficulty in stating the rule as in applying it to a given state of facts. Where one has notice of a fact affecting property which he seeks to purchase, which puts him upon inquiry, he is chargeable with the knowledge which the inquiry, if made, would have revealed; and one is put upon inquiry by notice of a claim which is inconsistent with the title he seeks to obtain, and must exercise due diligence to ascertain the facts upon which the claim is based. In *Fidelity Company v. Railroad Co.*, 32 W. Va. 244, 9 S. E. 180, it is said that: "Whatever is sufficient to put a person on inquiry is considered as conveying notice; for the law imputes a personal knowledge of a fact, of which the exercise of common prudence might have apprised him. When a subsequent purchaser has actual notice that the property in question is incumbered or affected, he is charged constructively with notice of all the facts and instruments, to the knowledge of which he would have been led by inquiry into the incumbrance or other circumstances affecting the property of which he had notice."

The Supreme Court of the United States, after quoting the foregoing, say: "Vice Chancellor Wigram, in *Jones v. Smith* [1 Hare, 43], supra, laid it down that cases in which constructive notice had been established, resolved themselves into two classes: first, those in which the party charged had actual notice that the property in dispute was in some way affected, and the court has thereupon bound him with constructive notice of facts to a knowledge of which he would have been led by an inquiry into the matters affecting the property, of which he had actual notice; and, secondly, those where the court has been satisfied that the party charged had designedly abstained from inquiry for the purpose of avoiding notice. If there is not actual notice that the property is in some way affected so that the case does not fall within the first class, and no

fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind, or gross and culpable negligence, so as to bring it within the second, then the doctrine of constructive notice would not apply." The Supreme Court then adds: "Each case must be governed by its own peculiar circumstances." *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063.

Applying these statements of the law to the facts of the present case, we think the trial court was right in holding that the Lukes were put upon inquiry, and by diligence could have ascertained before the sale the rights of Smith in the premises. The complaint advised them that Smith and Rainey had a contract in writing, which Smith claimed gave him a lien upon the land. While this pleading was technically deficient, it disclosed enough to cause a prudent man to inquire as to the full terms of this writing, before purchasing. It is suggested by the appellee that, as defendants in the action, the Lukes could, by application to the court under paragraph 2555 of our statutes, have obtained a copy of the contract; but it is probable that had they requested of Smith or his counsel out of court a disclosure of the full terms of the contract, they would be protected. They made no inquiry, and we think that in failing to do so they were at fault and must be held chargeable with the knowledge they would have obtained had they made inquiry.

In 1898 Rainey executed a mortgage to one Hubbard upon the one-third undivided interest in the land standing in his name, warranting that his title thereto was free and unincumbered, which said mortgage was placed of record. Appellants contend that by participating and acquiescing in the placing of such title in Rainey of record, and with notice and without protest permitting Rainey to mortgage the property, and otherwise publicly treat it as his own individual property, Smith waived all right to claim a lien upon said premises prior and superior to that of the attachment and judgment creditors of Rainey. There is no evidence, however, that Smith knew anything of this mortgage, and we do not think that the record operated as constructive notice to him. *Bates v. Norcross*, 14 Pick. (Mass.) 224; *Maul v. Rider*, 59 Pa. 167; *Building Ass'n v. Fellers*, 96 Va. 337, 31 S. E. 505; *White v. McGregor*, 92 Tex. 556, 50 S. W. 564, 71 Am. St. Rep. 875.

It is further insisted that by reason of the failure to comply with the requirements of paragraph 2703, Rev. St. 1901, the property standing in Rainey's name is to be treated, in favor of his creditors, as his property. We do not think the statute applicable. It relates to merchants and traders, and not to

a joint venture in the purchase and improvement of real estate, such as the record discloses existed in this case.

We perceive no error in the record, and affirm the judgment of the district court.

DOAN, LEWIS, and DOB, JJ., concur.

(157 Cal. 528)

IN RE BELL'S ESTATE.

BELL v. NATIONAL BANK OF D. O. MILLS & CO. (S. F. 5,317.)

(Supreme Court of California. April 4, 1910.)

1. APPEAL AND ERROR (§ 994*)—REVIEW—CREDIBILITY OF WITNESSES.

The credibility of witnesses, though testifying by affidavit, is for the trial court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3904; Dec. Dig. § 994.*]

2. APPEAL AND ERROR (§ 323*)—SEPARATE APPEALS.

Whether or not creditors, opposing the application of a widow for a family allowance from the estate of her deceased husband, have an absolute right to appeal separately from the order of allowance, one of them may of necessity so appeal; the others refusing to join it in appealing.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1798-1805; Dec. Dig. § 323.*]

3. COSTS (§ 256*)—COSTS ON APPEAL—ABSTRACTS.

There being no rule or statute authorizing an appellant, instead of filing a transcript, to make reference to one filed in another appeal, and separate independent appellants not being required to unite in the filing of a transcript, and the respondent having refused to unite in a stipulation, which appellants offered to make, that they should so unite, and that both appeals should be heard on one transcript, insisting that her rights might be thereby prejudiced, she cannot, after reversal on appeal, take the position that the filing of the two transcripts was unnecessary, and therefore that the cost of that filed last should not be taxed as costs.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 968-971; Dec. Dig. § 256.*]

4. COSTS (§ 254*)—COSTS ON APPEAL—CERTIFYING ABSTRACT.

By provision of Supreme Court Rule 11 (78 Pac. ix), respondent is to be taxed with the cost of having the clerk certify the transcript; her attorney having refused to certify it as correct or to point out anything therein for correction.

[Ed. Note.—For other cases, see *Costs*, Dec. Dig. § 254.*]

5. EVIDENCE (§ 318*)—HEARSAY.

The affidavit of L. that B. returned, with his refusal to certify, a transcript to A., is not, on its face, hearsay, as L. might have been present when B. communicated his refusal to A.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1199; Dec. Dig. § 318.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the Estate of Thomas Bell, deceased. From an order, Teresa Bell appeals; the National Bank of D. O. Mills & Co. being the respondent. Affirmed.

See, also, 153 Cal. 331, 95 Pac. 372; 153 Cal. 345, 95 Pac. 378.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

T. Z. Blakeman, for appellant. James M. Allen, for respondent.

SLOSS, J. Appeal from an order denying a motion to tax costs on appeal.

Teresa Bell applied to the court in which the estate of Thomas Bell, her deceased husband, was pending, for an order of family allowance. Nineteen creditors appeared and opposed the application. An order granting the allowance was made. From this order the creditors appealed. Eighteen of them joined in a single notice of appeal. A separate notice was given by the nineteenth, the National Bank of D. O. Mills & Co. The appeals came up separately; that of the eighteen being numbered S. F. 4,582, and that of National Bank of D. O. Mills & Co., S. F. 4,583. In each case the order was by this court reversed. 153 Cal. 331, 95 Pac. 372; *Id.*, 153 Cal. 345, 95 Pac. 378. In due time the successful appellant in No. 4,583 filed its memorandum of costs, claiming costs in the sum of \$577, made up as follows: For printing transcript, \$544.50; paid clerk of superior court for certifying to transcript, \$22; paid clerk of Supreme Court for filing transcript, \$10; fees of clerk of superior court on filing remittitur from Supreme Court, 50 cents. The respondent (appellant here) moved the court to tax the costs by striking out the items for printing and for certifying transcript on the ground that they were excessive and unnecessary.

The position of the appellant is that she had already paid the full cost of printing and certifying the transcript in 4,582; that this transcript, with the exception of the notice of appeal, is an exact duplicate of that filed by the appellant in 4,583; and that there was no occasion for filing two transcripts. The affidavits bearing on these questions present various points of conflict. It is, of course, plain that, in support of the order appealed from, we must assume that every such conflict was resolved by the trial court in favor of the respondent. The credibility of the witnesses, whether testifying orally or by affidavit, is for the trial court. Reading the record in the light of this elementary rule, we find that the trial court had before it evidence justifying it in believing this to be the state of facts: Of the 19 creditors who opposed Mrs. Bell's application for family allowance, 2, D. O. Mills and National Bank of D. O. Mills & Co., appeared and were represented by Mr. James M. Allen. The other 17, including one Louisa J. Thompson, were represented by Mr. J. F. Leicester. Mr. T. Z. Blakeman appeared as attorney for the petitioner, Mrs. Teresa Bell. The reason for the taking of a separate appeal by the National Bank of D. O. Mills & Co. was that Mr. Leicester, on behalf of Louisa J. Thompson, refused to join said National Bank in taking an appeal. Before the filing of a transcript on either appeal, Mr. Leicester, at the request of Mr. Allen, wrote a letter to Mr. Blakeman, requesting him to stipulate that both appeals might be heard on

a single transcript. At that time the transcript on the appeal taken by Louisa J. Thompson and others (No. 4,582) had already been printed, and, by adding thereto a copy of the notice of appeal of the said National Bank, the same would have become a full and correct transcript for use on the appeal numbered 4,583. Mr. Blakeman replied by a letter stating that he would not stipulate as requested, as he might prejudice his rights by so doing. Mr. Leicester then wrote to Mr. Blakeman offering to stipulate in such manner and form as to protect any rights of Mrs. Bell to object to either of said appeals, and stating that any form of stipulation would be satisfactory to his firm if it would permit the hearing of both appeals on one transcript. To this Mr. Blakeman replied that he declined to sign any stipulation in the matter or to consent that said appeals might be heard on one transcript. Thereupon the National Bank of D. O. Mills & Co. prepared and filed its separate transcript.

This showing fully justified the court below in charging the cost of printing the additional transcript to the unsuccessful party. It is, of course, true, as claimed by appellant, that only such costs as are necessary should be allowed. *Bank of Woodland v. Hiatt*, 59 Cal. 580; *Miller v. Highland*, 91 Cal. 103, 27 Pac. 536. As a party aggrieved, the bank had a right to appeal from the order (*Est. of Fretwell*, 152 Cal. 573, 93 Pac. 283), and we see no ground for holding that it did not have the absolute right to appeal separately, if it so desired. Be that as it may, the taking of a separate appeal was made necessary here by the refusal of another party to join the National Bank in appealing. Under the rules of this court (Rule 2 [78 Pac. vii]), it became necessary for the appellant bank to file its transcript within a certain time after the filing of its notice of appeal. There is no rule or statute authorizing an appellant to dispense with the filing of a transcript by making reference to a transcript on file in another appeal. Nor do we find any case in which it has been held that the appeals of separate independent appellants should be embodied in a single transcript. This course appears to have been followed in *Emeric v. Alvarado*, 64 Cal. 529, 2 Pac. 418; but the decision neither holds nor intimates that it is the duty of the different appellants to unite in the filing of a transcript. In *Sharon v. Sharon*, 68 Cal. 326, 9 Pac. 187, the court was dealing with several appeals taken in one case by the same party. Indeed, it is difficult to see how one appellant can compel another to unite with him in the printing and filing of a transcript. In such case the necessity for filing a second transcript might be obviated by a stipulation of all the parties. Here the appellants in the two appeals offered to make such stipulation, but the respondent refused to join. It does not lie in her mouth, after such refusal, to complain that an additional transcript was printed and filed. If she had

been willing to have the two appeals considered on a single record, her assent to the proposed stipulation would have accomplished the purpose. Her conduct was the direct cause of the printing and filing of two transcripts, and the resulting burden properly falls upon her. It is suggested that the National Bank might have obtained from this court an order that the two appeals be heard on a single transcript. There is no rule providing for such order. It is at least doubtful whether it would be made over the objection of a respondent insisting that the filing of separate transcripts is essential to the protection of his rights. At any rate, where such insistence has influenced the action of the appellant in filing his transcript, the respondent should not be permitted, after the disposition of the appeal, to shift his position and claim that the filing was unnecessary.

Appellant's contention that the charge for printing was excessive is based upon evidence to the effect that the transcript in 4,583 was printed from the same forms as those used for the transcript in 4,582, and that for that reason the proper cost of printing was much less than the amount charged. But, as against this, the printer's affidavit shows that the forms used in printing the one transcript had been distributed before the other was ordered. The trial court had the right to believe this statement and act upon it.

The charge of \$22 for certifying the transcript is justified by the affidavit showing that Mr. Blakeman had refused to join in certifying (by stipulation) to its correctness. Rule 11 of this court (78 Pac. ix). There is no merit in the point that Mr. Leicester's affidavit to the effect that Mr. Blakeman had returned the transcript to Mr. Allen "with his refusal to certify" was hearsay and inferior evidence, and therefore not entitled to be considered as against an adverse showing. It does not appear to be hearsay. For aught that is shown, Mr. Leicester may have been present when Mr. Blakeman communicated his refusal to Mr. Allen. He testified positively to the fact, and we have no right to assume that he was undertaking to state matters not within his own knowledge.

The order is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

(157 Cal. 534)

In re GIRD'S ESTATE. (S. F. 5399.)

(Supreme Court of California. April 4, 1910.
Rehearing Denied May 4, 1910.)

1. BASTARDS (§ 18*)—LEGITIMATION—RECOGNITION.

Under Civ. Code, § 230, providing that "the father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as a legitimate child, thereby adopts it as such; and

such child is thereupon deemed for all purposes legitimate from the time of its birth," it is necessary, in order to sustain a decree for distribution of a decedent's estate to illegitimate children, that the jury find that decedent was their father, that during minority he publicly acknowledged each as his own child, and received it into his family as his own child, and otherwise treated each child as if it was his legitimate child, and the existence of a family is essential.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.*]

2. APPEAL AND ERROR (§ 994*) — REVIEW — QUESTIONS OF FACT—CREDIBILITY OF WITNESS.

The effect of an attempted impeachment of a witness or of evidence affecting his credibility is a question not reviewable by the Supreme Court under Code Civ. Proc. § 1847, making "the jury the exclusive judges of his credibility."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3902; Dec. Dig. § 994.*]

3. BASTARDS (§ 5*)—ILLEGITIMACY—ADMISSIBILITY OF EVIDENCE.

Where nonaccess by a husband is shown to a reasonable certainty, the positive testimony of the wife that another is the father of her children is competent evidence of their paternity.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 7, 8; Dec. Dig. § 5.*]

4. BASTARDS (§ 6*) — LEGITIMATION — EVIDENCE.

No different rule applies as to the sufficiency of evidence to support findings of legitimation of a bastard by the public acknowledgment of its paternity by the father and receiving it into his family than applies in other cases.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

5. BASTARDS (§ 13*)—LEGITIMATION—PUBLIC ACKNOWLEDGMENT.

The words "publicly acknowledging," as used in Civ. Code, § 230, providing for legitimation of a bastard by the father "publicly acknowledging" that he is the child's father, must be taken in their ordinary sense.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.*]

For other definitions, see Words and Phrases, vol. 6, p. 5772.]

6. BASTARDS (§ 6*)—LEGITIMATION—EVIDENCE OF RECOGNITION.

In a proceeding for distribution of a decedent's estate, evidence held to sustain the findings that decedent was the father of two illegitimate children, and that he publicly acknowledged them as his own, and received them into his family.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

7. BASTARDS (§ 13*)—LEGITIMATION—RECEIVING INTO FAMILY.

"Family," as used in Civ. Code, § 230, providing for the legitimation of a bastard by "receiving it * * * with the consent of his wife, if he is married, into his family," means no more than that the father must have a home, a settled place of habitation of which he is the head, into which he must receive the child, with the consent of his wife, if he be married; and brothers and sisters, who never live with him, are no part of his family.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2673-2691; vol. 8, p. 7661.]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

8. TRIAL (§ 106*)—ARGUMENT OF COUNSEL.

Parties are not entitled as a matter of right to be heard by as many separate attorneys as they see fit to present, and a party who is allowed full opportunity to present argument by one counsel cannot complain that the court excluded argument by another who had testified in the case, and who knew before the trial that he would be a witness, and was warned by the court before testifying that under a rule of the court he would not be permitted to argue the case if he testified, and no reflection was cast on his evidence by refusing to allow him to argue the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 267; Dec. Dig. § 106.*]

9. BASTARDS (§ 5*) — WITNESSES (§ 344*) — PROOF OF PARENTAGE—IMPEACHMENT—EVIDENCE OF IMMORALITY.

In a proceeding for distribution of a decedent's estate claimed by two illegitimate children, the mother who was the wife of another man, and who had testified to her relations with decedent, was asked on cross-examination how many men she had had sexual intercourse with since her husband left her, and who they were. *Held*, that an objection was properly sustained on the ground that it was too general, as it should have been limited to the time at or about the time of conception, and it was not proper in order to impeach the witness, as questions on cross-examination to show general immorality or specific acts of immorality are not allowable, the impeachment of witnesses being limited to the mode prescribed by the Code of Civil Procedure.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 7, 8; Dec. Dig. § 5.* Witnesses, Cent. Dig. § 1125; Dec. Dig. § 344.*]

10. BASTARDS (§ 6*)—PROOF OF PARENTAGE.

In a proceeding for distribution of a decedent's estate claimed by two illegitimate children, the evidence showed that the mother had lived with decedent for a number of years both before and after the birth of her children. *Held*, that testimony that the witness had seen decedent and the mother having sexual intercourse after the birth of the younger child was admissible as tending to show the relations between decedent and the mother, and as bearing on the probability of decedent's being the father of the children.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

11. WITNESSES (§ 383*)—IMPEACHMENT—INCONSISTENT STATEMENTS—COLLATERAL MATTERS.

Where a witness testifies to declarations made by decedent, and on cross-examination states that he never kept a memorandum of all the things decedent told him, and did not remember telling R. and C. that he had done so, it is not error to refuse to admit evidence by R. and C. to show that he had stated that he had kept such a memorandum, the matter attempted to be brought out being collateral to the issue.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1224; Dec. Dig. § 383.*]

12. BASTARDS (§ 5*)—ILLEGITIMACY—DECLARATIONS BY MOTHER.

In a proceeding for distribution of a decedent's estate claimed by two illegitimate children, the mother testified that decedent was the father of the children. *Held*, that evidence of a declaration by the mother to a physician shortly before the birth of one of the children that she was pregnant by another man, and that she desired to be rid of the child by an operation, was properly excluded, as the mother was not a party to this proceeding, and her

declarations were not binding on the children on the question of their paternity.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 7, 8; Dec. Dig. § 5.*]

13. WITNESSES (§ 383*)—IMPEACHMENT—CONTRADICTORY STATEMENTS—FOUNDATION—NECESSITY.

In order to impeach a witness by proof of inconsistent statements, a foundation must be laid in the examination of the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1233; Dec. Dig. § 388.*]

14. TRIAL (§§ 187, 240*) — INSTRUCTIONS — CREDIBILITY OF WITNESS—ARGUMENTATIVE INSTRUCTIONS.

In a proceeding to distribute a decedent's estate claimed by illegitimate children, the mother testified that decedent was their father. *Held*, that an instruction that, "of the women who are mothers of nameless children, there are few indeed who would hesitate at fraud, or to whom perjury would be a crime," was properly refused, as being argument and on the weight of testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 419, 561; Dec. Dig. §§ 187, 240.*]

15. BASTARDS (§ 13*) — LEGITIMATION — INSTRUCTIONS.

An instruction in a proceeding for distribution of a decedent's estate in which it was sought to show legitimation of illegitimate children of decedent under Civ. Code, § 230, is properly refused, which informs the jury that to hold that there had been an adoption under that statute would require "liberality of construction destructive of language of the statute itself."

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.*]

16. BASTARDS (§ 13*) — LEGITIMATION — ACKNOWLEDGMENT OF PATERNITY.

Under Civ. Code, § 230, providing for the legitimation of illegitimate children by the father receiving them into his family, the children may be received into the father's family without the father acknowledging his paternity to every relative, friend, and acquaintance who visits his house after their birth.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.*]

17. APPEAL AND ERROR (§ 1057*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Exclusion of evidence to establish a point established without conflict by other evidence is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4194; Dec. Dig. § 1057.*]

18. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Sustaining objections to questions on cross-examination, asked for the purpose of showing bias, is harmless, where the witness' testimony fully covers the subject-matter of the questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200; Dec. Dig. § 1058.*]

19. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where a witness has testified that another witness has made statements to him as to the paternity of her illegitimate child, refusal to allow him to testify that a letter written by the mother contained the same statements was not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200; Dec. Dig. § 1058.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**20. EXECUTORS AND ADMINISTRATORS (§ 316*)
—DISTRIBUTION OF ESTATE—RESERVATION
OF ASSETS.**

Where application is made by heirs of a decedent for distribution of his estate, under Code Civ. Proc. § 1658 et seq., relating to "partial distribution prior to final settlement," there having been no presentation of the administrator's final accounts, and the court finds that the estate "is but little indebted, and may be distributed * * * without loss to the creditors," it is error to order a distribution of all the estate, although the bond required by each petitioner under Code Civ. Proc. § 1661, has been given, such distribution being proper under Code Civ. Proc. § 1665, only on final settlement, but enough should be reserved to pay decedent's debts and the expenses of administration and the inheritance tax without recourse to the bonds, but if land belonging to the estate is mortgaged and is ample security for the debt, such debt may be disregarded, as under Code Civ. Proc. § 1661, the land mortgaged is subject to the mortgage after distribution.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1315-1318; Dec. Dig. § 316.*]

Department 1. Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

In the matter of the estate of Henry Gird, deceased. From a decree distributing all the property of the estate, and from an order denying a motion for a new trial, the administrator of the estate and decedent's two brothers and a sister appeal. Decree of distribution reversed, with directions to make a decree of partial distribution, and the order denying a new trial affirmed.

J. W. Rose and J. A. Barham, for appellants. C. H. Pond and R. L. Thompson, for respondents.

ANGELLOTTI, J. This is an appeal from a decree distributing all of the property of the estate of deceased to William Stephen Bennett and Nellie Florence Bennett, and from an order denying a motion for a new trial made by the administrator of said estate and two brothers and a sister of deceased. The application for distribution was one made under section 1658, Code Civ. Proc., by said distributees, claiming to be adopted children of deceased under the provisions of section 230, Civ. Code. This claim being opposed, the application was heard by the court and an advisory jury, and the latter found in response to questions submitted to them that deceased was the father of said petitioners, that he publicly acknowledged each during its minority as his own child, that he received each during its minority into his family as his own child, and that he otherwise treated each child during its minority as if it was his legitimate child. The trial court adopted these findings of the jury.

It is earnestly contended that the evidence is not sufficient to sustain these findings. All of them are essential to the affirmance of the decree, section 230, Civ. Code, providing that: "The father of an illegitimate child, by pub-

licly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth." Different views have been entertained by justices of this court whether the existence of a family into which the child can be received is essential to an adoption under this section, but that question has been finally determined in the affirmative by this court in *Estate of De Laveaga*, 142 Cal. 158, 169, 75 Pac. 790.

Material facts of the case concerning which there is no dispute are as follows: Deceased was born July 29, 1837, and died intestate April 4, 1907, leaving an estate valued at about \$21,000. He left two brothers and a sister, the brothers residing in Los Angeles county, and the sister residing in the state of Illinois. In 1853 or 1854 he settled in Alexander Valley, Sonoma county, on what was thereafter known as the "Gird Ranch," and this continued to be his home until the time of his death. He was never married. No person claiming relationship to him ever resided there with him other than the petitioners here. About the year 1865 or 1866 Mr. and Mrs. Fletcher, husband and wife, came to this ranch, bringing with them a half Indian girl about three years old, called Alice. For a time Fletcher worked for the deceased on the ranch, but left the neighborhood within two or three years and never returned. Mrs. Fletcher and Alice remained on the ranch, Mrs. Fletcher doing the general housework, and Alice helping as she grew older until at the time of her marriage she was doing a great part of the housework and much farm work outside. During all of this time deceased, Mrs. Fletcher and Alice lived in the same house and ate at the same table, Mrs. Fletcher and Alice sleeping in one room and deceased in another. Deceased was a highly educated man, and took an interest in teaching Alice to read and write. He always treated her kindly and much as any one would treat a child in his household. She finally married one Owen Bennett and lived with him as his wife for a short time, when they separated and she resumed her life on the Gird ranch with Mrs. Fletcher and deceased, but the marriage between Bennett and herself was not dissolved until after the death of deceased. The manner of living was the same as before her marriage, she continuing to occupy a sleeping room with Mrs. Fletcher, and deceased occupying another room. She worked about the ranch as before. She was never paid any wages. On May 22, 1885, she gave birth to William Stephen Bennett, one of the petitioners. Deceased sent for and paid the doctor. The boy was kept on the place and there grew to manhood, being treated practically as any boy raised on a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

farm. As he grew older he worked on the ranch and attended the public school. Deceased always manifested a kindly interest in him, and assisted him in his education. He always went by the name of Bennett, and was registered at school under that name. He was never paid any wages for his work. In the year 1895, Mrs. Bennett gave birth to the other petitioner, Nellie Bennett, who thenceforth was one of the household. This child was always known as Nellie Bennett. Deceased always treated her kindly. The evidence very clearly establishes that Mrs. Bennett's husband was not the father of Nellie. It must also be taken as establishing that he was not the father of Stephen. The only evidence as to the year of the marriage was to the effect that it occurred in the year 1880, and there was no evidence to contradict that given to the effect that Bennett and Alice separated not later than the year 1881, and never thereafter cohabited or even saw one another until long after the birth of Nellie, except on one occasion when Alice saw him at a distance, saying and excepting evidence to the effect that Alice had on several occasions admitted to others that Stephen was Bennett's child. The evidence was clearly of such a nature that we cannot say that the jury and court were not warranted in concluding that Stephen was not Bennett's child.

The only evidence that deceased was the father of these children was that given by Alice, and that afforded by the circumstances under which all the parties lived, certain alleged admissions of deceased, and his general treatment of Alice and the children. This evidence was of such a nature that an appellate court cannot hold, however much it may doubt the correctness of the conclusion of the trial court, that the conclusion of the trial court on the question of paternity is without sufficient support in the evidence. Alice testified positively that she commenced to have sexual relations with deceased in the year 1884, and that he was the father of both Stephen and Nellie. There was evidence given of statements and conduct on her part that was inconsistent with her testimony, but the effect of this attempted impeachment was purely a question for the trial court. Nonaccess by the husband being clearly shown, or at least being shown to a reasonable certainty, the positive testimony of Alice as to the paternity of her children was competent evidence, and, under the law, sufficient basis for a finding by the jury on the question of paternity. It may reasonably be argued that corroboration of her evidence is to be found in the fact that these children were apparently accepted by deceased without demur or objection as a part of his household, and were treated and brought up as his own children would have been, and that he, Alice, and the children all continued to live as members of one family ordinarily live. In addition to this, two witnesses tes-

tified positively that just after the birth of Nellie deceased declared in their presence, another person also being present, when some question was suggested as to the paternity of Nellie, that Stephen and Nellie were his children, and one of these witnesses testified that he heard deceased say many times that Stephen was his son, and Stephen testified that deceased told him that he was his son. Learned counsel for appellant is in error in his claim that a different rule may be applied by this court in cases of this character in determining the sufficiency of evidence to sustain the findings from that applicable in other cases. What was said by Justice Fox in the Matter of Jessup, 81 Cal. 423, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594, quoted in counsel's brief, was said solely with reference to the proper construction of a statute from the standpoint of policy, and, while it might constitute good material for argument to the trial court or jury on the question of the weight to be given by them to certain evidence, cannot be taken as laying down any rule of law. Estate of Sandford, 4 Cal. 12, involved no other question than whether an alleged written acknowledgment sufficiently complied with the terms of a statute. In Hite v. Hite, 124 Cal. 389, 57 Pac. 227, 45 L. R. A. 793, 71 Am. St. Rep. 82, only three of the justices concurred in any expression of opinion that might serve as a basis for the contention that an appellate court would ever review the finding of a trial court in regard to a matter where there is substantial evidence to support the finding, and we do not construe anything in the opinion signed by these three justices as intimating any such doctrine. By section 1844, Code Civ. Proc., it is provided: "The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason." But, says counsel, there are eight separate reasons why Alice Bennett was not "entitled to full credit," such as swearing to her own adultery, admissions, and inconsistent acts. In reply, we can only point to section 1847, Code Civ. Proc., which, after declaring the manner in which a witness may be impeached, declares "and the jury are the exclusive judges of his credibility." Both the trial judge and jury concluded that she was a witness entitled to full credit, and their conclusion on that question is not open to review by us. See Fowden v. Pacific, etc., Co., 149 Cal. 151, 161, 86 Pac. 178.

We do not deem it open to serious question that the evidence is sufficient to support the conclusion on the part of the trial court that deceased treated both Stephen and Nellie as if they were his legitimate children, and will not unnecessarily prolong this opinion by discussing the evidence in regard thereto. "The criterion referred to in the statute is the treatment usually accorded to legitimate children." Estate of Heaton, 139 Cal. 237, 73 Pac. 186.

A more serious question exists as to whether the evidence sufficiently shows that deceased publicly acknowledged Stephen and Nellie as his children to sustain the findings of the trial court to that effect. The language of section 230, Civ. Code, is simply "by publicly acknowledging it as his own." There is no provision as to what shall constitute "a public acknowledgment," and the words of the statute must be taken in their ordinary sense. *Blythe v. Ayres*, 98 Cal. 532, 577, 31 Pac. 915, 19 L. R. A. 40; *Townsend v. Meneley*, 37 Ind. App. 127, 74 N. E. 274, 76 N. E. 321. In *Crane v. State*, 94 Tenn. 86, 28 S. W. 317, a prosecution for bigamy, the statute provided that the testimony of a bystander who witnessed the ceremony and "the public acknowledgment of the party charged shall be competent evidence." The court said: "Criticism is directed to the term 'public acknowledgment of the party charged,' and it is insisted that this means some acknowledgment before a court or other public tribunal. We do not so construe the law, but any acknowledgment of the fact of marriage, by confession or conduct, in the presence of one or more individuals, would answer the requirement of the statute. It need not be in the shape of a public avowal, made in the courts, or in the market place, or from a housetop, but can be made as well by acts and conduct recognizing the marriage, as by oral statements to third persons." In *Blythe v. Ayres*, supra, it was said in the main opinion, signed by three of the justices, that "this acknowledgment was also public, for, as we have seen, the thought of concealment of the paternity of the child never entered his mind." In the light of what is said in the various authorities as to the meaning of such terms as "public acknowledgment," we are of the opinion that there was sufficient evidence to support the conclusion of the trial court. The circumstances surrounding the birth of these children, and the conditions existing in the household of deceased before and after their birth, coupled with his treatment of them, and his interest in them, were of such a nature, in the absence of any statement to the contrary by him, as to constitute evidence of a general acknowledgment of paternity to the community. In the face of circumstances which might well be accepted as calling for explanation as to the true situation if he was not the father of these children, he never expressly denied that he was such or made to any living person, so far as the evidence shows, any explanation why these children were accepted by him as a part of his household. Of course, he was under no obligation to make any explanation to any one, but in the absence thereof he could not complain if the community accepted, as they might very reasonably do, that he was the father of these children. In addition to the evidence of this character there was the evidence of his declarations to three persons

on the only occasion when the question of the paternity of these children appears to have been raised in his presence, to the effect that they were his children, and also the evidence of a witness to the effect that he had heard deceased on many occasions say that Stephen was his son. It may be proper to say again, as we said in regard to the witness Alice Bennett, that the question of the amount of credit to be given to these witnesses was one solely for the trial court. That the children always went by the name of Bennett and that deceased on two separate occasions introduced Stephen as Mr. Bennett or Mr. Steve Bennett, once to his attorney and once to a stranger, do not destroy the effect of the evidence given in support of the children's claim. Nor is the fact that he did not say anything about the matter to his brother when he visited his home shortly before his death of such importance, under the circumstances, as to forbid the conclusion of public acknowledgment. The many reputable witnesses called by appellants to show absence of express acknowledgment to them or in their presence amounted to no more than that they had never heard any such acknowledgment made by deceased, but as to practically all of such witnesses there was nothing to indicate that there was in the circumstances anything to call for an acknowledgment to them. While the case, both on the question of paternity, and that of public acknowledgment, may not be a very strong one in favor of claimants, we are constrained to hold that it was sufficiently strong to support the findings of fact of the trial court thereon, and that being so those findings are conclusive on us, however we might decide the matter had we the right to review findings of fact made on conflicting evidence.

It is claimed that the evidence is insufficient to support the conclusion that he received these children "into his family." If his household in Sonoma county is to be regarded as "his family," within the meaning of section 230, Civ. Code, it cannot be questioned, of course, that the evidence was sufficient. In *Estate of Bennett*, 184 Cal. 323, 66 Pac. 371, this court said: "The meaning which is to be given to the word (family) is to be determined by the context, and also from a consideration of the subject-matter to which it relates. Every case must depend upon its particular circumstances. Mr. Jarman says (*Jarman on Wills*, p. 941) 'family' is not a technical word, and is of flexible meaning. *Anderson's Law Dictionary* defines the word: 'In its modern comprehensive meaning, a collective body of persons living together in one house.' It is sometimes used to include parents with their children, whether dwelling together or not. The word has also a broader and secondary meaning, which includes all the offspring or descendants of a common progenitor, but is not to receive this construction unless

such intention is manifested from the context." Webster defines it as: "The collection of persons forming a domestic household, including parents, children, servants, and sometimes lodgers." By the Century Dictionary it is declared to be: "The collective body of persons who form one household under one head and one domestic government, including parents, children, and servants." In their concurring opinion in *Blythe v. Ayres*, 96 Cal. 592, 31 Pac. 927, 19 L. R. A. 40, Justices McFarland and De Haven said: "Either a widower or a bachelor, as we all know, may have a family, viz., 'a collective body of persons living together under one head or manager.'" In *Garner v. Judd*, 136 Cal. 394, 68 Pac. 1028, this court, in bank, said, speaking through Chief Justice Beatty: "We have no doubt that when a man has a home where he lives, with a woman whom he holds out to the world as his wife, he has a family within the meaning of section 230, Civ. Code, into which he must receive an illegitimate child in order to legitimate it under that section." In *Estate of De Laveaga*, 142 Cal. 169, 75 Pac. 790, this court was careful to limit its language as to the necessity of the existence of a family into which the child can be received as one of the cardinal conditions prescribed for an adoption under section 230, Civ. Code, by saying "having a family, or at least a home in which he can receive him" is such a condition. The words of section 230, "receiving it * * * into his family," imply a receiving into a place of which he is the head—of which he has control. As used in this section the word "family," in our opinion, means no more at most than that the father must have a "home," a settled place of habitation of which he is the head, into which he must receive the child, such receiving to be with the consent of his wife if he be married. The brothers and sisters of deceased, who never lived with him in California, constituted no part of his "family" within the meaning of that section.

It is claimed that the trial court committed many errors in the trial of this case.

On objection of respondents, the trial court precluded J. W. Rose, Esq., one of appellants' two attorneys, from arguing the case to the jury or the court. The reason for this action on the part of the trial court was that Mr. Rose was an important witness for appellants and testified on their behalf, and there was a rule of the court purporting to preclude counsel who gave evidence in a case from participating in the argument thereof. The evidence given by Mr. Rose related to matters of such a nature that it must have been known before the commencement of the trial that he would necessarily be a witness, and at the time he was called as a witness he was warned by the court that he would be precluded from arguing the case if he testified. The reason for the refusal was stated by the court in the pres-

ence of the jury to be that the rule precluded one who was a witness from arguing a case. The suggestion that the court by this refusal cast any reflection on Mr. Rose or his evidence is unwarranted. We do not deem it necessary to discuss the question of the validity of the rule of the superior court of Sonoma county invoked by respondents. We can well see that the facts of a case might be such as to make its application such an unwarranted deprivation of a party's rights as to constitute an abuse of discretion. In this case appellants were not deprived of the right to argue this case by counsel of their own selection. The record shows that J. A. Barham, Esq., was one of the attorneys of record for appellants, participating throughout all the proceedings in this case, and practically conducting the trial on the part of the appellants. It further shows that the cause was argued to the jury by respective counsels. Counsel were fully advised by the court at the time Mr. Rose was called as a witness that he would thereby render himself ineligible to argue the case as counsel, and we are warranted in assuming that Judge Barham made his preparation for argument accordingly. Without intending to reflect in the slightest degree upon the ability of Mr. Rose in the matter of argument to a jury, we have no hesitation in saying that it would be absurd to hold that any prejudice may have accrued to appellants by reason of the refusal of the court to allow any additional argument to that of Judge Barham, especially when they were fully advised a sufficient time before argument that such would be the ruling of the court. Appellants were not deprived of any statutory right. Parties are not entitled as a matter of right to be heard by as many separate attorneys as they see fit to present. The trial court may exercise a reasonable supervision of such matters, and under ordinary circumstances, if a party is allowed full opportunity to present argument by one counsel, he cannot complain of any deprivation of his rights in this behalf. Certainly no statute prescribes that he shall be entitled to present separate arguments by different counsel.

Alice Bennett was asked on cross-examination: "Since Mr. Bennett left how many men have you had sexual intercourse with, and who are they?" An objection to this question was sustained, the court holding that the question was too general as to time and should be confined to the "time or around the time of gestation." A subsequent question of the same nature directed to "at or about the time immediately before the conception of Nellie" was then asked, and the witness answered that deceased was the only one. Error is alleged in sustaining the objection to the former of these questions. The authorities are practically in accord to the effect that evidence tending to show unchaste conduct of the alleged mother with other men is al-

lowable only in so far as it has a bearing upon the question of the paternity of the child—in so far as it tends to show that another is or may be the father of the child, and hence that it must be directed to a time at or about the time the child was begotten. See 3 Am. & Eng. Ency. of Law (2d Ed.) 822; 5 Cyc. 661; *State v. Lavin*, 80 Iowa, 555, 46 N. W. 553. The question here, one directed solely to mere acts of sexual intercourse, was not so confined, but, on the contrary, embraced a period of over 20 years. The only other basis on which it could be claimed to be a proper question was that of impeachment of the witness. But it is thoroughly settled that "questions on cross-examination, tending to show the general immorality of the witness, or specific acts of immorality, should never be allowed in any case for the mere purpose of discrediting or impeaching the witness. * * * The Code of Civil Procedure prescribes the method of impeaching witnesses, and they can be impeached in no other way than therein provided." *People v. Harlan*, 133 Cal. 16, 20, 65 Pac. 9, 10. See, also, *Sharon v. Sharon*, 79 Cal. 673, 22 Pac. 26, 131. The ruling of the trial court sustaining the objection was correct.

Complaint is made that the court should have stricken out certain evidence given by witness Sanders. The evidence was given on direct examination without objection, and was practically that he had come upon deceased and Alice while they were engaged in an act of sexual intercourse. On cross-examination it was developed that the witness was uncertain whether the incident occurred shortly before or shortly after the birth of Nellie, the younger child. The motion to strike out was based on the ground that the witness said it was after the birth of Nellie. Assuming this to be so, we nevertheless are of the opinion that the evidence was proper as tending to show the extent of the intimacy between Alice and the alleged father of her children, and to corroborate the testimony of Alice as to the nature of the relations existing between them as members of the same household before and after the birth of Nellie. In *People v. Jamieson*, 124 Mich. 164, 82 N. W. 835, a bastardy case, it was held that "acts of intercourse and undue familiarity both before and after the alleged act resulting in conception are admissible, as bearing upon the probability of the intercourse at the time stated in the complaint." See, also, 5 Cyc. 662, declaring that evidence of the intimate relations existing between the mother and alleged father is admissible, and that evidence of previous or subsequent intercourse is competent to show the probability of the particular act having occurred.

The trial court did not err in sustaining objections to questions asked witnesses Ralph Rose and Arthur Cochrane for the purpose of showing that witness Sanders, who had testified to declarations on the part of deceased, stated shortly before the trial that he kept

a memorandum of all the things that deceased told him during his stay at the Gird ranch. On his cross-examination by appellants, Sanders had testified that he never kept such a memorandum, and that he did not remember telling Rose and Cochrane that he had done so. This was clearly a collateral matter elicited on cross-examination. In *Faulkner v. Rondoni*, 104 Cal. 148, 37 Pac. 886, it was said, quoting from *People v. Devine*, 44 Cal. 448: "A recognized rule, or rather qualification of the rule, governing the impeachment of the credit of a witness by proof of contradictory statements elsewhere made by him, is that the matter involved in the supposed contradiction must not itself be merely collateral in its character, but must be relevant to the issue being tried"—citing many authorities. See 1 Greenl. on Ev. §§ 449, 461 "e," "f." As to such a collateral matter, the answer of Sanders could not be contradicted by appellants, but was conclusive on them.

It was sought by appellants to show certain declarations by Alice to a physician, Dr. Coffman, some few months before the birth of Nellie, to the effect that she was "in the family way" by one Smith, and that she desired to be rid of the child by an operation. This proposed evidence was properly excluded by the trial court. Alice was not a party to this proceeding, but only a witness on behalf of her children. Evidence of these declarations by her to the physician would have been pure hearsay, in no way binding on her children as evidence on the question of paternity. Being contrary to her evidence given on that question, the declarations, waiving other objections thereto, would have been admissible by way of impeachment of Alice as a witness, but a complete answer to appellants' claim in this regard is that no foundation was laid for any such impeachment on the examination of Alice.

There was no error in refusing to give appellants' requested instruction 1, commencing "I instruct you that, of the women who are mothers of nameless children, there are few indeed who would hesitate at fraud, or to whom perjury would seem a crime," etc. It was not only open to the objection of being in part pure argument in favor of appellants' side of the case, and an instruction on the weight to be accorded the testimony of certain witnesses, but it also in terms informed the jury that to hold that there had been an adoption under section 230, Civ. Code, would require "liberality of construction destructive of language, of the statute itself." There was no prejudicial error in modifying appellants' requested instruction 3. Appellants' requested instructions 4 and 5 were properly refused. They were to the effect that deceased did not receive the children into his family unless he acknowledged his paternity to every relative, friend, and acquaintance who visited his house after their birth. This certainly is not the law.

It was established without conflict that

there were always several hired men working on the Gird ranch. Exclusion of other evidence going simply to that extent was, therefore, not prejudicial error.

If all of the rulings sustaining objections to questions asked Sanders on his cross-examination for the purpose of showing bias on his part were erroneous, the effect of the errors was obviated by the testimony given by the witness, in which he fully covered the subject-matter of such questions.

The refusal of the trial court to allow the witness Hopper to testify as to the contents of a letter said by him to have been given to him by Alice to be given to Smith was not prejudicially erroneous. The theory of appellants was that the letter contained statements by Alice showing that Smith was the father of Nellie. But Hopper fully testified as to statements then and at other times to the same effect made by Alice to him. Additional evidence by him showing similar statements by her in a lost writing could not have added to the effect of his evidence already given.

What we have said disposes of all points made in appellants' briefs that require notice, except the claim that the trial court erred in distributing all the residue of the estate to the petitioners. It must be held that there is merit in this claim. The application of petitioners was one under section 1658 et seq., Code Civ. Proc., the sections relating to "partial distribution prior to final settlement," there having been no presentation of the accounts of the administrator—a prerequisite to final distribution. By the decree all the property of deceased, both real and personal, and specifically all cash, money in bank, and every other article of personal property, is distributed to the petitioners, share and share alike, and the bond for \$2,000, required by the court of each petitioner under section 1661, Code Civ. Proc., having already been given, the decree orders the administrator to forthwith deliver to the petitioners all of the property distributed. While the trial court might have been warranted in finding that all debts of the deceased except the mortgage debt had been paid, it did not so find. It did find to the contrary that "the estate * * * is but little indebted, and may be distributed as prayed for without loss to the creditors of said estate," evidently proceeding upon the theory that the creditors would be protected by the bonds ordered. It is manifest that our law does not contemplate the distribution of all the property of an estate under partial distribution proceedings or prior to the settlement of the final account of the executor or administrator. Such a distribution can be had only upon the final settlement of the accounts of the executor or administrator, or thereafter. Section 1665, Code Civ. Proc. The court in probate must

necessarily retain until such time what may reasonably be anticipated as necessary to pay debts and expenses of administration. "Creditors are not to be deprived of their lien upon the assets of the estate, and given a bond in lieu thereof. The court should see that sufficient assets are left, after partial distribution, to pay them, without recourse to the bond. The requirement of a bond is only additional security to provide against unforeseen liabilities, and against errors in judgment." In re Painter, 115 Cal. 635, 641, 47 Pac. 700. This is as applicable to expenses of administration as it is to debts of the deceased. The court here should have distributed to the petitioners a portion only of the residue of the property, reserving what it deemed a sufficient portion to pay any unpaid claims (including any probable deficiency on the mortgage claim, if any), and also to pay such expenses of administration as had been incurred and remained unpaid, and also such expenses of administration as might reasonably be incurred prior to settlement of the final account. If the land mortgaged constituted ample security for the mortgage debt, such debt could be disregarded so far as partial distribution was concerned, the land mortgaged being subject to the mortgage after distribution as before. Section 1661, Code Civ. Proc.; Estate of Mitchell, 121 Cal. 394, 53 Pac. 810. Nothing has been said on this appeal as to the inheritance tax due under the act of 1905, which, of course, is also payable out of the property remaining for distribution.

The decree of distribution appealed from is reversed and the matter remanded, with directions to the lower court to make a decree of partial distribution to the petitioners upon the findings and decision filed July 27, 1909, distributing to said petitioners all the property of decedent except such portion thereof as it may deem advisable to retain until final settlement of the accounts of the administrator for the purpose of paying debts and expenses of administration, upon the giving of such bond by the distributees under section 1661, Code Civ. Proc., as the court may deem proper, and subject to the payment by the distributees of the amounts due as inheritance tax under the act of March 20, 1905 (St. 1905, p. 341). The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

(157 Cal. 583)

COONEY v. GLYNN. (S. F. 5,173.)

(Supreme Court of California. April 7, 1910.
Rehearing Denied May 6, 1910.)

1. TRUSTS (§ 96*)—CONSTRUCTIVE TRUST.

Where a mother conveyed land to her son on his oral promise to hold the same for the benefit of a daughter, and without any other

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

consideration for the conveyance, a trust arises by operation of law in favor of the daughter.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 148; Dec. Dig. § 96.*]

2. TRUSTS (§ 109*)—CONSTRUCTIVE TRUST—EVIDENCE—GROUNDS—PREVENTING DEVISE.

In an action by a sister against her brother to establish a trust in her favor in land alleged to have been conveyed by their mother to defendant for plaintiff's benefit, evidence is admissible that four days before the deed was made the mother had executed a will devising the land to plaintiff, and that on defendant's suggestion, and his oral promise to hold the land for plaintiff, the deed was made and the will destroyed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 159; Dec. Dig. § 109.*]

3. TRUSTS (§ 365*)—ENFORCEMENT—LACHES.

Where land was conveyed by a mother to her son on his oral promise to hold the same for the benefit of his sister, and he complied with the terms of such trust for many years by paying to the beneficiary the rents and profits, an action to enforce the trust brought in less than a year after his repudiation is not barred by laches.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.*]

4. TRUSTS (§ 109*)—CONSTRUCTIVE TRUST—EVIDENCE.

Though a constructive trust in land cannot be established by oral promises of the grantee made after the execution of the deed, evidence of the subsequent declarations of the grantee as to what he agreed to do at the time the deed was made is admissible to show what occurred at the time of the transaction.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 159; Dec. Dig. § 109.*]

5. APPEAL AND ERROR (§ 997*)—REVIEW—QUESTIONS OF FACT—APPEAL FROM NON-SUIT.

On appeal from a judgment of nonsuit, the evidence is considered most favorable to plaintiff, and the judgment will be reversed if there is enough evidence to make out the cause alleged, though there may be contradictory evidence which, if given effect and allowed to prevail, would defeat plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4024; Dec. Dig. § 997.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Virginia C. Cooney, administratrix of Margaret J. Cooney, deceased, against Thomas J. Glynn. Defendant had judgment, and plaintiff appeals. Reversed.

Bishop & Hoefler and Bishop, Hoefler, Cook & Harwood (Alfred J. Harwood, of counsel), for appellant. Sullivan & Sullivan and Theodore J. Roche, for respondent.

SHAW, J. This is an appeal by the plaintiff from a judgment entered in favor of the defendant upon motion for a nonsuit at the close of plaintiff's evidence. The action was begun by the deceased, Margaret J. Cooney, in her lifetime. The present plaintiff was substituted during the pendency thereof upon the death of Margaret J. Cooney.

The complaint states a case to enforce a constructive trust in real estate. In sub-

stance it shows the following facts: Bridget Gallagher was the mother of Margaret J. Cooney, the original plaintiff, and of Thomas J. Glynn, the defendant. In the year 1891 she resided at the house of the defendant, Glynn, living with him as a member of the family. She was then about 76 years of age. The relations between them had been confidential and intimate for many years before that time. He had been accustomed to transact business for her and she relied upon him and trusted him implicitly with respect thereto. On the 23d of March, 1891, Mrs. Gallagher executed a will wherein she devised the premises in controversy to her daughter, Margaret J. Cooney. A few days thereafter the defendant suggested to Mrs. Gallagher that it would be more advantageous to cancel the will and convey the property to him, and he promised that if she would do so he would hold the same in trust for the use of Margaret J. Cooney. Thereupon, Mrs. Gallagher, assenting thereto, destroyed the will, and, relying upon his promise to hold the property in trust for his sister, executed to him a deed purporting to be a gift of the property to him. There was no other consideration for the conveyance. It was made upon the express understanding that he would hold the property in trust for his sister, and pay or apply the rents thereof to her use and benefit, and convey the same to her upon demand. Thereupon he went into possession of the property, collected the rents and profits, and applied them in part to the use and benefit of Margaret J. Cooney until December, 1904, at which time he began to apply the whole thereof to his own use, and refused to convey the premises to her. She thereupon demanded a conveyance to herself, which he refused to make.

The evidence was sufficient to establish the material allegations of the complaint. With regard to the trust, it was shown that during the year 1890 Mrs. Gallagher began to reside with Glynn as a member of his family; that she was the mother of Glynn and Mrs. Cooney; that she had executed a will on the 23d of March, 1891; that on the 27th of March in that year she executed the deed in controversy; and that the deed was made in pursuance of an understanding between Glynn and Mrs. Gallagher that he would hold the property in trust for his sister, Mrs. Cooney, and that he would receive the income therefrom, and pay it to his sister or for her use. One of the reasons for making this arrangement was a fear that, if it was put in Mrs. Cooney's control, her husband would induce her to sell the property and that it would thereupon be dissipated. It also appeared that the lot immediately adjoining the property in controversy was owned by Glynn, that there was a belief that the two would sell to better advantage if sold together than if sold separately, and, also, that if a building were to be erected it could be done more advantageously

by erecting a single building upon all the lots and dividing the income therefrom according to the respective interests, and that it was expected that at some time this could be done, or that a sale would be made, and that Glynn could manage the matter better if he held the title to both. Glynn took possession of the premises, and from that time until 1904 proceeded to collect the rents therefrom. Thereafter, to Mrs. Cooney's children, he repeatedly admitted that he was holding the same in trust for the benefit of his sister. In each instance he assured them that it was all right, that he was holding the property for their mother, and that he had so adjusted his affairs that if anything happened to him it would be hers upon his death. He applied the rents to her satisfaction, and, for the most part, to her use or to the use of her family. There is evidence to support the conclusion that, until the year 1904, he never denied his trust obligation, but always, upon inquiry, avowed his intention to fulfill it and to convey the property to Mrs. Cooney at the proper time.

Upon these facts it seems perfectly clear that the case made was that of a constructive trust in favor of Mrs. Cooney, and that the nonsuit was improperly granted. It has been established by a number of decisions in this state that where confidential relations exist between two parties, and one of them executes a conveyance of real estate to the other, upon a parol promise by the other that he will hold it for the benefit of the grantor, or for the benefit of some third person in whom the grantor is interested, there being no other consideration for the conveyance, a trust arises by operation of law in favor of the grantor, or in favor of the third person, for whom the property is to be held. It is the violation of the parol promise which constitutes the fraud upon which the trust arises. If made in good faith, and if it is of a continuing nature, the performance of it for a time does not prevent a trust from arising when it is broken and repudiated. *Brison v. Brison*, 75 Cal. 525, 529, 17 Pac. 689, 7 Am. St. Rep. 180; *Id.*, 90 Cal. 323, 334, 27 Pac. 186; *Jones v. Jones*, 140 Cal. 590, 74 Pac. 143; *Broder v. Conklin*, 77 Cal. 330, 338, 19 Pac. 513; *Alaniz v. Casenave*, 91 Cal. 41, 46, 27 Pac. 521; *Nordholt v. Nordholt*, 87 Cal. 552, 26 Pac. 599, 22 Am. St. Rep. 268; *Feeney v. Howard*, 79 Cal. 525, 529, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; *Odell v. Moss*, 130 Cal. 356, 62 Pac. 555; *Hayne v. Hermann*, 97 Cal. 259, 32 Pac. 171; *Butler v. Hyland*, 89 Cal. 575, 26 Pac. 1108.

The entire question is discussed at great length in *Brison v. Brison*, supra, and it is unnecessary to elaborate upon it here. The other cases cited illustrate numerous phases of the question in which it was attempted to distinguish the *Brison* Case. It is here attempted to distinguish it because in that case the plaintiff was the grantor, and the constructive trust, as it was claimed, arose in his

favor, whereas here the trust is not claimed on behalf of the grantor of the deed, but on behalf of Mrs. Cooney, a daughter of the grantor, and it is said that a trust cannot be thus created in favor of a third person. The case of *Hayne v. Hermann*, supra, was of the same character. In that case the land was conveyed by plaintiff's father to his wife, the defendant, who was plaintiff's mother, upon the express understanding that she would hold the property in trust for the grantor during his life, and after his death for the plaintiff and the defendant in equal proportions. After the death of Mr. Hermann, the daughter began the suit against her mother to enforce a trust as to the undivided one-half of the property. It was held that the case was not distinguishable in principle from that of *Brison v. Brison*, and that the trust arose by operation of law, and could be enforced by the third person as a beneficiary.

It was claimed by the plaintiff that four days prior to the execution of the deed in controversy Mrs. Gallagher had executed the will wherein she devised the property in controversy to Margaret J. Cooney, and that, at the suggestion of the defendant, the will was destroyed, and the deed executed to him instead thereof upon his promise to hold the property for the benefit of Mrs. Cooney. Upon the trial, the court rejected all evidence concerning the contents of the will and the execution thereof. This was clearly erroneous. It seems that the evidence was rejected upon the theory that, as the will was destroyed and had never been admitted to probate, it was absolutely void even as evidence, referring to the case of *McDaniel v. Pattison*, 98 Cal. 86, 27 Pac. 651, 32 Pac. 805. It is true that it is there declared that as a dispositive instrument an unprobated will is without effect. But, under the circumstances appearing here, the fact of the execution of the will by Mrs. Gallagher, the devise of this property to Mrs. Cooney, its subsequent destruction at the instance of the defendant, and the execution of a deed in lieu thereof to the defendant in trust for Mrs. Cooney, would be material and competent evidence to establish the constructive trust alleged. The evidence should have been admitted.

It is claimed that the action is barred by the statute of limitations and by laches. It appears from the evidence, however, that the defendant at all times recognized his obligations to hold the property for Mrs. Cooney and to apply the income therefrom to her use or in accordance with her direction. It is also shown that he did so apply the rents and profits, or at least the greater part thereof, and that he at no time repudiated the trust until within less than a year prior to the beginning of the action. The case in this respect is similar to *Butler v. Hyland*, supra, *Odell v. Moss*, supra, and *Hovey v. Bradbury*, 112 Cal. 620, 44 Pac. 1077. In *Butler v. Hyland* the property was conveyed by a third person to the aunt of plaintiff under circum-

stances which created a trust in favor of the plaintiff, a trust arising by operation of law. The terms of the trust were that her aunt should hold the property in trust for the plaintiff, and that was the purpose for which the conveyance was made. The plaintiff was a member of the family of her aunt. The rental value was small, and none of it was ever paid to plaintiff, but she knew her aunt was paying the taxes, assessments, and repairs. A period of nearly 20 years elapsed after the conveyance was made before the beginning of the action, and the plaintiff was of age for 16 years before the action was begun. It was held that where the promises which induced the conveyance are of a continuing nature, as in that case, and especially between members of one family, the doctrine of laches does not necessarily bar the action until there is a repudiation, or some act which would give notice to the beneficiary that the trustee no longer acknowledged any obligation to comply with the terms of the parol promise. The other cases are similar in character. The principle established by them is that, in cases of this character, neither the statute of limitations nor the equitable doctrine of laches begin to operate until the trustee begins to act in hostility to the continuing obligation imposed by the parol agreement or understanding.

The respondent makes the point that a constructive trust cannot be raised by any agreement made after the execution of the conveyance. This may be conceded to be correct, but the case shown by the evidence is not of that kind. The declarations of the defendant, which were made to the children of the deceased Mrs. Cooney a few days after the execution of the conveyance, were not declarations constituting a promise made at that time to hold the property in trust, but they were statements by him admitting that at the time the deed was executed he had made these promises. They constituted evidence therefore of what had occurred at the very time of the transaction, and were not subsequent promises made by him.

The evidence was not in all respects consistent. If the case had been submitted upon the merits, and thereupon the court below had made findings and given judgment for the defendant, it may be that there would be found enough in the evidence to support that judgment upon appeal to this court, in view of the limited power of the court to review the decisions of the trial courts in cases submitted to it upon the merits. But upon an appeal from a judgment of nonsuit, the rule regarding conflicting evidence is almost exactly the opposite of what it would be in considering the same evidence after a decision upon the merits. Upon a nonsuit the evidence is to be taken in the sense most favorable to the plaintiff, merely contradictory evidence against the plaintiff is to be rejected, and the

plaintiff must prevail if there is enough evidence to make out the case alleged, although there may be contradictory evidence which, if given effect and allowed to prevail, would defeat plaintiff. We have not attempted to relate the evidence contradictory to the facts above stated. In any event the reversal is necessary because of the exclusion of the evidence concerning the will.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(157 Cal. 591)

KIRK v. SANTA BARBARA ICE CO. et al.
(L. A. 2,410.)

(Supreme Court of California. April 8, 1910.)

1. MASTER AND SERVANT (§ 317*)—CONTRACTORS—INJURIES.

A licensee, operating under permission from a city to tear up a public street for the purposes of its business, is bound to restore the street, and to use due precautions to protect the public while the work is in progress, and cannot escape responsibility for injuries occurring from its failure to do so, on the theory that the restoration of the walk was under the control of an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1254; Dec. Dig. § 317.*]

2. APPEAL AND ERROR (§ 801*)—REVIEW—SCOPE—MOTION FOR NEW TRIAL.

Where prejudice of the jury was not assigned as a ground for a new trial in appellant's notice of intention to move, it could not be considered on appeal, under Code Civ. Proc. § 659, subd. 4, providing that when the motion for a new trial is made on the minutes of the court, for errors of law occurring at the trial, and excepted to by the moving party, the notice must specify the particular errors on which the party will rely.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 801.*]

3. APPEAL AND ERROR (§ 705*)—VERDICT—EXCESSIVENESS—REVIEW.

The alleged excessiveness of a verdict cannot be reviewed on appeal, where the transcript does not give the testimony with reference to plaintiff's injuries.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2943; Dec. Dig. § 705.*]

4. APPEAL AND ERROR (§ 1066*)—REVIEW—HARMLESS ERROR.

Where there was no evidence showing that plaintiff was negligent, appellant could not complain of an instruction authorizing a finding against it, notwithstanding plaintiff was negligent, because it had not specially pleaded plaintiff's contributory negligence, while prohibiting a finding against appellant's codefendant, who had pleaded plaintiff's contributory negligence in case the jury found he was negligent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

5. PLEADING (§ 84*)—CONTRIBUTORY NEGLIGENCE—CODEFENDANTS.

Where, in an action for injuries against codefendants, one of them specially pleaded plaintiff's contributory negligence, and the other did not, it was proper to charge that plaintiff might recover, notwithstanding his contributory negligence against the one, though he could not against the other, and this, though plaintiff's complaint charged that he was injured by rea-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

son of defendants' negligence without fault on his part, on which issue was joined.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 170; Dec. Dig. § 84.*]

Department 2 Appeal from Superior Court, Santa Barbara County; W. L. James, Judge.

Action by Augustias A. Kirk against the Santa Barbara Ice Company and others. Judgment for plaintiff, and from an order denying the motion of defendant ice company for a new trial, it appeals. Affirmed.

Day & Day, for appellant. H. C. Booth and L. H. Roseberry, for respondent.

MELVIN, J. This is an appeal by the Santa Barbara Ice Company (a corporation) from a judgment against it for damages in the sum of \$500, and from an order denying its motion for a new trial.

The action was for personal injuries caused by an obstruction placed on a sidewalk in the city of Santa Barbara by Charles C. Pike, one of the defendants herein. He had restored the cement which had been torn up for the purpose of digging a trench, in which pipes were laid connecting a certain shop, owned by one Abraham, with the refrigerating main of the ice company located beneath the street. George E. Voorhees, Jr., an officer of the ice company, in whose name its franchise to lay pipes in the streets of the city of Santa Barbara had been obtained, was also a defendant, but a motion for nonsuit in his behalf was granted by the court, as it appeared that the corporation was the owner of the franchise, and that Mr. Voorhees had acted for it in obtaining the authority to lay the pipe for the refrigerating system.

It appears from the evidence that the Santa Barbara Ice Company caused the digging of the trench across the sidewalk to Abraham's place of business, and that the earth was replaced, after the installation of the pipe, by the company's workmen under direction of a foreman employed by the corporation. Pike, who was a cement worker, called upon Abraham, and solicited the contract for repairing the sidewalk. He was referred to Grant, the acting manager of the ice company, with whom he communicated by telephone. His account of the conversation over the wire differs from that of Grant, but the jury evidently acted principally upon Pike's testimony. According to Pike, Grant expressed surprise that application for the contract to do the work should be made to him, as he and Abraham had talked the matter over, and he had left it to Abraham. He said that there were other repairs to the sidewalk needed in addition to those made necessary by the digging of the trench, that he had told Abraham to have the sidewalk repaired, and that the ice company would be responsible for that part of the work re-

quired to cover the break in the sidewalk produced by the digging of the trench. After reporting this conversation to Abraham, Pike did the work of restoring the sidewalk and placed boards and earth over that part of it which had been rendered necessary by the excavation made for the ice company. This obstruction was not protected by barriers nor lights. Over it the plaintiff fell, and sustained the injuries for which the jury awarded her damages. Witness Grant remembered the fact that he had conversed with Pike and had referred him to Abraham. He also testified that Abraham had agreed to fix the sidewalk, but admitted that if Abraham required it, he (Pike) was "to have the sidewalk fixed to cover up the trench."

From this evidence the jury was justified, we think, in concluding that the Santa Barbara Ice Company, through its manager, delegated to Mr. Abraham the selection of some one to restore that part of the sidewalk broken in the process of preparing to lay the pipe. As a licensee operating under its permission to tear up a public street for the purposes of its business, it was bound to restore that street and to use due precaution for the protection of the public while the work was in progress. It cannot escape responsibility upon the theory that the restoration of the sidewalk was under the control of an independent contractor, for its franchise imposes upon it a duty to the public which it cannot evade by the mere device of authorizing some person to have the work done. In such cases the rule respondeat superior applies. *Colegrove v. Smith*, 102 Cal. 223, 36 Pac. 411, 27 L. R. A. 590; *Luce v. Holloway*, 103 Pac. 886.

Appellant's counsel contend that a verdict which exonerates Pike and holds the ice company responsible for plaintiff's injuries is absurd, and while they concede the point that the ice company "cannot complain of an error of the jury or court which exonerates one defendant and holds another responsible. If the latter is in fact responsible," they earnestly assert that the verdict shows prejudice on the part of the jurors against the corporation. Whether or not this contention be correct we need not determine, for no assignment of error on the ground of the jury's prejudice appears in the notice of intention to move for a new trial, and therefore the point cannot be here considered. Code Civ. Proc. § 659, subd. 4. Even if we could consider the matter of prejudice we could not say whether or not the verdict was excessive because the transcript does not give the testimony with reference to plaintiff's injuries.

The court gave the following instruction: "Contributory negligence is such negligence on the part of the plaintiff as contributes directly or proximately to cause the injury suffered. A person is negligent who fails to use such care as a person of ordinary pru-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dence and caution should use under the same conditions and circumstances. Defendant Pike has pleaded as a part of his defense that plaintiff was negligent, and that her negligence contributed to cause the injury suffered by plaintiff. This is a special defense, and is not pleaded in the defense set forth in the answer of defendant Santa Barbara Ice Company. Therefore, if you find that the defendant Pike was negligent in the particulars set forth in plaintiff's complaint, and that through his negligence plaintiff was injured, but also find that plaintiff failed to use ordinary care, and that her own negligence contributed to cause the injury suffered by her, then she cannot recover as against defendant Pike. On the other hand, if you find that the defendant Santa Barbara Ice Company was negligent in the particulars set forth in plaintiff's complaint, and that through its negligence plaintiff was injured, then you should find a verdict against said defendant Santa Barbara Ice Company, notwithstanding you may find that plaintiff's own negligence may have contributed to cause her injury." Of this instruction appellant complains upon the grounds: (1) That the issue of contributory negligence was raised by the allegation in the complaint that the injury occurred without fault or negligence on plaintiff's part, and the traverse thereof in the answer; (2) as there was but one act of negligence of which complaint was made, and that was Pike's, his special plea of contributory negligence should have been available for all purposes of the case; (3) that the case was necessarily tried with this issue before the jury; (4) that no competent evidence on the issue of contributory negligence could have been excluded from the jury; (5) that the case was, as a matter of fact, tried upon that issue. It is unnecessary, however, to consider this instruction critically, for no evidence is recorded in the statement of the case tending to show contributory negligence, nor does anything with reference to that issue appear, except, perhaps, inferentially from the special finding of the jury that plaintiff used ordinary care and prudence in approaching the obstruction on the sidewalk. For aught that appears in the record, it may have been conceded by defendant that no contributory negligence existed. To justify us in reversing a case because of error in an instruction appellant must show that harm resulted from giving the special instruction. *Los Angeles Cemetery Ass'n v. City of Los Angeles*, 103 Cal. 461, 37 Pac. 375; *Chapell v. Schmidt*, 104 Cal. 511, 38 Pac. 892; *Allen v. McKay*, 120 Cal. 337, 52 Pac. 828; *Edwards v. Wagner*, 121 Cal. 376, 53 Pac. 821; *State Loan & Trust Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600. If the instruction were erroneous, and if the jury had found plaintiff guilty of contributory negligence while finding in favor of

Pike and against the ice company, then, perhaps, the latter would have cause for complaint; but we cannot see how harm resulted to it, in view of the finding that there was no contributory negligence. We think, moreover, that the instruction as an abstract proposition of law is correct, although its bearing upon the case as disclosed by the statement is not obvious.

From the foregoing discussion and the conclusions reached, it follows that the judgment in favor of plaintiff and the order denying appellant's motion for a new trial must be affirmed, and it is so ordered.

We concur: LORIGAN, J.; HENSHAW, J.

(157 Cal. 562)

PEOPLE v. CORD. (Cr. 1,554.)

(Supreme Court of California. April 5, 1910.)

1. HOMICIDE (§ 203*) — EVIDENCE — DYING DECLARATIONS.

A statement, made by one making a dying declaration, that he entertained no hope of recovery; that he made the declaration in that frame of mind—was competent and sufficient to show that he was without hope of recovery, though he also stated that he did not know what the future had in store for him.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 432; Dec. Dig. § 203.*]

2. HOMICIDE (§ 218*)—EVIDENCE—DYING DECLARATION—SENSE OF IMPENDING DEATH—QUESTION FOR COURT.

Whether or not one making a dying declaration was without hope of recovery is a question of fact for the trial court.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 453, 459; Dec. Dig. § 213.*]

3. HOMICIDE (§ 203*)—EVIDENCE—DYING DECLARATIONS.

The fact that one who had been fatally wounded had not been told by his physician that his wound was fatal did not render a dying declaration inadmissible, when it was made under the belief that he could not recover.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 437; Dec. Dig. § 203.*]

4. HOMICIDE (§ 203*)—EVIDENCE—DYING DECLARATIONS—"DYING PERSON."

Code Civ. Proc. § 1870, providing that in criminal actions the declaration of a dying person, made under a sense of impending death, may be admitted in evidence, is declaratory of the existing law that the belief that a fatal wound had been received, and that death was about to ensue, was sufficient to render a dying declaration admissible, and a person who had been fatally wounded, and who was in sore distress therefrom, and who believed that he would not recover, and who was soon about to die, was a "dying person," and a statement made in that belief relating to the cause of his injury is admissible, where it appears that he subsequently died from the direct effects of the wound, though he may have revived after making the statement, or may have lived a considerable time thereafter, and may have again begun to hope for recovery.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 435; Dec. Dig. § 203.*]

5. HOMICIDE (§ 204*)—EVIDENCE—DYING DECLARATIONS.

A person was shot, the bullet piercing the cartilage of the third rib and entering the arch

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the aorta, and fell down into the aorta, and rested on one of the semilunar valves opening from the left ventricle of the heart. In some unknown manner the puncture of the aorta became closed, and so remained for more than two weeks, when for some reason it again opened, causing almost immediate death from bleeding. The day after he was shot he made a dying declaration, after he had stated that he entertained no hope of recovery. Some three or four days after he was shot he was taken to a hospital for an operation, and he remained in the hospital until the day before his death, a period of two weeks. During that time he had recovered sufficiently to go out riding several times and walk upstairs with assistance. *Held*, that his declaration was admissible as a dying declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 433; Dec. Dig. § 204.*]

6. CRIMINAL LAW (§ 854*)—TRIAL—SEPARATION OF JURY.

The fact that a juror in a homicide case was, with the consent of accused, allowed during a recess to go, in charge of an officer, to visit his sick wife in the city, where the trial occurred, was not ground for reversing the conviction, where it was shown that while he was away nothing was said to him, and that the other jurors were locked up, and were inaccessible to any person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2039-2047; Dec. Dig. § 854.*]

7. CRIMINAL LAW (§ 854*)—TRIAL—SEPARATION OF JURY.

Where a jury in a homicide case were permitted to separate while deliberating on a verdict under such circumstances as to make it appear that they might have been tampered with, a new trial should be granted, unless there is affirmative proof explaining the separation, and showing that accused was not prejudiced thereby; and, where this burden is met, a new trial should be denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2039-2047; Dec. Dig. § 854.*]

8. CRIMINAL LAW (§ 1158*)—REVIEW—FINDING OF TRIAL COURT.

The court, on appeal from an order denying a new trial in a homicide case, on the ground of the separation of the jury while deliberating, must accept as true the evidence unfavorable to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3071; Dec. Dig. § 1158.*]

9. CRIMINAL LAW (§ 854*)—TRIAL—SEPARATION OF JURY.

While the jury in a homicide case were at luncheon, a fire broke out in a barn a block distant from the hotel. One of the jurors was a brother of the landlady of the hotel, and the landlady told the jury that as the roof of the hotel was on fire, the waiters could not continue to serve them, and she asked her relative to get the hose, which was in the kitchen, and the juror did so, and carried it from the kitchen through the dining room to the sidewalk in front. All of this was in the immediate presence of the jurors and the officer, with the exception of an instant, while he was in the kitchen. As the jurors started out to the sidewalk one of them ran upstairs, out in front on a balcony over the sidewalk. The juror came down into the street, and with several other jurors walked across to the opposite side, and remained there a few minutes watching the fire. Another juror took a bucket of water and put out a small fire on the sidewalk, and another juror gave directions to an acquaintance on the

street to take care of his horse. No one spoke to either of the jurors about the case. *Held* to justify a finding that the jury was not tampered with, so that the court properly refused to grant a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2039-2047; Dec. Dig. § 854.*]

10. WITNESSES (§ 855*)—IMPEACHMENT—EVIDENCE—GENERAL REPUTATION.

A witness may not be impeached by proof of a bad reputation for truth, unless he is held in such bad repute generally in the community in which he lives; for, under Code Civ. Proc. § 2051, it is the general reputation that is to be proved, and a witness to the reputation must at least be acquainted with the prevailing impression in the community, as disclosed by actions, conduct, or conversations relating to the character in issue, though it is not necessary that the witness should know that the majority of the community have that impression.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1154; Dec. Dig. § 855.*]

11. CRIMINAL LAW (§ 736*)—TRIAL—PROVINCE OF COURT AND JURY—ADMISSIBILITY OF IMPEACHING EVIDENCE.

The court must determine whether general reputation of a witness in the place of former residence is too remote in point of time to be allowed in evidence as impeaching evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1219; Dec. Dig. § 736.*]

12. WITNESSES (§ 352*)—IMPEACHMENT—EVIDENCE.

Where one had neither resided nor done any business in a county for 20 years, but had resided some 200 miles from his former residence, evidence on the subject of his reputation in the county of his former residence was properly excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1152; Dec. Dig. § 352.*]

13. CRIMINAL LAW (§ 485*)—EVIDENCE—OPINION EVIDENCE—HYPOTHETICAL QUESTION.

Where the uncontradicted evidence showed that the wound inflicted on decedent was necessarily fatal, a hypothetical question, put to a physician to elicit his opinion that the immediate cause of death of decedent might have been the reopening of the hole in the aorta inflicted by the wound, by reason of some movement or exertion then made by decedent, was properly excluded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 485.*]

14. WITNESSES (§ 286*)—EXAMINATION—CROSS-EXAMINATION—REDIRECT EXAMINATION.

An examination on redirect examination, not called for by the cross-examination, and not competent as original testimony, is properly excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 994; Dec. Dig. § 286.*]

In Bank. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

W. F. Cord was convicted of manslaughter, and he appeals. Affirmed.

J. A. Allen and Geo. D. Murry (E. O. Miller, of counsel), for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

SHAW, J. The defendant was tried upon a charge of murder of the first degree, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was convicted of manslaughter. He appeals from the judgment and from an order denying his motion for a new trial.

The information charged the defendant with the murder of one John P. Pawley on the 27th day of January, 1908. It appeared that on that day he shot Pawley with a pistol, inflicting a wound from which Pawley died on February 17, 1908. Upon the trial a statement purporting to be a dying declaration of Pawley was admitted in evidence, over the objection of the defendant. It is insisted that this ruling was erroneous for two reasons: (1) Because it was not shown that it was made by Pawley in the belief that he was about to die, and under a sense of impending death; and (2) that at the time he made the statement Pawley was not "a dying person" within the meaning of that term in the statute providing for the admission of dying declarations. Code Civ. Proc. § 1870, subd. 4.

1. The section cited declares that in criminal actions the declaration of a dying person, made under a sense of impending death, with respect to the cause of his death, may be admitted in evidence. The evidence is clearly sufficient to warrant the conclusion that the statement in question was given under a sense of impending death. It was made on January 28th, the day after the deceased received the fatal wound. He was then at his home, lying in bed, and weak from loss of blood caused by the wound. Before making the statement he was informed that he would be asked to relate the facts about the shooting, and that it was necessary first to ask whether or not he thought there was any hope that he would get well. To this he answered: "I don't see no hope in the world." Being then asked, "That is the way you feel?" he said, "I don't entertain no hope at all." After his statement was made and taken down in shorthand, the following conversation occurred between him and the district attorney: "Now, this statement you are making to us, you are making it in view of impending death? Yes, sir. And without any hope of recovery? Yes, sir. We don't know anything about what the future has, but I have no hope of any recovery. That is the way you feel? Yes, sir; the condition of my mind. And it is in that frame of mind that you are making this? In that frame of mind I am making this statement." This shows all that the statute requires on this point. His belief that he could not recover from the wound, and his understanding that he was giving the account of the manner in which he received it, under a solemn sense of approaching death, was clearly indicated by his testimony. The effect of the statements by him as to his mental condition was not destroyed by his remark, after giving the statement, that "We don't know what the future has." This was a mere statement of an obvious conclusion which any person might make under any

circumstances. It did not necessarily indicate that he thereby meant to qualify the statement that he was without hope of recovery. Whether or not he was without such hope was a question of fact to be determined in the court below. The evidence taken was competent for that purpose, and is legally sufficient to sustain the conclusion that he was without hope of recovery, and believed that death would soon take place. The evidence does not show that his physician had previously told him that the wound was fatal, but we know of no rule of law which makes such information a necessary prerequisite to the admission of a dying statement. He had been shot in the breast at the junction of the third rib with the breastbone. He was thereby rendered unconscious for a considerable time, and had lost a great deal of blood; the pleural cavity being found full of blood a few days afterwards. He was affected so that he could not breathe easily, except by lying in a half-reclining position, and he was suffering from pain. All these circumstances would give reasonable cause for grave apprehension of fast approaching death in the mind of a person so situated.

2. The claim that he was not, at that time, a dying person is founded on the fact that he lived for more than two weeks after making the statement, and that, until a few hours before his death, he was thought to be recovering. In this respect the case is remarkable, considering the nature of his wound as shown by the autopsy made after his death. It was found that the bullet, a 38 caliber, had pierced the cartilage of the third rib and the edge of the breastbone and had entered the arch of the aorta, and had then fallen down into the aorta and had rested upon one of the semilunar valves opening from the left ventricle of the heart. If the puncture of the aorta where the bullet had entered had remained open, the man would have died from arterial hemorrhage within a few minutes after he was shot. In some manner unknown it became closed and so remained until the time of his death, when for some reason it again opened, causing almost immediate death from the bleeding. It was the opinion of the physicians that immediately after the shooting the orifice was by some means closed long enough to allow the formation of an organized blood clot over it, which kept it closed until the blood clot had become somewhat disorganized, and that then the puncture opened, letting the blood flow and causing death at once. That the bullet had been, in the meantime, resting within the aorta upon the semilunar valve was shown by the fact that there was a thickening of the valve at the place where it was found, caused by inflammation, which must have been produced by irritation continuing for a considerable period of time. A blood clot was found at the place where the aorta had been

plered by the bullet. Some three or four days after he was shot he was taken to a hospital to have performed upon him the operation of drawing off the blood which had entered the pleural cavity. Nearly two quarts of blood were at that time drawn off by means of a needle. He was in the hospital thereafter until the day before his death, a period of two weeks. During that time he had recovered sufficiently to go out riding several times, and to walk upstairs with assistance. When he left the hospital the bullet had not been located, and the physicians, being ignorant of its situation, then expected that he would recover.

We have no decisions in this state declaring the meaning of the phrase "a dying person," in section 1870 of the Code of Civil Procedure. It does not mean that in order to make such declaration admissible the person making it must be at the time in the act of expiring, or in the final death struggle. It is seldom that a human being in that stage of dissolution is capable of making any statement whatsoever in the nature of a connected or reliable narrative or account of a past transaction. To admit such declarations only when made by a person in that condition would practically exclude them altogether, or render them useless for any purpose. We think the intention of the codifiers was to express, as clearly and comprehensively as was compatible with the necessary brevity, the rule on the subject of the admissibility of dying declarations as it had previously existed. By this rule it was not necessary that the person should be at the time in the throes of death, or that he should die immediately, or within any specified time thereafter, in order to give the declaration probative force. 1 Greenleaf on Ev. § 153; Roscoe, Crim. Ev. *p. 37 (8th Ed.) 61; 21 Cyc. 978; State v. Nash, 7 Iowa, 381; Hall v. Commonwealth, 89 Va. 177, 15 S. E. 517; Swisher v. Commonwealth, 26 Grat. (Va.) 963, 971, 21 Am. Dec. 330; State v. Reed, 53 Kan. 773, 37 Pac. 174, 42 Am. St. Rep. 322; State v. Kilgore, 70 Mo. 553; State v. Tilghman, 33 N. C. 513. It was considered that the belief that a fatal wound had been received, and that death was about to ensue therefrom, would deter such person from uttering a willful untruth about its cause, if not as effectively as would the sanction of an oath, reinforced by the earthly penalty for its violation, at least sufficiently to justify its admission as evidence of the facts recounted. Where a person has been fatally wounded, is in sore distress therefrom, and believes that he will not recover, and is soon about to die, his statement, made in this belief, relating to the cause of his injury is admissible, if it appears that he subsequently died from the direct effects of the wound, although he may have revived after making the statement, or may have lived a considerable time thereafter, and may have again begun to hope

for recovery. Such person is to be deemed "a dying person" within the meaning of the statute from the time the wound is received until death results from the injury, and his statement during that period, made in view of death and with the belief that it is near at hand, may be proven to establish the cause of death. In the present case the evidence shows that this wound was necessarily fatal, and that his dissolution therefrom was in progress continuously from the beginning to the close. The remarkable thing is that he lived so long in such a condition. He was never on the road to recovery, as appellant contends, but was constantly on the brink of death from a recurrence of hemorrhage. He believed his death imminent at the time he made the statement. The fact that he and others may have afterwards entertained a false hope of recovery could not have affected the solemnity or veracity of his statement, nor have made him other than a dying person, in the sense of the statute, at the time the statement was made.

3. It is contended that the jury was allowed to separate, after having been put in charge of an officer, during the trial, and before the case was finally submitted to them. One juror, whose home was in Visalia, where the trial occurred, was allowed to go, in charge of a deputy sheriff, to visit his wife, who was sick. This occurred during a recess of the trial, the juror was separated from the other jurors less than an hour, and the defendant's attorney had consented to the visit. It was shown that while he was away nothing was said to him about the case, and that the other jurors were locked up and were inaccessible to any person. There is no merit in the objection.

4. It is also claimed that there was a separation of the jury after they were charged, and before the verdict was returned. The jury was sent out to consider their verdict on June 2d and returned the verdict in the afternoon of the next day. They were taken to the Elder house on June 3d for luncheon, and were there seated at a table with the officer in charge. No one else was at that table. While they were eating luncheon a fire broke out in a barn one block distant from the hotel. As might be expected, the evidence as to what then ensued is conflicting. The court below decided against the defendant, and therefore we must accept the evidence unfavorable to him as true. One of the jurors, Mr. Cottle, was a brother of the landlady. When the news of the fire was first heard by the jury they remained at the table a few minutes. Then the landlady told them that, as the roof of the hotel was on fire, the waiters could not continue to serve them, and she asked Cottle to get the hose, which was in the kitchen, the door from the kitchen into the dining room being wide open. Cottle did so, and carried the hose from the kitchen through the dining room to the sidewalk in front. All this was in

the plain view and immediate presence of the other jurors and the officer, with the exception of an instant while he was in the kitchen. As he returned the jurors all arose and walked with him as he came from the kitchen into the dining room, and on out to the sidewalk, except one juror, Mr. Kellenberg. Kellenberg asked the landlady if he could assist her, and she asked him to run upstairs and assist persons there. As the other jurors started out to the sidewalk, Kellenberg ran upstairs and through a bedroom or hallway, out in front upon a balcony or porch over the sidewalk. He did this so quickly that when the officer reached the street with the other jurors Kellenberg was already on the porch, holding a ladder, while another person carried a bucket of water up the ladder to the roof to extinguish the fire. Kellenberg then came down into the street, and with several other jurors walked across to the opposite side of the street, and remained there a few minutes, watching the fire at the barn. They were about 60 feet away from the others at that time, but all of them were in plain view of the officer. One of them, Ballou, took a bucket of water and put out a small fire on the sidewalk. While this was occurring another juror, Sellers, gave directions to an acquaintance on the street to take care of his (Sellers') horse. No one spoke to either Kellenberg or Sellers about the case. The officer testified that he kept the jurors in view and within hearing, except as above stated, and as close together as he could under the circumstances, and that they did not talk to any one, nor have any chance to do so. While the jurors were thus out in the street other persons were coming and going about in rather close proximity to them. It would, of course, be improbable that there would be any talk about the case under these circumstances. Cottle was out of sight but an instant in going from the open kitchen for the hose; and, as he was very quick about it, it is a reasonable inference, if not a necessary conclusion, that he neither spoke nor was spoken to, in that moment, upon any subject. Where the jury has been permitted to separate while deliberating upon a verdict, under such circumstances as to make it appear that they might have been tampered with, a new trial should be granted, unless there is affirmative proof upon behalf of the people explaining the separation, and showing that the defendant was not prejudiced thereby. *People v. Adams*, 143 Cal. 210, 76 Pac. 954, 66 L. R. A. 247, 101 Am. St. Rep. 92; *People v. Brannigan*, 21 Cal. 339; *People v. Symonds*, 22 Cal. 352. If this burden is met by the people, a new trial should be denied. We think in this case there was reasonably strong proof that the jury was not tampered with, and that defendant suffered no prejudice from the confusion and slight separation growing out of the alarm of fire. There was other evidence showing greater confusion and a more

complete separation; but, as, before stated, we must take the view most favorable to the prosecution in support of the decision of the trial court. There was no attempt to show the slightest bad conduct on the part of any member of the jury, or any effort by any person to approach or influence them in any way. The following cases support the conclusion that there was no conduct on the part of the jury prejudicial to the defendant. *People v. Bemmerly*, 98 Cal. 301, 33 Pac. 263; *People v. Sansome*, 98 Cal. 239, 33 Pac. 202; *People v. Leary*, 105 Cal. 495, 39 Pac. 24; *People v. Bush*, 68 Cal. 627, 10 Pac. 169; *People v. Wheatley*, 88 Cal. 119, 26 Pac. 95; *People v. Yut Ling*, 74 Cal. 570, 16 Pac. 489.

5. The witness Anderson, for the defendant, testified that he was well acquainted in a certain community in Santa Clara county, where the deceased, Pawley, had formerly lived; that he knew Pawley there; that he had been a deputy sheriff and policeman there for 27 years; that he knew Pawley's reputation in that community at that time for truth, honesty, and integrity, and that it was bad. This evidence was stricken out by the court. He did not testify that he knew the *general* reputation of Pawley for truth, honesty and integrity, and the facts elicited in his cross-examination show that he knew nothing of Pawley's reputation, except what he had heard from three police officers on one occasion during a trial before a justice of the peace more than 20 years before, in Santa Clara county, where Pawley then lived; that these officers were talking about Pawley's testimony at that trial, and that the witness Anderson had seen Pawley but twice in his life, and that was more than 20 years before his death. It was also in evidence that for the last 20 years of his life Pawley had not lived in Santa Clara county, and had not done business there, but had lived in Tulare county, some 200 miles from his former residence. A witness may not be impeached by proof of a bad reputation for truth, unless he is held in such bad repute generally in the community in which he lives, or is generally known. It is the general reputation that is to be proven. Code Civ. Proc. § 2051. The ultimate fact to be established is his actual personal character, and it is considered that the general opinion of his character held by persons who know him is of probative value as evidence of his real character. Hence the witness to such reputation must at least be acquainted with the prevailing impression in the community, as disclosed by actions, conduct, or conversations relating to the character in issue, although it is not necessary that the witness testifying should know that the majority of the community have that impression. 16 Cyc. 1276, 1277. The question as to what territory and what people comprise the "community," especially in large cities, is not here involved. It

is a question for the court to determine whether or not general reputation in a place of former residence is too remote in point of time to be allowed in evidence. 16 Cyc. 1277. In the present case the deceased had not resided in Santa Clara county for more than 20 years before the shooting. It is obvious from these rules of law governing the subject that the court below, so far as appears, did not abuse its discretion in striking out the evidence of Anderson on the subject of the reputation of the deceased on motion of the district attorney.

6. The court properly refused to allow a hypothetical question to be put to a physician, intended to elicit his opinion that the immediate cause of the death of Pawley might have been the reopening of the hole in the aorta by reason of some movement or exertion then made by him. The wound inflicted by the defendant would nevertheless be the proximate cause of the death. The uncontradicted evidence was that it was necessarily fatal; and, even if not so, the proposed opinion would not have affected the proposition that Pawley suffered death at the hands of the defendant. If the opinion had been given as proposed it would have been immaterial to any issue in the case. Furthermore, the witness in answer to previous questions on cross-examination had stated that he hardly thought such a thing possible.

7. Another witness testified that Pawley's reputation for peace and quiet was bad. On redirect examination the court refused to allow him to testify further in regard to Pawley's temper when he became angry. There had been nothing in the cross-examination calling for such testimony as an explanation, and it was not competent as original testimony for the defendant.

We do not consider it necessary to discuss the alleged errors in giving and refusing instructions. They were not, as defendant claims, of a character to mislead the jury, but were correct in law, and were applicable to the case as submitted to the jury.

The judgment and order are affirmed.

We concur: SLOSS, J.; LORIGAN, J.; ANGELLOTTI, J.; HENSHAW, J.; MELVIN, J.

(157 Cal. 552)

In re GHIO'S ESTATE.

ROCOA v. THOMPSON.

(Sac. 1,669.)

(Supreme Court of California. April 5, 1910.)

1. TREATIES (§ 7*)—CONSTRUCTION—OPERATION AS TO STATE LAWS.

An intent of the federal government to materially abridge by treaty the autonomy of the several states and interfere with and direct the state tribunals in state proceedings affecting private property within their jurisdictions will

not be deemed to exist, unless the language used plainly expresses it, or necessarily implies it.

[Ed. Note.—For other cases, see *Treaties*, Dec. Dig. § 7.*]

2. EXECUTORS AND ADMINISTRATORS (§ 24*)—RIGHT TO APPOINTMENT—ITALIAN CONSUL GENERAL—"LAWS OF THE COUNTRY."

The treaty between the United States and the Argentine Republic of July 27, 1853 (article 9, 10 Stat. 1009), provides that if any citizen of either of the two contracting parties shall die without will in any of the territories of the other, the Consul General or consul of the nation to which decedent belonged, or the representative of such Consul General or consul, may intervene in the possession, administration, and judicial liquidation of decedent's estate, conformably with the laws of the country, for the benefit of the creditors and legal heirs. *Held*, that the phrase "laws of the country," so far as the United States is concerned, means the local laws of administration and procedure of the respective states, and qualifies the right and the method of intervention, as well as the procedure after intervention takes place, so that if a consul intervenes he must do so in the manner, to the extent, and for the purpose prescribed by the laws of the jurisdiction where the property is situated, and the Italian Consul General, under the treaty of May 8, 1878, between Italy and the United States (article 17, 20 Stat. 732), providing that the respective Consuls General, etc., shall enjoy in both countries all the rights which are or may hereafter be granted to the officers of the same grade of the most favored nation, would not have the right to be appointed administrator of the estate of a subject of Italy resident in California, leaving property there with his heirs resident in Italy, in view of the California law providing that the public administrator of the county shall officiate in such a case.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 24.*]

For other definitions, see *Words and Phrases*, vol. 4, p. 3721.]

3. TREATIES (§§ 7, 8*)—CONSTRUCTION—"INTERVENE."

In the construction of treaties, words are to be taken in their ordinary meaning as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such sense is clearly intended, and where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred; and as the treaty with the Argentine Republic of July 27, 1853 (10 Stat. 1005), giving the Consul General or consul of either nation the right to intervene in the administration and judicial liquidation of the estate of a subject of his nation dying in the other nation, intestate, relates to local proceedings for the settlement of estates, the word "intervene," used therein, should be given the meaning it usually has in that connection, which, in proceedings in rem, does not usually include the right to take the property from the custody of the court or officer upon whom the law imposes the duty of administering and distributing it, and hence the word in the treaty will be deemed to imply an intention to give a right to the consul to appear as a party in a pending administration or action carried on by another person, and not a right to institute and carry on the proceeding itself, especially as the object of the treaty to allow the consul to represent the subjects of his country who are interested as heirs or creditors would be fully met by such construction.

[Ed. Note.—For other cases, see *Treaties*, Dec. Dig. §§ 7, 8.*]

**4. PARTIES (§ 38*) — INTERVENTION—"INTER-
VENIRE."**

Intervene," when applied to matters of law, means to interpose in a lawsuit so as to become a party to it, and at civil law signifies the act of a third person who becomes a party in a suit pending between other persons.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 38.*

For other definitions, see Words and Phrases, vol. 4, p. 3731.]

In Bank. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Proceedings for settlement of the estate of Giuseppe Ghio. From an order granting letters of administration to George F. Thompson as administrator, Salvatore L. Rocca appeals. On rehearing, after judgment in the District Court of Appeal. Affirmed.

The opinion of the District Court of Appeal (per Hart, J., concurred in by Chipman, P. J., and Burnett, J.) is as follows:

"On the 27th day of April, 1908, Giuseppe Ghio died, intestate, in the county of San Joaquin, this state, leaving an estate consisting of personal property of the value of about \$1,061.85. The deceased, at the time of his death, was a resident of San Joaquin county, but a citizen of Italy. His surviving heirs are a widow and three minor children who were, at the time of his death and when the proceeding here involved was heard in the court below, residents of Italy. Both the public administrator of San Joaquin county and Salvatore L. Rocca, the Consul General of the kingdom of Italy, in and for the states of California, Oregon, Washington, Nevada, and the territory of Alaska, petitioned for letters of administration of the estate of said deceased. The court, upon the hearing of the matter of the petitions of the contesting petitioners, made an order granting letters of administration to George F. Thompson, the said public administrator, and, necessarily, refusing to grant letters to said Salvatore L. Rocca, Consul General, etc. This appeal is prosecuted from said order.

"The ultimate question submitted here for determination is one of more than ordinary magnitude. It involves the important proposition of whether foreign consular officers stationed and representing their governments in the United States are entitled, under and by virtue of the rights conferred upon them by the provisions and stipulations of the treaties subsisting between this and the governments they so represent, to supersede the public administrators in the matter of the administration of the estates of aliens (citizens of the countries they represent) denized in this country, dying here intestate and leaving estates within the jurisdiction of our local courts. It is not claimed that there is any provision contained in the treaty between this government and the kingdom of Italy which, in terms, authorizes the exercise by the consular officers repre-

senting the latter government in the United States of the power and right contended for here by the appellant. It is, however, the contention that under the 'most favored nation clause' of said treaty the Consuls General of Italy, stationed here, are, by virtue of the provisions of article 9 of the treaty between this government and that of the Argentine Republic, entitled to exercise the power and right claimed by the appellant in preference to the public administrator.

"The Italian treaty with this government provides that Consuls General of Italy are entitled to 'all the rights, prerogatives, immunities and privileges which are now or may hereafter be granted to the officers of the same grade of the most favored nation.' Article 9 of the Argentine treaty reads as follows: 'If any citizen of either of the two contracting parties shall die without will or testament in any of the territories of the other, the Consul General or consul of the nation to which the deceased belonged, or the representative of such Consul General or consul in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs.' U. S. Treaties 1904, p. 24; 10 Stat. 1009.

"Whether the position of appellant is tenable or otherwise rests and hinges entirely upon the meaning of the word 'intervene,' as used in the foregoing article of the Argentine treaty, and, therefore, upon the correct interpretation of said word as so employed his contention must either be sustained or rejected. In support of his contention, appellant cites the following authorities: In re Fattosini, 33 Misc. Rep. 13, 67 N. Y. Supp. 1119; In re Lobrasciano, 38 Misc. Rep. 415, 77 N. Y. Supp. 1040; In re Wyman, 191 Mass. 276, 77 N. E. 379, 114 Am. St. Rep. 601; Devlin on the Treaty Power, § 202.

"The construction given by the foregoing authorities of the language of the provision of the Argentine treaty upon which appellant relies to sustain his position is that the Italian consul, under the 'most favored nation clause' of the Italian treaty is entitled to the possession, for the purposes of administration, of the property of an Italian subject dying intestate and leaving estate within his consular jurisdiction. The cases of In re Logiorato, 34 Misc. Rep. 31, 69 N. Y. Supp. 507, and Lanfear v. Ritchie, 9 I. a. Ann. 96, hold to opposite views, and maintain that the full extent of the right and power prescribed to the Italian consul is to 'intervene' in such cases as the one at bar in the sense in which that word is used in our local statute law, and that such is the true interpretation of the word 'intervene,' as used in the Argentine treaty. In other words, it is held in the last-mentioned cases that to intervene is to 'come

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

between,' and 'the right to intervene in a judicial proceeding is a right to be heard *with others who may assert demands or defenses.*' (Italics ours.) This is, obviously, the meaning of intervention or of the right to intervene as prescribed in our local Code. Section 387, Code Civ. Proc. The effect of the construction thus given the provision of the Argentine treaty, that the Consul General 'shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, *conformably with the laws of the country,*' etc., is that said language means nothing more than that such intervention or such right to intervene shall be in accordance with the procedure or rules laid down by our local laws concerning the right to intervene in any case or under any of the circumstances indicated therein. In other words, assuming that, by virtue of the terms of the 'most favored nation' clause contained in the Italian treaty, the Italian consul, as to the estate or property of a subject of the kingdom of Italy, dying intestate in this country, is brought within the rights conferred by article 9 of the Argentine treaty, he is thus limited to the exercise of the right or power only of making himself a party to the proceedings in administration as an *intervener*, but must do so according to the mode prescribed for intervention by our Code, for the prosecution or defense and protection of the rights of the creditors and of the rightful heirs of the deceased or the legal successors to his estate, and *not as an administrator of the estate* in preference to the officer created by our local laws and invested with the power and right and duty to administer the estates of persons dying intestate, leaving estate situated here, but having no lawful heirs within the jurisdiction of the state.

"Mr. Devlin, in his very excellent volume on the treaty power, seems to approve the construction of the language of article 9 of the Argentine treaty as expounded by the New York Supreme Court in the case of *In re Lobrasciano*, supra, for, without comment, he repeats the language as used in that case that 'the power conferred upon the consul by the words above quoted (the right to intervene) is not limited by the succeeding words, "conformably with the laws of the country for the benefit of the creditors and legal heirs." These words relate merely to the procedure of administration,' proceeds Mr. Devlin, 'and not to the right to administer.'

"In the case of *In re Wyman*, supra, the Supreme Court of Massachusetts, holding with the contention of appellant here upon the construction of article 9 of the Argentine treaty, and applying such construction to the rights of the Russian vice consul under the 'most favored nation' clause of the Russian treaty, brushes aside the ruling in the Louisiana case of *Lanfear v. Ritchie*, supra, by declaring that the decision was rendered and filed 'at a time when we might expect the

doctrine of state rights to be strongly insisted upon.'

"It is an established and incontrovertible principle that a treaty negotiated by the government of the United States with a foreign power becomes, upon the adoption of such treaty, a part of the law of every state of the American Union, and that where the provisions and stipulations of the treaty are at cross-purposes with the statute of any state the latter must succumb to the former. This principle is essentially an indispensable attribute of the treaty-making power vested alone in the general government, and is expressly declared in the second subdivision of article 6 of the federal Constitution in the following language: '* * * All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution and laws of any state to the contrary notwithstanding.'

"The courts, with few exceptions, in the construction of the scope and effect of the treaty-making power delegated to and therefore exclusively vested in the federal government, have gone to the extreme limits, and recognize nothing within the rights reserved by the states to themselves which must not give way to the force of treaty stipulations. The federal courts have uniformly held this power to extend even to the abrogation, pro tanto, of all and every character of state legislation involving subjects of exclusive internal cognizance, where the stipulations of treaties and the provisions of local statutes conflict. As stated, this proposition proceeds from the fundamental principle of our system of government 'that the Constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and Constitution.' *Haugenstein v. Lynham*, 100 U. S. 490 (25 L. Ed. 628); *Foster & Elam v. Neilson*, 2 Pet. 253, 7 L. Ed. 415; *The Cherokee Tobacco*, 11 Wall. 616, 20 L. Ed. 227; *Mr. Pinckney's Speech*, 3 Elliott's Constitutional Debates, 321. And the same principle is enunciated and sustained by some of the state courts, as in the New York and Massachusetts cases cited and relied upon by appellant and to which we have hitherto referred. See, also, *People, etc., v. Gerke & Clark*, 3 Cal. 381.

"There is not, and there could never be, since the establishment of the general government by the adoption of the federal Constitution, any doubt that the treaty-making power of the federal government must, from the very necessities of our complex governmental system, be sufficiently broad to cover and include all of the usual subjects of treaties between different nations. Yet, it is not to be wondered that questions involving the extent to which the power could be exercised presented for judicial solution, when the nation was still young, many perplexing and troublesome problems, and that, as an act

of Congress attempting to deal with subjects clearly within the reserved rights of the states in contravention of such rights would be void as being in excess of the power of the national government, the early judges were to no little extent startled at the proposition that said government could accomplish through treaty stipulations what it was powerless to do by congressional legislation. Under the decided cases in which this power has been defined, we are unable to find the line beyond which the government may not extend its exercise.

"In the case of *In re Logiorato*, supra, in which, as we have seen, the contention of appellant as to the construction of the language upon which he relies in the Argentine treaty is controverted and discarded, the learned surrogate concedes 'that a solemn treaty of the United States with Italy is of binding force, and that it must control all courts, even to the extent of ousting them of jurisdiction or of *changing the rules of their procedure*.' (Italics ours.) And, thus we are led to inquire: May the federal government, through a treaty compact, change the nature of the preliminary proceedings, the mode of trial, and the rules of evidence established by the local Legislatures in criminal cases in which the laws of the commonwealth are charged to have been violated by citizens of another country who are residents of this? If so, why does not the power extend to the changing of the mode and character of the punishment to be imposed in all cases of infraction of the local criminal laws by foreigners denizenized here? Is it legitimately within the treaty-making power, as applying to aliens residing in this country, to change our procedure and the character of our system of pleadings in civil cases in law and in equity? We shall not undertake to answer these questions. Nor are we to be understood as declaring that, under the treaty-making power granted by the states to the central government, it would not constitute the exercise of competent authority to stipulate or provide for the trial in our *state courts* (we are not now speaking of the practice in consular courts, which are not state or local tribunals, and in which the practice and procedure must, necessarily, be prescribed and regulated by congressional legislation or perhaps by treaty negotiations, or by both) of alien residents by any mode or procedure upon which this government and another power might agree, however radically different such mode or procedure might be from that authorized by the system established by our local Legislatures. We neither affirm nor deny the proposition, for, as we have said, we are unwilling to venture an opinion, based upon the decisions we have examined, as to the limitations, if, indeed, there be any, upon this power, except that it cannot be so used as to change the character of the government or to be inconsistent with the nature and structure thereof or the objects

for which it was formed. The discovery of the exact and precise limitations upon the exercise of this power by our national government, keeping in view the rights which the states have reserved to themselves or have never given away, is a task which may well be commended to the genius and industry of some curious publicist.

"But we think that it can be safely laid down as an incontestible proposition that, where a foreign power, under the stipulations of a treaty with this government, claims rights which do not intrinsically or in themselves constitute the 'usual subjects' of treaties, such rights must be granted in language so clear and unmistakable that no serious question can arise as to the intention of the high contracting parties in relation thereto, and that in no case should the enjoyment of such rights be vouchsafed upon a strained or far-fetched construction.

"It may happen, and perhaps in the history of our foreign relations it has happened, that, in some particular instances, in order to promote and maintain the friendly commercial and political comity so essential to the peace, prosperity, and happiness of all civilized countries, requests are made or concessions asked and granted by treaty stipulation (in consideration of the concession of similar rights to this government) as to certain rights which, in strictness, do not involve or appertain to subjects which are peculiarly and inherently of international concern; that is to say, subjects which in themselves are not indispensably necessary to the maintenance of full and complete international amity. Such requests or concessions, if granted, are obviously acceded to for no other reason than that they are requested, or, perhaps, demanded, and not because they relate to the usual subjects of treaties. We can readily understand how, for instance, in the absence of an express provision in the treaty with regard thereto, a foreign power maintaining treaty relations with this government, could insist under the 'most favored nation' clause upon privileges as to our public educational advantages equally with the other governments in conventional amity with this, for the very obvious reason that the subject of education is one of universal interest and concern to all civilized governments. Such a subject naturally comes within the category of the 'usual subjects' of treaties. So with all those subjects with reference to which Congress possesses the sole power of legislation, as, for instance, the tariff, interstate commerce with its various ramifications, and like questions.

"This leads us to the consideration of the specific question submitted here for decision.

"As we have already explained, the Italian consul claims the right to administer upon the estate involved in this controversy by virtue of the 'most favored nation' stipulation of the Italian treaty by reference to the effect of said stipulation upon the provisions

of article 9 of the Argentine treaty. As before stated, the determination of the question is dependent upon the construction which may be properly put upon the language of the Argentine treaty by which it is provided that the consul of a foreign country is entitled to 'the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs.' We may as well say, in limine, that we do not agree with the appellant's construction of the language of article 9 of the Argentine treaty. The New York and Massachusetts cases which are cited in support of his construction are entitled to great weight in the consideration of the question, as are likewise, the views of Mr. Devlin, who has furnished the profession with a learned and valuable treatise on the Treaty-Making Power; but we are not satisfied with the conclusion reached by those writers and are of the opinion that it cannot be sustained upon principle or sound reason.

"In the first place, we see nothing in the right to administer upon the estate of a deceased alien, dying intestate and leaving property in this country, which justifies the conclusion that such right constitutes one of the 'usual subjects' of international treaties. The subject is one, on the contrary, which in itself, it seems to us, cannot and could not affect international relations or become an essential feature of the most perfect commercial and political relations between this and other governments. The object of the administration of estates of deceased persons in this country is: First, to protect the creditors thereof; and, secondly, to execute, as to the legal heirs, the law of descents. The rights of creditors are paramount to those of the heirs, but it is the duty of the courts and other officers charged with the responsibility of administering such estates to watch and protect the interests of both with equal vigilance and good faith. This being done, the object of administration is fully and effectually accomplished. Administration of the estates of deceased persons, like that of the estates of minors and incompetents, is a subject, as before suggested, essentially of local concern and possesses none of the characteristics of international importance. And this is equally true where the deceased is an alien resident and his legal heirs citizens and residents of a foreign country. The duty of administering the estate faithfully in the latter case is as binding upon the local officers charged with its performance as if the deceased and his heirs were citizens of this country. The legal heirs of the deceased in the case at bar, although citizens and residents of Italy, are undoubtedly entitled to the residue of the estate of said deceased after the payment of creditors and the expenses of administration. This right, flowing from treaty stipulations,

has often been so adjudicated and sustained by our courts, and it involves a proposition which constitutes an appropriate subject of the treaty-making power. The full extent of the interest, therefore, of a foreign government in the estate of a citizen of the country over which that government prevails dying intestate here is to see that the alien heirs of the latter or those entitled to succeed to his estate receive in full all that they are entitled to. In other words, such government is interested to the extent only that it may insist that the rights of its own subjects in this country shall be fully conserved and protected. This being so, is it to be supposed, in the absence of an express provision in the treaty to that effect, that this government intended, at the time of the execution of the treaty between it and the kingdom of Italy, that, under the 'most favored nation' clause, the consular officers of the latter stationed here should be authorized to oust a duly created local officer, specifically clothed with the power and duty of administering upon such estates as the one involved here, of his right to exercise the duties of his public office? We cannot be persuaded that such was the intention. There is no reason of which we can conceive why such should have been or was the intention. There is every reason why the intention was not to thus trespass upon the rights of the states and thereby set at naught a local statute specifically enumerating those entitled to administer upon the estates of persons dying intestate and leaving property within the jurisdiction of our local courts.

"Foreign consular officers stationed in this country should, undoubtedly, as they always are, be invested with plenary power to protect not only the general rights of the governments to which they belong, but also the individual personal and property rights of citizens of their countries who are denizens of this. And where, as in the case at bar, such officers are given the right by treaty to intervene in the administration of the estates of citizens of their own country dying intestate here—that is, given the right to officially and as parties to the proceeding for that purpose to exercise such surveillance over such estates as to enable them to fully protect the interests of the estates and all interested therein—they are thus given a power as plenipotentiary in extent as they are entitled to exercise, and the power so given and limited is not inconsistent with the rights of the states. In California (and we presume the same may be done in most if not all of the states) the probate court has the power to appoint and authorize an attorney to represent and protect the interests of absent heirs to all estates, and to the extent of his authority such attorney may in a sense intervene in the administration of those estates. While the right to appoint an attorney for that purpose is not expressly authorized by statute, but is a part of the inherent power

of the probate court, it would not for a moment be contended, if the law provided that an attorney should be so appointed and 'intervene' in behalf of absent heirs, he would thus be clothed with authority to administer upon such estate in preference to those enumerated in section 1365 of the Code of Civil Procedure.

"We think the clear intention of the Argentine treaty was to confer no greater right upon consular officers in cases like the present one than to see that the public administrator administers the estate so as to fully protect and preserve the interests of the creditors and heirs; that is, to see that the estate shall first discharge its obligations to its creditors and then to require the devolution of the residue upon those who are citizens and residents of a foreign country who are legally entitled to the same.

"But we are not without very excellent authority that the meaning here given to the word 'intervene' and the language following the use of that term, 'conformably with the laws of the country,' is correct.

"In the case of *In re Logiorato's Estate*, supra, the learned writer of the opinion thus disposes of the question: 'It will be observed that the right assured to the Consul General is to "intervene," and that this intervention is to be "conformably with the laws of the country." To intervene is to "come between" (Webst. Dict.), and the right to intervene in a judicial proceeding is a right to be heard with others who may assert demands or defenses. It is not a right to take possession of the entire corpus of a fund which is the subject of the proceeding. A right to intervene "conformably with the laws" of the state of New York is something different from a right to set aside the laws of the state, and take from a person who, by those laws, is the officer intrusted with the administration of the estates of persons domiciled here, and who leave no next of kin within the jurisdiction, the right and duty of administering their assets. * * * The eminent text-writers cited in the opinion of the learned surrogate (in the *Fattosini Case*) do not intimate that the courts of civilized states, acting under general laws framed for the protection of foreigners equally with their own citizens must grant administration, contrary to the terms of those laws, to consuls, under any circumstances whatever. Thus in *Wools. Int. Law*, p. 154, the learned writer, in enumerating the duties of consuls, includes the power "of administering on the personal property left within their consular districts by deceased persons, when no legal representative is at hand, and when law or treaty permits, and thus of representing them, it may be, before the courts of the district." Consuls may accept administration, but no right to override the local law is suggested. See, also, *Wheat. Int. Law* (8d Ed.) 167, 168.'

"Caleb Cushing, as Attorney General of the United States, in a letter addressed to

Mr. Cavalcante D'Albuquerque, envoy of the Emperor of Brazil, defined the meaning of the word 'intervene' as employed in international law. 8 Op. Atty. Gen. 99. This letter was written in the year 1856, three years subsequently to the conclusion of the treaty between the Argentine Republic and the United States, and therein the following language is used: 'The administration of the estate of a foreign decedent is primarily a question of the local jurisdiction, and his consul can intervene only so far as the local law may permit.' In the same letter, at page 99, the learned Attorney General proceeds: 'In all these cases, the consul of the decedent's country has no jurisdiction; he may intervene by way of advice or in the sense of surveillance, but not otherwise as consul and of right. Thus, if the decedent, being a foreigner, leaves in the state a minor heir, the consul of his country may intervene to see that he have a proper guardian to secure his interests in the succession.' It will thus be noticed that Mr. Cushing's interpretation of the word 'intervene' corresponds with that which we hold to be the correct meaning of the term as it is used in the Argentine treaty.

"Mr. John Hay, as Secretary of State, addressed an official letter, dated February 3, 1900, to Senator E. O. Wolcott, in which he said: 'With regard to the second inquiry, pertaining to the last clause of article 3, it may be said that the right of a consular officer to appear personally in behalf of the absent heirs or creditors until they are otherwise represented, does not imply that consular officers have the status of attorneys or are to perform the duties of a public administrator. By the law of nations a consular officer is the provisional conservator of the property within his consular district belonging to his countrymen deceased therein. The United States Consular Regulations direct our consular officers, when the foreign local authorities institute proceedings in relation to the property of deceased Americans who leave no representatives in the foreign country, to intervene by way of observing the proceedings, but it is not understood that this involves any interference with the functions of a public administrator.'

"But we think it is unnecessary to address further consideration to the question in controversy.

"Though in view of the construction we have given the Argentine treaty, it is not necessary to decide the question, we may suggest that it is a matter of serious doubt whether the 'most favored nation' clause in a treaty can in any event be invoked to secure advantages and privileges to a government granted by treaty to another country than the one seeking them to avail itself of such privileges, except where such advantages and privileges may be granted freely and without consideration. If, for example, it clearly appeared from the language of the Argentine treaty that the consular officers of the Ar-

gentine Republic were accorded the right to administer upon the estates of citizens of that country dying intestate in this, in preference to the public administrator or to any of the other persons mentioned in section 1385 of the Code of Civil Procedure, in consideration of a like privilege or right conceded to any of the diplomatic officers of this government stationed in the Argentine Republic, then we doubt very much whether the 'most favored nation' clause in other treaties could avail to give such governments the same right. This, it seems to us, would be particularly true where, as we have held to be the fact here, the privilege or right sought to be exercised under said clause does not spring from or belong to, intrinsically, any of the usual subjects of treaties. But, as stated, we do not feel that we are called upon to determine this question. An able consideration of the proposition, however, may be found in the opinion of Attorney General Cushing, rendered in the year 1855, in response to a request therefor from the Secretary of State (6 Op. Atty. Gen. p. 148), and also in the cases of *Bartram v. Robertson*, 122 U. S. 116, 7 Sup. Ct. 1115, 30 L. Ed. 1118, and *Whitney v. Robertson*, 124 U. S. 190, 8 Sup. Ct. 456, 31 L. Ed. 386.

"Other points are urged and discussed in the briefs, but we do not deem it necessary to consider them.

"For the reasons herein expressed, the order appealed from is affirmed."

Ambrose Gherini, Clary & Loutitt, and R. K. Barrows, for appellant. Eustace Cullinan, John E. Budd, and Cullinan & Hickey, for respondent. John J. O'Toole, *amicus curiæ*.

SHAW, J. Salvatore L. Rocca appeals from an order of the superior court granting to George F. Thompson, as public administrator of San Joaquin county, letters of administration upon the estate of Giuseppe Ghio, deceased, and refusing the application of said appellant for such letters. The appeal was submitted to the District Court of Appeal of the Third District and decided in favor of the respondent. A rehearing in the Supreme Court was ordered, because, as treaty rights were involved, it was deemed advisable that the highest state court should consider the matter. Giuseppe Ghio, at the time of his death, was a resident of San Joaquin county, Cal., and a citizen of the kingdom of Italy. He left a small estate situated in San Joaquin county. His heirs at law are his wife, Maria, and three minor children. All of them reside in Italy. The appellant is the Consul General of the kingdom of Italy for California, Nevada, Washington, and Alaska territory. The deceased died intestate on April 27, 1908, in San Joaquin county.

The sole question for consideration is whether or not where a citizen of Italy, being a resident of California, dies intestate,

leaving property in this state, and his lawful heirs all reside in Italy and are citizens of that country, the Consul General of Italy is entitled to letters of administration upon his estate, in preference to the public administrator of the county of his residence.

The appellant bases his claim to such letters upon the provisions of the treaty of May 8, 1878, between Italy and the United States. The clauses relating to this subject are articles 16 and 17, which are as follows:

"Art. 16. In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the consul or consular agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested."

"Art. 17. The respective Consuls General, consuls, vice consuls and consular agents, as likewise the consular chancellors, secretaries, clerks or attaches, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade of the most favored nation." 20 Stat. 732.

Under article 17, the appellant, as Consul General of Italy, claims the rights which are given to Consuls General of the Argentine Republic by the treaty between that country and the United States, concluded July 27, 1853 (10 Stat. 1005). The last clause of article 9 of that treaty is as follows: "If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the Consul General, or consul of the nation to which the deceased belonged, or the representative of such Consul General or consul, shall have the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." Page 1009.

Article 6 of the Constitution of the United States declares that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." And section 10, of article 1, further provides that: "No state shall enter into any treaty, alliance, or confederation." We will assume that the treaty-making power of the federal government is so far superior to the law-making power of Congress that it would authorize the federal government to control by treaty the power of the states to confer and limit the right of administration of estates and the power of the state courts to appoint administrators, so far as the estates of resi-

dent citizens of foreign countries are concerned. See, on this subject, note to Yeaker v. Yeaker, 81 Am. Dec. 536. If this is the case, the treaty with the Argentine Republic, if construed in accordance with appellant's contention, supersedes, in part, the provisions of our Code of Civil Procedure of California, giving the right of administration of the estates of persons dying intestate to the public administrator, in the absence of resident legal heirs, and gives to the consular agents of that country a paramount right to letters upon the estates of citizens of that country residing here, who die intestate leaving real or personal property in this state and no resident heirs. The favored nation clause of the Italian treaty would give the like right to the appellant, as Consul General of Italy, in the present case.

Similar favored nation clauses are found in the treaties with Austria-Hungary (Treaty of 1870, art. 15, 17 Stat. 831); Denmark (Treaty of 1826, art. 8, 8 Stat. 342); Japan (Treaty of 1894, art. 15, 29 Stat. 852); Kongo (Treaty of 1891, art. 5, 27 Stat. 929); Korea (Treaty of 1882, art. 2, 7 Fed. Stat. Ann. 680); Russia (Treaty of 1832, art. 8, 8 Stat. 448); Spain (Treaty of 1802, art. 28, 33 Stat. 2120); Switzerland (Treaty of 1850, art. 7, 7 Fed. Stat. Ann. 842); Tonga (Treaty of 1886, art. 11, 25 Stat. 1442); and Zanzibar (Treaty of 1886, art. 2, 25 Stat. 1439). Foreign consuls and consular agents are given the same "privileges" as those of the most favored nation by the treaties with Belgium (Treaty of 1880, art. 2, 21 Stat. 777); Costa Rica (Treaty of 1851, art. 10, 10 Stat. 922); France (Treaty of 1853, art. 12, 10 Stat. 999); Germany (Treaty of 1871, art. 3, 17 Stat. 922); Greece (Treaty of 1902, art. 2, 33 Stat. 2123); Honduras (Treaty of 1864, art. 10, 13 Stat. 705); Netherlands (Treaty of 1878, art. 3, 21 Stat. 663); Paraguay (Treaty of 1859, art. 12, 12 Stat. 1097); Persia (Treaty of 1856, art. 7, 11 Stat. 710); Roumania (Treaty of 1881, art. 2, 7 Fed. Stat. Ann. 773); and Servia (Treaty of 1881, art. 2, 22 Stat. 968). The treaty of 1903 with China gives Chinese consuls here the same "attributes, privileges and immunities" as those of the most favored nation. Article 2, 7 Fed. Stat. Ann. 487. The consuls from the countries thus given the same "rights," "prerogatives," or "powers," being those embraced in the last first given, could doubtless claim the same rights as those of Italy, with respect to estates of citizens of their respective countries dying here. Perhaps those included in the second list would claim the same right as a "privilege" within the intent of the respective treaties. The treaty of 1887, with Peru (25 Stat. 1461, art. 33), which terminated in 1899 by notification from Peru, provided that the consuls of each country, in the absence of heirs or representatives, should, ex officio, be the executors or administrators of the citizens of their country who died within their consular jurisdiction.

The question presented would directly affect the right of administration upon the estates of all citizens of all the above-named countries residing in this state, of whom there is doubtless a large number. It is also of grave importance because its solution in favor of the appellant necessarily ascribes to the federal government the intent, by means of its treaty-making power, to materially abridge the autonomy of the several states and to interfere with and direct the state tribunals in proceedings affecting private property within their jurisdictions. It is obvious that such intent is not to be lightly imputed to the federal government, and that it cannot be allowed to exist except where the language used in a treaty plainly expresses it, or necessarily implies it.

So far as we are aware, the exact point has not been considered in any of the states except Massachusetts and New York. In New York it has arisen only in the surrogate courts of two of the counties, New York county and Westchester county. The surrogate court of the latter county held that the Consul General of Italy was entitled to letters of administration upon the estate of a citizen of Italy who died leaving property in that county, in preference to the county treasurer, who, by the state law, was entitled as public administrator, in the absence of heirs and creditors. *In re Fattosini*, 33 Misc. Rep. 18, 67 N. Y. Supp. 1119. The same court, in a similar case, apparently decided that the Italian consul was entitled, by virtue of his office, to maintain a proceeding in the surrogate court, before any grant of letters of administration, to obtain possession of the effects of the deceased, in order that the consul might administer the same under the direction and control of the court. It does not appear that letters had been granted to the consul. *In re Lobrasciano's Estate*, 38 Misc. Rep. 415, 77 N. Y. Supp. 1040. The surrogate court of New York county held, in a similar case, that, where the public administrator refused to act and the Italian consul was legally competent under the state law, he would be entitled to letters, under the statutory provision that, when in such case the public administrator refused to act, any person legally competent might be appointed. But his right in preference to the public administrator was denied. *In re Logiorato's Estate*, 34 Misc. Rep. 31, 69 N. Y. Supp. 507. The Massachusetts Supreme Court decided that, under the most favored nation clause of the treaty with Russia and by referring to the treaty with the Argentine Republic, the Russian vice consul had a right to administer, paramount to that of the public administrator, in the case of a citizen of Russia who died in Massachusetts leaving personal property there; his legal heirs being in Russia. *McEvoy v. Wyman*, 191 Mass. 278, 77 N. E. 379. In a Louisiana case (*Lanfear v. Ritchie*, 9 La. Ann. 96) the Swedish consul applied for an order that he

supersede the duly appointed public administrator in the possession of the estate of a deceased citizen of Sweden, whose heirs were Swedish subjects residing in Sweden. The contention was that this was guaranteed by the treaty with Sweden. The treaty then in force did not contain any favored nation clause, nor purport to give to consuls in either country the right to administer the estates of its deceased citizens. The court denied his application on that ground, and also on the ground that a treaty could not control the state courts. In *Aspinwall v. Queen's Proctor*, 2 Curteis, 241, the English court held that the United States consul, as such, had no right, under the act of Congress of 1792, to administer upon the estate of an American traveler who died while in England leaving property there. The court said that "the crown is the party to see that the property of any person dying in its dominions goes into proper hands," and that the law of the United States could not be allowed to control, even if it purported to do so.

We do not agree with the Supreme Court of Massachusetts and the surrogate of Westchester county, N. Y., in regard to the meaning and effect of the Argentine treaty. They held that the right given thereby "to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country," included the right to be appointed administrator of the estate in place of the person who, might be designated by the laws of the particular state to be such administrator and who had either been previously duly appointed by the local state court, or was applying for such appointment. It appears clear to us from this language that, whatever right was given, it was intended to be a right which should conform to the laws of the country, and that, in view of the well-known complex form of our government, the phrase "laws of the country," so far as the United States is concerned, means the local laws of administration and procedure of the respective states. If the right asserted is necessarily contrary to those laws, it cannot be said to conform to them. Our law declares that in the absence of next of kin entitled to inherit, the public administrator shall take charge of and administer the estate for the benefit of the creditors and heirs. The right claimed under the treaty is that, in such a case, the consul of the country of which the deceased was a citizen shall take charge and administer; a right directly in conflict with our law. The contention of the appellant is that the only effect of the phrase "conformably with the laws of the country" is that the consul, when appointed, must administer the estate in compliance with the local law of administration. The more obvious interpretation is that the phrase qualifies the right and the method of intervention, as well as the proce-

cedure after intervention takes place; that is, that, if the consul intervenes, he must do so in the manner, to the extent, and for the purposes prescribed and allowed by the laws of the local jurisdiction in which the property is situated. This is the grammatical effect of the qualifying clause.

Whether the matter in hand is the possession, the administration, or the judicial liquidation of the estate, the treaty secures to the consul only the right to "intervene" therein. The word "intervene" is here used with reference to a proceeding in a judicial tribunal. In that connection the word has a settled meaning. The dictionaries declare that when applied to matters of law it means: "To interpose in a lawsuit so as to become a party to it." Cent. Dic.; Stand. Dic. Bouvier defines intervention at common law thus: "The admission, by leave of court, of a person not an original party to pending legal proceedings, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceedings." And in the civil law as "the act by which a third party becomes a party in a suit pending between other persons," citing Pothier *Procès Civils*, lère part, c. 2, §. 6, 3 (1 Bouv. Dic. [Rawle's Ed.] 1114). A similar definition is given in our Code of Civil Procedure (section 387).

Appellants say that the word should be construed according to its literal meaning, "to come between," and that "to come between," in the possession and administration of an estate, means to have a preferred right to act as administrator, if it refers to a time before the appointment is made, or to supersede any other appointee, if used in reference to any subsequent time. This claim is based on the assertion that an intervention was unknown in the civil law, from which it is supposed the Argentine Republic takes its system of legal procedure, and also upon the principle that in construing treaties words are to be given their popular rather than their legal signification.

The Constitution of the Argentine Republic was adopted on May 25, 1853. It was avowedly modeled upon the Constitution of the United States, which it closely follows, both in general plan and in specific provisions. Its government is federal in form, with "provinces" which correspond to our states; each having power to make its own local laws subject, however, to the civil, criminal, commercial, and mineral codes when such should be enacted by the national Congress. Argentine Const. arts. 105, 108, and 67 [10], vol. 9, Senate Exec. Doc. The treaty with this country was made in July, 1853. At that time the public men of that country must have been very familiar with the form of government of the United States and with the fact that it committed local affairs to the several states. It is not proba-

ble, therefore, that the words of the treaty under consideration were chosen with the intent to have the international agreement become a part of, and in part supplant, the laws of the states of the United States, or of the provinces of Argentina, in matters committed solely to the states or provinces. The assertion that an intervention, as our law defines it, was not known in civil law countries, is shown to be without foundation by the foregoing citation of Bouvier to Pothier, and also by the fact that our own Code definition of an "intervention," and that of many of the other states, is taken from the Code of Louisiana. *Horn v. Volcano W. Co.*, 13 Cal. 69, 73 Am. Dec. 569. The procedure and jurisprudence of that state, as is well known, was derived from the Code Napoléon and from the system in use in the early Spanish American colonies, both of which are adaptations of the civil law. Justice Field said, in *Geofroy v. Riggs*, 133 U. S. 271, 10 Sup. Ct. 298 (33 L. Ed. 642), with regard to the construction of treaties: "As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." Appellant quotes this canon of construction as decisive of the sense in which the word "intervene" is to be understood. The court in that case held that the phrase "in all the states of the Union," in the clause of the treaty with France giving citizens of France the right to inherit the property of citizens of the United States, included the District of Columbia. The subject in hand and the context indicated that the phrase was used, in the most comprehensive sense, to include the entire country. But treaties are subject to the same rules of interpretation as other documents. The clause of the Argentine treaty relates to legal proceedings for the settlement of estates and the words used are to be given the meaning they usually have when used in that connection. The right to intervene in a legal proceeding partaking of the nature of a proceeding in rem is not usually understood to include the right to take the property from the custody of the court, or from the officer upon whom the laws of the country impose the duty of administering and distributing it. The object and purpose of the treaty would be fully met by allowing the foreign consul to represent the citizens of his country who are interested as heirs or creditors in case they are not present or otherwise represented, giving him the right to ap-

pear in court for them, either officially, or in their name, to protect their interests, and requiring that he be served with notices to them, when notice is required. The use of the word "intervene" implies an intention to give a right to the consul to appear as a party in a pending administration or action carried on by another person, and not a right to institute and carry on the proceeding himself. He has, in addition, a duty pertaining to his office imposed upon him by his own government, that of seeing to the safe-keeping and proper disposition of the effects of citizens of his country who may die while traveling, or while temporarily present in the country to which he is accredited, or even while residing therein, and for that purpose, in the absence of any other representative of the deceased having a better right, he may "intervene in the possession" of the estate, conformably with the laws of the country. The custom of nations would permit this, and it may be that, if the public administrator refuses or fails to apply, the consul may petition for and receive letters to himself as the official agent for the persons interested. But the treaty is not to be understood as giving him such right in preference to those upon whom it is devolved by the laws of the country when they are present and ready to accept its possession and discharge their duty concerning it. The theory of respondent is, in our opinion, in harmony with the spirit and purpose of the treaty and is in accord with the obvious meaning of the language used.

The order appealed from is affirmed.

We concur: ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

(13 Cal. A. 678)

McELHANEY v. McPHERSON. (Civ. 657.)
(Court of Appeal, First District, California.
Feb. 23, 1910. Rehearing Denied April 22,
1910.)

1. CONTRACTS (§ 28*)—EXISTENCE OF PROMISE TO PAY—EVIDENCE.

Evidence held to support a finding that defendant did not promise to pay plaintiff for releasing an obligation due plaintiff from defendant's husband.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 133; Dec. Dig. § 28.*]

2. APPEAL AND ERROR (§ 904*) — REVIEW — CREDIBILITY OF WITNESSES.

The Court of Appeal will not pass on the credibility of witnesses, though much of the testimony was read from depositions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3901; Dec. Dig. § 904.*]

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by J. M. McElhanev against Sarah M. McPherson. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

F. J. Hambly, for appellant. Rogers, Bloomingdale & Free, for respondent.

HALL, J. Plaintiff appealed from the judgment in favor of the defendant and the order denying his motion for a new trial.

The action was brought to recover from defendant the sum of \$725, which it is alleged she orally promised to pay plaintiff in consideration of the release and discharge by plaintiff of an antecedent and existing obligation due to plaintiff from one S. A. McPherson (the husband of defendant). Subdivision 3, § 2794, Civ. Code. The court found in favor of plaintiff as to the existence of the obligation alleged to be due from S. A. McPherson to plaintiff, but found that defendant did not promise or agree to pay plaintiff \$725, or any other sum, for a release or discharge of such obligation, and that plaintiff did not cancel or release such obligation. Plaintiff attacks the sufficiency of the evidence to support the findings in favor of defendant. That the evidence in the record is sufficient to support the finding that defendant did not promise or agree to pay plaintiff the sum of \$725 or any other sum we have no doubt.

Plaintiff and S. A. McPherson had had certain dealings for the sale of certain land belonging to said McPherson. S. A. McPherson had sued plaintiff, and had recovered a judgment for the possession of the land against plaintiff, who had appealed therefrom. Plaintiff had brought suit against said S. A. McPherson for commissions as a broker for the sale of a portion of the land, and this suit was pending. He also asserted a claim against one Frisbie in connection with the same matter. S. A. McPherson had left the state, and plaintiff, Frisbie, and defendant met in Oakland at the residence of Frisbie. At this meeting the terms of a settlement were arrived at as between plaintiff and Frisbie. Plaintiff testified that it was also agreed between him and defendant that she would pay him \$725 for a release and discharge of his claims against her husband. The parties met the next day at the office of M. C. Chapman, an attorney, where an agreement between plaintiff and Frisbie was drawn up by Chapman and executed by plaintiff and Frisbie. A writing was also drawn in the form of an agreement between plaintiff and defendant. This was neither signed by plaintiff nor defendant, and, while the things to be done by plaintiff are fully set forth in the writing, the amount of money to be paid by defendant to plaintiff in consideration thereof is left blank. The writing is unilateral in form, and was only intended to be signed by plaintiff, and recites that "for and in consideration of the sum of ——— dollars * * * to me in hand paid," etc., which is followed by words of present release and discharge of plaintiff's demands against defendant's husband, and covenants to satisfy and discharge of record a certain

contract, and to dismiss the pending suit against defendant's husband. Plaintiff, of course, does not rely upon this writing, but testified that, both at Frisbie's house and at Mr. Chapman's office, defendant orally made the promise to pay him \$725. As to what he testified concerning what took place at the office of Mr. Chapman he is supported by the testimony of Mr. Chapman. On the other hand, defendant testified that she made no such promise either at the house of Mr. Frisbie or at Mr. Chapman's office. She only received a copy of the writing to submit to her husband's attorney at San Jose. Her testimony is corroborated by Mr. Frisbie. The effect of his testimony is that no settlement was agreed upon by Mrs. McPherson. She was undecided what to do, and wished to consult her advisers at San Jose before agreeing to a settlement. Defendant testified that she said: "You can draw up all the papers you wish, but I will never pay it as long as I feel as I do at the present time. * * * The talk all the way through was that I would go to San Jose to see my attorneys before I would decide differently. * * * I did not promise to pay the \$725; I was to consult the lawyer before I made any decision whatever."

The brief of appellant is largely addressed to matters that affect the credit to be given the witnesses. With this, however, this court has nothing to do. That much of the testimony was read from depositions does not affect the rule. But it is fair to say that the testimony was given more than 12 years after the transaction occurred, and it is not surprising that the witnesses are not clear as to everything that was said. It is significant, however, that the amount that it is claimed defendant agreed to pay was not inserted in the document that was prepared as evidence of the settlement. If she had finally agreed to pay \$725, no reason appears why the amount should not have been inserted. On the other hand, the leaving of the amount blank is entirely in accord with her claim that she did not agree to any payment, and wished to consult her attorney before agreeing to any settlement.

As the finding that defendant never made the promise sued on is sustained by the evidence, it becomes immaterial as to whether or not the other findings in favor of defendant are supported by the evidence or not. The finding in favor of defendant as to the alleged promise is controlling as to the judgment.

Our attention is also briefly called to some alleged errors in admitting testimony. We find nothing under this head that would justify a reversal. Most if not all the rulings objected to relate to evidence directed to the issue found in favor of plaintiff.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

(12 Cal. A. 681)

JEWELL v. COLONIAL THEATER CO.
et al. (Civ. 727.)(Court of Appeal, First District, California.
Feb. 28, 1910.)**1. ACCOUNT, ACTION ON (§ 6*)—PLEADING—BILL OF PARTICULARS.**

Under Code Civ. Proc. § 454, providing that a pleading need not set out the items of an account, but plaintiff must deliver on demand a copy of the account, etc., where defendants were indebted to plaintiff in a gross sum for services rendered and for traveling expenses incurred, under an express contract, the complaint need not show how much was for services and how much for traveling expenses, since an uncertainty in this regard could have been cured by a bill of particulars.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 10; Dec. Dig. § 6.*]

2. MASTER AND SERVANT (§ 80*)—ACTION FOR SERVICES—EVIDENCE—SUFFICIENCY.

In an action for services rendered as an actress, and for traveling expenses, evidence held to support findings in favor of plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 118; Dec. Dig. § 80.*]

3. MASTER AND SERVANT (§ 80*)—ACTION FOR SERVICES—ADVANCEMENTS—COUNTERCLAIMS—EVIDENCE—SUFFICIENCY.

In an action for services rendered as an actress, and for traveling expenses, in which defendant counterclaimed for money advanced or loaned, evidence held to show an executed alteration of the contract, and to sustain the theory that the advancements had been fully repaid.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 118; Dec. Dig. § 80.*]

4. PARTIES (§ 90*)—DEFENDANTS—MISJOINDER—LIABILITY.

Though defendants did not plead a misjoinder of defendants, only such as are shown by the evidence to be liable may be held for the indebtedness. *

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 148; Dec. Dig. § 90.*]

5. PRINCIPAL AND AGENT (§ 136*)—AUTHORIZED ACTS OF AGENT—BREACH OF CONTRACT—LIABILITY OF AGENT.

Where a contract showed on its face that it was made by a person as agent for another, and there is no question as to his authority to act as such, he is not liable for a breach of the contract by his principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 478; Dec. Dig. § 136.*]

6. PRINCIPAL AND AGENT (§ 146*)—UNDISCLOSED PRINCIPAL—BREACH OF CONTRACT—LIABILITY OF AGENT.

An agent who binds himself by the terms of a contract without disclosing his principal is liable for breach of the contract by the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 522; Dec. Dig. § 146.*]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Izzetta Jewell against the Colonial Theater Company, a corporation, and others. Judgment for plaintiff, and defendants appeal. Reversed in part and affirmed in part.

F. J. Castelhun and F. C. Castelhun, for appellants. F. H. Dam, for respondent.

HALL, J. Plaintiff recovered judgment against all the defendants for the principal sum of \$300, and the defendants appealed from the judgment and the order denying their motion for a new trial. Defendants jointly demurred to the complaint generally, and upon the grounds of uncertainty and ambiguity. The demurrer was properly overruled. It fairly appears from the complaint that defendants are indebted to plaintiff in the gross sum of \$506.75 for services rendered as an actress and for traveling expenses incurred, under an express contract, whereby defendants agreed to pay plaintiff said sum therefor. It was not necessary for the complaint to show how much was for services and how much was for traveling expenses. Any uncertainty in this regard could have been cured by a bill of particulars. Code Civ. Proc. § 454; Pleasant v. Samuels, 114 Cal. 34, 45 Pac. 998; McFarland v. Holcomb, 123 Cal. 84, 55 Pac. 761. Defendants in a joint answer denied the allegations of the complaint, and set up a counterclaim in the sum of \$350 for money alleged to have been advanced and loaned to plaintiff by defendants. The court found that defendants were indebted to plaintiff in the sum of \$300 for services rendered and for traveling expenses incurred, under an express contract, whereby defendants agreed to pay plaintiff said sum, and found against defendants on the counterclaim; and the main question presented by the record is as to the sufficiency of the evidence to sustain these findings.

Plaintiff was engaged at New York by Frank Bacon, acting for Martin Kurtzig. The contract was in writing, and signed "Izzetta Jewell. Martin Kurtzig, by Frank Bacon," and by its terms plaintiff was engaged as an actress to play leading business for a season of 52 weeks, beginning on or about September 17, 1906, at a weekly salary of \$100 per week. The contract also provided that "the said manager shall pay all expenses of transportation of the person and baggage of the said actor during travel and fare both ways. This contract may be canceled at any time after the first performance by either party giving two weeks' notice in writing to the other." This contract was dated August 11, 1906, and, as before stated, signed "Martin Kurtzig, by Frank Bacon." Kurtzig testified that Bacon was authorized to enter into such contract for him, and that he was the manager of the defendant corporation, for whom the contract seems to have been made. The evidence shows without conflict that the plaintiff came to San Francisco from New York under this contract, and commenced services thereunder as an actress in the Colonial Theater in San Francisco, and so continued until the 6th day of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

May, 1907, when the theater was closed, and she was dismissed, without any previous notice, and without any fault upon her part. It was shown without conflict that her salary for the last week was not paid, save that she herself testified that she had drawn \$41.25 thereon. She was not given the two weeks' notice required by the contract, nor paid for the two weeks following her dismissal, although the evidence was uncontradicted that when a leading actress is discharged without the two weeks' notice it is the universal custom to pay the full two weeks' salary for that period. It was shown that the fare to New York was \$83, and that had not been paid her.

It is thus apparent that when she was discharged she was entitled, under the written contract, to a balance of \$58.75 for the week preceding her discharge, \$200 for the two weeks following her discharge without notice, and \$83 for return fare to New York, making a total of \$341.75. The court found for her in the sum of \$300, and we think that this finding, under the circumstances above detailed, should be sustained. It is true that some of the items above set forth are not in strict accord with the issues presented by the pleadings, in that it is alleged that the traveling expenses had been "incurred," when in fact she had not yet bought her ticket to New York. But no objection was made to the evidence upon this ground, and the case seems to have been tried upon the theory that such proof was within the issues. If such objection had been made, the pleading could, and doubtless would, have been amended so as to conform to the proof. Under the contract introduced in evidence she was entitled, when discharged, to payment of her return fare. For these reasons we think the finding is sustained so far as it affects such of the defendants as are bound by the contract with plaintiff, a point which we shall discuss later.

We have assumed thus far that the finding upon the counterclaim is sustained. It is clear from the evidence that certain moneys were advanced or loaned to plaintiff, either by Kurtzig acting for himself, or for the company. There is a conflict as to the amount. But there is evidence that after plaintiff arrived in San Francisco it was orally agreed between her and certain of the individual defendants acting for the company that her salary should be increased from January 1, 1907, to \$125, of which she should be paid \$100 in cash each week and the balance \$25 credited against her indebtedness, and that this was done until her indebtedness was fully paid. So far as this was a variation of the written contract it was only admissible so far as it was executed. A written contract may be altered by an executed oral agreement. Civ. Code, § 1698. This evidence showed an executed oral al-

teration, and sustained the theory that the advancements to plaintiff had been fully repaid.

We now come to the question as to what defendants are shown to be liable for the debt due to plaintiff. Defendants did not plead a misjoinder of defendants, but nevertheless only such as are shown by the evidence to be liable may be held for the indebtedness. *Rutenberg v. Main*, 47 Cal. 214. The evidence does not show any liability upon the part of either Bacon or Mandlebaum. On its face the contract showed that Bacon was acting only as the agent of Kurtzig, and the evidence is without conflict that he had authority to act as such agent. He is therefore not liable, and the findings against him are not sustained by the evidence. The same is true of Mandlebaum. Whatever he did was as manager for the Colonial Theater Company, and after plaintiff knew who the principal was. The evidence shows that the Colonial Theater Company was the principal for whom the contract was made, and it is liable. Kurtzig is liable, as he bound himself by the terms of the contract without disclosing his principal.

Some other points are made as to rulings of the court, but we do not think any are of sufficient importance to require discussion or a reversal of the order or judgment.

The judgment and order are reversed as to the defendants Frank Bacon and F. Mandlebaum, and affirmed as to defendants Colonial Theater Company, a corporation, and Martin Kurtzig.

We concur: COOPER, P. J.; KERRIGAN, J.

(12 Cal. A. 766)

LOMA PRIETA LUMBER CO. v. HINTON.
(Civ. 724.)

(Court of Appeal, First District, California
March 9, 1910. Rehearing Denied by Supreme Court April 29, 1910.)

1. CONTRACTS (§ 1*)—DEFINITION.

A "contract" is the meeting of minds upon and agreement to do a definite thing.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1513-1534; vol. 8, pp. 7615, 7616.]

2. CONTRACTS (§ 28*)—BUILDING CONTRACTS—SUFFICIENCY OF EVIDENCE.

In an action on a building contract, evidence held to show that plaintiff furnished certain millwork to defendant at her instance and request.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 28.*]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by the Loma Prieta Lumber Company against Mary E. Hinton. From a judgment for defendant and from an order deny-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing plaintiff's motion for new trial, it appeals. Reversed.

Albert H. Elliot, for appellant. James G. Maguire and Joseph Leggett, for respondent.

COOPER, P. J. This action was brought to recover the sum of \$1,845.60 for millwork furnished by plaintiff, to be used and which was used, in the construction of a building for the defendant. The court filed findings, upon which judgment was entered in favor of defendant. This appeal is from the judgment and the order denying plaintiff's motion for a new trial.

There is no controversy as to the following facts: That the building was constructed for defendant; that the cost of the building exceeded \$1,000, and that there was no contract in writing, and no contract of any kind filed for record; that one Bugbee was the architect who drew the plans and specifications, and one Johnson was the superintendent in personal charge of the construction of the building; that the millwork was furnished by plaintiff, and was of the reasonable value of \$1,845.60; that plaintiff has not been paid for said millwork; that no lien was filed against the building.

The court found in effect that plaintiff did not furnish the millwork to defendant at her instance or request, and upon this finding judgment was ordered in favor of defendant. It is here claimed that this finding is not supported by the evidence, and that is the main question, and, in fact, the only question that need be considered in this case.

On behalf of the plaintiff, Bugbee testified that he drew the plans and specifications for the building, and that he was to receive 10 per cent. on the total cost of the building for his services in drawing the plans and superintending the construction; that he informed defendant that he would have to employ a superintendent to take charge of the hiring of the labor and purchasing the materials and to let the subcontracts, and that defendant would have from time to time to advance the money as needed to pay for such labor and materials; that to this the defendant consented, and that the witness, in pursuance of such arrangement, employed Johnson as superintendent, agreeing to pay Johnson one-half of the 10 per cent. which he was to receive, and that either himself or Johnson purchased the necessary materials, employed the labor, let the subcontracts and paid for the same with moneys advanced by defendant as needed; that he told defendant that he thought the building could be constructed for a total cost of \$8,000, but afterwards several changes were made at the request of defendant, such as putting in basins and wardrobes in each room, which considerably increased the cost. Johnson testified on behalf of the plaintiff that he was the superintendent in charge of the building, and that the contract or arrangement was made in his presence substantially as testified to

by Bugbee; that he ordered the labor and materials from time to time; that plaintiff furnished the millwork at his request; that he had every laborer sign a pay roll which was turned over to defendant, and that she gave the witness money to pay the men according to the pay roll; that defendant would come on Friday or Saturday to look at the pay roll, and then go to the bank and get the money with which to pay the men, and then hand the money to the witness; that defendant did this 15 or 20 times; that the witness kept a pay roll in his own handwriting from which he refreshed his memory, and that defendant paid the following items: November 10th, \$26.25; December 8th, \$34.95; January 26th, \$12.50; December 19th, \$72.95; February 9th, \$169.25; February 16th, \$361.60; February 23d, \$207.20; March 2d, \$396.95; March 9th, \$254.75—which said items were on the pay roll for labor. The witness continued from such pay roll to give other items for labor—plumbing and other materials which were furnished for the building and used in the construction thereof. He further testified that for getting the bills and the money to pay them promptly 2 per cent. discount was allowed, and defendant desired to and did get such discount; that defendant went with witness to the bank and introduced him, and asked the bank to let witness have money from time to time on her orders, and that he did often go and get the money with which to pay the bills upon the orders given him by defendant; that the changes and extras in the building in deviation from the original plans as made from time to time added \$2,000 to \$2,500 to its cost.

If the above quoted testimony is true, the defendant is liable to the plaintiff as a matter of law, for the reason that Bugbee and Johnson were her agents in the purchase of the materials, which included the millwork.

Defendant's counsel further insist that the evidence offered by defendant shows that she made an oral contract with Bugbee, by the terms of which he was to construct the building as an independent contractor for \$8,000. Defendant testified in her own behalf, and her statement of the contract is as follows: "I wish to say that he suggested the \$8,000 himself, and when I could get \$5,000—the bank notified me that they had collected \$5,000 insurance, and I went to Mr. Bugbee, and asked him what we could do with that on the lot. He said for '\$8,000 I could put you up a rooming house with sixty rooms,' and I said, 'A temporary building?' He said, 'Oh, no; a building that will last twenty years.' I said, 'I will see if the bank will let me have \$3,000 more in addition, and let you then know.' The bank allowed me the loan of \$8,000—\$3,000 in addition to what I had received from the insurance—and then I went to Mr. Bugbee, and said we can get no more, and I had no more, and he said he could do it, and he began to excavate and

got Mr. Johnson to excavate—not much excavating, it was more clearing away the bricks from the lot.” The witness further said that Mr. Bugbee agreed to construct the building for \$8,000; but in order to arrive at the truth we must examine her testimony as a whole.

In cross-examination she testified that she paid out \$2,440, in addition to the \$8,000 for the construction of the building, and also \$300 additional for clearing the lot. She also admitted that she paid the following amounts for material and labor on the building, to wit: Plumbing, \$1,000; the Linwood Company, \$600; painting, \$150; hardware, \$154; Christian Lumber Co. bill, \$150; electric wiring, \$23; that the roofing was \$63, of which she had paid \$40 and was paying \$10 a month on that. She further testified that there was a balance of \$300 due for lumber, which she had agreed to pay; and further as follows: “Mr. Bugbee always promised to give me an accounting, but he went away without doing it. Q. What do you mean by that? A. I wanted to know how much it was. Q. You wanted to know how much the labor bill was? A. Yes, sir. Q. And Mr. Bugbee said he would give you an accounting? A. Yes, sir. Q. How many times did you ask him for such an accounting? A. I would remind him and he would put me off. * * * Q. In the talk with Mr. Bugbee concerning the construction of this building, what was said about his compensation? A. He said that \$8,000 would cover everything. He said he could contract for the building, but he didn't like to sign a contract because he was doing all his work this way, and he had been able to save one woman a thousand dollars by not having a contract. Q. That is, by not letting out a contract to a contractor? A. By not having a contract he was able to do the work cheaper for the owner by not having a contract. Q. By not having a contract with whom? A. With the owner—the person that was building. Q. He told you that by not having a contract with the owner that in another case he had saved the owner \$1,000? A. Yes, sir. Q. Because he said he could buy the materials cheaper by paying cash? A. Yes, sir. Q. What was said by you or him about paying Mr. Bugbee for his services? A. There was nothing said. Q. What was agreed upon, or what was determined upon between you and Mr. Bugbee, as to what was to be paid for his services? A. He said that he could make it all in the commissions that he was to have. Q. The commissions from whom? A. The people he was dealing with—buying from—by paying cash he knew how and when to buy, and so on, and that would cover everything. Q. As I understand you, he was to buy the material? A. Yes, sir. Q. And he was to get his pay by the commissions from these people that sold the material to him? A. Yes, sir.”

It was further shown that the defendant,

in her verified answer filed by her in a prior suit brought in the superior court by Johnson against her relative to the same building, stated in said answer as follows: “That in or about the month of November, 1906, M. G. Bugbee individually on his own behalf entered into an agreement with the defendant, by which M. G. Bugbee personally and individually agreed to furnish plans for and erect and construct the building mentioned in plaintiff's complaint for the defendant at a gross cost not exceeding the sum of \$8,000.” The witness was further asked and answered as follows: “Q. Did Mr. Bugbee agree with you that if the building should cost less than \$8,000 he was to pocket the difference between the building cost and \$8,000? A. No, sir; he told me about how he had treated others, and I supposed he had the same benevolent intentions towards me, but he didn't say—we didn't have any agreement that if it cost less than \$8,000 that either he or I should have what was left. Q. It wasn't your intention that if the building cost \$8,000 that Mr. Bugbee was to get the difference? A. He said he saved an owner in one case a thousand dollars—he might be able to do it for somebody else.”

Mrs. Moody, the daughter of defendant, testified as to the contract as follows: “In my presence he told my mother that he could put up the house for \$8,000, and I turned to him and said, ‘Mr. Bugbee, does that include everything?’ and he said, ‘Yes.’ I said, ‘Your fees and everything?’ and he said, ‘Yes, that includes everything.’ I don't remember anything more than that was said.” In cross-examination Mrs. Moody said that in the conversation between her mother and Mr. Bugbee nothing was said about Bugbee's compensation. The following questions were asked her and answered as follows: “Q. Then at that conversation between your mother and Mr. Bugbee, you did discuss the question of Mr. Bugbee's fees? A. No, sir; the price of the building. Q. I will ask you at that time was anything said about Mr. Bugbee's compensation? A. No, sir. Q. Nothing was said about it? A. No, sir. Q. Nothing at all was said about what Mr. Bugbee was to get out of this? A. No, sir. Q. What was Mr. Bugbee to get out of it for building the building? A. I do not know. Q. Didn't you just testify, Mrs. Moody, that Mr. Bugbee said that the \$8,000 would include his compensation? A. Yes, sir; but I didn't know how much that was to be. Q. Then there was something said about Mr. Bugbee's compensation? Didn't you ask him if it also included his fees? A. No, sir.”

When we view the above evidence on the part of the defendant, we do not think it of sufficient dignity to raise a conflict. A contract is the meeting of minds upon and agreement to a definite thing. The contract as stated by the architect and by the superintendent is reasonable and consistent with each and every act of the parties done in

pursuance thereof and in connection with the building. An oral contract for \$8,000 is out of the ordinary way of doing business. There was nothing said about the time or the amount of the payments, or the manner in which they should be made. If such a contract was made defendant would not have any concern with the payment of the bills except in so far as to prevent liens upon her property. She would not have to get an accounting from Bugbee as to the bills paid. She would not have sworn in a different case relating to the same contract that the agreement was that Bugbee would build for "not to exceed \$8,000." The defendant testified that Bugbee was to get his compensation by charging and collecting a commission from the materialmen. That is wholly inconsistent with the agreement to pay Bugbee \$8,000 to construct the building; and not only this, but the benefit of the discount on the bills was received by the defendant as they were paid by her or under her direction.

The testimony of Mrs. Moody, the daughter, is equally unsatisfactory. She does not state anything said about the time, manner, or amount of payments; and while she testified in direct examination that she asked Bugbee if the \$8,000 included "his fees and everything," in almost the next breath in cross-examination she said that nothing was said about Bugbee's compensation; that she did not ask him if the \$8,000 included his fees. If Bugbee had been the original contractor he would have taken the receipts, had the benefit of the discounts on the bills, and retained the bills instead of their being receipted and given to the defendant. The defendant would have taken receipts from Bugbee for payments on the contract, but no such receipts were produced. The acts and conduct of the parties speak with more force than bare words. The question cannot be answered by the defendant merely saying, "The contract was \$8,000." We look for the truth to the facts and the entire history of the transaction. No reasonable person could read the testimony in this record and have a doubt remaining as to the fact that the building was constructed for the defendant on a percentage basis, and that she was responsible for the materials purchased and used in its construction.

The judgment is reversed.

We concur: KERRIGAN, J.; HALL, J.

(12 Cal. A. 732)

RANDALL v. GLASS. (Civ. 769.)

(Court of Appeal, Second District, California. March 9, 1910. Rehearing Denied by Supreme Court April 29, 1910.)

SALES (§ 52*)—VALIDITY—VIOLATION OF STATUTE.

In an action for the price of metallic disks to be used as money in defendant's business col-

lege, evidence held not to show that such disks were, contrary to law, in the likeness and similitude of genuine coins of the United States.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 483; Dec. Dig. § 52.*]

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by George W. Randall against D. R. Glass. From the judgment and from an order denying his motion for new trial, defendant appeals. Affirmed.

J. W. Stephenson, for appellant. H. Conner, for respondent.

SHAW, J. This is an action to recover the agreed price of certain metallic disks which plaintiff made and delivered to defendant pursuant to an order for the same given by defendant. The disks were not designed to represent money, but intended to be used in place thereof in pretended business transactions conducted by the students of the business college of defendant. Defendant appeals from the judgment and an order of court denying his motion for a new trial.

As a defense to the cause of action defendant alleged "that said disks are in likeness and similitude as to design, color, and inscription of the coins of the United States * * * issued as money by and under the authority of said government"; his contention being that the disks are counterfeits of the United States coins, the making of which is contrary to law, and hence the agreement to pay for the same is nonenforceable. As to the issue thus tendered the court found "that none of said disks so made and delivered to defendant by plaintiff are in likeness and similitude as to color, design, and inscription of any of the coins issued as money by the United States government, or the Republic of Mexico." Other than the criticism of the use of the conjunctive, "and," instead of the disjunctive, "or," in this finding, which under the facts of the case is without merit, the sole ground upon which appellant contends for a reversal is that the finding is not supported by the evidence; appellant insisting that the disks so nearly resemble United States coins as to constitute counterfeits thereof. At the trial, samples of the pieces of metal were introduced in evidence as ocular proof in support of the allegation of the answer, and these exhibits are brought up with the record. They consist of copper pieces in size similar to the \$5, \$10, and \$20 gold coins of the United States, and aluminum pieces similar in size to the minor silver coins of the United States. The edges are not milled, and in color the copper disks bear no resemblance to gold coin, and the specific gravity of the aluminum coins clearly distinguishes them from silver. The inscriptions upon these disks, while not entirely alike, are similar, and that upon one will

serve as an illustration of all. On one side thereof in raised letters is the following: "San Bernardino Business College. The Famous Lightning, Legible Shorthand Taught in three months or no charge. San Bernardino, Cal." On the obverse side in raised characters covering nearly half the length of the diameter of the disk, which is otherwise smooth, is the following: "\$20.00." Aside from the fact that the disks are similar in size to gold and silver coins of the United States, they bear no resemblance whatever to such coins, or those of the Republic of Mexico. They do not purport to be money, and it is clear from the record that they were not intended to be passed or used as money. Appellant might with equal reason insist that a piece of paper similar in size to a \$20 bill of United States currency, one side of which contained an advertisement of his "famous lightning, legible shorthand," with the characters "\$20.00" printed upon the obverse side thereof, constituted a counterfeit of the United States currency. It is incredible that any one, however illiterate or unskilled in business dealings, could be deceived into the belief that these disks constituted coins of the United States. They are not counterfeits in resemblance or similitude of the gold or silver coins of the United States, nor of any foreign country the coins of which are current or in actual circulation in the United States. Sections 5457 and 5458, U. S. Comp. St. 1901; *United States v. Sprague* (D. C.) 48 Fed. 828; *United States v. Stevens* (D. C.) 52 Fed. 120; *United States v. Hopkins* (D. C.) 26 Fed. 443.

The defense set up and supported by appellant's testimony is, nevertheless, unique in that he testifies in support of an allegation to such effect that the disks are not in the likeness and similitude of genuine coins, by reason of which fact "the college would be ridiculed by the scholars using it," hence he is not bound by the contract; and, if this position be deemed inadequate as a defense, he then insists that the disks bear such a striking resemblance and similitude to United States coins as to constitute counterfeits thereof, and, hence, upon grounds of public policy, he is entitled to judgment relieving him from his contractual obligations. Neither position is sustained by the record.

Judgment and order affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

(12 Cal. A. 779)

WELLER v. STEVENS. (Civ. 744.)

(Court of Appeal, Second District, California. March 9, 1910. Rehearing Denied April 8, 1910; Denied by Supreme Court April 29, 1910.)

ACCORD AND SATISFACTION (§ 11*)—ELEMENTS.

Where plaintiff's assignor, who had built ice machines for defendant, the price thereof to be determined by the cost of construction, ren-

dered a statement for a balance due of \$3,030.67, and defendant in reply refused to pay the statement in full, but stated that a certain amount was due, and inclosed a check therefor, but did not declare that it was in full of all demands, his letter, on the contrary, indicating that as to the balance he expected plaintiff to bring suit, and upon the return to him of a receipt on account made no objection, but arranged for a meeting to adjust the parties' differences, there was no accord and satisfaction, to constitute which there must be an offer on conditions and an acceptance with knowledge thereof.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 75, 76; Dec. Dig. § 11.*]

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by D. R. Weller against Will P. Stevens. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Lucien Earle, for appellant. Jones & Weller, for respondent.

SHAW, J. Action to recover a balance of \$2,609.40 and interest alleged to be due upon an open account for goods sold and delivered by plaintiff's assignor to defendant. In addition to a general denial, defendant pleaded, by way of a separate defense, an accord and satisfaction. The findings as to all the issues were against defendant, and judgment went for plaintiff in accordance with the prayer of the complaint, from which, and an order denying his motion for a new trial, defendant prosecutes this appeal.

Appellant's claim for a reversal is based upon the ground that the facts proved established an accord and satisfaction, as alleged in his answer. Hence he claims the finding to the contrary is unsupported by the evidence.

It appears from the evidence that defendant employed plaintiff's assignor to manufacture certain ice machines; the price thereof to be determined by the cost of construction. The machines were constructed in accordance with the specifications therefor and duly delivered to defendant. Thereafter plaintiff's assignor sent to defendant a statement of account as to the cost of manufacturing the machines, showing a balance due of \$3,030.67. Upon receipt of this statement defendant wrote a letter to the assignor protesting against the charges as being exorbitant, and showing that according to his figures the balance due was only \$421.27, as to which, says he in the letter, "I am inclosing you a check for \$421.27 covering the same." There was an absence of anything on the check indicating that it was delivered in full payment of the account, and there is nothing in the letter transmitting the check showing that it was intended as a payment in full of the account. On the contrary, it appears therefrom that defendant conceded a liability to the extent of \$421.27, for,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

among other things in his letter, he says: "I consider (the charges) altogether too high, and I certainly shall not pay this price unless a jury and judge say that I shall pay the same, and, when they do, I am glad to state that the bill will be promptly paid."

* * * So you see I think your bills are unreasonable and will never pay the same willingly as they now stand." And in closing he states: "I deeply regret that I cannot see my way clear at the present time to pay the bill as you have seen fit to render it." In reply to this letter, plaintiff's assignor wrote: "We inclose herewith the receipt on account for \$425.27. We cannot render you receipt in full for the reason that your version of the conditions under which these machines were ordered and built cannot be accepted." And further requesting that a meeting be arranged between them in order to effect an amicable settlement of the account. Defendant replied to this, expressing his willingness to hold the suggested meeting at a date therein named by him. Defendant testifies: "I did not know prior to this statement that was rendered to me by the plaintiff what the machines were going to cost. I had conversations with the plaintiff, but could get nothing out of them. The date that I wrote to the plaintiff the letter on the 22d of November, 1906, was the first time that I knew the total price of the machines. Prior to that time I had no definite price from them as to the cost of the machines." This is substantially all the evidence touching the question at issue, and we think it clearly justified the court in finding the issue in favor of plaintiff. Defendant testifies that he intended the check to be in full payment of the account; but there is absolutely nothing in the record tending to show that he gave expression to such intention. His undisclosed intention could not bind the plaintiff. Neither upon the check nor in the letter was there any statement to indicate to plaintiff that it was intended to be in full payment. "The nature of the offer or tender by the debtor is an important consideration in determining whether there has been an acceptance and satisfaction. To constitute an accord and satisfaction it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction; and it must be such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such conditions." 1 Cyc. 332. Appellant asserts that, "according to the weight of authority, where a claim is in dispute, and the debtor sends or gives the creditor a check for a less sum, which he declares to be in full payment of all demands, the retention thereof by the creditor constitutes an accord and satisfaction." This

statement of the law is correct; but in the first place, it does not appear that there was any dispute prior to the receipt of the statement. Defendant received the statement and, regarding it unreasonable, refused to pay it in full, but did concede that a certain amount was due and paid it. He did not declare that it was in full payment of all demands; on the contrary, his letter clearly indicates that as to the balance he expected plaintiff to bring suit, which he declared he would not pay willingly, but that it would be promptly paid upon the rendition of judgment against him. Moreover, when plaintiff's assignor notified him they could not accept his version of the case, and inclosed a receipt on account for the amount of the check, he made no objection to such application, but at their suggestion fixed a time to meet them for the purpose of adjusting their differences as to the balance of the account which he had refused to pay.

Judgment and order affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

(12 Cal. A. 757)

GRANGERS' UNION v. ASHE et al.
(Civ. 677.)

(Court of Appeal, First District, California, March 9, 1910. Rehearing Denied April 7, 1910; Denied by Supreme Court April 29, 1910.)

1. JUDGMENT (§ 251*)—CONFORMITY TO PLEADINGS.

Where the complaint alleged that defendants were liable as partners, and the findings were that there was no such partnership, but defendants in effect denied liability as partners, or as individuals, they raised an issue not raised in the complaint and one upon which an individual judgment might be based.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.*]

2. JUDGMENT (§ 251*)—ACTION FOR GOODS—PARTNERSHIP—PROMISE TO PAY—EFFECT.

In an action against an alleged partnership for goods sold, where one of the alleged partners promised to pay for the goods to be sold, it was immaterial that he was not a partner with the other, or that the allegation of partnership was not proved.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.*]

3. INTEREST (§ 47*)—ACTION FOR GOODS—CLAIM—JUDGMENT—WHEN INTEREST ACCRUES.

In an action for goods sold, it was error to allow interest on the amount of the claim from the date it was found to be due, since no interest can be recovered in an action on an open account prior to the filing of a complaint.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 106, 107; Dec. Dig. § 47.*]

Appeal from Superior Court, San Benito County; M. T. Doolling, Judge.

Action by the Grangers' Union, a corporation, against R. Porter Ashe and another. Judgment for plaintiff, and defendants ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

peal. Reversed in part; modified and affirmed in part.

See, also, 106 Pac. 889.

John T. Thornton, Leo. O. Lennon and T. M. O'Connor, for appellants. Briggs & Hudner, for respondent.

KERRIGAN, J. This is an action for goods sold and delivered. The case was tried by the court sitting without a jury, and judgment went for plaintiff against the defendants. The appeal is from that judgment, taken within 60 days after the entry thereof under sections 941A, 941B, and 941C of the Code of Civil Procedure.

The facts of this case are simple, and no question of difficulty is presented. The defendants claim that the goods were sold and delivered to the Ruinart Stock Farm, a corporation. Plaintiff, on the other hand, alleged in its complaint that the defendants were copartners, doing business under the name of Ruinart Stock Farm, and were liable as such for the goods and supplies furnished. The evidence introduced by the defendants tended to prove that the goods were, as claimed by them, sold and delivered to the Ruinart Stock Farm, and in corroboration of this evidence it was shown by the plaintiff's books of account that the merchandise in question was in fact charged to the Ruinart Stock Farm. Plaintiff, however, introduced evidence that Gaston M. Ashe represented to the manager of the plaintiff that he, with his brother and codefendant, would be personally responsible for said goods; that, upon being asked by said manager how the account should be charged, Gaston M. Ashe said that it had better be charged to the Ruinart Stock Farm, and, accordingly, the merchandise was so charged. There is no evidence in the record showing that the defendants were partners, and the court found they were not, and the record shows that Gaston M. Ashe had no authority to represent to plaintiff that R. Porter Ashe would be liable personally for the supplies furnished.

The complaint alleges that the defendants are liable as partners, while the findings are that there was in reality no such partnership; wherefore defendants suggest that the judgment should have been rendered in their favor. But they, in effect, denied liability as partners or individuals, and thus, it may be said, raised an issue not raised by the complaint, and one upon which an individual judgment might be based. *Flinn v. Ferry*, 127 Cal. 648, 60 Pac. 434; *Vance v. Anderson*, 113 Cal. 532, 45 Pac. 816; *Doble Co. v. Keystone, etc., Co.*, 145 Cal. 491, 78 Pac. 1050. However, it appearing that Gaston M. Ashe had promised to pay for the goods to be sold, it makes no difference that he was not a partner with R. Porter Ashe, or that the allegation of the partnership was not proved. *Bates on Partnership*, vol. 2, § 1068;

Id. vol. 1, §§ 170, 171; *Courson v. Parker*, 39 W. Va. 521, 20 S. E. 583; *Welmer v. Rector*, 43 W. Va. 735, 28 S. E. 716; *Ency. of Plead. & Prac.* vol. 15, p. 955; *Hunter v. Martin*, 57 Cal. 365; *Wallace v. Baisley*, 22 Or. 572, 30 Pac. 432; *Marx Bros. v. Calpepper*, 40 Fla. 322, 24 South. 59; *Whitwell v. Thomas*, 9 Cal. 499.

The court allowed interest at the rate of 7 per cent. per annum on the amount of the claim from the date it was found to be due. This was error. No interest can be recovered in an action for goods sold and delivered upon an open account prior to the filing of the complaint. *Pac. Mutual Life Ins. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758; *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; *Heald v. Hendy*, 89 Cal. 633, 27 Pac. 67; *Easterbrook v. Farquarson*, 110 Cal. 311, 42 Pac. 811; *Lane v. Turner*, 114 Cal. 306, 46 Pac. 290. Calculating interest at the legal rate on the principal sum found to be due from the date the complaint was filed until the judgment was rendered would give an amount less by the sum of \$40 than the amount allowed as interest on the judgment.

There being no evidence to support the judgment against R. Porter Ashe, it must as to him be reversed, and it is so ordered. As we have just seen, however, there is evidence to support the findings against Gaston M. Ashe; and as to him the judgment is directed to be modified by deducting therefrom the sum of \$40 as of its date of entry, and as so modified it is affirmed.

We concur: COOPER, P. J.; HALL, J.

(18 Idaho, 70)

BLAKE v. JACKS, Assessor.

(Supreme Court of Idaho. April 13, 1910.)

(Syllabus by the Court.)

1. COUNTIES (§ 16*)—ANNEXATION—APPORTIONMENT OF COUNTY DEBT.

Where a county is enlarged by annexing a portion of another county, the annexed portion is liable to pay its proportionate share of the indebtedness of the county to which it is annexed.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 12; Dec. Dig. § 16.*]

2. COUNTIES (§ 16*)—DEBTS—ANNEXATION OF TERRITORY.

Under the provisions of section 1963, Rev. Codes, which pledges the faith, credit and all taxable property within the limits of the county as it was constituted at the time the indebtedness was incurred for its payment, all taxable property subsequently brought into the county is liable for its proportionate share of such indebtedness.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 12; Dec. Dig. § 16.*]

3. COUNTIES (§ 16*)—ANNEXATION OF TERRITORY—LIABILITY FOR DEBTS.

Under the provisions of our statute, the indebtedness of a county becomes a burden upon all of the taxable property brought within the county after the creation of such indebted-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ness, as well as upon the taxable property that was within the county at the date of the creation of the indebtedness.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 12; Dec. Dig. § 18.*]

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by J. W. Blake against J. S. Jacks, Assessor. Judgment for defendant. Plaintiff appeals. Affirmed.

Morgan & Morgan, for appellant. D. C. McDougall, Atty. Gen., J. H. Peterson, Asst. Atty. Gen., and Dwight E. Hodge, Co. Atty., for respondent.

SULLIVAN, C. J. An act was passed by the Legislature in 1908 (see Sess. Laws 1903, p. 204) which segregated from Shoshone county a portion of such county and annexed it to Nez Perce county, and this action is brought to test the right of Nez Perce county to levy and collect taxes on property in said annexed portion for the purpose of paying the principal or interest of warrants or bonded indebtedness created by and existing against said county prior to the annexation. The facts pleaded in the complaint were sufficient to put in issue the right of Nez Perce county to levy and collect taxes on the annexed territory for the purpose of paying the indebtedness of Nez Perce county existing at the time of the annexation. The court sustained a general demurrer to the complaint, and entered judgment of dismissal, the plaintiff having declined to plead further, and the appeal is from said judgment. The sustaining of the demurrer and entering judgment of dismissal is assigned as error.

It is contended that since this court held in *Shoshone County v. Proffitt*, 11 Idaho, 763, 84 Pac. 712, that the portion of Shoshone county segregated therefrom and attached to Nez Perce county must pay its ratable portion of the indebtedness of Shoshone county, and that Nez Perce county as it existed at the time of the annexation was not liable for any part of that indebtedness, it would be unjust and inequitable now to require the segregated and annexed portion to pay its proportionate part of the indebtedness of Nez Perce county that existed at the time of the annexation. In the case of *Shoshone County v. Proffitt*, supra, it was held by a majority of this court, under the provisions of section 3, art. 18, of the state Constitution, that whenever any part of a county is stricken off and attached to another county the part stricken off must pay its ratable proportion of all of its then existing liabilities to the county from which it is taken, and that the county to which it is attached was not liable to pay any of such indebtedness, and that is the law of that case.

In support of counsel's contention that it would be unjust and inequitable to require

the annexed portion to pay its proportionate share of the mother county's indebtedness, and also its share of the county's indebtedness to which it is annexed, section 1963, Rev. Codes 1909, is cited, which provides that the faith, credit, and all taxable property within the limits of a county as it was constituted at the time the indebtedness was contracted or incurred are and must continue pledged for the payment of the same, and that, that being true, Nez Perce county, as it existed before the annexation, must and ought to pay all of the then existing indebtedness of the county.

The provisions of that section pledge the faith, credit, and taxable property within the limits of a county as it was constituted at the time of incurring the indebtedness to the payment of such indebtedness. But it was not intended by such provisions to exempt any taxable property that was brought into the county after the indebtedness was incurred from the payment of its ratable share of such indebtedness. The pledge of property then in the county to the payment of indebtedness was not intended to release other taxable property within such county from taxation for that purpose. Where it is not prohibited by statute, the natural and legal result of annexation of one portion of a county to another is that such annexed portion must pay its ratable share of the indebtedness of the county to which it is annexed.

It was held in *Watson v. Commissioners of Pamlico Co.*, 82 N. C. 17, that, where a county is enlarged by annexation of new territory, the property thus brought within the corporate limits will be subject to taxation to discharge the pre-existing indebtedness of the old corporation. In the course of that decision, the court cites *Com'rs of Currituck v. Com'rs of Dare*, 79 N. C. 565, and states that the court in that case cites with approval the doctrine laid down in 1 *Dillon on Municipal Corporations*, § 123, where it is stated that where a new county is created out of the territory of an old county, or if a part of its inhabitants or territory is annexed to another county, unless some provision is made in the act respecting the property and existing liabilities of the old county, the latter will be entitled to all of the property, and be solely answerable for all of the liabilities, and says: "The plaintiffs can derive no support to their claim of exemption from the decision in *Currituck v. Dare*, supra, since the liability of all the taxable property in the county of Dare, as constituted, to assessment to meet its obligations is recognized, while so much as is taken from *Currituck* by the express terms of the enactment is additionally charged with its ratable share of the debt of the latter incurred for internal improvement."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

That case is clearly against the contention of the appellant. The case of Chicago, St. P., M. & O. Ry. Co. v. Cuming Co., 31 Neb. 374, 47 N. W. 1121, involved the question whether certain property was exempt from taxation to pay the debts of the county to which it was annexed that existed prior to the annexation. The court disposed of that contention as follows: "If the position contended for by the plaintiff should be sustained, then only such property as was within the county when the bonds were voted would be liable for the payment of the same. This, however, is not the law. The voters of a county, when voting bonds, assume a burden, not only for themselves, but for all the property owners in the county; and, in effect, agree that the county shall pay the bonds, with lawful interest thereon. This applies to all taxable property in the county, whether in the county when the bonds were voted, or such as may be brought therein afterwards."

In Lake Shore & M. S. Ry. Co. v. Smith, 181 Ind. 512, 31 N. E. 196, the court said: "The general and well-settled rule is that, where the territorial boundary of a body politic or corporation is extended so as to include new and additional property, such property is thereby subjected to taxation in like manner and to the same extent as property previously included within the corporation; and this is true, even though such taxation be for the purpose of paying pre-existing debts of the corporation."

It is held in 28 Cyc. 222 et seq., as follows: "Debts of a municipality contracted before an addition become a burden upon the added territory as well as upon the original territory, unless it is otherwise provided by statute." The rule there laid down was applied to cities and towns, and the same rule extends to counties as well as cities. Com'rs of Laramie Co. v. Com'rs of Albany Co., 92 U. S. 307, 23 L. Ed. 552.

We arrive at the conclusion that the property in the annexed portion of the county is liable for its proportionate share of the indebtedness of Nez Perce county as it existed before the annexation. The judgment of the trial court must therefore be sustained, and it is so ordered, with costs in favor of respondent.

STEWART and AILSHIE, JJ., concur.

(18 Idaho, 61)

DARKNELL v. OCEUR D'ALENE & ST. JOE TRANSP. CO., Limited.

(Supreme Court of Idaho. April 12, 1910.)

(Syllabus by the Court.)

1. PLEADING (§ 368*)—JOINER OF CAUSES OF ACTION.

Where two or more causes of action are improperly united and commingled in one count

in the complaint, the proper procedure to reach the defect is by motion to require the plaintiff to separately state his several causes of action in different counts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1194; Dec. Dig. § 368.*]

2. ACTION (§ 45*)—JOINER OF CAUSES OF ACTION.

A cause of action arising on an express contract for the payment of a fixed and specified salary may be united in the same action with a cause of action for the same services on an implied contract to pay the reasonable value of such services.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 433; Dec. Dig. § 45.*]

3. CORPORATIONS (§ 388*)—CONTRACTS—ULTRA VIRES—ESTOPPEL TO CLAIM.

Where D. entered into a contract with a corporation, whereby it was mutually understood and agreed that, in consideration of D. purchasing stock in the corporation and retaining and continuing his ownership in such stock of the corporation, the corporation would furnish him employment as assistant general manager as long as D. retained the ownership of such stock, at the same salary that the corporation might or should from time to time pay to one W., its general manager, and D. entered into the employment of the corporation under such contract and continued in the service of the company for about three years, and thereafter sued the corporation to recover his wages at the agreed and stipulated price, the corporation will be bound to pay such salary as was agreed and stipulated and will be estopped from setting up the plea of ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1556-1567; Dec. Dig. § 388.*]

4. CORPORATIONS (§ 518*)—CONTRACT OF EMPLOYMENT—ACTION FOR SERVICES.

In such case, where the services have already been rendered, and the action is one merely to collect the salary already earned, the question as to the power of the corporation to repudiate the contract and discharge the employee does not arise and is not involved.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 518.*]

5. CONTRACTS (§ 138*)—VALIDITY—PUBLIC POLICY.

Sound public policy can never run counter to the principles of honest and fair dealing, and the rule of public policy cannot be invoked to defeat the recovery of an honest claim.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 498-503; Dec. Dig. § 138.*]

6. FRAUDS, STATUTE OF (§ 139*)—CONTRACT OF EMPLOYMENT—SERVICES.

The statute of frauds (subdivision 1, § 6009, Rev. Codes) will not prevent the recovery of an agreed and stipulated price contracted to be paid for services and labor which have been rendered by the employee during a period exceeding one year, simply because the contract was not reduced to writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 334, 337; Dec. Dig. § 139.*]

7. FRAUDS, STATUTE OF (§ 49*)—CONTRACT OF EMPLOYMENT—TERMINATION WITHIN ONE YEAR.

A contract, whereby a corporation agrees to employ D. at a specified salary so long as he continues to own and hold his stock in the corporation, does not come within the purview of the statute of frauds (subdivision 1, § 6009, Rev. Codes), on the ground that the same was not in writing, for the reason that such con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tract is capable of being fully performed, completed, and terminated within a year.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 74; Dec. Dig. § 49.*]

Appeal from District Court, Kootenai County; Robt. N. Dunn, Judge.

Action by A. A. Darknell against the Coeur d'Alene & St. Joe Transportation Company, Limited. Judgment for defendant, and plaintiff appeals. Reversed, and new trial granted.

R. E. McFarland, for appellant. Robert H. Elder, for respondent.

AILSHIE, J. This action was commenced for the recovery of judgment for services rendered by the plaintiff to the defendant corporation. An amended complaint was filed, and a demurrer to that complaint was sustained. A second amended complaint was filed, and it was upon that complaint that the cause went to trial. It was alleged by the plaintiff that on the 1st day of April, 1905, he purchased 30 shares of the capital stock of the defendant corporation, and that he thereupon and on the same day entered into the contract with the defendant upon which this action is based. Paragraph 5 of the second amended complaint alleges the nature and character of the contract upon which the action is founded, and is as follows: "That on, to wit, the 1st day of April, 1905, and after plaintiff had purchased said shares of stock, said plaintiff and defendant entered into an oral agreement, upon the terms whereof defendant agreed to employ, and did employ, plaintiff as the assistant general manager of said defendant, and agreed and promised to pay to plaintiff for his services as said assistant general manager, for such period of time as plaintiff should retain his said shares of stock, the same salary from time to time paid to and received by said J. C. White as such general manager, and thereupon, to wit, on the 1st day of April, 1905, plaintiff entered in the employ of said defendant under and by virtue of said oral agreement, and performed services for said defendant as such assistant general manager at the monthly salary of \$100, until the 6th day of October, 1905, when said defendant commenced to pay, and ever since said last-mentioned date to the present time has paid, to said J. C. White, as such general manager, the salary of \$3,000 per annum, by reason whereof and under the terms and conditions of said oral agreement plaintiff became and was entitled to receive for his services as assistant general manager the sum of \$3,000 per annum from the 6th day of October, 1905." It is further alleged that under and by virtue of the contract set out in paragraph 5 the plaintiff performed services for the defendant as assistant general manager from the 1st day of April, 1905, up to and including the 6th

day of October, 1905, at the monthly salary of \$100, and that from the 6th day of October, 1905, up to and including the 6th day of June, 1908, the plaintiff performed services for defendant continuously as assistant general manager at the salary of \$3,000 per annum. Plaintiff alleges that the salary claimed by him is the same salary that the defendant was paying to its general manager, J. C. White, during the same period of time that plaintiff was in its employ, and that plaintiff was by the terms of his contract to receive the same compensation as the general manager might receive for the same period of time. In addition to the foregoing allegations as to the nature of the contract, plaintiff also alleges, in paragraph 6, "that said services were reasonably worth" the sums alleged and claimed by him in his complaint.

When the case came on for trial, the defendant filed a motion "to require plaintiff to elect as between two causes of action to proceed upon and to strike." The court appears to have sustained this motion and made an order requiring the plaintiff "to elect between the two separate and distinct causes of action set forth in his complaint herein, and that all of said complaint relative to any cause of action other than the one plaintiff elects to retain in his complaint be stricken from said complaint." The plaintiff protested against this action, took his exception, and thereupon elected to proceed upon the contract as set out in his complaint for the recovery of a stipulated salary. The trial thereupon proceeded, and plaintiff called his first witness and began to examine him, whereupon the defendant objected to the introduction of any evidence in the case "for the reason that plaintiff's amended complaint * * * as it now stands under the order of the court * * * does not state facts sufficient to constitute a cause of action." This motion was sustained by the court, and the plaintiff excepted and has preserved the proceedings in a statement and bill of exceptions. This appeal is from the judgment.

It was contended by the defendant on its motion to require the plaintiff to elect, and is contended in this court, that the plaintiff had improperly commingled two separate and independent causes of action in one count. In other words, it is insisted that the complaint charged a pretended cause of action on the contract for a stipulated salary and also a pretended cause of action on quantum meruit. This contention seems to have been based on the fact that the plaintiff inserted in his complaint the allegation that the services were of the reasonable value of the amount alleged. If this contention be correct, still the proper method of reaching the objection would not be by motion to require the plaintiff to elect. The two causes

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

es of action would not be inconsistent. If improperly united and commingled in one count, the proper motion would have been to require the plaintiff to separately state his several causes of action. It is conceded, and the complaint so states, that the recovery sought was for a stipulated price for services rendered—the services here rendered under contract. The only question which seems to arise in the case is whether the plaintiff could recover on a stipulated price or must recover on quantum meruit. The two theories are not inconsistent. Indeed, if the plaintiff should succeed in proving that he rendered the services and should be unable to prove that he had a contract for a specific salary, then he would be clearly entitled to recover the reasonable value of the services, provided his complaint contains a count on quantum meruit. Under the statute (subdivision 1, § 4109) causes of action arising out of "contracts express or implied" may be joined. So a cause of action on an express contract for a fixed salary may be joined with a cause of action for the same service on an implied promise to pay the reasonable value thereof. *Cowan v. Abbott*, 92 Cal. 100, 28 Pac. 213; *Estrella, etc., Co. v. Butler*, 125 Cal. 234, 57 Pac. 980; *Olmstead v. Dauphiny*, 104 Cal. 635, 38 Pac. 505.

It is argued, and the chief contention is made by respondent, that this contract is void, that as to the corporation it was ultra vires, and that it is also contrary to public policy, for the reason that it has the effect of divesting the directors and officers of their power of controlling and managing the business and affairs of the corporation. However sound this argument may be, and whatever merit it may contain, it is clearly inapplicable to the present status of this case and the facts on which we must pass. The question of the power of the directors to discharge the appellant and absolve the corporation from a further continuance of the relation or longer recognizing the binding effect of the contract and accepting appellant's services under the contract does not arise in this case. Here, according to the allegations of the complaint, appellant continued for several years in the service of respondent under the terms of this contract, and the only question which arises now is the liability of the company to pay for the service already rendered. May he rest his right of recovery on the price fixed by the contract, or shall he be bound to base his recovery on the reasonable value of the services rendered? No dispute arises on this appeal as to the actual performance and acceptance of the service. The only question now involved is as to the measure of compensation; appellant claims the right to recover for services already rendered according to the terms of the contract, which terms have been fully performed on his part, while respondent repudiates the contract and denies any right of recovery thereunder. In

our judgment, it is scarcely a debatable question. The validity and binding effect of the contract having been recognized until after the services have been rendered, the corporation will now be liable to pay in accordance with its terms if appellant succeeds in his proofs. The plea of ultra vires would not be available to the corporation in such case.

The contract is in no way violative of any theory or principle of public policy. Sound public policy can never run counter to principles of honest and fair dealing. This is wholly different from a case where the contract provides that the party shall be retained either for a fixed or an indefinite period as a trustee or elective officer of the corporation, or where the contract disables the corporation from carrying on its business, as was the case in *Glass v. Basin & Bay State Mill Co.*, 31 Mont. 21, 77 Pac. 302, and *Gibbs v. Cons. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979. The principles of honesty and fair dealing will not permit the company to escape liability to pay the appellant the agreed price after he has parted with his services on the agreement and understanding that he should receive a stipulated salary. Had he been notified in advance that if he rendered the services he would only be allowed compensation in such sum as he could prove to be reasonable, he might have preferred to seek a better employment at a fixed and more remunerative salary. Whatever the binding effect of this contract might be for the future and with reference to services not yet rendered, it is the unmistakable legal duty of respondent to pay for past services in accordance with the contract as the same may be proven. 5 *Thompson on Corp.* §§ 6016, 6017.

It is argued by respondent that plaintiff cannot recover under this contract for the reason that it was in violation of subdivision 1, § 6009, Rev. Codes. That provision of the statute prohibits the introduction of oral evidence to prove an agreement that by its terms is to be performed within a year from the making thereof. The provisions of the statute are not applicable to the case in hand. This is not an action for specific performance or for damages on account of a breach of the contract, or concerning any unperformed portion of the contract or services to be rendered in the future. So far as the action in hand is concerned, it is an executed contract, just as much so as would be a contract between A. and B. for the performance of labor at \$5 per day, and which contract was entered into two years before the commencement of action by A. for the recovery of his wages. We apprehend that A. would not be prohibited proving the contract as to the wages he was to receive for the two years' services rendered, simply because the contract was not in writing. It would be quite a different proposition, however, if B. had refused to furnish A. the

work, and A. had sued B. for a breach of the contract. By a long line of authorities it is held that such a contract as this does not fall within the statute of frauds, for the reason that it was capable of being performed and might have been fully performed and terminated within a year, and that such contracts are not within the statute. 2 Page on Contracts, § 676; Wood on Frauds, § 270; East Line, etc., R. R. Co. v. Scott, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 767; L. & N. R. R. Co. v. Offutt, 99 Ky. 427, 36 S. W. 181, 59 Am. St. Rep. 407; Sax v. Detroit, etc., Ry. Co., 125 Mich. 252, 84 N. W. 314, 84 Am. St. Rep. 575; Smalley v. Mitchell, 110 Mich. 650, 68 N. W. 978; Yellow Poplar Co. v. Rule, 106 Ky. 455, 50 S. W. 685; Greene v. Harris, 9 R. I. 407; Eaton v. Whitaker, 18 Conn. 222, 44 Am. Dec. 590.

In this case the contract was to be terminated on the sale by plaintiff of his stock in the corporation. His purchasing and continuing to hold the stock was the consideration for the contract, and on his making a sale of the stock the agreement and likewise the employment would end. McMullan v. Dickinson Co., 63 Minn. 405, 65 N. W. 661, 663. The sale might have taken place the following day or any day during the year.

The judgment in this case must be reversed, and a new trial will be granted. Costs awarded to appellant.

SULLIVAN, C. J., and STEWART, J., concur.

(18 Idaho, 53)

HARR v. KIGHT et al.

(Supreme Court of Idaho. April 11, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 957*)—REVIEW—DISCRETION OF COURT—OPENING DEFAULT.

An application to open and set aside a default is addressed to the sound legal discretion of the court; and, unless it appears that such discretion has been abused, the order will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8823; Dec. Dig. § 957.*]

2. JUDGMENT (§ 143*)—OPENING DEFAULT—GROUNDS.

To entitle a party to relief from a judgment or order entered by default, it is necessary that such person make a sufficient showing of mistake, inadvertence, surprise, or excusable neglect, and in addition thereto that such person has a meritorious defense to such action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269-291; Dec. Dig. § 143.*]

3. JUDGMENT (§ 162*)—DEFAULT—GROUNDS.

Showing in this case examined, and held that the trial court did not abuse its discretion in refusing to open and set aside a default.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 162.*]

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

Action by Jackson Harr against James

Kight and others. Judgment for plaintiff, and defendants appeal. Affirmed.

I. N. Smith and Clay McNamee, for appellants. S. O. Tannahill and Geo. W. Tannahill, for respondent.

STEWART, J. An action was commenced by the respondent against the appellants in the district court of Nez Perce county to obtain a perpetual injunction, restraining the appellants from interfering with a certain water right claimed by respondent, and certain water pipes and reservoir, and for damages. The complaint was filed with the clerk on February 15, 1909. Summons was issued and served personally upon the defendants in Nez Perce county on February 16, 1909. Upon April 6, 1909, the default of the defendants for want of an answer was entered by the clerk. On April 15, 1909, a general demurrer was filed to the complaint, signed by I. N. Smith, attorney for defendants. On May 12, 1909, the judge of the district court filed his findings of fact, conclusions of law, and a decree which, among other things, recited: "This cause came on to be heard on the 26th day of April, A. D. 1909, before the court without a jury, the plaintiff appearing in person and with his attorneys, S. O. Tannahill and Geo. W. Tannahill, Esqs.; the defendant having been duly and regularly served with summons as by law required, and having failed to appear and answer or demur; their default for not answering having been duly entered, as required by law; the court having heard the evidence on the part of the plaintiff, and duly considered the same, and having heretofore made its findings of fact and conclusions of law." Then followed the findings and the decree in favor of the plaintiff, quieting the plaintiff's title to certain water rights, right of way, and water flowing through a certain pipe and reservoir, and for a perpetual injunction. On June 12, 1909, a motion to set aside the default was made, supported by the affidavits of James Kight and I. N. Smith, and accompanied with an answer to the complaint. In the affidavit of Kight it is stated that he had stated the facts of his case to I. N. Smith, his counsel, and was advised by him that he had a good and sufficient defense, and referred to his answer, and, as an excuse for his failing to appear and suffering default to be entered against him and the other defendants, he stated that the defendants had employed the firm of Johnson & Stookey as their counsel, and that because of some misunderstanding, the affiant received no notice of the setting of the case for trial, nor did he have an opportunity to appear at the trial for that reason; that he was anxious to appear, and would have appeared had he received notice, and that it was never his intention to concede the rights claimed by plaintiff, nor to admit

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the plaintiff was entitled to the waters in controversy; that he was delayed further from the fact that he engaged I. N. Smith to represent his interest, and agreed to send him a certain sum of money, and that he sent the money on April 21st, by post office order, but because of miscarriage the same was not received by his attorney. In the affidavit of I. N. Smith he swears that he is attorney for the defendants, and was first consulted by the defendants on April 14, 1909, and partially engaged as attorney, but before he would take any step other than to file a demurrer, he should be paid the sum of \$25, and on April 15th he filed a general demurrer; that at that time the register of actions did not show any entry of default; that after that he waited to hear from his client with remittance, and did not receive any letter until about June 5, 1909; that as a matter of fact his client, on April 21, 1909, purchased a post office order at Lenore, Idaho, in favor of said Smith, and wrote a letter on that day, and placed the letter and post office order in an envelope, and erroneously addressed the letter to N. P. Smith at Lewiston, Idaho; that such letter was advertised and on May 17, 1909, was sent to the dead letter office and was remailed to the sender on June 4th. In the meantime Kight had informed his attorney that he had sent the money and asked for an investigation, and upon receiving assurances that the money had been sent, said Smith as attorney served the answer and the affidavit of Kight to set aside the default; that in his opinion there was a complete and perfect defense to the cause of action set forth in the complaint; and that Kight had always expressed his desire to contest said action and protect his interests, and did not concede the rights of the plaintiff. On April 28th he wrote his client, informing him of the condition of the case, but because of his poverty he was unable to come to Lewiston and look after the case, but did come in about a week prior to May 28th, and tried to get his counsel to go ahead with the case, but counsel insisted on the payment of the \$25. Counsel further states in his affidavit that he was informed by his client that his client's former attorneys, Johnson & Stookey, had attempted to settle the cause without appearance, by answer or otherwise, in court, and sent to their client a certain stipulation which he refused to sign; that he depended upon his counsel to see that no default was taken against him, and that he did not know that default had been taken until he was informed by affiant; that affiant was not employed in the said case until after the default was entered.

In opposition to the motion to set aside the default, affidavits were made by Jackson Harr and S. O. Tannahill, one of his counsel. Mr. Harr swears that after service of summons had been made in said case, Johnson & Stookey, representing the defendants, met with the plaintiff and his attorneys and drew up a stipulation, and that the defendants were ad-

vised by their attorneys that their rights were fully protected, and that they should sign the stipulation and consent that a judgment be entered accordingly; that they had no other or further defense in the action; that the defendants disregarded the advice of their attorneys, and refused to sign such stipulation; that the default in said case was entered on April 6, 1909, and on April 26th the plaintiff appeared in person and with his attorneys, and submitted his proof; that I. N. Smith, who afterward became attorney for defendants, was advised of the entry of the default, and was advised that the evidence had been taken, and a judgment and decree drawn, and that such decree was served upon said I. N. Smith, and was held until May 8th before the same was signed or filed; that the court adjourned on May 17th, and no application or motion or pleading had been filed for the purpose of setting aside the default, and the findings of fact and the conclusions of law and the decree were regularly made and filed on May 8, 1909. Accompanying this affidavit is the stipulation referred to, from which it appears that the findings and decree are in accordance therewith.

In the affidavit of Mr. Tannahill he swears that on April 10, 1909, at the request of the defendants and their counsel, Johnson & Stookey, affiant met one of the defendants and P. E. Stookey of said firm for the purpose of entering into a stipulation and settlement of the matters in controversy, and that a stipulation was drawn up which is the same stipulation made a part of the affidavit of Jackson Harr; that said Stookey advised the defendants that they should sign said stipulation and settle the matters in controversy, as they had no substantial defense to said action, and that affiant and Stookey separated with such understanding that said stipulation would be signed and approved; that I. N. Smith, who afterward became one of defendant's counsel, was advised that no answer had been filed, and that affiant intended to take judgment against the said defendants, and that said Smith stated he did not know what action he desired to take, or words to that effect; that on April 26th affiant caused the plaintiff to appear, and evidence was taken and a decree thereafter drawn and presented to the court for signing, and affiant served a copy of said findings of fact, conclusions of law, and decree on I. N. Smith, who now appears as attorney for the said defendants, and that said findings and decree were handed to said Smith on April 27, A. D. 1909; that no application was made to set aside the default, and on May 8, 1909, the findings and decree were signed and filed.

Upon this showing, the trial court denied the application of the appellants to set aside the default and judgment. From that order this appeal was taken.

The only question presented on this appeal is: Did the trial court abuse its discretion in refusing to set aside the default? This

court has decided so often that it seems supererogation to repeat that "An application to set aside and vacate a judgment is addressed to the sound, legal discretion of the court, and unless it appears that such discretion has been abused, the order will not be disturbed on appeal." *Culver v. Mountain Home Electric Co.*, 107 Pac. 65. Under the provisions of Rev. Codes, § 4229, a party may be relieved from a judgment or order taken against him through mistake, inadvertence, surprise, or excusable neglect, and this court in a number of cases has held that a defendant making application to open a default must not only show that the default was entered against him through his mistake, inadvertence, surprise, or excusable neglect, but must also show sufficient facts from which it appears that he has a good defense. *Holzeman v. Henneberry*, 11 Idaho, 428, 83 Pac. 497. To entitle a party to relief from a judgment or order entered by default, it is necessary that such person make a sufficient showing of mistake, inadvertence, surprise, or excusable neglect, and, in addition thereto, that such person has a meritorious defense to such action, and if the ruling upon the showing made does not show an abuse of legal discretion, then the order will not be reversed.

According to the showing made, the complaint was filed February 15, 1909; summons served February 16, 1909. After service of summons the defendants employed counsel, and the counsel so employed met counsel for respondent and entered into a stipulation in accordance with which it was agreed judgment should be entered, and after making such stipulation, counsel for defendants did not file a demurrer or answer or further appear in said action. The respondents declined to accept the settlement made or the advice of their counsel. On April 6, 1909, no appearance having been made by defendants, their default was entered. On April 15th a general demurrer was filed in said cause by I. N. Smith, who had been secured as counsel for defendants instead of Johnson & Stookey, their former counsel. The case came one for trial before the court on April 26, 1909; the record reciting that defendants were in default and failed to appear and answer. On May 12, 1909, the judge filed his findings of fact and conclusions of law and decree. The only excuse appearing in the affidavits, upon which the trial court was asked to set aside such default, is the showing that defendants consulted I. N. Smith, and partially employed him as their attorney on April 14, 1909, but that he declined to take any step other than file a demurrer until he was paid a certain fee demanded by him, and that, while as a matter of fact his client remitted him through post office

order such fee on April 21, 1909, he did not receive the same until about June 8, 1909. It is apparent from this record that Johnson & Stookey were defendants' counsel after their first employment up until the time defendants employed I. N. Smith on April 14th. The summons was served in Nez Perce county on February 16th; consequently the defendants were in default on February 27th, yet the default was not entered until April 6th. When the demurrer was filed on April 15th by I. N. Smith, who was then acting for the defendants, such defendants were in default, and the filing of the demurrer could not affect such default. Rev. Codes, § 4174; *Irvine v. Davy*, 88 Cal. 495, 26 Pac. 506. It further appears that after I. N. Smith had partially been employed as counsel for the defendants, he was informed by counsel for plaintiff before judgment had been entered that said defendants were in default, and that plaintiff intended to take judgment against them, and that no appearance was then made on behalf of the defendants, and that, after the trial was had on April 26th, a copy of the findings and decree was served upon said Smith as counsel for the defendants, yet defendants made no appearance in said cause, and that said findings and decree were held and not signed until May 8, 1909, or filed until May 12th, and yet defendants made no appearance or move to open or set aside said default. Under these facts it would have been an abuse of discretion had the trial court sustained the motion to open such default. The defendants were guilty of such neglect and carelessness in protecting their own interest as under no ordinary circumstances could be imputed to an ordinarily careful man in a business matter.

If this court should reverse this case and hold that the trial court abused its discretion in refusing to open the default, then there would scarcely be a default judgment, but that a sufficient showing could be made to set the same aside. Litigation would be delayed and prolonged, and the statute fixing the time within which an answer or demurrer must be filed would practically be nullified. Taking this view, it is unnecessary to determine whether the answer stated a defense, because even if it should be found that such answer did state a meritorious defense, yet the utter failure of the defendants to make a sufficient showing of mistake, inadvertence, surprise, or excusable neglect necessarily leads to an affirmance of the judgment.

The judgment is affirmed. Costs awarded to respondent.

SULLIVAN, C. J., and AILSHIE, J., concur.

(18 Idaho, 76)

BERNARDI v. NORTHERN PAC. RY. CO.
(Supreme Court of Idaho. April 14, 1910.)

*(Syllabus by the Court.)***1. RAILROADS (§ 103*)—DUTY TO FENCE.**

Under the provisions of Rev. Codes, § 2815, it is the duty of every railroad company operating any steam or electric railroad in this state to erect and maintain lawful fences on each side of its road, where the same passes through, along, or adjoining inclosed or cultivated fields or inclosed lands.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 315-318; Dec. Dig. § 103.*]

2. RAILROADS (§ 411*) — DUTY TO FENCE TRACK.

Until such fences shall be made and maintained, such corporation shall be liable to pay all damages which shall be done by its agents, engines, or cars, to horses, cattle, mules, or other animals on said road, regardless of whether the person operating or in charge of such engine or cars was negligent or not.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1409-1432; Dec. Dig. § 411.*]

3. RAILROADS (§ 103*) — DUTY TO FENCE TRACK—"ENCLOSED OR CULTIVATED FIELDS OR ENCLOSED LANDS."

The language used in Rev. Codes, § 2815, as follows: "Where the same passes through, along or adjoining enclosed or cultivated fields or enclosed lands"—refers to country districts, or where a railroad runs along, adjoining, or through cultivated fields or inclosed lands, and was not intended to apply to municipalities or towns, whether incorporated or not, unless such town was so extended as to include cultivated fields or inclosed lands other than residence lots.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 315-318; Dec. Dig. § 103.*]

4. RAILROADS (§ 103*)—DUTY TO FENCE TRACK—POWER OF LEGISLATURE.

It is clearly within the power of the Legislature as a police regulation to require railroad companies to fence their track, and it is for the judgment of the Legislature whether such duty shall be extended to the requirement that a railroad shall fence its road in municipalities or towns or in rural sections where the lands are not cultivated or inclosed, such as the open prairie, sagebrush, and timber lands not cultivated or inclosed.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 103.*]

5. RAILROADS (§ 443*)—DUTY TO FENCE—ANIMALS ON TRACK.

Held, under the evidence in this case, that the appellant was not required to fence its road where the animal for which damages were sought entered upon the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1614; Dec. Dig. § 443.*]

6. RAILROADS (§ 103*)—FENCES.

A railroad company is not required, under the provisions of Rev. Codes, § 2815, to fence its road where the same runs through a narrow canyon, with a public traveled road occupying almost the entire space between the ends of the ties and the foot of a precipitous mountain on one side of the track and residences and stores occupying almost the entire space between the ends of the ties and the foot of a precipitous mountain on the other side, and there are no cultivated fields or inclosed lands through, along, or adjoining which such road runs at the place of the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 318; Dec. Dig. § 103.*]

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by Frank Bernardi against the Northern Pacific Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

E. J. Cannon and Featherstone & Fox, for appellant. Walter H. Hanson, for respondent.

STEWART, J. This action was commenced to recover damages for the value of a cow killed by appellant company in the operation of its railroad. The cause was tried to a jury in the district court, and a verdict returned for the plaintiff. This appeal is from the judgment.

This appeal must be determined by answering the question: Was it the duty of the appellant company to fence its railroad track at the point where the cow entered upon said track? Rev. Codes, § 2815, provides: "Every railroad company operating any steam or electric railroad in this state, shall erect and maintain lawful fences not less than four feet high on each side of its road, where the same passes through, along or adjoining enclosed or cultivated fields or enclosed lands, with proper and necessary openings and gates therein, and farm crossings; and also construct and maintain cattle guards at all highway crossings where fences are required as aforesaid, suitable and sufficient to prevent horses, cattle, mules or other animals from getting on the railroad. Until such fences, openings, gates, farm crossings and cattle guards shall be duly made and maintained, such corporation shall be liable to pay all damages which shall be done by its agents, engines or cars, to horses, cattle, mules or other animals on said road, or by reason of any horse, cattle, mule or other animals escaping from or coming upon said lands, fields or enclosures occasioned in either case by the failure to construct or maintain such fences or cattle guards, regardless of whether the persons operating or in charge of such engines or cars were negligent or not. But after such fences, gates, farm crossings and cattle guards shall be duly made and maintained, such corporation shall not be liable for any such damages unless negligently or willfully done. If any corporation aforesaid fail, neglect or refuse for and during the period of three months after the completion of its road through or along the fields or enclosures hereinbefore named, to erect and maintain any fence, opening gates, farm crossings or cattle guards as herein required, and after having received not less than thirty days' notice requiring them so to do, then the owner of such fields or enclosures may erect and maintain such fences, opening gates, farm crossings and cattle guards, and shall

thereupon have a right to sue and recover from such corporation in any court of competent jurisdiction, the full value of the same: Provided, That no recovery can be had on account of stock injured or killed which came upon said highway by reason of failure to keep such gates closed."

This statute makes it the duty of a railroad company to erect and maintain lawful fences on each side of its road "where the same passes through, along or adjoining enclosed or cultivated fields or enclosed lands." The penalty fixed by the statute for failure to erect and maintain such fences is twofold: First, the company is made liable to pay all damages which shall be done by its agents, engines, or cars to the animals named in the statute, "regardless of whether the persons operating or in charge of such engines or cars were negligent or not"; second, if the company neglect or refuse, for and during the period of three months after the completion of its road, "through or along the fields or enclosures hereinbefore named, to erect and maintain any fence, * * * after having received not less than thirty days' notice requiring them so to do, then the owner of such fields or enclosures may erect and maintain such fences, * * * and shall thereupon have a right to sue and recover from such corporation * * * the full value of the same." The statute, of which this section is a part, was approved March 13, 1907, and this section was intended to be a substitute for section 2680 of the Revised Statute of 1887 which had previously been held to be unconstitutional. *Catril v. Union Pacific Ry. Co.*, 2 Idaho, 576, 21 Pac. 416. The language, however, of this section, with reference to requiring a railroad company to fence is very similar to the language found in section 2679, Rev. St. 1887, now section 2814 of the Revised Codes; and it may be questionable whether or not the later act does not also repeal section 2814 of the Revised Codes.

In the case of *Johnson v. O. S. L. Ry. Co.*, 7 Idaho, 355, 63 Pac. 112, 53 L. R. A. 744, this court had under consideration section 2679, supra, and held: "Under the authorities we do not feel authorized to hold that the statute requires fencing merely for the protection of adjoining landowners. When the statute was enacted, Idaho was a sparsely settled territory. Large sections were unsettled, with practically no cattle or stock running at large. The Legislature evidently thought it would be too great a hardship to compel railway companies to fence their tracks through the territory, and only required it in the settled portions, where horses and cattle would be found in large numbers. When we passed into statehood through the provisions of the Constitution, we continued the statute in force. We cannot conclude that the Legislature exercised this police power, which is so necessary for the protection of human life and private

property, for private abutting or contiguous landowners only, but must conclude that it was enacted for the good of the general public." And the court quotes with approval from *Patrie v. Railroad Co.*, 6 Idaho, 448, 56 Pac. 82, as follows: "If the provisions of said section require the defendant corporation to fence its track wherever and whenever it runs through land owned by private persons, the judgment must be sustained. The intent of the Legislature in enacting said section must be arrived at from a literal construction, if such construction would not result in an absurdity or inconsistency. The statute declares that a railroad corporation must make and maintain a good and sufficient fence on either or both sides of their track or property, wherever the line of road passes through or along or abuts upon, or is contiguous to, private property or inclosed land in the actual possession of another. The record shows that said track passes through private property, and we think the statute as applied to the facts of this case is too clear to require any construction. To hold that it does not require the defendant corporation to fence its track except when and where a private person may fence his land would be injecting language into said section that is not found there, and could not be put there by a fair implication and reasonable construction."

By the language "Enclosed or cultivated fields or enclosed lands," as used in this section, the Legislature clearly had in mind rural or country districts where the railroad runs through, along, or adjoining inclosed or cultivated fields or inclosed lands, and did not intend to make such section apply to municipalities or towns, whether incorporated or not, unless such town was so extended as to include fields or inclosed lands other than town lots, or to a railroad passing along or in front of town lots or inclosed lots used for residence purposes only. Had the language of this section been general and specified, "that every railroad company operating any steam or electric railroad in this state shall erect and maintain lawful fences not less than four feet high on each side of its road bed," then the statute would have applied to the road where it runs through municipalities and towns, whether incorporated or not; and the question then might arise whether by such language it was the intention of the Legislature, or whether it was in the power of the Legislature, to require the railroad company to fence its road where it would be impracticable or impossible, or where it would greatly inconvenience the public, or materially interfere with the operation of such road. But these objections clearly do not apply to the provisions of the statute, if it is construed as the Legislature certainly intended it to be; that is, as applicable to cultivated or inclosed lands. When the Legislature used this language it did so with the purpose and inten-

tion of making said section apply to a road running through, along, or adjoining cultivated fields and inclosed lands; and, as said by this court in *Johnson v. O. S. L. Ry. Co.*, supra, "The Legislature evidently thought it would be too great a hardship to compel railway companies to fence their tracks through the territory, and only required it in the settled portions," and by the language used in section 2815 it is clear that the Legislature was enacting said section for the protection of the public in rural and farm communities, and that the Legislature did not intend to make said section applicable to municipalities and towns.

This court would not be justified in reading into the statute language which the Legislature did not put there or extending the construction of the language so as to embrace conditions clearly not intended by the Legislature. It is clearly within the power of the Legislature as a police regulation to require railroad companies to fence their track, and it is for the judgment of the Legislature whether such duty shall be extended to the requirement that a railroad shall fence its road in municipalities or towns or in rural sections where the lands are not cultivated or enclosed, such as the open prairie, sagebrush, and timber lands not cultivated or inclosed; and, until the Legislature does so provide, damages cannot be recovered for live stock killed upon a railroad track, by agents of the company in operating its road, without proving negligence. In other words, the failure to fence will not supply the proof of negligence, unless it be shown that the animal killed entered upon the track at a place where the law requires the company to fence. We think this construction is clearly authorized by the further provisions of this section with reference to the right of an owner of adjoining fields and inclosures to notify the company to erect and maintain such fence, and upon failure giving such owner the right to erect such fence and sue and recover from such corporation the value thereof; for in this latter provision the Legislature refers to the road "through or along the fields or enclosures," and clearly used such language with reference to rural sections where lands were inclosed as settled, cultivated, or improved, such as farm lands, pastures, orchards, and other sections under inclosure. *Edwards v. Hannibal & St. Jo. R. Co.*, 68 Mo. 567. The statute of Missouri, under construction in the latter case, was similar to the Idaho statute, except it also specified "open prairie" in addition to where the road passed "through or along cultivated fields and enclosed lands," and in that case the court says: "It is patent from the phraseology employed in this section that it was intended to apply only to farming lands and the open prairie and not to lands included within the limits of any incorporated town or city."

So we conclude that by the language used

the Legislature intended to make such section apply to farm lands, inclosed and cultivated lands, and not to municipalities or towns, whether incorporated or not, or other sections not cultivated or inclosed, unless the lands included fields or inclosed lands other than town lots. This brings us to a consideration of the evidence in this case for the purpose of ascertaining whether the facts bring the case within the provisions of this statute. A branch of the Northern Pacific Railroad extends from Wallace, Idaho, to Burke, Idaho, and passes through a very narrow canyon, with high precipitous mountains on either side. Along the west side of the railroad extending up this canyon is a wagon road used by the public in passing up and down said canyon. The width of the railroad right of way or the public road is not shown by the evidence. In the vicinity where the animal in question was killed the canyon is very narrow, the wagon road occupying almost the entire space between the end of the railroad ties and the foot of the mountain on the west. To the east of the railroad the houses of the residents of Black Bear, an unincorporated village, are constructed, abutting against the foot of the mountain, and reaching to within 8 to 13 feet of the railroad track. The evidence does not show that there are any laid-out highways across the railroad track. There is a crossing shown by the evidence just above where the accident occurred, but whether a public highway it does not appear. The railroad track in this canyon is nowhere fenced. The animal injured was kept by the plaintiff in his front yard in Black Bear; the front fence of his inclosure was about 13 feet from the railroad track. The cow strayed from this inclosure and went upon the railroad, and was on the track near the front of a store, which was generally recognized as a waiting place for the railroad trains, post office, and station. There are no cultivated lands in this canyon near where the accident occurred. Some of the residents have their houses inclosed, but it is clearly not a rural or country district, or a place where the railroad company was required to fence its track, under the statute involved in this case. Whether, if the language of the statute had been general, it would have been possible to fence the road at the place where the animal in question entered upon the track without greatly inconveniencing the public, and preventing the public passing from one side of the railroad to the other, we need not determine in this case, because under the statute the railroad company was not required to fence its roadbed at the place where this accident occurred.

The judgment is reversed. Costs awarded to appellant.

SULLIVAN, C. J., and AILSHIE, J., concur.

(35 Okl. 809)

SUPERIOR OIL & GAS CO. v. MEHLIN.
(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE (§ 25*)—CONTRACTS ENFORCEABLE.

Specific performance will not lie, unless the agreement is certain, fair, and just in all its parts; and in such an action any element showing that the contract is unfair, unjust, and against good conscience will justify the court in refusing such decree, although the contract, had it been executed, might offer no sufficient ground for cancellation.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 56-60; Dec. Dig. § 25.*]

2. SPECIFIC PERFORMANCE (§ 28*)—CONTRACTS ENFORCEABLE — EXECUTORY CONTRACT OPTIONAL WITH PARTY.

An executory contract, which under its terms leaves it optional with one party whether or not he will proceed with the contemplated enterprise, makes the same likewise optional with the other, and specific performance will not be decreed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61-68; Dec. Dig. § 28.*]

3. MINES AND MINERALS (§ 73*)—OIL AND GAS LEASES—CONSTRUCTION.

A different rule of construction obtains as to oil and gas leases from that applied to ordinary leases or to other mining leases; and, owing to the peculiar nature of the mineral, and the danger of loss to the owner from drainage by surrounding wells, such leases are construed most strongly against the lessee and in favor of the lessor.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 201, 210; Dec. Dig. § 73.*]

4. SPECIFIC PERFORMANCE (§ 28*)—CONTRACTS ENFORCEABLE.

Defendant, an intermarried citizen, allottee, of the Cherokee Nation, June 24, 1904, executed a contract with plaintiff in which he agreed to make an oil and gas lease on his allotment in accordance with the terms and conditions required by the Secretary of the Interior, or, if they be not required, a regular oil and gas lease such as was used in the state of Kansas. Action brought for specific performance, in which the lease agreed on and sought to be enforced was shown to contain a proviso allowing plaintiff 15 years from its execution within which to begin operations, and, for an unspecified consideration, license to extend such term indefinitely; decree by the court denied. *Held* not error.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 28.*]

5. EQUITY (§ 423*)—NATURE OF RELIEF.

The relief granted in equity is such as the nature of the case, the law and the facts, demand, not at the beginning, but at the time the decree is entered in the litigation.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 986-988; Dec. Dig. § 423.*]

6. SPECIFIC PERFORMANCE (§ 127*) — DENIAL OF EQUITABLE RELIEF—COMPENSATION.

In a case where specific performance requiring execution of a contract is not decreed by reason of a want of equity growing out of the peculiar character of the contract involved, it is the duty of the court to retain jurisdiction of the action, and to decree compensation to the plaintiff to the extent of the money by him paid, and interest thereon, and also for

all beneficial and lasting improvements which in carrying out the terms of the alleged contract he may have in good faith made upon the premises.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 406-411; Dec. Dig. § 127.*]

7. SPECIFIC PERFORMANCE (§ 127*)—DENIAL OF EQUITABLE RELIEF—RIGHT TO COMPENSATION.

Where, in an action for specific performance of a lease, the same is found to be of a class which will not support a decree, but there is no fraud, and plaintiff has paid a money consideration thereon, and has in good faith entered under the same and made valuable and lasting improvements, a court in denying specific performance will grant plaintiff an opportunity to establish his right to compensation from defendant, and decree the same a lien upon the premises involved.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 406-411; Dec. Dig. § 127.*]

Error from District Court, Nowata County; T. L. Brown, Judge.

Action by the Superior Oil & Gas Company against James G. Mehlin. Judgment for defendant, and plaintiff brings error. Remanded, with instructions.

Eugene B. Lawson, for plaintiff in error.
W. H. Kornegay, for defendant in error.

DUNN, C. J. November 6, 1906, the Superior Oil & Gas Company filed its complaint in equity against James G. Mehlin in the United States Court for the Northern District for the Indian Territory, sitting at Nowata, for the purpose of securing the reformation of a certain contract and its specific performance. The lower court denied plaintiff's prayer, and the cause has been brought to this court for review. For a correct understanding of the matters placed at issue and necessary for determination, we will set forth the material averments of the complaint and the answer.

In its amended complaint the plaintiff avers that on the 24th day of June, 1904, the defendant was a citizen of the United States, a white man not of Indian blood, and an adopted citizen of Cherokee Nation. That having full and complete power and authority in the premises, he entered into the following written agreement: "This agreement made and entered into this the 21st day of May, A. D. 1904, by and between James G. Mehlin, party of the first part, and Superior Oil & Gas Co., a corporation, duly organized and existing under the law of Arkansas, applicable to the Indian Territory, party of the second part, witnesseth: That whereas the said James G. Mehlin has filed as a duly enrolled citizen of the Cherokee Nation of the following lands: The NE/4 of SE/4 of sec. 19; and the W/2 of the NW/4 of the SW/4 of sec. 20; and S/4 of SE/4 of sec. 19. And whereas the legal rights of said Mehlin to receive the allotment of said land is not set-

tled; it is mutually agreed as follows: That as soon as the rights of the said Mehlin are settled in his favor, he will at once make an oil and gas lease to the party of the second part, in accordance with the terms and conditions required by the Secretary of the Interior, or if they be not required, a regular oil and gas lease such as is used in the state of Kansas. In the event, however, that within a reasonable time from date hereof the case has not been settled, or the party of the second part may desire to drill for oil, said Mehlin agrees to provide for filing of some one else on the land who will execute said lease." That under and by virtue of the terms of said contract the defendant agreed with plaintiff that he would execute to plaintiff an oil and gas lease on the lands selected in allotment by him, whenever his rights as a citizen of the Cherokee Nation were fully and finally established. That at the time of entering into the said contract there was a mutual mistake made by plaintiff and defendant in describing the said lands in said contract, in this, to wit: (Herein is set out the alleged error, with a description of the lands intended to be included.) That the rights of defendant as a citizen of the Cherokee Nation were finally decided in his favor by the Supreme Court of the United States on the 5th day of November, A. D. 1906, and at any time thereafter the defendant could have made a good and valid lease to plaintiff in accordance with the terms and conditions of the contract entered into on the 24th day of June, 1904. That in accordance with the terms and conditions of the said contract, plaintiff, after the rights of defendant had been settled in his favor by a decision of the Supreme Court of the United States, caused to be presented to defendant for his signature a regular oil and gas mining lease on commercial forms, such as is used in the state of Kansas, and which form was agreed to by the parties when the contract was entered into, covering that portion of defendant's allotment known as his surplus lands, which lease defendant refused to sign, copy of said lease being hereto attached, and marked "Exhibit B," and made a part hereof. Plaintiff states that said lease was drawn in conformity to the contract entered into between plaintiff and defendant on the 24th day of June, 1904, and that no objections of any kind whatsoever were made by defendant to the form of leases presented to him for his signature, or to the terms and conditions of the same.

Attached to plaintiff's amended complaint and made a part thereof are forms of all leases provided for in the contract. The plaintiff further pleads that the consideration for the making of the lease was \$600 in stock in the plaintiff corporation, which it avers it delivered to, and that the same was received by, the defendant; also, \$300 in cash, being the amount of money expended by defendant in the digging of a well on the prem-

ises, and that as a further consideration defendant was to receive 10 per cent. of the product produced under the lease. The answer of defendant virtually admitted every averment of plaintiff's complaint, either by direct admission or by a failure to controvert. Section 3277, St. Ind. T. (Manuf. Dig. § 5072); 2 Ency. L. & P. p. 175. The only material elements of fact which it denied was the averment of the payment of the consideration mentioned therein, the other questions raised by the answer being almost altogether of law; there being contained therein such general averments as that the instrument created no obligation on the part of defendant to make an oil and gas lease, for the reason that there was no consideration for the same moving from plaintiff to defendant, and that there was no obligation provided for therein on the part of plaintiff to do anything for the benefit of the defendant. That under said demand it is wholly optional with the plaintiff to work the land for oil and gas, and that the instrument is too indefinite to create any obligation. That the same is against public policy, and that at this time it would be unjust and inequitable for the court to reform said instrument and to require said defendant to make a lease to the plaintiff; that the prevailing rate of royalty in the community at the present time far exceeds 10 per cent. of the product mined, and that the contract sought to be enforced was not sufficient under the statute of frauds. The actual issues made by the pleading were in a great measure ignored and abandoned by the parties on the trial, and evidence covering the entire subject-matter of the controversy, without reference to whether the same was put in issue or not, was generally without objection offered, heard, and by the master and court adjudicated. The consideration as averred in the complaint was established by proof, and so found by the court, except possibly the final consideration as shown by the evidence in reference to the stock in the plaintiff company. The term of the lease, which is neither pleaded in the complaint nor shown by the exhibit, was fixed under the evidence, and found by the court, at 15 years. Evidence likewise showed that the defendant had, prior to the trial of the cause, entered into a lease with another concern, and that the prevailing rate of royalty and compensation for oil and gas leases was 8 per cent. of the product, and over \$200 bonus per acre. The plaintiff, it seems, had by and through the assistance of the defendant secured a large number of leases of the defendant's relatives, and others in the immediate vicinity of his land, and on his failure and refusal, on the determination of his rights in and to his allotment, to consummate the proposed agreement to execute a lease this suit was brought to compel it.

Defendant testified that he intended by his contract to cover his entire allotment, and if this were all that was involved in the

action, there could be no doubt that a decree for a reformation would follow as a matter of course; but, as reformation is sought solely for the purpose of securing specific performance in the execution of the lease provided for therein, the contract will not be reformed, unless the remedy of specific performance can likewise be awarded. Under these circumstances we turn to the record to ascertain whether or not specific performance of the lease contracted for will be decreed. The provisions of the contract in reference to the lease is that the same will be made in accordance with the terms and conditions required by the Secretary of the Interior, or, if they be not required, a regular oil and gas lease such as is used in the state of Kansas, and the lease to be thus made was to be executed as soon as the rights of Mehlin to his land were settled in his favor. The construction which the parties placed upon this particular portion of the contract was shown in the evidence by testimony that it was the intention to have a regular oil and gas lease such as was used in the state of Kansas, rather than one under terms required by the Secretary of the Interior. It was asserted that it was intended to have a commercial lease, instead of being bound up by rules and regulations of the Interior Department, if possible. The condition thus referred to necessarily contemplated the exercise of Mehlin's rights as they existed at the time he was called on to act; that is, if his rights were such at the time of making the lease that the law would require the sanction of the Secretary of the Interior to validate any lease made, then it was to conform thereto. On the other hand, if a commercial lease should at that time be valid, this was the kind agreed on. It is virtually conceded by counsel that at the time of the execution of this contract any valid lease made by the defendant on his homestead would require the approval of the Secretary of the Interior (see section 72, Cherokee Agreement [Act July 1, 1902, c. 1375, 32 Stat. 726]; section 131, Bledsoe's Indian Land Laws; and Act April 21, 1904, c. 1402, 33 Stat. 189), while under Act May 27, 1908, c. 199, 35 Stat. 312 (Bledsoe's Indian Land Laws, § 600), any and all restrictions upon the leasing by the defendant of his entire allotment were removed, and he would at this time be able to make a lease on his homestead, as well as his surplus, without the approval of the Secretary of the Interior. While a judgment in a court of law always relates to the condition of facts as they exist at the commencement of the action, such is not the rule in equity, as here the relief administered is such as the nature of the case and the facts justify at the close of the litigation. 16 Cyc. 479; *Pennsylvania Co. v. Bond*, 99 Ill. App. 535; *Peck v. Goodberlett*, 109 N. Y. 190, 16 N. E. 350. This consideration is essential, for the reason that to the complaint are at-

tached as exhibits two forms of leases; one such as the pleader assumed and averred contained terms such as would be approved by the Secretary of the Interior, and the other a regular oil and gas lease such as is used in the state of Kansas. The removal of all restrictions on defendant and his allotment, and the agreement of the parties as manifested by the contract, the pleadings, and the evidence, leaves, then, for our consideration solely the latter lease, the execution of which we are asked to specifically decree and enforce.

Mr. Pomeroy in his work on Equity Jurisprudence, at section 1405, says in substance that a contract to be subject to specific performance must be reasonably certain as to its subject-matter, its stipulations, its purposes, its parties, and the circumstances under which it is made. It must be, in general, mutual in its obligations and in its remedy, perfectly fair, equal, and just in its terms and its circumstances, and be such that the remedy of specific performance will not be harsh or oppressive. A rule of unexceptional application is that specific performance will not be awarded unless the contract is certain, fair, and just in all its parts and any fact showing that the contract is unfair, unjust, and against good conscience will justify the court in refusing such decree, although the same, if duly executed, would present no sufficient ground for cancellation, or would be enforceable at law. *Dalzell et al. v. Dueber Watch Case Mfg. Co.*, 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749; *Federal Oil Co. v. Western Oil Co. et al.* (C. C.) 112 Fed. 373. A form of a regular oil and gas lease such as was used in the state of Kansas was appended as an exhibit to the complaint, and the terms thereof material to be here considered, relating to the time for which it was to run and the conditions under which plaintiff could be required and compelled to operate under it, are in three paragraphs, which are as follows:

"That the party of the first part, for and in consideration of one dollar (\$1.00) cash in hand paid, and the royalties, covenants, stipulations and conditions hereinafter contained, and hereby agreed to be paid, observed and performed by the party of the second part, its successors and assigns, does hereby grant, demise, lease and let unto the said party of the second part, its heirs, successors and assigns, for the term of fifteen years from the date hereof, and as long thereafter as oil or natural gas, or either of same is produced from said land by the said party of the second part, all the oil deposits and natural gas in and under the following described tract of land, lying and being within the Cherokee Nation, * * *" etc.

"The said party of the second part further covenants that it will commence operations upon the above described land within the term aforesaid, and to operate the same in

good and workmanlike manner; to commit no unnecessary waste upon the said land in its occupancy or use; to take good care of the same and to promptly surrender and return the premises upon the termination of this lease to the party of the first part or to whomsoever shall be lawfully entitled thereto, * * * etc.

"It is also hereby stipulated that, in case operations as aforesaid are not commenced within the term aforesaid, the said party of the second part shall pay to the said party of the first part the sum of \$——, in advance, for each additional year such commencement is delayed from the end of the term aforesaid until a well is completed, * * * etc.

From the foregoing it will be noted that the lessee under the terms of the lease could delay the beginning of any well upon the land described for practically 15 years, and then if at the end of that period of time he desired to delay longer, there was a proviso allowing it (for a consideration not specifically named) to hold the land indefinitely, without beginning any operations whatsoever. Thus, while by a decree defendant might be compelled to enter into this lease, no court could under its terms exercise any power to compel the lessee to operate. Under its terms it is left entirely to the action of the lessee to either drill for oil or gas, or not drill, and there is no forfeiture or burden provided for during this 15-year term, in which the lessee may deprive the owner of any of the benefits whatsoever of having his land exploited. The general rule in such cases is that contracts unperformed, optional as to one of the parties, are optional as to both. *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732; *Huggins et al. v. Daley*, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; *Reese et al. v. Zinn et al.* (C. C.) 103 Fed. 97; *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674, 57 C. C. A. 428.

The favorable presumptions which are usually indulged in behalf of ordinary lessees are not enjoyed by those holding leases of the character whose enforced execution is sought by plaintiff in this action, for the doctrine seems to be fundamental that, on account of the peculiar nature of the subject-matter upon which they operate, and the danger of loss to the lessor through the movement of the oil and gas to surrounding lands and its withdrawal from neighboring wells, oil and gas leases are construed most strongly against the lessee and in favor of the lessor. *Costigan on Mining Law*, § 127, p. 475; *Bryan on Petroleum*, § 146; 6 *Pomeroy, Eq. Juris.* § 787; *Donahue on Petroleum and Gas*, p. 149; *Thornton on the Law Relating to Oil and Gas*, § 78; 2 *Snyder on Mines*, § 1181; *Southern Railway Co. v. Franklin & Pittsylvania Railway Co.*, 96 Va. 706, 33 S. E. 485, 44 L. R. A. 297; *Huggins et al. v. Daley*, supra; *Venture Oil Co. v. Fretts*, supra; *Berry v. Frisbie et al.*, 120 Ky. 337,

86 S. W. 558; *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317, 49 N. E. 399, 39 L. R. A. 765, 63 Am. St. Rep. 721; *Munroe v. Armstrong et al.*, 96 Pa. 307.

The Circuit Court of Appeals of the Fourth Circuit, in the case of *Huggins et al. v. Daley*, supra, says: "There is, perhaps, no other business in which prompt performance is so essential to the rights of the parties, or delays so likely to prove injurious—no other class of contracts in which time is so much of the essence. There is no other branch of mining where greater damage is done by delay. Coal and precious metals lie either in horizontal veins or in pockets. They remain where they are until removed. Oil and gas are the most uncertain, fluctuating, volatile, and fugitive of all mining properties. They lie far below the surface, beyond the control of human will, and beyond the reach of any legal process, whence they may flow unrestrained if the owner of adjoining land bores a well down to the strata which holds them; and there is no law which can provide adequate, or indeed any, compensation for such results. This is a matter of common knowledge, and 'courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction. * * * In *Oil Co. v. Marbury*, 91 U. S. 593, 23 L. Ed. 328, the facts were, to some extent, the converse of those here; but Mr. Justice Miller comments on the fluctuating character and value of this class of property, and asserts the injustice 'of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit,' and, referring to the distinction between real estate whose value is fixed, says: 'The class of property here considered is subject to the most rapid, frequent, and violent fluctuations in value of anything known as property, and requires prompt action in all who hold an option whether they will share its risks or stand clear of them (and that), no delay, for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably for himself whether he will abide by his bargain or rescind it, is allowed in a court of equity.'"

Bryan on Petroleum, at page 146, speaking on the question of the light in which these leases are viewed by the courts, especially where they present elements of unfairness, whereby under their strict terms a lessee may await at lessor's risk the event of oil or gas discovery, says: "The trend of decisions touching questions of forfeiture arising out of oil and gas leases has been almost uniformly in favor of the lessor. Generally it is the lessee who is favored, and, after a substantial compliance by him with the terms of the contract, equity will not regard a technical breach. But, with mining leases, it is otherwise. This is due principal-

ly, if not entirely, to the nature of the business of mining, and more specifically oil mining; to the temptation offered the shrewd operator to purchase at a nominal price the right of developing the lands, the owner of which is ignorant of their real value for any purpose, and then to hold them indefinitely should it suit his purpose, neither working them himself nor permitting another to do so. * * * But the lessee, where the instrument presents a semblance of inequalities or unfairness, will find that he has a thorny road to travel before reaching a judicial establishment of his claims." And to the same point the Supreme Court of Pennsylvania, in the case of *Munroe v. Armstrong et al.*, supra, said: "In the rapid development and exhaustion of oil lands cessation of work for nine months is a long period. Often, in far less time, the fluctuation in prices of lands and leaseholds is very great. Perhaps in no other business is prompt performance of contracts so essential to the rights of the parties, or delay by one party likely to prove so injurious to the other."

The lease contract here sought to be enforced presents terms which preclude its favorable consideration at our hands. The principles enunciated in the foregoing authorities to our minds are conclusive of plaintiff's rights. Under this lease defendant would be required to turn his land over to plaintiff, so far as oil and gas exploitation was concerned, and defendant could be deprived of this valuable property right forever. "Certainly the contract is most unfair, and it would be unconscionable for a court of equity to place the appellant in a position to forever deprive the owner of the soil of the right to use his land, or to drill for such treasures as the earth may contain. *Munroe v. Armstrong*, 96 Pa. 307." *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674, 57 C. C. A. 428.

Notwithstanding the fact, however, that we are unable to grant to plaintiff the primary relief for which it prays, there is no fraud shown, and there are manifest equities in its behalf which we cannot pass without noticing. Plaintiff has paid defendant money in an effort on its part to carry out the terms of the contract as it assumed them to be, and defendant has received and retained this money, and apparently has made no offer of return. In addition thereto plaintiff, with the consent of defendant, entered upon his allotment, and erected a house on the same for a residence or office building; the exact cost of the same being uncertain. Plaintiff's petition contains a prayer for general relief, and in such cases the trend of authorities is that, where the equitable relief specifically prayed for cannot be given, the plaintiff's action will not be dismissed, but in some proper manner he will be given an opportunity to obtain relief to the extent to which he is shown a right. 16 Ency. Plead. & Prac. p. 801; *Selbert et al. v. Thomp-*

son et al., 8 Kan. 65; *Martin et al. v. Martin*, 44 Kan. 295, 24 Pac. 418. And numerous authorities support the rule that, when specific performance cannot be decreed, compensation will be allowed to the extent of the purchase money actually paid upon the alleged contract, and where in such a case facts are shown entitling plaintiff to have a lien declared upon the premises for reimbursement, the court may retain the case for the purpose of affording such relief, and compensation may be awarded for improvements made in good faith. 20 Ency. P. & P., pp. 494, 495. The rule thus laid down finds support in many authorities (26 Am. & Eng. Ency. of Law, p. 85; *Johnston v. Glancy et al.*, 4 Blackf. [Ind.] 94, 28 Am. Dec. 45; *Hug, Adm'x, v. Van Burkleo*, 58 Mo. 202; *Devore v. Devore*, 138 Mo. 181, 39 S. W. 68; *Fry on Specific Performance of Contracts* (3d Ed.) pp. 1276-1279), and at section 1454 it is said that: "The lien is not strictly confined to a case of simple purchase; it extends to the case of a lease, and entitles an intended lessee who has entered under the contract and expended money to a lien on the lessor's interest." Under the judgment of the court plaintiff's complaint would be dismissed. On this account we believe a new trial should be ordered.

In the consideration of a similar proposition the Court of Appeals of the state of New York, in the case of *Sternberger et al. v. McGovern*, 56 N. Y. 12, said: "The remaining question is whether the General Term ought not to have ordered a new trial instead of giving final judgment dismissing the complaint. It appears from the opinions that the latter course was adopted for the reason that it appeared, upon the trial, that the plaintiffs were aware, at the time of the commencement of the action, that the defendant could not perform the contract, and that in such a case equity would not retain the suit for the purpose of awarding damages which could be recovered in an action at law. This was the rule prior to the adoption of the Code. *Morse v. Elmendorf*, 11 Paige [N. Y.] 277. But the Code authorizes the uniting of causes of action, both legal and equitable, arising out of the same transaction in the complaint. *Bradley v. Aldrich*, 40 N. Y. 504, 512 [100 Am. Dec. 528]. The facts constituting these causes of action must be stated in the complaint. The court held in that case that no facts constituting a legal cause of action were stated in the complaint, and that, as the plaintiff failed to prove the equitable cause of action stated, the complaint was properly dismissed. This shows that, when the complaint states facts giving an equitable cause of action and also a legal cause of action, arising out of the same transaction, the party is entitled to have both tried, if necessary to obtain his rights. * * * True, the mode of trial may be different. The former must be tried by the court or a referee, unless some question or questions of fact involved are ordered by the

court to be tried by jury. Either party has the right to a jury trial of the latter. This creates no practical difficulty. The one issue may be tried by the court and the other by jury if the ends of justice require the trial of both, or both may be tried by the court or a referee if the parties so desire."

There is no evidence offered, and no fact asserted, testified to, or found, upon which a conclusion of active bad faith would be justified. The money paid defendant, the improvement of his property by the construction of a house thereon, both of which were incident to and referable solely to the assumed contractual relation between the parties, were made under such circumstances that this complaint, on the denial of specific performance, ought not to be dismissed, but should be by the court retained for the adjustment of the remaining differences between the parties. It is no good reason to our minds why plaintiff should be driven out of court, and compelled to institute a new proceeding to have its manifest rights adjusted, because it asked for relief to which the facts showed it was not entitled.

The cause is therefore remanded to the district court of Nowata county with instructions to set aside the order denying plaintiff's motion for a new trial and take evidence upon plaintiff's claim for compensation and damages against the defendant, making any judgment, should one be obtained, a lien on the land involved. Should the pleadings herein be insufficient, amendments should be allowed, and issues framed, with the costs of the litigation abiding and following the judgment.

TURNER, WILLIAMS, HAYES, and KANE, JJ., concur.

(28 Okl. 32)

FT. SMITH & W. R. CO. v. COLLINS.

(Supreme Court of Oklahoma. March 11, 1910.)

(Syllabus by the Court.)

1. RAILROADS (§ 443*)—KILLING OF STOCK—EVIDENCE.

Where, in a suit for the negligent killing of plaintiff's mare, the evidence discloses that an hour or two after one of defendant's passenger trains had gone east she was found at the side of the track about two feet from the ends of the ties, with her hind legs almost severed and skinned about the head, with blood and hair upon the rails; that her tracks indicated she had run from the center of the track, beginning on a dirt road crossing eastward about 30 or 40 yards to where she lay; that from there the track was straight and the right of way unobstructed westward about 600 yards or half a mile, and eastward some 200 yards; that she could have been seen on the track from where she lay for a quarter of a mile; that a train going at average speed could have been stopped in 500 feet;—*held*, that there was sufficient evidence of negligence to take

the case to the jury, and a judgment for plaintiff will not be disturbed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1808-1820; Dec. Dig. § 443.*]

2. TRIAL (§ 250*)—INSTRUCTIONS.

It was not error for the court to refuse to give an instruction not based on the evidence or the issues of the case, and which would have probably misled the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.*]

Error from Pittsburg County Court; R. W. Higgins, Judge.

Action by M. D. Collins against the Ft. Smith & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

C. E. Warner and R. A. Smith, for plaintiff in error. A. C. Sewell and B. Pope Hammond, for defendant in error.

TURNER, J. On January 28, 1908, M. D. Collins, defendant in error, as plaintiff, sued the plaintiff in error, Ft. Smith & Western Railroad Company, before a justice of the peace for Canadian township, Pittsburg county, for \$180 for negligently killing his mare. There was judgment by default for plaintiff, from which defendant appealed. On trial anew in the county court, where the defense was a general denial, there was judgment for plaintiff for \$55 and costs. After motion for a new trial filed and overruled, defendant brings the case here.

It is assigned for error that the verdict is not sustained by the evidence and is contrary to law. While it is conceded the evidence may be sufficient to warrant the jury in finding that the animal was killed by defendant's train, it is insisted that there was not sufficient evidence of negligence to take the case to the jury. The evidence discloses that Collins was the owner of the mare; that on the morning of June 13, 1907, she was found lying on defendant's right of way about two miles west of the town of Blocker; that she had both hind legs cut off, except for a little hide; that she was skinned on the head; that she was lying in a shallow ditch running parallel with the track, some two feet from the end of the ties, at the mouth of a cut about two feet deep; that she was lying some 30 or 40 steps from a dirt road crossing; that her tracks originated between the rails on this crossing in the middle of the track and led therefrom eastward, indicating that she was running to where she was killed, at which place there was blood and hair upon the track; that from where she lay the track was straight and the right of way unobstructed 600 yards or half a mile westward, and eastward some 200 yards; that she could have been seen on the track at this point from an engine for a quarter of a mile; that a train going at average speed could be stop-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ped at 500 feet; that a passenger train had gone east that morning some hour or two before the animal was discovered in this condition. There was no eyewitness to the injury, and defendant, in effect, disclaimed all knowledge of how it happened.

We not only think the evidence sufficient to warrant the jury in finding the animal to have been killed by defendant's east-bound passenger train on that morning, but are also of the opinion that the facts are such that reasonable men might differ upon the question as to whether or not there was negligence on the part of defendant. Where such is the case, the question of negligence is one of fact for the jury. *M., K. & T. Ry. Co. v. Ward*, 1 Ind. T. 670, 43 S. W. 954. At the point where the animal was killed, the track was clear for 50 feet on each side, and the animal could have been seen for a distance of from a quarter to a half mile by the engineer had he been on the lookout. It was held that such circumstances were sufficient to take the case to the jury on the question of negligence. See, also, *M., K. & T. Ry. Co. v. Farrington*, 1 Ind. T. 646, 43 S. W. 946. In short, we think it is sufficient on this point to say, as was said by the court in *Gulf, C. & S. F. Ry. Co. v. Washington*, 49 Fed. 347, 1 O. C. A. 286: "It is the province of the jury to say whether the circumstances in any given case are sufficient to warrant a finding that the cattle which no witness saw killed were killed through the negligence of the railroad company, where there is any evidence tending to show that fact."

There was no exception to the charge of the court; but it is next contended the court erred in refusing to give the following instructions: "The court instructs the jury that the engineer of a train must use reasonable care and watchfulness to discover cattle upon the track, and, when they are discovered, to use reasonable care and diligence to avoid injuring them; but that it is not always necessary that the engineer should stop the train, or slacken its speed, on discovering stock on the track. Ordinary prudence requires him to endeavor promptly to drive them off by sounding his whistle, but does not require him to stop or slacken the speed of the train, when he may reasonably believe that they will leave the track in time." We do not think so, for the reason that, assuming it to correctly state the law, the same is not applicable to the facts disclosed by the testimony. Had the engineer testified and there arose any question as to what his duties were under the law as applicable to the facts, it might have been the duty of the court to have instructed as requested. But the engineer did not testify, or any one else, on behalf of defendant, in charge of the train. The testimony as it stood tended to fix liability on defendant. If the testimony of the engineer would have

tended to defeat liability, his testimony was all with defendant, and it was its duty to produce it or wear the presumption that if produced it would strengthen the presumption of liability. *Starkie on Ev. 54*; *Gulf, C. & S. F. Ry. Co. v. Ellis*, 54 Fed. 481, 4 O. C. A. 454. This it did not do or attempt, but by this instruction asked the court to charge as though it had. As well for a defendant on trial for assault and battery, on a plea of not guilty, after proof of the battery, to interpose no evidence and assign for error that the trial court refused to charge on his right of self-defense. In neither case would the instruction be applicable to the facts in evidence, and, although abstractly correct, should be refused.

Yarborough v. Tate, 14 Tex. 484, was a suit for slander. The words declared were actionable, and it was proved indisputably that they were uttered by defendant of the plaintiff publicly, in earnest and in anger, and constituted, unexplained, *prima facie*, a willful and malicious slander. There was no justification or attempted justification, and no proof offered in defense whatever. The jury returned a verdict for defendant. There was nothing in the evidence which would have warranted the jury in finding that the words were uttered in jest. The court, however, charged hypothetically upon such a state of facts, which was held error, and the case reversed.

In *Zimmerman v. Knox*, 34 Kan. 247, 8 Pac. 104, Zimmerman converted his property in Topeka into cash and left with his family for California. On arriving at Garden City he was arrested on a telegram from Knox, who held an unsettled demand against him for \$128, and brought back to Dodge City, where he effected his escape and rejoined his family further on his journey. He later sued Knox for false imprisonment. It was not claimed that he had been guilty of any public offense, and the officer held no warrant or process authorizing his detention. The jury returned a verdict in his favor for \$15, and he appealed. The court's instructions were based upon the hypothesis that he was arrested by Knox in a civil action on process therein sued out to prevent him from leaving the country to avoid payment of his debts. The court said: "This instruction was wholly inapplicable under the testimony, and we think erroneous. We have searched the record in vain to find any testimony which tends in any degree to show that John D. Knox had begun any suit, civil or criminal, in Ford county, against the defendant; and there is no pretense on the part of the defendant that any such suit had been instituted nor that any order of arrest had been issued in any case against the plaintiff. The officer acted alone under the telegraphic communication admitted to have been sent by John D. Knox, directing the arrest and detention of the plaintiff, and

It was conceded that whatever proceedings were had in his arrest were for the purpose of enabling the collection of the money due from the plaintiff Zimmerman to Knox. Under these facts the imprisonment was illegal—and reversed the case, granted him a new trial, and in the syllabus said: "Where instructions are given that are not based on the evidence or the issues of the case, and which appear to have probably misled the jury, the judgment will be reversed and a new trial granted. *S. S. Ass'n v. Hunt*, 17 Kan. 532, and cases cited in Crane's annotated edition; *Raper v. Blair*, 24 Kan. 374; *Railroad v. Hay*, 31 Kan. 177 [1 Pac. 766]; *State v. Hendricks*, 32 Kan. 559 [4 Pac. 1050]; *Railroad v. Pierce*, 33 Kan. 66 [5 Pac. 378]; *Feineman v. Sachs*, 33 Kan. 621 [7 Pac. 222, 52 Am. Rep. 547]; *Bigelow v. Henniger*, 33 Kan. 362 [6 Pac. 593]; *Dowell v. Williams*, 33 Kan. 319 [6 Pac. 600]; *Railroad v. Pierce*, 33 Kan. 61 [5 Pac. 378]; *State v. Whitaker*, 35 Kan. 731 [12 Pac. 106]; *Ransom v. Getty*, 37 Kan. 76 [14 Pac. 487]." See, also, *Case v. Ill. Cent. R. Co.*, 38 Iowa, 581; *Kansas City, Ft. Scott & Gulf Railroad Co. v. Hay*, 31 Kan. 177, 1 Pac. 766; *Missouri Pacific Railway Co. v. Pierce*, 33 Kan. 61, 5 Pac. 378; *People v. Hugh Devine*, 95 Cal. 227, 30 Pac. 378; *Wahldgren v. Market Street Railway Co.*, 132 Cal. 656, 62 Pac. 308, 64 Pac. 993.

The instant request was based upon the law as laid down in the syllabus of *L. R. & Ft. S. Ry. Co. v. Trotter*, 37 Ark. 593. That was a suit in damages against the company for an injury to a horse. In substance, the facts were that Trotter was the owner of the horse. Defendant's track ran along side of the field in which it and others were grazing, some 40 yards away. The horse's stable was on the other side of the track. That while thus grazing defendant's train rounded a curve in the track going east and sounded the stock alarm. That the animals ran and attempted to cross the track in front of the train over a dirt road crossing, but were cut off, and ran down the track in front of the train and into a culvert, where the animal in question was injured. The engineer testified that, after continuing to sound the stock alarm, he stopped the train 20 yards before reaching the culvert, which was as soon as possible. We can see how such a charge might have been proper in that case, where the engineer testified to sufficient facts upon which to base it, but not in this, where no such facts were even attempted to be proven, but the charge based on that hypothesis.

Finding no error, for the reasons stated, and that said instruction, if given, would probably have misled the jury, the judgment of the trial court is affirmed. All the Justices concur.

(3 Okl. Cr. 624)

INGRAM v. STATE

(Criminal Court of Appeals of Oklahoma.
March 30, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1159*)—APPEAL—REVIEW OF EVIDENCE.

Under our system of jurisprudence, it is the exclusive province of the jury to determine whether the evidence tending to prove the guilt of the defendant is so lacking in convincing force as to leave an intelligent and discriminating mind to doubt as to the truth of the charge contained in the indictment, and in reviewing questions of fact upon appeal to the Criminal Court of Appeals, if there is a fair conflict in the evidence, or it is such that different inferences can be properly drawn from it, the determination of the jury will not be interfered with, unless it is clearly against the weight of evidence, or appears to have been influenced by passion or prejudice.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

2. RAPE (§ 51*)—SUFFICIENCY OF EVIDENCE.

See opinion for evidence held sufficient to sustain a verdict of guilty without capital punishment for the crime of rape.

[Ed. Note.—For other cases, see *Rape*, Cent. Dig. §§ 71-77; Dec. Dig. § 51.*]

Error from District Court, Carter County.

Will Ingram was convicted of crime, and brings error. Affirmed.

Cruce, Cruce & Bleakmore and W. B. Johnson, for plaintiff in error. Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for the State.

DOYLE, J. Plaintiff in error, Will Ingram (hereinafter designated the "defendant"), was indicted jointly with his brother, Tom Ingram, in the United States court for the Indian Territory for the Southern district of said territory, at the April term, 1907. Said indictment charges that the defendant, on the 17th day of February, A. D. 1907, did upon one Enid Kerr commit the crime of rape, and that the said Tom Ingram, standing by, did aid, abet, and assist the said Will Ingram the said felony and rape then and there to do and commit. Under the provisions of the enabling act and of the Constitution of the state of Oklahoma, the case was tried in the district court of Carter county. Upon the trial so had the jury returned a verdict of guilty, without capital punishment, against the defendant Will Ingram, and a verdict of guilty, fixing the penalty at imprisonment in the penitentiary for five years, against the defendant Tom Ingram. Motion for new trial was filed and overruled. On the 16th day of June, 1908, in conformity with the verdict, the defendant was by the court sentenced to imprisonment at hard labor in the state prison for the term of his natural life. The defendant appealed by filing on October 31, 1908, in this court a petition in error with case-made attached. No briefs have been filed. Mr. Johnson of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

counsel made an oral argument, in the main contending that the verdict was against the weight of the evidence, and that hence justice requires a new trial.

Notwithstanding the appeal has been substantially abandoned, nevertheless, in deference to the gravity of the case, we have deemed it our duty to fully and carefully examine the record. Enid Kerr, the victim of the assault, at the time 12 years of age, lived with her stepfather about two miles west of Poolville, in what is now Carter county, and the defendant's home was about 300 yards south. The testimony on the part of the prosecution proves that on the day alleged, which was Sunday about the hour of noon, Enid Kerr, with her brothers, aged 7 and 10 years, went to a point on a creek branch between her home and the Ingram home, and while there she was inhumanly assaulted and ravished.

Enid Kerr testified that she was there digging with a piece of broken hoe for "tooth brushes," when Will and Tom Ingram appeared; that the defendant grabbed her, choked her, and put his hands over her mouth; that Tom Ingram chased her little brothers away, and then held her while the defendant ravished her; that the defendant then held her while his brother Tom ravished her; that they then ran off, the defendant going down the branch, and Tom Ingram going toward his home; that as soon as they left, her brothers returned and went with her to their home; that only her mother was at home; and that her mother laid her on the bed and sent for a doctor. She also testified that she had known the defendant for about six years.

Mrs. Payne testified: That Enid Kerr was her daughter. That in the morning of the day alleged in the indictment her husband went to Elk. That about the noon hour her children went to a little branch, and within an hour her daughter came back crying and told her what the defendants had done. That she laid her on the bed and found that she was bleeding from the inside of her privates. That she then ran to the door and saw Tom Ingram coming out of the branch going toward her home. That she ran right down into the branch and lost sight of him. That she went on to the Ingram home and asked Mrs. Ingram, "Where's those wretched boys at?" Mrs. Ingram said, "Will has gone to Elk, and Tom went with Ed after some cows." That she turned to leave, and Mrs. Ingram said: "Stop! What is the matter?" And witness said: "I have no time to stop. I have got to have a doctor." And ran back home. She then sent her two little boys to Poolville, telling them to tell their papa to come and bring the doctors. That soon her husband returned, and Dr. Irby and Dr. Norris reached there soon after.

Lee Payne testified: That he was 10 years old. That on said day, with his sister and

brother, he went to a branch near their house, and with his brother he stopped to swing on a grapevine, while his sister with an old piece of a hoe went to dig tooth brushes; that they heard her scream, and they ran down to her and saw the defendant holding her, and Tom Ingram was with him and chased them back where they could not see their sister. Shortly they saw them leave. That Will went down a cow trail, and Tom went up toward his home. That they returned then to where their sister was and found her lying on the ground and she was crying. That they started to the house with her, and she staggered and fell. That they sat there a little while and then returned to the house. That his mother sent him and his brother to Elk after the doctor. That they met their father and returned home with him.

Dr. Norris testified that on Sunday, the 17th day of February, 1907, he was called with Dr. Irby to go to the Payne home to attend Enid Kerr; that he arrived there between 2 and 3 o'clock; that he found from his examination that she had bled pretty freely; that the hymen had been ruptured, and the perineum lacerated; that she was still bleeding from the rupture and the laceration; and that he returned that night and further treated her.

Dr. Irby testified that he was called on said day with Dr. Norris to treat Enid Kerr, and his examination showed a rupture of the hymen and also of the perineum.

E. K. Pool testified: That he lived at Poolville. Was acquainted with the defendants Will and Tom Ingram 9 or 10 years. That Mr. Payne lived about a mile and a half southwest of Poolville. That the defendants' home was 300 yards south from Payne's. That there was a branch between. About 8 o'clock p. m. on the 17th day of February, 1907, he went with others to Ingram's house and arrested Will and Tom. That Will Ingram had a scratch under his left eye, and that he asked him, "What scratched your face there?" and he said he had run against a wire up in the lot that morning.

As a defense the defendants sought to prove an alibi, and that it was a case of mistaken identity of the defendants as the parties who committed the crime. More than 20 witnesses testified to the presence of the defendant in and about the village of Elk on the day that the crime was committed. However, a careful examination of this testimony shows the absence of the defendant for a brief period about the hour of noon on said day. The defendant or his codefendant did not testify upon the trial.

Upon a careful reading of the evidence in this case, there can be no doubt but that the verdict of the jury is amply supported, if they believed the evidence given on the part of the prosecution. That the jury did believe the evidence on the part of the prosecution is clearly established by the fact that

they found the defendant guilty of the crime charged.

The prosecutrix testified positively to the identity of the defendants, as the parties who ravished her. In this she was corroborated by her little brother, and we can find no sufficient reason for believing that this testimony is not worthy of belief. Without going into a detailed discussion of the instructions given, it is sufficient to say that they correctly and fully expound the law of the case, including the defense of alibi. The defendant was represented by counsel pre-eminent in their profession, and all that ability and skill could do was done for him.

From the record before us it appears that justice has been done, and the judgment ought not to be set aside, except for some plain error in the proceedings, which was, or might be, prejudicial to the defendant. We are unable to find any such error in the record.

Wherefore the judgment of the district court of Carter county, as to the defendant Will Ingram, is affirmed.

FURMAN, P. J., and OWEN, J., concur.

(3 Okl. Cr. 866)

FOOSHEE v. STATE

(Criminal Court of Appeals of Oklahoma. April 28, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1129*)—WRIT OF ERROR—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error in substance that the court erred in overruling a motion for a new trial states a conclusion which could result only from error committed prior to the presentation of the motion, and the assignment of itself presents no question for review in the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2957-2958; Dec. Dig. § 1129.*]

2. INDICTMENT AND INFORMATION (§ 24*) — CONSTRUCTION OF RECITALS — "THEN AND THERE."

The formal part of an indictment reads as follows: "At the November, 1908, term of the district court of Carter county, state of Oklahoma, begun and held in the city of Ardmore in said county on the 9th day of November, 1908, the grand jury of said county, good and lawful men, legally drawn and summoned according to law, and then and there examined, impaneled, sworn, and charged according to law, do present and find," etc. *Held*, that the words "then and there" have direct reference to the expression "at the November, 1908, term of the district court," and not to the phrase "on the 9th day of November, 1908."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 105-107; Dec. Dig. § 24.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6946-6948, 7815.]

3. INDICTMENT AND INFORMATION (§ 24*)—DATE OF IMPANELING GRAND JURY—SUFFICIENCY OF RECITAL.

The date of the impaneling of a grand jury is properly shown by the journal of the court,

and need not appear in the indictment. If the indictment shows that it was found and returned at a term of the district court by a grand jury impaneled during that term, it is sufficient in that respect.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 105-107; Dec. Dig. § 24.*]

4. GRAND JURY (§ 5*)—QUALIFICATION OF JURORS.

The mere fact that a person is a member of an association organized for the purpose of aiding the public officers in the maintenance of law and order and the suppression of crime does not disqualify such person as a grand juror.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 8; Dec. Dig. § 5.*]

5. STATUTORY PROVISIONS.

Under section 6738 of Snyder's Compiled Laws of Oklahoma, after a grand jury has been examined as to his qualifications, has answered under oath that he is qualified, has been received by the court and permitted to act, and after an indictment has been found, no possible issue can be made upon the competency or incompetency of such juror for the purpose of invalidating the indictment.

6. STATUTORY PROVISIONS.

Under section 6663 of Snyder's Compiled Laws of Oklahoma, a person held to answer a charge for a public offense may, before the grand jury is sworn, challenge for cause an individual grand juror or the entire panel; failing to do so, he cannot, after an indictment has been found, take advantage of any objection to the panel or to an individual juror, whether he knew of such objection at the time the jury was impaneled or not.

7. JURY (§§ 82, 94, 110*)—VALIDITY OF JURY LIST.

The statutory inhibition against placing an elector's name in the jury box who has served upon a regular jury panel within 12 months last past is not mandatory, but only directory; and a violation thereof as to any person will not vitiate the jury list, but will render such person subject to challenge for cause when called upon to serve the second time. If, however, he be not challenged on that ground, the question of his competency cannot afterwards be raised.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 282, 307-309, 423, 503-523; Dec. Dig. §§ 82, 94, 110.*]

8. GRAND JURY (§ 34*)—ATTENDANCE OF DEPUTY COUNTY ATTORNEY.

Under section 1603 of Snyder's Compiled Laws of Oklahoma, a lawfully appointed deputy county attorney may appear before the grand jury for the purpose of interrogating witnesses, and may perform the same duties before the grand jury which the county attorney himself may perform.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 73; Dec. Dig. § 34.*]

9. INDICTMENT AND INFORMATION (§ 137*)—QUASHING — GROUNDS — MISCONDUCT OF GRAND JURY.

Proof that the grand jury left their regular jury room and went to a near-by sanitarium to take the testimony of a witness, without any showing as to who the witness was, whether or not his testimony was in fact taken, why he could not attend before the grand jury, or to what case the testimony of the witness pertained, the act of the grand jury, standing in the record as an isolated fact unconnected with the case at bar by any evidence, direct or circum-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

stantial, constitutes no ground for setting aside an indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.*]

10. INDICTMENT AND INFORMATION (§ 110*)—MURDER—SUFFICIENCY OF INDICTMENT.

An indictment for murder, to be sufficient, must allege that the killing was done without authority of law, but it need not allege it in the exact language of the statute; the use of any other words equivalent in effect and meaning is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-292, 294; Dec. Dig. § 110.*]

11. INDICTMENT AND INFORMATION (§ 110*)—MURDER—SUFFICIENCY OF INDICTMENT—"UNLAWFULLY"—"WITHOUT AUTHORITY OF LAW."

The word "unlawfully" is the full equivalent in effect and meaning of the phrase "without authority of law," as the latter is used in the statutory definition of murder.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-292, 294; Dec. Dig. § 110.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7191-7193.]

12. HOMICIDE (§ 131*)—MURDER—SUFFICIENCY OF INDICTMENT.

It is not necessary to allege in an indictment for murder that the deceased was a human being.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 204; Dec. Dig. § 131.*]

13. HOMICIDE (§ 135*)—"MURDER"—SUFFICIENCY OF INDICTMENT.

In an indictment for the murder of one person, committed with a premeditated design to effect the death of a different person, it is not necessary to allege an actual assault upon the person designed to be killed, under a statute defining "murder" as the killing of one human being by another, without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 135.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4632-4637; vol. 8, pp. 7726, 7727.]

14. CRIMINAL LAW (§ 762*)—INSTRUCTIONS.

In an instruction to the jury that, "If you convict the defendant, you can only convict on one count of the indictment," the conditional clause, "if you convict the defendant," does not indicate any belief, opinion, or desire the mind of the court as to what the verdict the jury should be.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762; * Homicide, Cent. Dig. §§ 581, 656.]

15. CRIMINAL LAW (§ 878*)—TRIAL—VERDICT.

Where a conviction is had upon an indictment containing more than one count, but each count charging the same offense in a different form, the law does not require that the jury in their verdict upon which count the conviction is had.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098-2101; Dec. Dig. § 878.*]

16. CRIMINAL LAW (§ 878*)—TRIAL—VERDICT.

Where the same act constitutes two or more different offenses, and such different offenses are charged in separate counts of the indictment, the law requires that a verdict

of conviction state upon which count the conviction is had.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098-2101; Dec. Dig. § 878.*]

17. HOMICIDE (§ 14*)—MURDER—"PREMEDITATED DESIGN."

The court instructed the jury that: "A design to effect death is premeditated within the meaning of the law, if the intention to take life is deliberately formed in the mind before the act is done which results in death, no matter for how short a time. It may be formed instantly before committing the act by which it is carried into execution." *Held*, a sufficient definition of a "premeditated design" to effect death.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 19, 20; Dec. Dig. § 14.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5507, 5508; vol. 8, p. 776.]

18. CRIMINAL LAW (§ 1056*)—TRIAL—INSTRUCTIONS—FAILURE TO DEFINE LEGAL TERM USED.

The failure of the court to define a legal term used in his instructions and in the statutory definition of the offense, where the defendant makes no request for a definition of the term, and saves no exception to the failure of the court to define it, is no ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. § 1056.*]

19. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

The court instructed the jury that: "It is the opinion of the court that there is no proof in the case justifying a conviction of the defendant of manslaughter in the second degree; that your verdict should be either guilty of murder, manslaughter in the first degree, or not guilty, but, notwithstanding this opinion of the court, you may, if on your oaths you believe the defendant guilty of manslaughter in the second degree, convict him of that crime." *Held* erroneous as being a charge on the weight of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1743, 1752, 1768, 1770; Dec. Dig. §§ 763, 764; * Homicide, Cent. Dig. §§ 579, 603, 631, 648.]

20. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—DEGREE OF OFFENSE NOT IN EVIDENCE.

The court should not instruct upon a degree of an offense of which there is no evidence tending to show the defendant's guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860-1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.*]

Appeal from District Court, Carter County; Malcolm E. Rosser, Judge.

John Fooshee was convicted of murder, and appeals. Affirmed.

Fooshee & Brunson, for plaintiff in error. Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for the State.

RICHARDSON, J. The plaintiff in error, hereinafter called the defendant, as ground for a reversal of this cause urges seven assignments of error, which we shall consider seriatim.

The first is that the lower court erred in overruling the defendant's motion for a new

trial. This assignment is general in form; it is predicated solely on other specific assignments of error, and states a conclusion which could result only from error committed in the trial of the cause and prior to the presentation of the motion for a new trial. Of itself, therefore, this assignment presents no question for review in this court.

Before entering his plea below the defendant filed a motion to set aside the indictment, alleging five grounds therefor. The court, after hearing the testimony adduced in support of said motion, overruled the same, and the defendant excepted. The first reason stated in the motion as a ground for setting aside the indictment, together with the court's action in overruling the same, is made the basis of defendant's second assignment of error. This assignment is, in substance, that the court erred in overruling defendant's motion to set aside the indictment because said indictment shows on its face that it was returned by a grand jury impaneled and sworn on the 9th day of November, 1908, and the crime is alleged in said indictment to have been committed on December 1, 1908, and after the date as shown by the record on which said grand jury was discharged. If the facts stated in this assignment were true, then undoubtedly the motion to set aside should have been sustained on this ground, and the action of the trial court in overruling the same would constitute reversible error; for the reason that such a state of facts would necessarily show, either that the indictment was found and returned prior to the commission of the offense charged therein, contrary to subdivision 5, § 6704, Snyder's Comp. Laws Okl., or else that it was found and returned by a purported grand jury after said grand jury had been discharged by the court, and had in fact ceased to exist as a grand jury. The journal entries show, however, that the district court of Carter county convened on November 9, 1908, on which day a grand jury was impaneled and sworn, and one L. J. Ackers appointed its foreman. Said grand jury made its final report, and was discharged on November 19, 1908. On December 4, 1908, the court being still in session, upon the petition of about 200 citizens of Carter county, the Honorable S. H. Russell, judge of that judicial district, made and entered an order for the drawing and summoning of 20 persons from which to impanel another grand jury, and ordered the venire made returnable on December 7, 1908. On December 7, 1908, such other grand jury was lawfully impaneled, and W. F. Whittington appointed its foreman. On December 14, 1908, this last grand jury, not having been discharged, but being still in session, returned into open court the indictment in question against the defendant, duly indorsed and signed, and the same was filed in open court and in the presence of the grand jury. That part of the indictment material to this ques-

tion reads as follows: "At the November, 1908, term of the district court of Carter county, state of Oklahoma, begun and held in the city of Ardmore in said county, on the 9th day of November, 1908, the grand jury of said county, good and lawful men, legally drawn and summoned according to law, and then and there examined, impaneled, sworn, and charged according to law to diligently inquire into, etc., * * * do present and find," etc.

The gist of the defendant's contention on this point is that the words "then and there" as used in said indictment refer specifically to the preceding expression, "on the 9th day of November, 1908," thus identifying the grand jury which returned this indictment as the grand jury which was impaneled on that day, and consequently as the grand jury which was discharged on November 19, 1908, prior to the commission of the offense charged. This contention is extremely technical, and we cannot assent to its correctness. In the first place, the expression "then and there" as used in the indictment refers to the term of the court during which the jury was examined, impaneled and sworn, as said term is designated and described in the indictment—that is, "at the November, 1908, term"—and does not refer to the particular date of November 9, 1908. In the second place, there is no statutory or other legal requirement that an indictment show the date of the impaneling of the grand jury which found it. Section 6704, Snyder's Comp. Laws Okl. That is properly shown by, and is preserved in, the journal of the court. And even if the expression "then and there" as used in this indictment should be held to refer to the date of November 9, 1908, and thus create a presumption that the grand jury which returned the indictment was impaneled on that date, that presumption is nevertheless completely overcome by the journal entries, which show the dates of the impaneling and discharging of the two juries. The indictment does show unequivocally that it was found and returned at the November, 1908, term of the district court of Carter county, Okl., by a grand jury lawfully impaneled during that term, and nothing more is required by the law in that respect.

Moreover, if the journal of the court is not to be considered, as the defendant contends, but only the indictment is to be looked to in this matter, and is to control, and if the expression "then and there," as used in the indictment, refers to the date of November 9, 1908, then there is nothing to show that the grand jury impaneled on that date had ever been discharged, and nothing to show that this indictment was not returned, and lawfully returned, by that grand jury; for in such case the indictment so states, and the defendant says that it is conclusive. And if one journal entry may be examined to impeach the indictment in this respect, why may not

another be looked to to sustain it? Are we to examine the journal to confute the indictment, but required to close the book as soon as it appears that we shall find proper entries in chronological order explaining the whole matter, and showing a legal and consistent procedure throughout? Must we, in connection with this indictment, look to the order impaneling and discharging the first grand jury, and close our eyes to the one impaneling this jury? We think not.

The third assignment of error also is based upon the action of the court in overruling the motion to set aside the indictment; the defendant claiming that such action was erroneous, for the reason that the grand jury which returned the indictment was not drawn and impaneled according to law, in that W. F. Whittington, the foreman, had previously been drawn and impaneled as a member of the petit jury at the same term of that court. This fact was set out in the motion. The assignment of error contains the further statement that Whittington was prejudiced against the defendant, and that his selection on said grand jury was therefore prejudicial; but the motion to set aside contains no such averment, nor is the statement supported by the testimony taken on the hearing of the motion. The only evidence relied upon to show prejudice against the defendant on the part of Whittington is the fact that he was a member of an association in Ardmore called a "Law and Order League," which had for its purpose the aiding of the public officers in the maintenance of law and order and the suppression of crime, and that Whittington had contributed \$1 toward bearing the incidental expenses of that organization. We find nothing in the foregoing which shows that Whittington was prejudiced against the defendant; nor did the fact that he was a member of a law and order league disqualify him for grand jury service. *Koch v. State*, 32 Ohio St. 353; *Commonwealth v. Brown*, 147 Mass. 585, 18 N. E. 587, 1 L. R. A. 620, 9 Am. St. Rep. 736; *Peoples v. State*, 46 Fla. 101, 35 South.-223. But, even if he was prejudiced and was disqualified, that fact could not avail the defendant after the indictment had been returned. *Lee v. State*, 69 Ga. 705; *Williams v. State*, 69 Ga. 11; *State v. Baughman*, 111 Iowa, 71, 82 N. W. 452; *Commonwealth v. Woodward*, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302; *United States v. Belvin*, 46 Fed. 381; *State v. Rickey*, 10 N. J. Law, 83; *Commonwealth v. Clark*, 2 Browne (Pa.) 323; *People v. Jewett*, 3 Wend. (N. Y.) 314; *State v. Gillick*, 7 Iowa, 287.

The record before us shows that Whittington had been previously drawn and impaneled as a petit juror at that same term of the court. It also shows that he was excused as a petit juror, but does not show how long he served, if he served at all, before he was excused. There is nothing in the record which shows how his name came to be drawn from the jury box twice. Whittington testified that

he had a son with the same initials as himself, but that his son was not there at that time. It may be that his son was a resident of Carter county when the jury list was made up, and that one name was intended for Whittington and the other for his son. Be that as it may, our statute settles all objections to the competency of Whittington as a grand juror so far as it affects this indictment. Section 6738, Snyder's Comp. Laws Okl., provides: "When a grand juror has been fully examined as to his qualifications to sit, and has answered under oath that he is qualified, and has been received by the court and permitted to act, his incompetency shall not thereafter be shown as a ground of objection to any indictment returned by that grand jury." The journal entry of the order impaneling this grand jury shows that Whittington, together with all of the other grand jurors, was duly sworn to answer truthfully all questions touching his competency and qualifications to serve as a grand juror; that he was fully examined by the court as to his qualifications to sit; that the court found him competent and qualified, received him as a grand juror, and permitted him to act as such. That being true, after an indictment had been found against the defendant, no possible issue could be made upon Whittington's competency or incompetency which would invalidate that indictment. *People v. Phelan*, 123 Cal. 551, 56 Pac. 424; *People v. Geiger*, 49 Cal. 643; *People v. Arnold*, 15 Cal. 478; *State v. Hamlin*, 47 Conn. 95, 38 Am. Rep. 54; *Bellair v. State*, 6 Blackf. (Ind.) 104; *State v. Ingalls*, 17 Iowa, 8.

It is true that the law contemplates that a juror's name shall be placed on the same list only one time, and that only one slip of paper bearing his name shall be placed in the jury box. It is also true that section 3903, Snyder's Comp. Laws Okl., provides that: "No elector's name shall be placed in the box by the jury commissioners who has served upon a regular panel within the twelve months last past." But there is nothing in the record to show that Whittington had served on a regular jury panel within the 12 months preceding the placing of his name in the jury box, nor that he had served the limit of two weeks during this particular term of court. Moreover, we regard these matters as being not mandatory, but merely directory. A violation of them, unless done with a corrupt or fraudulent intent to injure the defendant, would not vitiate the whole list of jurors selected or the whole panel drawn, though individual jurors so selected and drawn would be subject to challenge for cause, if seasonably made, when drawn the second time, after having already served within the statutory period.

Furthermore, the record shows the presence of the defendant in open court during the impaneling of the grand jury, and the tender of the jury to him by the court for

examination and challenge—a privilege of which the defendant did not avail himself, though another prisoner, John Mulkey, on that occasion did challenge a juror named Warren. Section 6683, Snyder's Comp. Laws Okl., provides as follows: "Neither the state, nor a person held to answer a charge for a public offense, can take advantage of any objection to the panel or to an individual grand juror unless it be by challenge, and before the grand jury is sworn, except that after the grand jury is sworn, and before the indictment is found, the court may, in its discretion, upon a good cause shown, receive and allow a challenge." If the defendant should succeed in having this indictment set aside on account of an objection to the juror Whittington, then he would be taking advantage of an objection to this individual juror, not only after the grand jury was sworn, but also after the indictment had been returned, a thing absolutely prohibited by the statute. This he cannot do. *State v. Pierce*, 90 Iowa, 506, 58 N. W. 801; *State v. Gibbs*, 39 Iowa, 318; *State v. Hart*, 29 Iowa, 268; *Dixon v. State*, 74 Miss. 271, 20 South. 839; *State v. Welch*, 33 Mo. 33; *State v. Hoffman*, 71 N. J. Law, 285, 58 Atl. 1012; *Carter v. State*, 39 Tex. Cr. R. 345, 46 S. W. 236, 48 S. W. 508; *Barber v. State* (Tex. Cr. R.) 46 S. W. 233.

Also the motion to set aside the indictment does not state that Whittington's alleged incompetency was unknown to the defendant at the time the jury was impaneled, nor was any evidence adduced on the hearing to that effect. As the fact that such incompetency was or was not known to the defendant was a fact peculiarly within the defendant's own knowledge, then even in the absence of the above statute, it was incumbent on the defendant, since he was present at the impaneling of the jury, to aver and prove such want of knowledge on his part. In the absence of such averment and such proof, even if we had no such statute as the sections quoted above, the indictment would not be set aside. *Musick v. People*, 40 Ill. 268; *State v. Howard*, 10 Iowa, 101; *Patrick v. State*, 16 Neb. 330, 20 N. W. 121. In such case, the presumption being in favor of the legality and regularity of the proceeding, the defendant would be presumed to have known the facts; and the law would deny him the right to sit silently by and fail and refuse to make his objection known until after the indictment was returned, and then attack it with a motion to quash. But under the two sections of the statutes already quoted the defendant's knowledge, or want of knowledge, is wholly immaterial, and in so far as we have been able to ascertain has been so held by every court which has been called upon to construe a statute of similar import. The court committed no error, therefore, in overruling the motion to set aside the indictment on this ground.

In his fourth assignment of error the de-

fendant complains that the court erred in refusing to set aside the indictment because one J. T. Coleman, who was not a member of the grand jury, and who, as the defendant says, was not the county attorney of Carter county, was present in the grand jury room while the grand jury were investigating the charge against the defendant. From the evidence introduced it appears that Coleman was present during the taking of testimony by the grand jury in this case; that he was not present while the jury were deliberating or voting upon the matter of finding an indictment; that he was at that time deputy county attorney of that county; and that his appointment was a matter of record in the county clerk's office in that county. The defendant does not attack the legality of Coleman's appointment, but contends, first, that under the statute no officer, except the county attorney himself, may be present at the taking of testimony before the grand jury, and that the deputy county attorney is excluded; and, second, that Coleman was a member of the Law and Order League, prejudiced against the defendant, and intent upon his prosecution. Section 6683, Snyder's Comp. Laws Okl., provides: "The grand jury may at all reasonable times ask the advice of the court or of the district (county) attorney. The district (county) attorney may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable before them and may interrogate witnesses before them whenever he thinks it necessary, but no other person is permitted to be present during their sessions except the members and a witness actually under examination and no person whomsoever must be permitted to be present during the expression of their opinions or the giving of their votes upon any matter before them." Section 1602, Snyder's Comp. Laws, however, makes it the specific duty of the county attorney to attend upon the grand jury for the purpose of examining witnesses in their presence; and the following section (1603) provides in express terms that the county attorney may appoint a deputy, or deputies, to perform the duties devolving on such county attorney. Construing section 6683 in connection with sections 1602 and 1603, we hold that the words "district (county) attorney" include the lawfully appointed deputy or deputies of the county attorney, and that such deputy or deputies may perform the same duties before the grand jury that the county attorney himself may perform. *Regent v. People*, 96 Ill. App. 189; *Shattuck v. State*, 11 Ind. 473; *State v. Fertig*, 98 Iowa, 189, 67 N. W. 87; *Franklin v. Commonwealth*, 105 Ky. 237, 48 S. W. 986.

Furthermore, our statute makes provision for setting aside an indictment on account of the presence of an unauthorized person before the grand jury only when such person was present when the jury were voting upon the question of returning an indictment.

Section 6738, Snyder's Comp. Laws Okl. And while we are not called upon to decide the point, and do not decide it, yet there are numerous respectable authorities holding that the presence of a stranger or unauthorized person in the grand jury room only while testimony is being taken, and not while the jury are voting or deliberating, will not invalidate the indictment, unless it is shown that the accused was thereby prejudiced in some substantial right. *Bennett v. State*, 62 Ark. 516, 36 S. W. 947; *State v. Bates*, 148 Ind. 610, 48 N. E. 2; *State v. Bacon*, 77 Miss. 366, 27 South. 563, *State v. Justus*, 11 Or. 178, 8 Pac. 337, 50 Am. Rep. 470; *Mason v. State* (Tex. Cr. R.) 81 S. W. 718; *State v. Brewster*, 70 Vt. 341, 40 Atl. 1037, 42 L. R. A. 444; *State v. Wood*, 112 Iowa, 184, 84 N. W. 503; *Wilson v. State*, 41 Tex. Cr. R. 115, 51 S. W. 916.

As to the second objection to Coleman's presence in the grand jury room, we have already held that membership in a law and order league did not disqualify the grand juror Whittington, and it would be peculiar if such membership disqualified a public prosecutor. We find no evidence of any personal animosity on the part of Coleman against the defendant; and, if he was intent upon prosecuting the defendant, as contended, then his intentions were only in harmony with his duty. No misconduct on the part of Coleman is alleged or shown, nor did the defendant aver or prove that his rights were prejudiced in the least by any act of Coleman's. We sustain the lower court upon this assignment of error.

The fifth assignment of error is that the court erred in overruling the defendant's motion to set aside the indictment because the grand jury was permitted to leave the jury room and go to a sanitarium, some three or four blocks away, to examine a witness. The record shows that the grand jury, under the instructions of the court, went to a sanitarium to take the testimony of one witness. The record does not show who the witness was, whether or not his testimony was in fact taken, why he could not attend before the grand jury, or to what case the testimony of the witness pertained. That act of the grand jury stands in the record as an isolated act, unconnected with this case by even a modicum of evidence, either direct or circumstantial. There are no doubt occasions on which the grand jury, ex necessitate, may be permitted and under proper instructions by the court leave their jury room and go to some near-by place at the county seat for the purpose of taking the testimony of a witness whose condition is such as to preclude his appearance in the jury room. The location of the grand jury room is not fixed by law. That question calls for no consideration here, however, for the reason that such act of the grand jury is not shown to have had any connection with the investigation of the

charge against this defendant, and the defendant is not shown to have been injured thereby.

The next contention is that the court erred in overruling the defendant's demurrer to the indictment. It is urged that the indictment is insufficient, first, because it does not allege that the killing was done without authority of law, though it alleges that it was done unlawfully; second, because it does not allege that Luther Ford, the deceased, was a human being; and, third, because the killing of the deceased is alleged to have been done in an attempt by the defendant to kill one William Ballew, and the indictment does not allege that the defendant made an assault upon William Ballew.

Murder is defined by our statutes to be the killing of one human being by another, without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being. An indictment for murder, therefore, to be sufficient, must contain an allegation that the killing was done without authority of law. But the pleader in framing the indictment is not required to use the exact language used by the statute in defining the offense; while it is better and safer to do so yet the use of any other language equivalent in effect and meaning is sufficient. *Walcher v. Territory*, 18 Okl. 528, 90 Pac. 887. We hold that the word "unlawfully" as used in this indictment is the full equivalent in effect and meaning of the phrase "without authority of law." If an act is done unlawfully, it cannot be said to have the authority and sanction of the law; on the contrary, it is done, not only without authority, but in direct violation, of law, and is an unlawful act. What the law does not prohibit, however, is permitted, and is therefore not unlawful. So an unlawful act can be only a prohibited act; an act forbidden by law; an act done without authority of law.

As to the second proposition, if it was necessary to allege in the indictment that the deceased was a human being, then the indictment is defective indeed; for in such case, and by the same reasoning, it was also necessary to allege that the defendant and Ballew were human beings, because murder could have been committed in this case only by one human being killing another human being in an unlawful attempt to kill a third human being. Inasmuch as the word "murder," however, implies fundamentally the killing of one human being by another, and as the indictment alleges that the defendant did "kill and murder one Luther Ford," the law presumes all parties mentioned to have been human beings, and there was no necessity for alleging it in the indictment. *People v. McNulty*, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61; *Cremar v. People*, 30 Colo. 363, 70 Pac. 415; *Baker v. State*, 121 Ga. 592, 49 S. E. 782; *Sutherland v. State*, 121 Ga. 591, 49

S. E. 781; *Kirkham v. People*, 170 Ill. 9, 48 N. E. 465; *Merrick v. State*, 63 Ind. 327; *State v. Stanley*, 33 Iowa, 526.

Nor do we find any merit in defendant's third contention upon the insufficiency of the indictment, namely, that it was necessary to charge an assault by the defendant upon Ballew. By the express terms of our statute the unlawful killing of a human being, committed with a premeditated design to effect his death, or with a premeditated design to effect the death of any other person, is murder. Certainly this definition will cover a case where one person unlawfully assaults another with a premeditated design to kill him, and in the affray kills a third person. But it is not limited in its application to that character of case alone. Suppose that A. in the nighttime lies in wait for the purpose of killing B. as the latter passes by; C. comes along, and A., mistaking him in the darkness for B. shoots C. and kills him, but with the premeditated design to kill B. Would not that be murder? And yet no assault was committed upon B.; he may have been miles away. It is true that in such case an indictment charging the homicide to have been committed with a premeditated design to kill C. would be good, and under the doctrine of implied malice would be sustained by proof of the actual facts. But if the prosecution knew the facts and alleged them—A.'s actual and premeditated design to kill B., and his assault upon and slaying of C. with such premeditated design to kill B.—would any one say that such indictment was not good, and that proof of the facts thus alleged would not support a conviction? Of course, there can be no murder without an assault. But the firing of the fatal shot; the striking of the fatal blow; the administering of the poison—all constitute, not only an assault, but also a battery. Necessarily, therefore, an assault upon the deceased is charged in the very allegation of the infliction of the fatal wound. And an indictment which charges the shooting and killing of the deceased, and alleges that the same was done without authority of law, and with a premeditated design to kill another person, naming him, fulfills the requirements of the statute; and, if those allegations are sustained by the proof, a conviction thereunder must stand. The indictment in this case charges the offense substantially in the language of the statute, and is sufficient.

The court gave the jury the following instruction: "You are instructed that, if you convict the defendant, you can only convict him on one count of the indictment, and it will be your duty to say by your verdict on which count you convict." The defendant in his seventh assignment of error complains of this instruction, and says that the expression "if you convict the defendant" carries the inference that the court desired a conviction. But we are unable to perceive how such an inference could possibly be ex-

torted from those words. There is no such requirement of law, however, as that stated in this instruction; for, where a conviction is had upon an indictment containing more than one count, but each count charging the same offense in a different form, as does this indictment, the law does not require that the jury state in their verdict upon which count the conviction is had. In such case a general verdict of guilty or not guilty, and, if guilty, stating the degree of the crime where it is distinguished into degrees, is all that is required. The rule is otherwise, however, where the same act constitutes two or more different offenses, and such different offenses are charged in separate counts of the same indictment. In the latter case the verdict should state upon which count the defendant is convicted, for the purpose of showing the crime of which he is convicted. But no injury results to the defendant where the court, on an indictment charging the same offense in different counts, requires that the verdict state the count upon which the conviction is had; and the error, if any, is harmless.

The defendant makes the same complaint of the tenth instruction, in which the court told the jury: "If you find the defendant guilty of murder, you will assess his punishment at, etc., ———." It is hard to believe that this assignment is urged seriously. The use of the expression "if you find the defendant guilty" does not indicate in the slightest degree any belief, opinion, or desire in the mind of the court, one way or the other, as to what the verdict of the jury should be.

Lastly the defendant says that the court erred in failing to give the jury a clear, accurate, and concise definition of "premeditated design" and of the term "without authority of law." The court in his seventh instruction defined premeditated design as follows: "A design to effect death is premeditated within the meaning of the law if the intention to take life is deliberately formed in the mind before the act is done which results in death, no matter for how short a time. It may be formed instantly before committing the act by which it is carried into execution." The defendant has pointed out no feature wherein this definition lacks clearness, accuracy, or conciseness, and we hold it sufficient, especially in the absence of any request to the trial court that it be amplified. The court did not in direct terms define to the jury the expression "without authority of law" as used in the definition of murder, but in instructions of which the defendant does not complain the court defined both justifiable and excusable homicide, and submitted those issues to the jury. Every homicide committed without legal justification or legal excuse is committed without authority of law. The court properly stated to the jury what constituted legal excuse and

legal justification, and the instructions as a whole convey a correct understanding to any intelligent mind of what is meant by the expression "without authority of law." Furthermore, the record shows no request on the part of the defendant for an instruction defining this term, no exception to the failure of the court to define it, and the matter is not mentioned in defendant's motion for a new trial. Even if error had been committed in that respect, therefore, under the state of the record this court would not reverse on that ground.

This disposes of all of the defendant's assignments of error, and requires an affirmation of the judgment below.

There is one matter, however, to which we think attention should be called in an admonitory way, and that is the seventeenth instruction given by the court. It is as follows: "You are instructed that it is the opinion of the court that there is no proof in the case justifying a conviction of the defendant of manslaughter in the second degree; that your verdict should be either guilty of murder, manslaughter in the first degree, or not guilty; but, notwithstanding this opinion of the court, you may, if on your oaths you believe the defendant guilty of manslaughter in the second degree, convict him of that crime." We heartily disapprove of this instruction. If there was no evidence introduced on either side tending to show that the homicide was manslaughter in the second degree, if under the evidence adduced the court could say, as a matter of law, that the defendant was either guilty of murder or manslaughter in the first degree, or else was innocent, then he should not have submitted to the jury the question of manslaughter in the second degree at all. *New v. Territory*, 12 Okl. 172, 70 Pac. 108; *Robinson v. Territory*, 16 Okl. 241, 85 Pac. 451; *Regnier v. Territory*, 15 Okl. 652, 82 Pac. 509. On the other hand, if the evidence in any manner justified the submission to the jury of the defendant's guilt or innocence of manslaughter in the second degree, then certainly it was error for the court to charge upon the weight of the evidence by informing the jury that, in the opinion of the court, the evidence did not warrant a conviction for that crime. In such case a jury might thereby be influenced to convict a defendant of one of the higher degrees of homicide, when otherwise they would find him guilty only of manslaughter in the second degree. Another vice in this instruction is the fact that it does not require the jury to find the defendant's guilt of the offense beyond a reasonable doubt to warrant conviction. The giving of this instruction, however, was not excepted to; it was not mentioned in the motion for a new trial, and as not been assigned or urged as error here. One of the evidence taken in the case was

incorporated in the case-made, except that introduced in support of the motion to set aside the indictment. So we know nothing about the issues made by the evidence. If in fact the evidence did not warrant the submission of manslaughter in the second degree to the jury, then the instruction was harmless; and, from the defendant's acquiescence in the court's action, we presume that to have been the case. As the record stands, the giving of that instruction is not reviewable here as a ground for reversal; but we have thought it proper to express our opinion in regard to it, to the end that future error may be avoided.

The judgment of the lower court will therefore be affirmed.

FURMAN, P. J., and DOYLE, J., concur.

(3 Okl. Cr. 651)

HAWKINS v. UNITED STATES.

(Criminal Court of Appeals of Oklahoma. April 26, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 366*)—EVIDENCE—RES GESTÆ.

Upon a trial for murder, a declaration made by the deceased, clearly without premeditation or design, not more than half a minute after the shooting, upon the spot where the shooting occurred, and which declaration tended to explain the main fact, namely, the circumstances of the shooting, is properly a part of the *res gestæ*, and is admissible.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 806, 811, 814, 819, 820; Dec. Dig. § 366.*]

2. HOMICIDE (§ 338*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE WITHOUT PREDICATE.

Where a dying declaration is admitted in evidence before a proper predicate therefor is laid, but by evidence subsequently adduced the declaration is shown to be admissible, the error in admitting the declaration without requiring the predicate proof to be first made is harmless.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 338.*]

3. HOMICIDE (§ 203*)—EVIDENCE—DYING DECLARATIONS—PREDICATE.

Proof that the deceased was shot one afternoon, and died about 8 or 9 o'clock the following morning, that his wound was intensely painful and necessarily fatal, that he was unable to be moved from the house in which he was shot, and that he stated that he was going to die, shows a conviction in deceased's mind that death was impending, and is a sufficient predicate for the admission of his dying declaration.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*]

4. HOMICIDE (§ 218*)—EVIDENCE—DYING DECLARATIONS—SENSE OF IMPENDING DEATH—QUESTION FOR COURT.

Whether a purported dying declaration was made under a sense of impending death is a question solely for the court in so far as it determines the admissibility of the declaration in evidence.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 458, 459; Dec. Dig. § 218.*]

5. HOMICIDE (§§ 216, 267*)—DYING DECLARATIONS—DETERMINATION OF QUESTION OF ADMISSIBILITY.

When a dying declaration is offered in evidence, the court should require the necessary preliminary proof to be first made to the court and in the absence of the jury. If it is made and is sufficient, then both the preliminary proof and the declaration should be given anew before the jury. If it is not sufficient, neither the preliminary proof nor the declaration should be given to the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 457, 561; Dec. Dig. §§ 216, 267.*]

6. CRIMINAL LAW (§ 541*)—EVIDENCE AT FORMER TRIAL—ADMISSIBILITY.

Before the testimony of a witness at a former trial may be proved as secondary evidence against a defendant in the final trial, it must first be proved that such former trial was had, that the witness was sworn and testified, that the defendant was present, and had opportunity for cross-examination, and that the witness has since died, become insane, left the state, that he is sick and unable to testify, or that his whereabouts cannot with due diligence be ascertained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1231; Dec. Dig. § 541.*]

7. CRIMINAL LAW (§ 899*)—TRIAL—WAIVER OF OBJECTION TO EVIDENCE—INTRODUCTION OF COUNTER EVIDENCE.

Where incompetent and injurious testimony is admitted over the objection of the defendant, the latter does not waive his objection by the introduction of counter evidence, even though such counter evidence would not have been competent but for the admission of the incompetent evidence sought to be counteracted by it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2122; Dec. Dig. § 899.*]

8. WITNESSES (§ 48*)—COMPETENCY—CONVICTION OF INFAMOUS CRIME.

Under the law in force in the Indian Territory prior to statehood, record proof of the conviction of a witness of an infamous crime rendered such witness disqualified to testify except in his own behalf; but proof of such fact by the witness' admission went only to his credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 100-115; Dec. Dig. § 48.*]

9. WITNESSES (§ 48*)—COMPETENCY—CONVICTION OF INFAMOUS CRIME.

Under the law in force in the Indian Territory prior to statehood, the deposition or former testimony of a witness qualified when he gave it, but subsequently disqualified by conviction of an infamous crime, cannot, after such conviction, be admitted over objection, upon the theory that the witness must be competent at the time his testimony is offered.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 109; Dec. Dig. § 48.*]

10. HOMICIDE (§§ 151, 152*)—MURDER—SUFFICIENCY OF EVIDENCE.

Under section 863, Ind. T. Ann. St. 1899 (Mansf. Dig. § 1520), to make a prima facie case of murder, the prosecution is required to establish only two facts, namely, the death of the deceased, and the fact that he was killed by the defendant. If those two facts are established without disclosing facts sufficient to raise a reasonable doubt of the degree of the homicide or of the defendant's justification or excuse, then the burden shifts to the defendant to introduce sufficient evidence to engender a reasonable doubt as to the degree of the offense, or as to whether he was justifiable or excusable.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 276-283; Dec. Dig. §§ 151, 152.*]

11. HOMICIDE (§ 300*) — MURDER — INSTRUCTIONS—SELF-DEFENSE.

Instructions upon self-defense in a trial for murder which tell the jury that it must *appear* from the evidence that the defendant was not the aggressor before the plea of self-defense can avail him, and that if they *believe* certain facts from the evidence, then they should acquit the defendant as having acted justifiably, and which nowhere tell the jury that if, upon a consideration of all the evidence, they entertain a reasonable doubt as to whether the defendant acted in his real or apparent necessary self-defense, they should acquit, are disapproved.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

(Additional Syllabus by Editorial Staff.)

12. STATUTES (§ 226*)—CONSTRUCTION—ADOPTION OF STATUTES FROM ANOTHER STATE.

Act Cong. May 2, 1890, c. 182, 26 Stat. 81, adopting certain general laws of Arkansas, also adopted the construction previously placed upon such laws by the Supreme Court of Arkansas.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. § 226.*]

13. CONSTITUTIONAL LAW (§ 199*) — LAW CHANGING QUALIFICATION OF WITNESS.

A law changing the qualifications of witnesses is not *ex post facto* as to offenses committed prior to its passage.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 581; Dec. Dig. § 199.*]

Appeal from District Court, Wagoner County; John H. King, Judge.

Gabe Hawkins was convicted of murder, and he appeals. Reversed and remanded for new trial.

Cook & De Graffenried, for plaintiff in error. Chas. West, Atty. Gen., Chas. L. Moore, Asst. Atty. Gen., and S. M. Rutherford, for the State.

RICHARDSON, J. On the 4th day of October, 1905, the plaintiff in error, Gabe Hawkins, hereinafter designated as the defendant, was indicted in the United States Court for the Western District of the Indian Territory at Muskogee for the murder of one Sanford Daniels, alleged to have been committed in that district on the 30th day of April, 1905. The cause was continued from time to time until the admission of Oklahoma into the Union, after which, by proper order of the district court of Muskogee county, it was transferred for trial to the district court of Wagoner county, upon a showing that the offense, if any, was committed in the latter county. The cause was tried at the October, 1908, term of the court, and resulted in a verdict finding the defendant guilty of murder, without capital punishment.

The defendant admitted the killing, but pleaded self-defense as a justification. The homicide was committed in a house owned by R. B. Daniels, the deceased's father, and occupied by one Dora Smith, a tenant. Just prior to the killing the said R. B. Daniels and Warrior Hawkins, a brother of the defendant, had a difficulty on these premises, in which no weapons were used and neither

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

party was hurt. Neither the deceased nor the defendant participated in this difficulty, the defendant not being present at the time. The state contended that when the defendant, who was about two blocks from the scene of the trouble, heard of the difficulty, he announced his intention to "go down and settle that squabble," and that he then proceeded to the house carrying his pistol in his hand; that the deceased, who was on the porch when the defendant arrived, went into the house upon seeing the defendant coming up armed; that the defendant immediately cocked his pistol, and made a demonstration as if to shoot through the door, when those present told him not to shoot in the house because he might hit the deceased; that thereupon the defendant put his shoulder against the door, broke it open, and deliberately shot and killed the deceased, who was standing in the room unarmed. The defendant contended that he went to the house to get his brother and take him home; that he did not have his pistol in his hand; that he stopped upon the porch, and, the door being open, he saw the deceased in the room; that when the deceased saw him he drew a pistol and said, "Gabriel, I am going to kill you," and thereupon leveled the pistol on the defendant, whereupon the defendant drew his pistol and shot the deceased. A considerable crowd was present at the time of the shooting; and on the trial the contention of each party was supported by the testimony of several witnesses.

1. In response to questions propounded by the state, and over the objection of the defendant, the witness R. B. Daniels testified that the deceased told him immediately after the shooting that he (the deceased) was unarmed. In connection with this statement the witness testified that at the time the shot was fired he was about seven feet from the corner of the room in which the shooting occurred; that he ran into the room at once, that some one was then picking the deceased up from the floor where he had fallen, and that the statement was made by the deceased at that time and under those circumstances. The defendant saved an exception to the action of the court in admitting this testimony, and he assigns it as error here. The record shows that this declaration was made not more than half a minute after the shooting, and upon the very spot where the shooting occurred; the time when and the circumstances under which it was made clearly indicate that it was made wholly without premeditation or design, and could not have been the result of deliberation; it tended to explain the main fact, which was the circumstance of the shooting, and it followed immediately upon it. It was, therefore, properly a part of the *res gestæ*, and was admissible. *Price v. State*, 1 Okl. Cr. R. 358, 98 Pac. 447; *Com. v. Hackett*, 2 Allen (Mass.) 136; *Mitchum v. State*, 11 Ga. 615; *State v. Garrand*, 5 Or. 217; *State v. Ah Lol*, 5 Nev.

99; *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661; *Com. v. Werntz*, 161 Pa. 591, 29 Atl. 272.

2. The witness R. B. Daniels also testified that the deceased made a dying declaration in which he said that he was unarmed at the time of the shooting, and that he did not know why the defendant shot him unless it was on account of some old grudge. The defendant objected to this testimony for the reason that the proper predicate for its introduction had not been laid. The only predicate laid at the time this testimony was given was the fact that the deceased had been shot, and that he made the positive statement that he was going to die. By evidence subsequently adduced, however, it was shown that the deceased was shot one afternoon, and died about 8 or 9 o'clock the following morning; that he was shot in the stomach a little to the left of the median line, the ball ranging downward, backward and to the right; that the wound was intensely painful and necessarily fatal, and that the deceased until he died was unable to be moved from the room in which he was shot. All of these facts considered together in our opinion are sufficient to show a conviction in deceased's mind that death was impending, and thus to make the dying declaration competent. See leading case of *Rex v. Woodcock*, 1 Leach C. C. 503. Also *Anthony v. State*, Meigs (Tenn.) 265, 33 Am. Dec. 143; *Reg. v. Perkins*, 9 Car. & P. 395, 2 Moody, C. C. 135; *State v. Phillips*, 118 Iowa, 660, 92 N. W. 876; *Mattox v. United States*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917; *Fogg v. State*, 81 Ark. 417, 99 S. W. 537; *Com. v. Hargis*, 124 Ky. 356, 99 S. W. 348; *People v. Dobbins*, 138 Cal. 694, 72 Pac. 339; *People v. Lem Deo*, 132 Cal. 199, 64 Pac. 265; *People v. Yokum*, 118 Cal. 437, 50 Pac. 686; *Com. v. Brewer*, 164 Mass. 577, 42 N. E. 92; *People v. Smith*, 172 N. Y. 210, 64 N. E. 814.

As a matter of practice it is much better to require the state to make the full preliminary proof necessary to establish the competency and admissibility of the dying declaration in the absence of the jury and before the declaration is given in their hearing; but where that is not done, and a consideration of all the evidence in the case shows the dying declaration to be competent and admissible, the error, if any, will be treated as harmless. In such case, however, the ever present possibility of the state's ultimate failure to make the predicate proof, and the serious injury to the defendant resulting from the consequently erroneous admission of the declaration, constitute a risk which the trial court should never take. Whether a purported dying declaration was made under a solemn sense of impending death is a question solely for the court in so far as it determines the admissibility of the declaration in evidence; and when that stage of the proceeding is reached, the court should have the jury retire, and require the state to

make the necessary preliminary proof to the court before proceeding further in the presence of the jury. If such proof is made and is sufficient, then the jury should be recalled, and both the preliminary evidence and the declaration should be given before them. If the preliminary proof is not sufficient, neither the declaration nor any part of the preliminary evidence, unless the latter is competent for some other purpose, should be given to the jury at all.

3. The state offered in evidence, and the court admitted over the defendant's objection, a writing purporting to be the testimony of one John Adams given before the United States commissioner in the defendant's examining trial. It appears from the statement of the attorneys for the prosecution made to the court and incorporated into the record that at the time of offering this writing the witness Adams was serving a life term of imprisonment in the federal penitentiary at Ft. Leavenworth, Kan., under a conviction for the crime of murder; this was admitted by the defendant to be true. It further appears, though only from the statement of the state's attorneys, that a subpoena for the witness was issued, delivered to the sheriff for service and returned not served; that at the instance of the county attorney the Governor of Oklahoma made a request for the removal of the prisoner from the penitentiary to Wagoner county for the purpose of testifying in this case, and that the penitentiary authorities refused to permit his removal. The state read the writing to the jury, and the defendant excepted to the ruling of the court admitting it in evidence. The statements contained in this writing were very damaging to the defendant. While the length of the document forbids its reproduction here in full, yet the following constituted a portion of it: "I am a citizen. I know Warrior and Gabriel Hawkins & Sanford Daniels. Was in town day Sanford was shot. Went to town about 2 o'clock. Saw Warrior and Gabriel by Tom Lewis'. They were in a buggy. Saw them at Dora Smith's place twice. I was in house when Sanford was shot, in the room where Sanford was shot. Saw Sanford when he came. He first came up & stayed awhile and then went back. While he was gone Warrior & Bob Daniels had a fight. Then 20 minutes after Sanford rode back up there. He went in the house. I went in behind Sanford & shut the door. Gabriel shoved the door open and shot Sanford. Sanford was next to middle door. Gabriel shoved open the south room door. Sanford was standing up when Gabriel shot him—doing nothing. I was two feet from Sanford. Sanford had nothing in his hand. I was east of him. When Sanford was shot he eased down by the side of the wall. Said he was shot. Gabriel asked who shot Sanford. I told him he shot Sanford & he ran away. I said 'You shot

him.' I saw the pistol in his hand. Saw his pistol when he fired at Sanford. It was two or three feet from Sanford. Warrior was outdoors. I did not see Warrior after the shooting. I did not see Warrior with any gun." The admission of this writing was error. We pass for the present the question of the competency of the witness John Adams had he been produced in person to testify against the defendant upon this trial, and reserve for investigation further on the admissibility of the testimony of an absent witness given in a former trial of the same cause. Answer both of those questions in the affirmative, and the admission of this writing was still patent error. In the first place this writing does not prove itself. It was not proved by a syllable of testimony from a single witness. There was no evidence other than the writing itself showing that an examining trial was ever had in this case; that John Adams ever testified as a witness at such examining trial, if there was one; that he was sworn, if he did testify; or that the defendant was present and had opportunity for cross-examination. Proof of each and every one of these matters from the mouth of a living witness, present and testifying from the witness stand, confronting the defendant and subject to his cross-examination, was an indispensable prerequisite to the admission of this testimony under any phase of the case. *Carpenter v. State*, 58 Ark. 283, 24 S. W. 247; *Wilkins v. State*, 68 Ark. 441, 60 S. W. 30; *Dolan v. State*, 40 Ark. 454.

The defendant, for the purpose of counteracting the effect of the purported testimony of the witness Adams, introduced without objection on the part of the state a contradictory statement proved to have been made in writing by Adams prior to the alleged examining trial. Adams' purported testimony taken at the alleged examining trial shows that he was there interrogated about this contradictory statement, the time and place of his making it being stated in the questions, and that Adams denied making the same. And the state contends that by introducing this statement the defendant waived any objection previously made to the admission of Adams' testimony. We cannot agree to this contention. When incompetent evidence is introduced against the defendant and over his objection, he has the right to minimize its injurious effect by any competent counter evidence which he may have, and by doing so he does not waive his objection previously made; and that is true though such counter evidence would not have been competent, but for the admission of the incompetent evidence sought to be counteracted by it. The error of the court in admitting in evidence the written statement of Adams' purported testimony was not waived or cured by the introduction of the alleged contradictory statement, and there-

fore necessitates a new trial of this cause.

The probability that upon another trial proper proof may be made of the facts just pointed out as a prerequisite in any case to the admission of this writing necessitates the consideration of another reason urged by the defendant both here and below why the writing is inadmissible; and that is that its admission is in violation of the sixth amendment to the federal Constitution, providing that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him.

This homicide was committed, and this indictment was found, in the Indian Territory prior to the admission of Oklahoma into the Union. The law as it existed in that territory, therefore, must determine this question. Congress, by Act May 2, 1890, c. 182, 26 Stat. 81, put in force in the Indian Territory so far as applicable certain general laws of the state of Arkansas contained in Mansfield's Digest, among which was chapter 20, adopting the common law; chapter 59, entitled "Evidence"; chapter 45, entitled "Criminal Law"; and chapter 46, entitled "Criminal Procedure." Ind. T. Ann. St. 1899, cc. 12, 25, 19, 20. It has been held by the Court of Appeals in the Indian Territory, the United States Circuit Court of Appeals for the Eighth Circuit, and the Supreme Court of the United States that, in adopting and putting in force in the Indian Territory these general laws of the state of Arkansas, the constructions previously placed upon those laws by the Supreme Court of Arkansas were also adopted. Under the decisions of the Supreme Court of Arkansas, where the defendant has been confronted with a witness in a former trial of the same cause, whether before a coroner or justice of the peace sitting as an examining magistrate, or upon an application for bail, or upon a trial in the circuit court, and where the witness testified under oath, and an opportunity for cross-examination was afforded the defendant, the testimony given by such witness on such former trial may be proved in the final trial as secondary evidence, if it is first satisfactorily proven that the witness has since died, become insane, left the state, or that his whereabouts cannot with due diligence be ascertained, or that he is sick and unable to testify. *Hurley v. State*, 29 Ark. 17; *Shackelford v. State*, 33 Ark. 539; *Dolan v. State*, 40 Ark. 454; *Pope v. State*, 22 Ark. 72; *Vaughan v. State*, 58 Ark. 363, 24 S. W. 885; *McNamara v. State*, 60 Ark. 400, 10 S. W. 762; *Sneed v. State*, 47 Ark. 180, 15 S. W. 68. And it is held by the court that the admission of such evidence under such circumstances is not violative of section 10 of article 2 of the Constitution of Arkansas, which provides that the defendant shall have the right to be confronted with the witnesses against him.

The Supreme Court of the United States

has never passed upon the exact question presented by this record. It sustained such a procedure as not violative of the sixth amendment to the federal Constitution where it was shown that the witness had died since giving his former testimony. *Mattox v. United States*, 156 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409. And in *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244, it held that if the witness is absent by the act or procurement of the defendant, his former testimony may be given. It held in *Motes v. United States*, 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150, that where the absent witness was in the corridor of the courthouse within the hour before he was called, it appearing that his absence was due to the negligence of the prosecution, and not to the suggestion, connivance, or procurement of the accused, the former testimony of the witness was inadmissible. Surely that would be the rule in any court. The government of the Indian Territory being wholly federal, and the sixth amendment to the federal Constitution being a limitation upon the federal government and effective in the Indian Territory, if the decisions of the Supreme Court of the United States could be held to have so construed that amendment as to exclude the former testimony of a witness permanently absent from the territory, and who could not attend upon the court if he would, such construction would of course be conclusive upon us in this case; for Congress could no more put in force in the Indian Territory the law of another state, valid in the state, but violative of the federal Constitution in the territory, than it could originally enact such a law for the Indian Territory. But we cannot find where the Supreme Court has so held; and in our opinion reason and principle and the weight of authority require a contrary holding. See *Wigmore on Evidence*, vol. 2, c. 45, where the subject is ably and exhaustively treated, and to which we give our sanction.

If, subsequent to giving his testimony in the examining trial, the witness John Adams was convicted of the crime of murder and sentenced to the penitentiary, then, under the law in force in the Indian Territory, and preserved by the enabling act and our Constitution as applicable to pending cases there, upon proof of that fact by the production of the record of his conviction or by certified copy thereof, the witness would be disqualified to testify in this case. *Bise v. United States*, 5 Ind. T. 602, 82 S. W. 921; *Werner v. State*, 44 Ark. 122; *Ransom v. State*, 49 Ark. 176, 4 S. W. 658. Under the decisions in Arkansas and the Indian Territory, however, such conviction for the purpose of establishing the incompetency of the witness can be proved only by the record or a certified copy thereof; and if the conviction is shown by the oral admission of the witness himself upon his examination, and not by the record, then it does not disqualify the

witness, but goes only to his credibility. *Bise v. U. S.*, supra.

It is true that the law of this state in regard to the qualifications of witnesses is different; under the law in force in the Territory of Oklahoma, and by the Constitution extended over and put in force in the whole of the state of Oklahoma, no person is disqualified as a witness by reason of his conviction for any crime except perjury; such conviction, if the offense involves moral turpitude, goes only to the credibility of the witness. It is also true that a law changing the qualifications of witnesses is not ex post facto as to offenses committed prior to its passage. *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262. But these matters are not necessary to be considered here, for the reason that, under the act of Congress of March 4, 1907, c. 2911, § 3, 34 Stat. 1287, amending section 20 of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 277 [U. S. Comp. St. Supp. 1909, p. 154]), the terms of which were accepted by section 28 of the schedule of the Constitution, there has been and could have been no change in the law with respect to offenses committed in the Indian Territory before statehood. The defendant in such case is to be tried under the law as it existed in the Indian Territory, and he neither gains nor loses any advantage by the change in the form of government or in the code of laws.

It was also the law in the Indian Territory that a defendant against whom the former testimony of a now absent or deceased witness is offered may make to the introduction of such testimony every objection which he could make if the witness were present and personally testifying; and if the witness subsequent to the giving of his former testimony has been convicted of an infamous crime, and that fact is properly proved, his former testimony cannot be introduced over the objection of the adverse party, the theory being that the witness must be competent at the time his testimony is offered. *Redd v. State*, 65 Ark. 475, 47 S. W. 119; *St. Louis, I. M. & S. Ry. Co. v. Harper*, 50 Ark. 157, 6 S. W. 720, 7 Am. St. Rep. 86. The majority of the better considered cases, however, hold the contrary, and Mr. Wigmore lends the weight of his opinion to the latter view, saying: "The time of the witness' testifying is here the time of the deposition or former testimony, his qualifications then to speak the truth are alone concerned. Wigmore on Evidence, vol. 2, § 1410. And in some jurisdictions the very fact of the witness' subsequent conviction, and therefore disqualification, is of itself held to warrant the admission of his former testimony given when no such disqualification existed. The rule in the Indian Territory, however, was as we have stated it, and we have no power to change it.

4. The court instructed the jury over the

objection of the defendant that, "Before the plea of self-defense will avail the defendant upon trial, it must appear from the evidence that he was not the aggressor, and that he used all reasonable means in his power, consistent with his safety, to avoid the difficulty of killing his assailant." The defendant excepted to the giving of this instruction on the ground that it places the burden of proof upon him; he says that in no instance does the burden shift from the prosecution to the defendant, but that to warrant a conviction the prosecution is required to show beyond a reasonable doubt the want of justification on the part of the defendant.

It was provided by section 863, Ind. T. Ann. St. (Mansf. Dig. § 1520), that: "The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve upon the accused, unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide." To make a prima facie case of murder under this statute the prosecution is required to prove only two facts; namely, the death of the deceased, and the fact that he was killed by the defendant. If each of these facts is proved beyond a reasonable doubt, and without disclosing facts sufficient to raise a reasonable doubt as to whether the homicide was only manslaughter, or as to whether it was justifiable or excusable, then prima facie the defendant is proved guilty of murder. Thereupon the burden of proof shifts to the defendant; and to discharge it he must produce evidence sufficient in quality and quantity to raise a reasonable doubt, either as to the degree of the homicide, or as to whether it was justifiable or excusable, falling in which a conviction for murder is warranted. If, however, the defendant does produce evidence sufficient to raise such reasonable doubt, then the burden returns to the prosecution, and to warrant a conviction for murder it must overcome such doubt thus engendered by proof beyond a reasonable doubt of the existence of each essential element of the crime.

Also section 896, Ind. T. Ann. St. (Mansf. Dig. § 1553), provides: "In ordinary cases of one person killing another in self-defense, it *must appear* that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary; and it *must appear also* that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given." The instruction complained of was substantially in the words of the statute; but this statute also is construed almost uniformly to mean that the defendant is required only to raise

a reasonable doubt as to the necessity for the killing and as to who was the assailant. There could be no objection to this instruction if in connection with it the court gave the explanation which the interpretation of the statute requires. But it did not do so. It would have been better if, in the abstract portion of this instruction telling the jury under what circumstances the plea of self-defense could not avail the defendant, the court, instead of using the unqualified expression, "it must appear from the evidence that the defendant was not the aggressor," had stated to the jury in substance that the law of self-defense is solely and emphatically a law of necessity; that it does not imply the right of attack, and could not avail the defendant if he was the aggressor, or if the fatal difficulty was sought for by him, or was provoked by him by any willful act of his own reasonably calculated to bring it about, or if he voluntarily or of his own free will entered into it, no matter how hard he was pressed or how great his danger became during the progress of the difficulty. This would have conveyed to the jury the information intended to be given, and would not have been subject to criticism as placing on the defendant the burden of making greater proof than the law requires of him.

Also, in the affirmative charge on self-defense, the court told the jury that if they believed certain facts from the evidence in the case, then they should acquit the defendant as having acted justifiably; but the court nowhere told the jury, except perhaps inferentially in the general instruction upon the presumption of innocence and the burden of proof, that if, after considering and weighing all the evidence in the case, they entertained a reasonable doubt as to whether the defendant acted in his real or apparent necessary self-defense, then they should give the defendant the benefit of that doubt and acquit him. The better practice is to do this in connection with the substantive charge on the defendant's theory of self-defense, as shown by the evidence.

For the errors indicated, the judgment of the lower court is reversed and the cause remanded, with directions to grant the defendant a new trial. It is so ordered.

FURMAN, P. J., and DOYLE, J., concur.

1 Mont. 14)

DUNSETH v. BUTTE ELECTRIC RY. CO.
et al.

Supreme Court of Montana. March 28, 1910.)

JUDGMENT (§ 570*)—MERGER AND BAR—JUDGMENT OF UNITED STATES COURT.

Rev. Codes, § 6717, provides that a final judgment dismissing the complaint does not prevent a new action for the same cause of action, unless it expressly declares, or it appears, that it is rendered upon its merits. Section 6761

provides that the judge may direct the jury to render a verdict in favor of the party entitled thereto where the case presents only questions of law. In an action before a federal court by a street car passenger, to recover for injuries, the judgment recited the impaneling of a jury, the submission of evidence by plaintiff and defendant, and that when all of the evidence in the case had been submitted the direction of a verdict in favor of the defendant. In a subsequent action in the state court, the pleadings admitted that the suit was on the same cause of action between the same parties. Held that, in the latter action, the judgment in the federal court was upon the merits, and was a bar to an action in the state court.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 570.*]

2. JUDGMENT (§ 829*)—UNITED STATES "CIRCUIT COURTS."

The Circuit Courts of the United States are courts of general jurisdiction, corresponding in a general way as to their general authority with the state and district courts, and full faith and credit must be given to their records and proceedings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1510; Dec. Dig. § 829.*]

For other definitions, see Words and Phrases, vol. 2, p. 1158.]

Appeal from District Court, Silver Bow County; Jno. B. McClernan, Judge.

Action by Sara Dunseth against the Butte Electric Railway Company and others. Judgment for plaintiff, and the Butte Electric Railway Company appeals. Reversed and remanded, with directions to enter judgment in favor of defendant.

W. M. Bickford, George F. Shelton, H. O. Hopkins, and Chas. A. Ruggles, for appellant. Breen & Hogevoil, L. P. Donovan, and A. B. Melzner, for respondent.

SMITH, J. This is an action brought in Silver Bow county to recover damages for personal injuries alleged to have been received by the plaintiff while alighting from a car of the defendant company on which she had been a passenger in the city of Butte. The defendant McConkey is alleged to have been the conductor, and the defendant Lang, the motorman, in charge of the car. The injuries complained of were sustained on May 29, 1907. The cause of action is based upon the allegation in the complaint that while the plaintiff had one foot upon the ground, and was in the act of alighting from the car, which had been brought almost to a standstill at the corner of Montana and Platinum streets, where she had previously signified to the conductor her desire to get off, the defendants negligently "jerked the car from under her," and caused her to fall to the ground, whereby she was injured. She alleges that, "had it not been for the jerk," she could have alighted with safety. The defendants answered separately, by (1) denying all of the allegations of the complaint, except the formal parts thereof, and the averment that plaintiff was a passenger

or other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on the car in question; and (2) by alleging affirmatively "that on or about the 1st day of November, 1907, in the Circuit Court of the United States, Ninth Circuit, District of Montana, there was an action pending between Sara Dunseth, plaintiff, and the Butte Electric Railway Company, a corporation, and August Rundblad, defendants; that the said Sara Dunseth, plaintiff therein, is the same Sara Dunseth, the plaintiff herein, who has brought this suit; that the Butte Electric Railway Company, the defendant therein named, is the same Butte Electric Railway Company that is made defendant in this suit; that the plaintiff in and by the complaint therein, claimed damages for personal injuries upon the same cause of action as herein set forth in the complaint filed in this cause; that the injuries alleged to have been suffered by the plaintiff therein, are the same as the injuries alleged to have been suffered by the plaintiff in this cause; and the facts alleged in said complaint therein are the same as those alleged herein, and the same cause of action was relied upon as a ground of recovery therein as that set forth in the complaint herein; that an answer to said complaint was duly filed by the said defendant Butte Electric Railway Company therein; that the replication thereto was filed by the plaintiff, and the said cause of action, being at issue, came on for trial in said United States Circuit Court for the Ninth Circuit, District of Montana, on or about the 1st day of November, 1907, before the court and a jury of twelve persons, duly impaneled and sworn to try the issues in said cause; that thereupon witnesses on behalf of the plaintiff were sworn and testified, witnesses were sworn and testified on behalf of the defendant, and witnesses were sworn and testified in rebuttal; and the evidence being closed, and each party then and there announcing in open court that it had no further testimony to offer in said cause, the jury were instructed by the court, and thereupon returned into court their verdict in favor of the defendant Butte Electric Railway Company and against the plaintiff; and thereafter judgment upon the merits was duly given and made in favor of the defendant Butte Electric Railway Company and against the plaintiff, which said judgment so given and made was upon the merits, and not otherwise, and is as follows, to wit: (Title of Court and Cause.) Judgment. The above-entitled cause coming on regularly to be heard, the respective parties being present in court, represented by their counsel, and announcing themselves ready for trial, the said action was dismissed, on motion of the plaintiff, against the defendant August Rundblad; whereupon a jury of twelve good and lawful men was impaneled to hear and try said cause, and evidence was submitted upon the part of the plaintiff and the defendant, and at the time when

all of the evidence in the case had been submitted by the respective parties to said action, on motion of counsel for defendant, the court, having under consideration all of the evidence introduced in said action, and being fully informed in the premises, ordered and directed that a verdict should be rendered in favor of said defendant and against the plaintiff herein: Now, therefore, in consideration of the premises, and of said verdict, it is ordered, adjudged and decreed that the plaintiff herein take nothing by her said action, and that the defendant Butte Electric Railway Company go hence without day, and that said defendant Butte Electric Railway Company have judgment for its costs and disbursements herein expended.' That by virtue of said judgment, and by reason of the proceedings hereinbefore set forth, the cause of action sued upon by the plaintiff herein has been fully determined and adjudicated by the judgment upon the merits hereinbefore set forth, and the plaintiff has no further right to proceed in this case upon the same cause of action, tried and determined upon the merits in the former case."

Plaintiff's replication to the affirmative allegations just quoted is as follows: "Admits that on or about the 1st day of November, 1907, in the Circuit Court of the United States, Ninth Circuit, District of Montana, there was an action pending between Sara Dunseth, plaintiff, and Butte Electric Railway Company, a corporation, and August Rundblad, defendants; that the said Sara Dunseth, plaintiff therein, is the same Sara Dunseth, the plaintiff herein, who has brought this suit; that the Butte Electric Railway Company, the defendant therein named, is the same Butte Electric Railway Company that is made defendant in this suit; that the plaintiff in and by the complaint therein, claimed damages for personal injuries upon the same cause of action as herein set forth in the complaint filed in this cause; that the injuries alleged to have been suffered by the plaintiff therein are the same as the injuries alleged to have been suffered by the plaintiff in this cause; and the facts alleged in said complaint therein are the same as those alleged herein, and the same cause of action is relied upon as a ground of recovery therein as that set forth in the complaint herein; that an answer to said complaint was duly filed by the defendant Butte Electric Railway Company therein; that the replication thereto was filed by the plaintiff; and the said cause being at issue, came on for trial * * * before the court and jury of twelve persons, duly impaneled and sworn to try the issues in said cause; that thereupon witnesses were sworn and testified on behalf of the plaintiff, witnesses were sworn and testified on behalf of the defendant, and witnesses were sworn and testified in rebuttal; that the following judgment was given

and made (setting forth a copy of the same judgment pleaded in the answers). Denies, on information and belief, each and every other allegation in said further and separate answer contained."

We have quoted the replication thus at length, for the reason that it appears to have been drafted with a view of inviting a motion for judgment on the pleadings, and thus clearly presenting the question of law involved. It will be observed that the only denial in the replication is on information and belief, and relates to the allegation in the answer that the judgment of the federal court was upon the merits. A motion for judgment on the pleadings was duly made by the Butte Electric Railway Company. This motion was denied, the cause was tried, and a verdict returned in favor of the plaintiff and against that defendant on April 3, 1909, for the sum of \$5,000. Judgment was entered on the verdict, a new trial denied, and the defendant company has appealed. The verdict is silent as to the individual defendants, making no reference to either of them; neither are they referred to in the judgment. The record in cause No. 2,794, which was argued and submitted with this appeal, discloses the fact that on June 25, 1909, plaintiff's counsel moved the court for an order dismissing the action as to the defendants McConkey and Lang, and on July 31, 1909, over objection of the defendant Butte Electric Railway Company, the order was made. Several questions are discussed in the briefs of counsel, but the fundamental one is whether the judgment entered in the United States court was a judgment upon the merits, and therefore a bar to the present action. A solution of that question renders a consideration of others unnecessary, and for the purpose of arriving at it we shall assume that the issue is properly presented by the replication.

It is contended by the appellant's counsel that a judgment on a directed verdict is always and necessarily a judgment upon the merits. The following cases are thought to sustain the position: *Briggs v. Waldron*, 83 N. Y. 582; *Burnett v. State*, 62 N. J. Law, 510, 41 Atl. 719; *Andrews v. School District*, 15 Minn. 70, 27 N. W. 303. We, however, are not inclined to go so far in our ruling; but are rather of opinion that a judgment on a directed verdict may or may not be a judgment upon the merits, dependent upon the question decided by the court and the scope of the ruling. It is not necessary that a question of fact should actually have been decided, in order to constitute a thing adjudicated between the parties. If it be true, as apparently indicated by the pleadings in this case, that the cause came on for trial in the district court of Silver Bow county upon exactly the same state of the pleadings as had previously been presented to the federal court, then, whatever technical question of pleading

may have been decided by the latter court, became a thing adjudicated so far as the state court was concerned, and, as the point decided disposed of the entire case, then the entire case became *res judicata* upon that state of the pleadings. If the plaintiff was dissatisfied with the ruling of the federal court, it was her privilege to appeal. She had not the right, however, to make the same record in the state court and ask that court, in effect, to reverse the ruling of the federal court. A litigant has no right, as against the same adversary, to have a question, either of law or fact, relating to the same cause of action, twice adjudicated, in the same court or another court of like jurisdiction, unless a re-examination of the question has been regularly ordered. See *Kleinschmidt v. Binzel*, 14 Mont. 31, 35 Pac. 460, 43 Am. St. Rep. 604; *Agnew v. McElroy*, 10 Smedes & M. (Miss.) 552, 48 Am. Dec. 772. And an erroneous ruling is just as conclusive as a correct one, if allowed to become final.

But we have no difficulty in arriving at the conclusion, from a mere inspection of the judgment of the federal court, in the light of admissions in the pleadings, that the question determined was that, upon the facts in the case, the defendant as a matter of law was entitled to a final decision in its favor. The admissions in the pleadings, supplemented by a copy of the judgment of the federal court, supply all of the information that could be derived from an inspection of the judgment roll. Section 6717, Rev. Codes, declares: "A final judgment dismissing the complaint, either before or after trial, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment roll, that it is rendered upon its merits." This judgment does not expressly declare that it was rendered upon the merits. Neither does it in terms dismiss the complaint. Considerable confusion has arisen because of the fact that the expression "upon the merits" has often been loosely or thoughtlessly employed. Black says: "We must not lose sight of the fact that a judgment, although not upon the merits, and therefore not conclusive in respect to the very cause of action, may still be final as to the precise point upon which the determination was based." 2 Black on Judgments, § 693. There is a wide distinction between the merits of the whole controversy, and the merits of some particular question. As an illustration: A judgment rendered on a demurrer may or may not be a judgment on the merits, depending upon the circumstances of each case. *Glass v. Basin & Bay State Min. Co.*, 35 Mont. 567, 90 Pac. 753. And so with a judgment of involuntary nonsuit. *Ordway v. B. & M. Railroad*, 69 N. H. 429, 45 Atl. 243. There are many authorities in conflict with the case last cited, but we think the reasoning of the New Hampshire court is unanswerable. A judgment against the plaintiff on the merits, in the broadest

sense of the expression, determines that he has no cause of action against the defendant. In a more restricted sense the words are sometimes used to indicate that he cannot recover in the particular form of action. See *Glass v. Basin & Bay State Min. Co.*, supra. In the first instance he is permanently out of court; in the second, he may restate his case so as to disclose the cause of action that he has. But he cannot claim a right in that action to have the precise question, theretofore decided against him, again determined by the court, unless a re-examination has been regularly ordered. He may, however, as was pointed out by Mr. Justice Holloway, in *Glass v. Basin & Bay State Min. Co.*, supra, supplement his original pleading by additional allegations which complete the statement of a good cause of action. For the purposes of this appeal we shall treat the expression "upon the merits" as though it were employed in its broadest sense.

There is nothing in the pleadings or upon the face of the judgment to indicate that it was rendered because of a mere defect of form; or because of any technical omission in the plaintiff's pleadings; or on account of variance between pleadings and proof. And the suggestion naturally occurs, if such had been the case, why the fact was not set forth in the replication, at the time when the plaintiff, with so great particularity of detail, was narrating what did actually take place in the federal court, in contradiction of the allegation of the defendant that the cause was there decided upon its merits. Instead of doing so, she denied, on information and belief, that the same was so decided, when she must have known what actually took place.

Under the practice in vogue in this state now and at the time of the trial in the federal court (see section 6761, Rev. Codes) the judge may direct the jury to render a verdict in favor of the party entitled thereto, where upon the trial of an issue by such jury, the case presents only questions of law. It was intimated by this court, in *McKay v. Montana Union Ry. Co.*, 13 Mont. 15, 31 Pac. 999, *Creek v. McManus*, 13 Mont. 152, 32 Pac. 675, and *Cummings v. Helena & L. S. & R. Co.*, 26 Mont. 434, 68 Pac. 852, that the action of the court in directing a verdict is, in effect, the same as granting a nonsuit. This statement is true so far as it goes; that is to say, directing a verdict may have the same effect as granting a nonsuit. But the two modes of procedure differ in principle. A motion for a directed verdict may reach a situation which could not be reached by a motion for a nonsuit. For instance: The plaintiff may be able to establish a prima facie case; the defendant offers in bar affirmative matter which the plaintiff is unable to contradict or disprove. A motion for a directed verdict is properly interposed in such case, and this we believe to be the usual and ordinary practice. A motion for a directed verdict is sometimes

made after the close of the evidence, in order to again raise the same point involved in the motion for a nonsuit, and sustained, the court having changed its mind in the meantime. In such case the motion serves the same purpose as a motion for a nonsuit. But the practice is not technically proper. It will be observed that section 6761, Rev. Codes, supra, permits a directed verdict when the case presents only questions of law. This section in nowise enlarges the powers of the court as applied to the facts. *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871.

It is contended by the appellant that the federal courts have greater latitude in dealing with the weight of the evidence than have the state courts, and this is perhaps true. See *Sloss I. & S. Co. v. South Carolina & G. R. Co.*, 85 Fed. 133, 29 C. C. A. 50; *Hodges v. Kimball*, 104 Fed. 745, 44 C. C. A. 193; *Turnbull v. Ross*, 141 Fed. 649, 72 C. C. A. 609. But the difference in procedure, while it may serve to emphasize counsel's argument, does not affect the merits of the question we are considering. A determination by a court that, upon all the facts in the case, the plaintiff is not, as a matter of law, entitled to recover, is just as binding and conclusive upon him as a determination by the court or jury that his witnesses are not entitled to credit, and that he ought not to recover for that reason. In its ultimate effect we can see no difference in principle between a directed verdict and one not directed. It is only when the vital, deciding facts stand proven, and undisputed in effect, as well as in terms, that the court may direct a verdict. Another way to reach the same result is for the court to tell the jury that if they find the facts as so proven (which they necessarily must), then their verdict should be for plaintiff or defendant, as the case may be. But such verdict no more determines the cause on the merits than does a verdict dictated by the court. The result in principle is exactly the same. It expresses the judgment of the court and not that of the jury. So that it is not necessary in this case to predicate our decision, in any degree, upon any difference in practice or procedure between the federal courts and the state courts. The Circuit Courts of the United States are courts of general jurisdiction, corresponding in authority, in a general way and in their wider spheres, with the district courts of this state. Full faith and credit must be given to their records and proceedings. 2 Black on Judgments, § 938.

It appears from the admissions in the pleadings and from the judgment pleaded that the cause was at issue in the United States court; that an issue of fact, necessitating the presence of a jury, was ready for trial; that, after the jury was impaneled, evidence was submitted by both parties—that is to say, the plaintiff produced evidence tending to establish the facts set forth in

her complaint (it is so admitted in the pleadings), and evidence was offered on the part of the defendant. The presumption is that the plaintiff's evidence as to how the accident occurred was a truthful narration of the facts, and differed in no substantial respect from that which she must offer in the district court. It is significant that witnesses were sworn and testified in rebuttal, showing that every opportunity was given and accepted to bring out all of the facts. Indeed, each party announced, as is customary under such circumstances, that it had no further evidence to offer. Thereupon the defendant moved for a directed verdict, and we will assume, for the benefit of the plaintiff, notwithstanding the fact that the cause was being tried in a federal tribunal, that the court did not consider the weight of the evidence, but that the ground of the motion was that, as a matter of law, the defendant was entitled to a verdict. Thereupon the court, "having under consideration all of the evidence introduced in said action and being fully informed in the premises," directed the jury to render a verdict for the defendant. It seems to us that the conclusion is inevitable, from the language employed, that the court, applying the law to the facts, decided that, upon those facts, the plaintiff had no cause of action against the defendant. We do not see how the matter could be made plainer or how it can be claimed, in view of the express declaration of the federal judge that he had the evidence under consideration in granting the motion, that the result was reached on account of some defect or omission in the pleadings. It is argued that, for aught that is shown by the record, the court may have determined that there was a fatal variance between the pleadings and proof and have granted the motion for that reason. There is not any suggestion to that effect in the judgment; and it is admitted in the replication that the same cause of action was relied upon as a ground of recovery, and that the facts alleged in the complaint were the same as those alleged in the state court. The individual defendant Rundblad was dismissed from the case before the jury was impaneled; so that it is not to be supposed that his having been joined as a party was the reason for directing a verdict; the only reasonable conclusion, judging from the state of the record, is that the cause went to trial against the corporation defendant solely on the ground that it was liable upon the principle expressed by the maxim respondeat superior. Such is the gravamen of the complaint in this case, admitted to be the same in its statement of facts as the complaint in the former action. The identity of the servant who caused the car to be "jerked" is of no importance, so far as the liability of the railway company is concerned. But the most significant fact, as shown by the judgment

pleaded, is that the federal court did not confine itself to a determination that the plaintiff's complaint should be dismissed, but went further and adjudged that, in view of the facts, the defendant was entitled to a verdict against the plaintiff. It was an ancient principle of the common, as well as the Roman, law, that there should be a speedy and final determination of litigation.

We conclude, therefore, that the appellant's motion for judgment upon the pleadings should have been granted. The judgment appealed from and the order denying a new trial are therefore reversed, and the cause is remanded to the district court of Silver Bow county, with directions to enter a judgment in favor of the appellant.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(41 Mont. 56)

ARCHER et al. v. CHICAGO, M. & ST. P. RY. CO. OF MONTANA.

(Supreme Court of Montana. April 2, 1910.)

1. LICENSES (§ 58*) — LICENSE AS TO REAL PROPERTY — CONSTRUCTION OF DAM AND DITCH—REVOCATION.

A parol license to construct a dam and an irrigation ditch on one's land, though acted on, is revocable at the pleasure of the licensor at any time before a prescriptive right is acquired; the doctrines of implied grant and estoppel not obtaining, though the dam site and the right of way for the ditch could have been acquired by condemnation.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 120, 121; Dec. Dig. § 58.*]

2. LICENSES (§ 60*)—LICENSE AS TO REAL ESTATE—REVOCATION—NOTICE.

A licensee having no removable property on the land, no notice of revocation is necessary.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 123; Dec. Dig. § 60.*]

3. LICENSES (§ 62*)—LICENSE AS TO REAL ESTATE—REVOCATION.

A license to construct a dam and an irrigation ditch is revoked by the licensor granting a railroad right of way across the land, to the extent that the license is interfered with by the construction of the railroad as authorized by the grant.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 125; Dec. Dig. § 62.*]

4. APPEAL AND ERROR (§ 837*)—REVIEW OF EVIDENCE.

Though defendant in order to have been entitled to raise the question of the nature of plaintiff's right should have pleaded it, yet its evidence touching such right, having been admitted without objection, will be given the same consideration on appeal as though it was fully warranted by the pleadings.

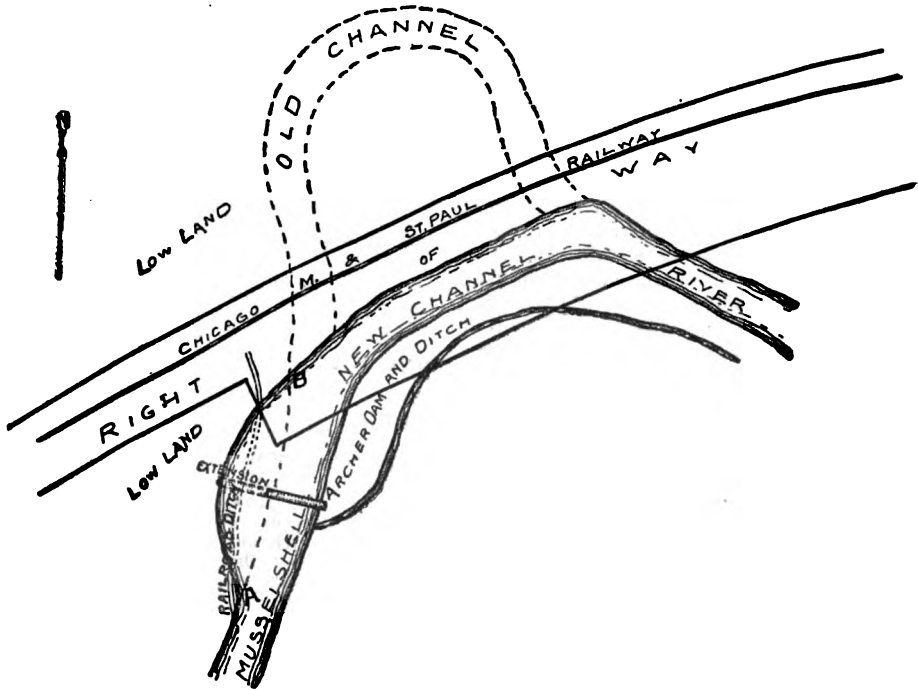
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3275; Dec. Dig. § 837.*]

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

Action by T. F. Archer and others against the Chicago, Milwaukee & St. Paul Railway Company of Montana. From an order granting defendant a new trial, plaintiffs appeal. Affirmed.

The following is the map referred to in the opinion:

section 27, township 9 N., range 28 E., part in Fergus county and part in Yellowstone county. At the time the dam and ditch were constructed, that land was, and continuously since has been, owned and possessed by George Bachman, except such of it as was conveyed to the defendant railway company. In 1906, when the Chicago, Milwaukee & St.



W. M. Johnston and Wm. Wallace, Jr., for appellants. Gunn & Rasch, for respondent.

HOLLOWAY, J. The map herewith presented will serve to illustrate the facts appearing on this appeal. In 1899 Kreichbaum, Cartwright, Gile, and Bethke constructed the dam across the Musselshell river at the point shown on the map, and likewise constructed a ditch tapping the east bank of the river immediately above the dam, for the purpose of conveying water for irrigating their lands lying farther down the river. Kreichbaum succeeded to the interest of Gile, Davis to the interest of Bethke, and Davis, Archer, and Cooley, each also acquired certain interests from Kreichbaum. From 1899 to the present time the dam and ditch have been used continuously by the plaintiffs during every irrigation season, except as hereinafter mentioned. For convenience the dam and ditch are marked on the map "Archer Dam and Ditch." The dam, the head of the ditch, the point where the line of railway crosses the original channel, at the initial letter "M," and all the territory at and to the left of these points and below the north line of the right of way, is on the S. E. $\frac{1}{4}$ of

Paul Railway Company came to construct its line of road through this state, it purchased by deed from Bachman a strip of land for right of way purposes, 100 feet in width, and, at the point illustrated by the map, an additional strip 200 feet wide, for the purpose of changing the channel of the Musselshell river. The deed from Bachman and wife to the railway company, in addition to conveying these strips of land, particularly authorizes the company to change the channel of the river at this point, and releases it from any and all claims for damages on account of such change. The deed requires the company to make some practical arrangement for taking water for irrigation purposes across the right of way, requires the company to make one grade crossing, and, if it could be done in a practical manner, to make an underground passageway for stock at a slough. The location of this slough is not fixed either in the deed or by the evidence. Upon one of the maps used upon the trial the location of a slough is indicated some distance west of the points mentioned above, and doubtless this is the slough to which reference is made in the deed. After making certain provisions for the use of snow fences

by the railway company, the deed continues: "And said parties of the first part [Bachman and wife], for themselves and for their heirs and assigns, covenant and agree that said grant is upon no other consideration than that named herein; that neither said party of the second part [railway company] nor its agents have made any agreement, promise, or condition, verbal or written, for or relating to any crossing, passageway, or other privilege over, across, or under said railway; and that the right thereto shall be only that conferred by statute, or by an instrument in writing under the corporate seal of the party of the second part. And said party of the first part hereby releases all damages and claims thereto to all its other lands by reason of the location, construction, and operation of a railway over and upon said premises, hereby conveyed." Having secured this conveyance, the railway company excavated a new channel for the Musselshell river, as indicated on the map, and then constructed a solid grade embankment, about seven feet high, across the old channel at the point "M," and across the low land immediately adjacent thereto. The company also constructed an irrigation ditch, marked on the map "Railroad Ditch," tapping the west bank of the river some distance above plaintiffs' dam, and thence running in a northerly direction, substantially parallel with, and but a short distance from, the west bank of the river, to the railway grade and passing through the grade by means of a box flume. Prior to June, 1908, the location of the west bank of the river is represented on the map by the dotted line between points "A" and "B." Parallel with, and a short distance from, the west bank of the river as it was before the channel was changed, was a considerable area of land lower than the bank of the river itself, indicated on the map as "Low Land." During the period of high water, which occurred every spring, the water which overflowed the west bank of the river would flow over this low land and return to the main channel some distance below. After the railway company constructed its grade across the low land and across the old channel, the water was confined between this solid embankment and the bluff on the east and south sides of the new channel. During the high-water season in the early part of June, 1908, the west bank of the river at the dam and above and below it for some distance was overflowed, the embankment between the west bank and the railroad ditch completely cut out down to the level of the river bed, the west bank of the river given the new position indicated on the map, and the plaintiffs' dam left as an obstruction to little more than one-half of this new channel, and wholly useless as a means of raising the water in the river so that it would flow through the Archer ditch. In order to repair the damage, it was necessary for plaintiffs to

extend the dam westward to the new bank a distance of about 90 feet (the new portion of the dam is indicated on the map as the "Extension"), and this was done at a necessary expense of \$1,727.23. Plaintiffs thereupon brought this action against the railway company to recover that amount. There is also a second cause of action set forth in the complaint for damages caused to the Archer ditch some distance below the dam; but from the fact that the amount of the verdict is exactly the amount claimed in the first cause of action it seems reasonably certain that the jury disregarded the second cause of action altogether. The briefs of counsel deal with the first cause of action; and hereafter, in speaking of the pleadings, it will be understood that reference is made to the issues arising upon the first cause of action only.

The wrongful acts of the railway company which are said to have caused the injury to plaintiffs' dam are (a) constructing the solid grade embankment over and across the old channel and the low land, thereby preventing the flood waters from spreading over the low lands as they had theretofore done; and (b) constructing the railroad ditch so close to the west bank of the river, and failing to place in the ditch, at the point where it taps the river, a headgate to control the amount of water diverted by the ditch. It is said that because of these alleged wrongful acts the west bank of the river was washed away from the west end of the dam, resulting in the injury to plaintiffs, for which compensation is demanded. The cause, being at issue, was tried to the court sitting with a jury. At the conclusion of the evidence, counsel for defendant railway company moved the court for a directed verdict for defendant, upon the ground that the dam and head of the Archer ditch were shown to have been constructed and maintained by the plaintiffs upon the land of Bachman under a mere parol license, which had been revoked by the deed from Bachman and wife to the railway company. This motion was denied, the cause submitted to the jury, and a verdict returned in favor of the plaintiffs for the amount claimed in the first cause of action. The defendant moved for a new trial, and this motion was granted in an order in which the court gives the reason for its ruling. The reason is the same as that specified as the ground of defendant's motion for a directed verdict. From the order granting a new trial the plaintiffs appealed. Two questions are presented for solution: (1) Did the right of plaintiffs to the use of Bachman's land for their dam and the head of their ditch rest merely in parol license, revocable at the will of Bachman; and (2), if the right amounted only to such license, was it revoked by the deed from Bachman and wife to the railway company?

1. When the Archer dam and ditch were

constructed on Bachman's land, there was not any agreement made between the parties. Bachman's consent was not asked; but he knew of plaintiffs' operations, made no objections, and gave them permission to take from his adjacent land brush, rock, and earth for the construction of the dam. Under these circumstances, it is urged by appellants that Bachman lost his right to maintain against the plaintiffs either trespass or ejectment, and that his only right, if any, was a right to maintain an action for damages. If the only claim which Bachman could assert against the plaintiffs was one for damages, then we agree with counsel for plaintiffs that such right was personal to Bachman, and did not pass to his grantee, the railway company, by virtue of the deed. But the extent of Bachman's right depends upon the character of plaintiffs' interest at the dam and head of the ditch. It cannot be questioned that at its inception the right of plaintiffs was merely a license resting in parol, a license not coupled with an interest, and for which there was not any consideration whatever paid. There are two classes of cases sustaining appellants' contention. The first proceeds upon the theory that when the licensee expends large sums of money in making the improvement, and such expenditure is made without opposition by the licensor, the license becomes executed and irrevocable; that, in fact, what was in its inception a license becomes in reality a grant. Typical of this class of cases is *Rerick v. Kern*, 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497, decided in 1826. The other class proceeds upon the theory of estoppel in pais; that, by standing by without making objection and permitting the improvement to be made and large sums of money to be expended, the landowner is estopped to maintain ejectment or to have an injunction. A leading case of this character is *Goodin v. Cincinnati & White Water C. Co.*, 18 Ohio St. 169, 98 Am. Dec. 95, decided in 1868. By the second class it is held that the landowner's only remedy is an action for damages for the injury to his property. The doctrine of the Pennsylvania court has been adopted in some other states. In *Roberts v. Northern Pacific R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873, decided in 1895, the doctrine announced by the second class of cases is asserted, though the decision of the Ohio court is not mentioned. The *Roberts* Case has been followed in *New York City v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820, and in *United States v. Lynah*, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539, and by some state and other courts. That the doctrine of each of these classes of cases was well recognized long prior to 1898 is sufficiently evidenced by the many decisions upon the subject extant at that time. In *Great Falls Waterworks Co. v. Great Northern Ry. Co. et al.*, 21 Mont. 487, 54 Pac. 903, decided in 1898,

the same contentions were made that are now urged upon our attention. Particular emphasis is laid by appellants upon the fact that, while the *Roberts* Case above was decided more than three years prior to the *Great Falls* Case, it was not called to the attention of this court, and we are now asked to reconsider the questions decided. But, while it is true that the case of *Roberts v. Railroad Company* was not considered by this court, the principle of that case received very thorough attention, and the Pennsylvania and Ohio cases above, and many others supporting the doctrine announced in each of them, were relied upon by the waterworks company, and considered by this court. It was then recognized that the authorities are in conflict upon the subject, but, after a painstaking review, this court announced its conclusion as follows: "Now, the sequence of the rule that an easement can only be created by deed is that a license which merely renders lawful an entry which otherwise would be unlawful cannot, except by prescription—which is equivalent to a deed—become an absolute right in property without practically doing away with the statute of frauds, and completely overturning the common-law rule, as pointed out by Baron Alderson in *Wood v. Leadbitter*, 13 M. & W. 838, 16 Eng. Ruling Cas. 49. *Browne*, Statute of Frauds, § 29. An extended examination of cases bearing upon the doctrine of the revocability of parol licenses has impressed upon us the belief that the sound, the logical, as well as the safe, reasoning, sustains the rule that a parol license of the character of the one under consideration is always revocable at the pleasure of the licensor, so far as any further enjoyment of the privilege extended goes. *Freeman's* note to *Lawrence v. Springer*, 31 Am. St. Rep. 715. Modern text-writers, deducing principles from the more recent opinions of the courts, have taken this view of the subject; and to give that security to titles so essentially important in affording protection against flaws, and burdens not imposed by writing, but resting upon verbal permissions or agreements, it is well settled that the doctrine of estoppel is inapplicable, 'inasmuch as the licensee is bound to know that his license was revocable, and that in incurring expense he acted at his own risk and peril.' The principle of the *Great Falls* Case was again asserted by this court in *Prentice v. McKay*, 33 Mont. 114, 98 Pac. 1081; and now, after further consideration, we are thoroughly convinced of the correctness of this court's decision in each of the two cases cited above. As a further ground of argument in favor of invoking against Bachman the doctrine of estoppel in pais, it is urged by appellants that, under the Constitution and laws of this state, they could have acquired their dam site and the right of way for their ditch by condemnation proceedings; but that ques-

tion was likewise considered in the Great Falls Case. We are unable to see wherein the fact adds anything to the character of plaintiffs' right. They were upon Bachman's land under a mere parol license or they owned a servitude upon his land. As was observed in the beginning, at its initiation plaintiffs' right rested merely in a parol license, and under the authority of this court, in the cases cited above, that right was not augmented by anything done by the parties thereafter, so far as this record discloses. The authorities supporting the decision in the Great Falls Case are collected at length in 25 Cyc. 648.

2. Having reached the conclusion that the right of plaintiffs upon Bachman's land rested in a mere parol license, revocable at the will of the licensor, we are brought to a consideration of the second question, viz.: Was that license revoked by Bachman? "A license may be revoked by obstructing the land licensed to be used, but an appropriation of the land to any use inconsistent with the enjoyment of the license works a revocation." 25 Cyc. 651; *Prentice v. McKay*, above. And again: "Where the licensee has movable property on the premises, he should be given reasonable notice of a revocation of the license and an opportunity to remove it. But, where the termination of the license necessitates no removal of property, no notice is necessary." 25 Cyc. 652. These plaintiffs did not have any removable property upon Bachman's land, and notice of revocation was therefore not necessary. Under the grant in the deed from Bachman and wife to the railway company, the company was authorized (a) to change the channel of Musselshell river; (b) to construct its grade embankment along the right of way over the old river channel and across the low land adjacent; and (c) to construct the railroad ditch. There was not any limitation imposed as to the manner of the use of the lands granted, except that the railway company was to provide some practical method for conveying water for irrigation purposes across its right of way, and, in the absence of any evidence to the contrary, we must assume that the railroad ditch with its flume fully met that requirement to the satisfaction of Bachman, for whose benefit it was imposed. The right of the company to construct the ditch in the manner in which it was constructed cannot be questioned. It was excavated upon Bachman's land, with Bachman's consent, and of itself the ditch did not interfere in any manner with whatever right the plaintiffs had. Furthermore, the provision of the deed for the construction of this ditch leaves it discretionary with the railway company to construct it in any manner, at least in any manner satisfactory to Bachman, and, so far as his record goes, the ditch as constructed appears to have met Bachman's approval. The deed also required the company to make a grade crossing; but that would not affect this

case in any particular, and the evidence does not disclose whether it was or was not made. There is also the requirement that the company should construct an underground passageway for live stock at the slough, if it could be done in a practical manner, but we are not informed by this record whether that requirement was or was not fulfilled; in fact, the location of the slough is not identified. Neither is there anything to indicate that, if such passageway was not constructed, it was practical to provide for it.

It is plain from this record that plaintiffs' injury arose as the natural consequence of the building and maintenance of the solid grade embankment across the old channel at the initial letter "M" and over the low land immediately adjacent thereto. Such building and maintenance of the grade is not at all inconsistent with the grant contained in the deed, and in thus building the railway company was apparently proceeding in a manner best calculated to secure the safety of the traffic which would be moved over the road, as it was its duty to do. *State v. District Court*, 34 Mont. 535, 88 Pac. 44, 115 Am. St. Rep. 540. Furthermore, the deed does provide: "That neither said party of the second part [railway company] nor its agents have made any agreement, promise, or condition, verbal or written, for or relating to any crossing, passageway, or other privilege over, across, or under said railway; and that the right thereto shall be only that conferred by statute, or by an instrument in writing under the corporate seal of the party of the second part." This is in effect a direct grant to the railway company to construct a solid grade embankment, except for the box flume and the underground passageway for live stock; and we must therefore assume that the railway company carried into execution the plan in contemplation by both parties to the deed at the time of its execution. Now, if the construction and maintenance of the railroad grade as it was built and maintained in the ordinary course of events so far interfered with the right of plaintiffs to maintain their dam and the head of their ditch as that damage would naturally result therefrom, then it must follow that, since the parties to the deed contemplated the use of the right of way as it was actually used, both Bachman and the railway company intended that any further use by the plaintiffs of their dam and ditch would be wholly at their own risk. Any injury which might result would be comprehended by the terms "damnum absque injuria." That the injury to plaintiffs was the natural result of the use to which the railway company put the right of way is demonstrated by this record. It is perfectly apparent that a like injury every year during the high-water period can only be effectually avoided by substituting trestlework for the solid embankment across the old channel and the low land; and there is not anything in the record to justify a court in imposing that bur-

den upon the company, particularly in view of the grant contained in the deed, even assuming that the trestlework would be equally safe and as well adapted to the company's use.

There is a suggestion in appellants' brief that, in order to raise the question of the character of plaintiffs' right, the defendant should have pleaded it; but it is a sufficient answer here to say that the evidence touching such right was admitted without objection and will be given the same consideration on appeal as though it was fully warranted by the pleadings. *Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994; *O'Brien v. Corra-Rock Island Min. Co.*, 40 Mont. —, 105 Pac. 724.

The trial court held "that the plaintiffs were mere licensees in the construction of the ditch and dam in question; that their license was revocable; that the conveyance from Bachman to the defendant was a revocation of such license; that, therefore, defendant cannot be held for damages in this action; and that its motion for a directed verdict on the above grounds should have been granted." We agree with this view so far as it relates to the first cause of action, and, since that cause of action is now finally disposed of, judgment in favor of the defendant thereon should be entered.

The order granting a new trial is affirmed. Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

(41 Mont. 72)

MURPHY et al. v. COOPER.

(Supreme Court of Montana. April 2, 1910.)

1. APPEAL AND ERROR (§ 1002*)—REVIEW—VERDICT—CONCLUSIVENESS.

Where there is a substantial conflict in the testimony, the verdict will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3935; Dec. Dig. § 1002.*]

2. EVIDENCE (§ 96*) — BURDEN OF PROOF — COUNTERCLAIM.

An owner of land who, in a suit for services in cutting timber thereon, sets up a counterclaim for the amount he paid to the government for trespass committed by the employé in cutting timber on government land, has the burden of proving the counterclaim.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 120; Dec. Dig. § 96.*]

3. LOGS AND LOGGING (§ 8*)—CUTTING TIMBER—CONTRACTS—ACTION—EVIDENCE.

In an action for services in cutting timber on the land of defendant, evidence held to show that plaintiff, who was ordered to confine his operations to the land of defendant, trespassed on the land of the government, and that defendant paid damages to the government therefor.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 8.*]

4. APPEAL AND ERROR (§ 839*) — REVIEW — MATTERS CONSIDERED.

The court on appeal will confine itself strictly to the case presented to it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3279; Dec. Dig. § 839.*]

On Motion for Rehearing.

5. APPEAL AND ERROR (§ 832*)—REHEARING—REVIEW—QUESTIONS RAISED CONSIDERED.

The question of the sufficiency of the counterclaim cannot be raised for the first time on the motion for rehearing.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3221; Dec. Dig. § 832.*]

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

Action by J. T. Murphy and another, co-partners, doing business under the firm name and style of Murphy & Ryan, against Walter Cooper. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

George Y. Patten, for appellant. George D. Pease, for respondents.

SMITH, J. This is an appeal from a judgment in favor of the plaintiffs and from an order of the district court of Gallatin county, overruling the defendant's motion for a new trial.

The action was brought to recover the sum of \$2,235.40 as a balance alleged to be due on an account for work, labor, and services performed by plaintiffs in cutting, hauling, and delivering railroad ties and other timber, in Bear Canyon, Gallatin county, for the defendant between November 1, 1905, and August 1, 1908. The answer admits the allegations of the complaint and that the amount claimed by the plaintiffs is due them; but it is asserted that the sum of \$1,872.30 should be deducted therefrom by way of counterclaim. For such counterclaim defendant alleges that on or about September 24, 1906, the parties entered into an oral contract, by the terms of which plaintiffs were to cut for him all the railroad ties which could be made from the timber on certain lands belonging to him in sections 16, 17, 20, and 28, township 3 south, range 7 east, Bear Canyon, in Gallatin county, for which he was to pay them 30 cents for No. 1 ties, 18 cents for No. 2 ties, and 6½ cents per stick for lath timber, to be made from the tops of the tie timber; that pursuant thereto plaintiffs cut a large quantity of timber between September 24, 1906, and April 1, 1908, and, while so engaged, the plaintiffs wilfully and negligently, in the course of such cutting, entered upon certain lands belonging to the United States, in sections 8, 9, 17, 21, and 28, in the same township and range, and there cut, in trespass, certain timber, for which the defendant was

compelled to, and did, pay to the federal government the sum of \$1,250.10; that they left upon the ground certain brush, slashings, and refuse; that the defendant has been compelled to give to the government of the United States a bond in the sum of \$300, as a guaranty that he will clear up such brush, slashings, and refuse; that the same will cost him about \$120.20; that, further, by reason of said trespass he was required to and did expend the sum of \$500 for surveys in re-establishing his lines, and in settling such trespass. He further alleges that he notified the plaintiffs of the claims made by the officers of the United States on account of such trespass, and of the fact that he would be compelled to pay the same, and that he would charge the amounts thereof to them and deduct them from the sum due them under the contract, to which they assented. In their replication plaintiffs admit that they entered into the contract, but they allege that according to its terms the ties and timber were to be cut by them on lands designated by defendant; that no particular lands were designated by him at the time the agreement was entered into, but it was understood and agreed that the defendant was to survey and designate on the ground the lands from which the timber was to be cut, from time to time, as plaintiffs were ready to cut the same. They deny that they cut any timber from government lands, but allege that, if they did so, it was on account of the fact that such timber was designated by defendant. They deny any knowledge or information sufficient to form a belief as to whether the defendant has been compelled to pay any moneys to the United States government, and they deny positively that they ever assented to any settlement between defendant and the United States, or that any amount should be charged to them. The cause was tried to the court sitting with a jury. A general verdict was returned in favor of the plaintiffs for the full amount claimed by them, upon which verdict judgment was entered.

It is contended: (1) That the court erred in admitting and rejecting certain testimony; and (2) that the evidence is insufficient to justify the verdict. There are 35 specifications and assignments of error found in appellant's brief, but they have all been grouped under the two general contentions noted above. We shall first consider the second assignment, and will remark, in passing, that this was peculiarly a case wherein special findings would have greatly simplified the work of the district court, as well as of this court, and would have removed a certain element of uncertainty which has occasioned some embarrassment and much extra research and consideration of the testimony found in the record.

Walter Cooper testified that the contract was made in his private office between him-

self and Murphy; that in the course of the conversation Murphy said that he was perfectly familiar with the lines of defendant's lands; that they had a blueprint and a compass; that Murphy was told they must adhere to the lines of defendant's land, because the price was such that he could not afford to pay a man to direct them, whereupon Murphy said that they were old tie-makers, and as such were familiar with the compass and with running lines, and were perfectly able to look after that part of it; that it was understood they were to cut from defendant's lands; that he told Murphy that, if they could not keep within the lines, he would not enter into the agreement, because there was "nothing in it." He also testified that, when the government officials called his attention to the fact that timber had been cut in trespass, he had several conversations with plaintiffs, told them where the trespasses complained of were alleged to have been committed, and they said they had cut the timber there. He said: "I told them this would have to be paid for, and I told them I was in a position where I had no option in the matter. I told them I must pay, as having received this property without having knowledge of its having been taken from government lands. They did not have very much to say about it. They did not object. They said they supposed it had to be paid for. * * * A portion of this material that the government alleged had been cut in trespass was yet in the timber and had not been delivered. * * * They asked me to see Mr. Conkling, who had control of the forest operations, and see if he wouldn't let them deliver the balance of the timber so that they could get the benefit of the hauling. This I did, and Mr. Conkling said it was all right for them to go and deliver the timber on the flume. We said we would charge them whatever we had to pay the government, less the hauling. This agreement seemed to be satisfactory to them. We have paid the government the amounts claimed by it for those different trespasses. * * * I made a memorandum at the time of the contract with Murphy, as follows: 'Bozeman, Sept. 24, 1906. Made contract with Murphy & Ryan to-day to make and deliver on my flume all railroad ties that can be made from timber found on my land, situated in sections 16, 17, 20 & 28, as shown by blueprint of same in 3 S. 7 E. Bear Canyon, for which I agree to pay 30c each for No. 1 ties and 18c for No. 2 ties; for lath timber made from tops 6½c per stick, for sticks 4½ in. to 8 in. in diameter at top and 8 ft. long, delivered on flume, and received and inspected from time to time as delivered. Agreement with Jack Murphy. Walter Cooper.' Says no ties on 17."

George Bramble testified: "Murphy said to me, 'We got over the lines—cut timber

over the lines.' I says, 'Aren't you afraid to go in there and making trouble of it?' He says, 'No, it will only cause the old man (meaning Cooper) to pay stumpage.' I says, 'The timber isn't very good, is it?' He says, 'Yes, the timber is fine.'" Murphy denied having such conversation.

J. W. Freeman, United States district attorney, testified that he had compelled Cooper to pay for the timber cut in trespass.

H. W. Trask testified that he was bookkeeper and confidential man for Mr. Cooper. He said: "I had charge of the business in Bear Canyon. I was able to go once or twice a month and look over the various work personally. I had been assured at all times by both Murphy and Ryan that they knew where Mr. Cooper's lines were and had run them. * * * They had given me to understand that they had better knowledge than anybody else. The question of the locality of their cutting with reference to their general work was discussed frequently. * * * I have had conversations with them as to what timber was comprehended under the contract, to the effect that they were to cut strictly within the lines of Mr. Cooper's lines, * * * and I have asked both Murphy and Ryan as to whether or not they were cutting within Mr. Cooper's lines, and they both assured me they were. They had a blueprint or map of Mr. Cooper's lands and also a standard make of surveyor's compass. I saw one of their men making ties off of Mr. Cooper's land, and they told me they would move him off right away. Neither of the plaintiffs at any time made any objection to a settlement of those trespasses; nor did they at any time make any dispute or deny their commission of the trespasses."

David T. Conkling testified: "I am in charge of the Gallatin Forest. I had a conversation with Ryan, and he told me they cut so much stuff from government land because they were looking for the best timber they could find. In the conversation that I had with them neither of the plaintiffs ever made any denial of the fact that they had committed these trespasses, * * * although I never had a positive admission from them that they did the cutting. It was a generally understood fact, and no denials were made by them. * * * I asked Murphy if he was furnished a blueprint, and he told me he had one. * * * The lines referred to were imaginary lines and were hard to find."

John T. Murphy, one of the plaintiffs, gave the following version of what took place between himself and Mr. Cooper at the time the contract was made: "I told Mr. Cooper I had been up in Bear Canyon, what I saw, and we discussed prices, and finally he told me to go ahead and go to work in that country, and he also promised me the timber on section 21. I insisted on that timber, and he

agreed to keep it for me, because there was timber on that section handy to the flume. We were to cut in cull timber. * * * No memorandum was made by Mr. Cooper or anybody at that time. I didn't tell him we were familiar with his lands. I told him I knew where I had been working for five years up to that date. I had worked there for him before on this same cull timber, except in section 28. I wasn't familiar with the lines with reference to this cull timber. He didn't furnish me with any blueprint or compass at that time. There was a blueprint left with my wife at camp, but I didn't know when it was left there. Mr. Cooper didn't tell me that if we couldn't cut within the lines he didn't want us to cut at all. There were no lines up there blazed out that we could go by. We never admitted to Mr. Cooper that he could charge any sum against us for any alleged trespass. I never at any time consented that those charges be made against me and Mr. Ryan. The first time I came to town I told Mr. Cooper I didn't think I ought to pay a cent and didn't know I had to pay. * * * It was agreed we were to cut on 28, also on 21. As to whether it was my understanding that our cutting was to be confined to 21 and 28, I will say it was to be there and in other places where we could find timber. He wanted us to clean 21 and 28 up that winter, and afterwards other places we could find timber. We could work and clean that upper country up that winter. Q. And so the agreement was that you could work wherever you found timber, and the agreement was that you could cut on 21 and 28 and other places after you finished that? A. No, we were to cut— Q. What did he say with reference to that, with regard to other timber? A. There was no contract at all. Q. So the contract was simply to cut timber on 21 and 27 [28]? A. Those were the places mentioned. Q. And that was the extent of the contract, was it? A. We had men working at the time, and he didn't say what to do with them, and I told him we would move them up as soon as we could. Q. You had a contract on September 24, 1906? A. Yes, sir. Q. What was said at that time? A. Nothing, only I was to get the price for ties. Q. I am asking you as to the place. Was there any agreement that you were to cut elsewhere than on sections 21 and 28, at that time? A. I don't know as there was. Q. Will you say there was not? A. No, I won't say. I won't say that I remember whether there was or not. Q. You remember the agreement you had at that time? A. I know the prices. Q. Was that all you were concerned in? A. I know I was to work on 28, and I was to have 21. Q. I am asking you as to the agreement. A. I told Mr. Cooper unless I could have this timber on 21 I didn't want any. Q. We have disposed of 21.

You said the contract was you were to cut on 21 and 28. A. And I was to build a camp on 28. Q. So far as you can recall, there was no other agreement with reference to cutting timber besides on sections 21 and 28 at that time? A. There may have been. Q. You say there was or was not? A. I don't say either way. Q. You have no recollection of anything of that kind? A. Not positive. That is all I can tell with reference to the contract at that time as to the places where the timber was to be cut. * * * I don't remember anything said by him about cutting within the lines at that time. * * * He didn't tell me he had had previous trouble with trespass matters. I believe he also said he wanted us to be careful and keep within the lines. * * * Nothing was said with reference to our keeping in the lines, but I think he said he had had trouble on the West Gallatin. As to whether he warned me to keep within the lines and avoid trespass, I will say that I told him that I knew the lines. I knew where the lines were on one corner. I supposed I knew where the ground was, but not where the lines were. As to how I knew where the lines were, I will say that it was because I worked for him on the same ground for four or five years. I kept within the lines of the slashings. I didn't go beyond where other people were working, and that was the theory I was going on with Mr. Trask and Mr. Cooper, and on 28 my knowledge of Mr. Cooper's lands I had none, and in that proposition to Mr. Cooper or Mr. Trask I had none until after the survey made by Mr. Robertson. I never said to Mr. Cooper or Mr. Trask that I knew where the lines were. * * * I think it is true that these trespasses that were testified to by Mr. Trask, Mr. Cooper, Mr. Conkling, and Mr. Hayes were the lands our men cut upon. It is not a fact that I stated to Mr. Conkling that we cut beyond Mr. Cooper's lines and on government land because we wanted good timber. * * * I had every reason to think that the ground belonged to Mr. Cooper, and I told Mr. Trask so, and that I wasn't going to stand for it. * * * All of the ties cut in trespass were cut by us and our men mostly, and the tie cutting that was done on sections 16, 17, 20, 21, and 28, after the contract was entered into, was done by us and our men, with the exception of some mine ties Mr. Trask had made."

J. W. Ryan, one of the plaintiffs, testified: "The reason we cut on government land was that there was no way of telling where we were working. They were supposed to be their lands. We never found any lines there to show us. * * * A blueprint came in there, I guess it was shortly prior to the time this contract was made." In answer to the question, "Did you commit these trespasses on the ground in question?" he answered, "We done this cutting alleged to have been

in trespass which was charged against Mr Cooper, except a small portion of it."

We think it altogether unreasonable to suppose, in view of the foregoing testimony, that the jury could have found that the timber cut in trespass, for which Cooper was obliged to pay, was not cut by plaintiffs and their men. Both plaintiffs virtually confessed that the greater portion of it was cut by them. So that, in order to arrive at the conclusion that they were entitled to a verdict for the full amount of their claim, the jury must have found that they did not undertake to cut within the lines of Cooper's lands, as known to them. Cooper testified positively that Murphy did so agree. Bramble said that Murphy spoke of getting over the lines. Trask's evidence was to the effect that both of the plaintiffs told him that, by the terms of the contract, they were to cut strictly within Mr. Cooper's lines; and Conkling testified that Ryan said that they cut so much stuff from government lands because they were looking for the best timber they could find. We may assume that this testimony is all contradicted. The question for decision is, however: What were the terms of the contract between Cooper and Murphy? We have Cooper's version. No third person was present. What does Murphy say about it? If there is a substantial conflict in the testimony of these two parties, the verdict of the jury must remain undisturbed. Let us first look to the allegations of the verified replication. We find it there alleged that "the said timber [was] to be cut from such lands as should be designated from time to time by the defendant." And again: "These plaintiffs allege that according to their said agreement such ties and timber were to be cut by plaintiffs on lands designated by the defendant, but no particular sections or lands were designated or described by the defendant at the time said agreement was entered into, but it was understood and agreed that the defendant was to survey and designate on the grounds the lands from which said timber was to be cut from time to time as the plaintiffs were ready to cut the same, and all of said timber so cut by the plaintiffs was to be received and inspected from time to time as delivered on said flume, and these plaintiffs deny that the agreement was otherwise than above stated by them." And again: "Plaintiffs allege that if they ever cut any timber of any kind or description from any government lands that they were not at fault in so doing, and that the same was cut by them because such timber was designated by the defendant to be so cut by them." There is no testimony whatsoever to substantiate these allegations. Murphy's narration of the transaction contains no intimation that Cooper agreed to designate the lands from time to time during the progress of cutting. The record discloses the fact that Cooper owned lands in sections 21 and

28. Murphy's testimony seems to indicate an anxiety to be allowed to cut on section 21, and he says it was finally agreed that they should cut on sections 21 and 28. We have no doubt that, if the contract contained no other provisions, it should be interpreted as confining the plaintiffs' operations to these two sections of land. But Murphy testified that, according to the terms of the contract, they were to cut on sections 21 and 28 "and in other places where we could find timber." It then became very material to ascertain where, according to the contract, those other places were. He testified that they were not to work wherever they found timber, after they finished cutting sections 21 and 28. And this testimony was followed by his declaration that there was "no contract at all" with regard to other timber, and that the places mentioned were sections 21 and 28. Finally, in answer to the direct inquiry as to what was said at the time the contract was made, he said, "Nothing, only I was to get the price for ties," and he finished his testimony on this branch of the case by stating that he did not know, "as there was any agreement" that they were to cut elsewhere than on sections 21 and 28; that he did not remember whether there was or not; that there may have been some other agreement with reference to cutting elsewhere; that he would not say either way; and that he had no positive recollection of anything of that kind. Thereupon he limited the terms of the contract strictly to sections 21 and 28, by saying that he could tell nothing more with reference to the places where the timber was to be cut.

Viewing this testimony in its most favorable light, and bearing in mind that the burden of proof rested upon the defendant, it not only fails to prove the affirmative allegations of the replication, but in our judgment substantially corroborates the testimony of the defendant himself. The latter's motion for a directed verdict should have been sustained.

We recognize the difficulty of the plaintiff Murphy's position. It appears that he was unable to substantiate the allegations of his replication, quoted above, and he was therefore left in a situation where he must either confess that he was to cut within the lines of the defendant's lands, or that he agreed to cut timber belonging to the government of the United States. It seems unnecessary to comment upon the apparent contradictions in other parts of his testimony. Neither is it necessary, as it seems to us, to discuss other specifications of error found in the brief of counsel.

In deciding this appeal we have confined ourselves strictly to the case presented to this court. This we believe to be the proper course for an appellate court to pursue. It is not to be understood, however, that the

decision establishes the precedent that the correct theory of the relative rights and obligations of the parties was adopted in the court below. We have not considered that question.

The judgment of the district court and the order denying a new trial are reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

On Motion for Rehearing.

SMITH, J. Respondents' counsel claim that the court overlooked the question whether the appellant's counterclaim states facts sufficient to constitute a cause of action. In view of what is said in the last paragraph of the foregoing opinion, we do not think the learned counsel can consistently claim that it was the court which overlooked the question. We do not decide that the counterclaim is insufficient. It is too late to raise that question for the first time on motion for a rehearing.

Rehearing denied.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(41 Mont. 100)

STATE ex rel. ROSENSTEIN v. DISTRICT COURT OF SECOND JUDICIAL DIST. OF SILVER BOW COUNTY et al.

(Supreme Court of Montana. April 4, 1910.)

1. JUSTICES OF THE PEACE (§ 140*)—APPEAL—COMPLIANCE WITH STATUTORY REGULATIONS.

In cases of appeal from justices' courts, which by Const. art. 8, § 23, are subject to statutory regulation, there must be at least substantial compliance with the statute to confer jurisdiction on the appellate court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 466; Dec. Dig. § 140.*]

2. JUSTICES OF THE PEACE (§ 160*)—APPEAL—NOTICE—PURPOSE.

The first purpose of a notice of appeal pursuant to Rev. Codes, § 7121, is to clothe the appellate court with jurisdiction of the cause, for the appeal is taken by filing and serving the notice, and the second is to inform the adverse party to removal of the cause, so that he may have his day in the appellate court to maintain his rights.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 579; Dec. Dig. § 160.*]

3. JUSTICES OF THE PEACE (§ 160*)—APPEAL—NOTICE—REQUISITES.

A notice of appeal required by Rev. Codes, § 7121, which is silent as to the contents or form thereof, must inform the adverse party of the particular judgment or order from which the appeal is taken, and so should describe it by reference to the court which rendered it, to the parties, and to the date, amount, or character of it, as to identify it, or with resort to other extrinsic evidence.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 587; Dec. Dig. § 160.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. APPEAL AND ERROR (§ 419*)—NOTICE OF APPEAL—REQUISITES.

The object of a notice of appeal is accomplished when the appellate court can ascertain from inspection thereof what particular judgment appellant complains of.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2145, 2146; Dec. Dig. § 419.*]

5. JUSTICES OF THE PEACE (§ 160*)—APPEAL—NOTICE—INSUFFICIENCY.

Where a notice of appeal does not state the nature or amount of the judgment, and states the date of the judgment as "the — day of September, 1909," it cannot be ascertained from inspection thereof, without resort to extrinsic evidence, whether or not the judgment referred to is the one shown by the copy of the justice's docket filed in district court, and is insufficient.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 587; Dec. Dig. § 160.*]

Application for prohibition by the State, on the relation of H. D. Rosenstein, against the District Court in and for Silver Bow County and Jeremiah J. Lynch, judge thereof. Motion to quash the alternative writ denied, and a peremptory writ ordered to issue.

Mackel & Meyer, for relator. Veazey & Veazey and E. L. Bishop, for respondents.

BRANTLY, C. J. Original application for writ of prohibition. On September 13, 1909, the relator brought his action in a justice's court in Silver Bow county to recover of the Great Northern Railway Company damages in the sum of \$299. The railway company appeared to defend the action, and thereupon, after a trial, on October 5th, judgment was rendered and entered in favor of the relator for the amount demanded and for costs, taxed at \$9. The railway company, desiring to appeal to the district court, caused to be filed with the justice, and served upon the relator, the following notice: "In the Justice's Court of Silver Bow Township, before Henry Foley, Justice of the Peace. H. D. Rosenstein, Plaintiff, v. Great Northern Railway Company, a Corporation, Defendant. Notice of Appeal. The State of Montana, County of Silver Bow—ss.: You will please take notice that the defendant in the above-entitled action hereby appeals to the district court of the Second judicial district in and for the county of Silver Bow from the judgment therein made and entered in the said justice's court on the — day of September, 1909, in favor of said plaintiff and against said defendant and from the whole thereof. Dated October 5th, 1909." On October 8th the justice transmitted to the clerk of the district court a copy of his docket, together with the papers filed in the action, and they were filed with the clerk in his office on that day. Thereupon the relator, appearing specially and for that purpose only, moved the court to dismiss the appeal, on the ground of insufficiency of the

notice to give the court jurisdiction. The motion having been denied, this proceeding was instituted to restrain the court from proceeding to trial and judgment. The respondents have moved to quash the alternative writ and dismiss the proceeding on the ground that the facts stated in the affidavit do not warrant the relief sought. The application is submitted for determination upon the one question, to wit: Is the notice of appeal, which incorrectly states the date of the judgment and wholly fails to designate the amount of it or describe it otherwise than by naming the court and the parties, sufficient to confer jurisdiction upon the appellate court?

Appeals from justices' courts to the district courts are allowed in all cases in such manner and under such regulations as may be prescribed by law. Const. art. 8, § 23. Section 7121, Rev. Codes, provides: "The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party or his attorney." The provision touching appeals from the district courts to the Supreme Court is substantially the same. Rev. Codes, § 7100. It will be noted that these provisions are silent as to the contents or form of the notice required; so that, while appeals are subject to statutory regulation, with which there must be at least a substantial compliance in order to confer jurisdiction upon the appellate court (*Territory v. Hanna*, 5 Mont. 246, 5 Pac. 250; *State v. Northrup*, 18 Mont. 522, 35 Pac. 228; *State v. Malish*, 15 Mont. 506, 39 Pac. 739; *Hines v. Carl*, 22 Mont. 501, 57 Pac. 88; *Creek v. Bozeman Water Works*, 22 Mont. 327, 56 Pac. 362), we must consider what the office of the notice is, and by resort to general rules of law ascertain what the contents of it must be. The first purpose of it is to clothe the appellate court with jurisdiction of the cause for trial or for review, as the case may be; for the appeal is taken by filing and serving the notice, though it is ineffectual for any purpose unless the required undertaking be filed. Rev. Codes, § 7124. The second purpose of it is to convey information to the adverse party that the appellant has removed the cause to the appellate court, so that he may have his day in that court to maintain his rights. It seems obvious therefore, that, to afford him the opportunity to appear, he must be informed of the particular judgment or order from which the appeal is taken, so that he may understand what he is required to meet. This requires that the judgment or order be described by reference to the court which rendered it, to the parties litigant, and to the date and amount or character of it, in terms sufficiently specific to identify it. In other words, the notice performs the office of a summons. In *Sperling v. Calfee*, 7 Mont. 514, 19 Pac. 204, it

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was held that the judgment must be specifically referred to. So in *Steuffen v. Jefferis*, 9 Mont. 66, 22 Pac. 152, it was said: "The order denying a motion for a new trial is one from which an appeal may be taken directly; but a litigant, wishing to appeal from such order, must give notice thereof, and his notice of appeal must direct the attention of the adverse party to the fact that such order will be the subject of review in the appellate court." In the case of *Hall v. Butte Electric Ry. Co.*, 39 Mont. 144, 101 Pac. 965, this court dismissed an appeal because the notice recited a judgment against three defendants, whereas the judgment found in the record was against one defendant only.

The general rule is thus stated in 24 Cyc. p. 689: "A notice of appeal, to be effective, must properly designate the judgment appealed from by a sufficient description to show the applicability of the notice to the judgment, without resort to extrinsic evidence. But the object of a notice of appeal is accomplished when the appellate court can ascertain from an inspection of the notice what particular judgment the appellant complains of." Applying this rule to the notice before us, we find that it does not describe the judgment complained of, either by stating the nature or amount of it or by giving the date of it. It omits the first particular of the description entirely, and states the date in such a way as to make it applicable to any judgment which may have been rendered and entered at any time within 35 days prior to the date at which the judgment complained of was actually rendered. It cannot, therefore be ascertained from an inspection of the notice and without resort to extrinsic evidence whether the judgment referred to is the one shown by the copy of the docket of the justice filed in the district court, or whether reference is made to another, rendered between the same parties at any time within 35 days prior to its date. It wholly fails to identify the judgment. It is therefore insufficient.

Counsel cite many cases in support of their respective contentions in which particular forms of notice are considered. They are in irreconcilable conflict. Some of the courts, as in Oregon, Wisconsin, and Minnesota, hold to the rule of strict construction. *Beck v. Thompson*, 35 Or. 182, 57 Pac. 419, 76 Am. St. Rep. 471; *Atkinson v. Chicago & N. W. R. Co.*, 69 Wis. 362, 34 N. W. 63; *Pettingill v. Donnelly*, 27 Minn. 332, 7 N. W. 360. Others, as in Washington, Nevada, and Iowa, have apparently adopted the rule that extrinsic evidence may be resorted to to supplement and aid the recitals in the notice. *Horell v. California, Or. & W. Ass'n*, 40 Wash. 531, 82 Pac. 889; *Paul v. Cragnas*, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540; *Kennedy v. Rosier*, 71 Iowa, 671, 33

N. W. 227. While we should go far to sustain an appeal when the notice could by any reasonable construction be held to refer to the particular judgment or order, we are not inclined to sustain one where the notice does not furnish the information required, without supplement by reference to extrinsic evidence. The appeal should have been dismissed.

The motion to quash the alternative writ is denied. A peremptory writ is ordered issued as prayed for.

Writ granted.

SMITH and HOLLOWAY, JJ., concur.

(41 Mont. 123)

COLEMAN v. NORTHERN PACIFIC RY. CO.

(Supreme Court of Montana. April 18, 1910.)

NOTARIES (§ 3*)—COMPENSATION.

Where a notary public was employed to take depositions, he could write out the testimony himself or employ a stenographer at whatever compensation might be agreed upon between them, or allow his employer to furnish a stenographer, and while, if he chose either of the first two methods, he would be entitled to the fee for taking and transcribing the testimony fixed by Rev. Codes, § 3165, and for certifying an affidavit, including oath, where he permitted the employer to hire a stenographer, and failed to insist upon his rights, he impliedly consented to the hiring by the employer, and, the stenographer having been paid by the employer, the notary, who merely attached his certificate to each deposition as notary public and swore the witnesses, was entitled only to the fees for such certificates and administration of oaths.

[Ed. Note.—For other cases, see *Notaries*, Dec. Dig. § 3.*]

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Action by John A. Coleman against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Modified, affirmed, and remanded, with directions.

Wm. Wallace, Jr., John G. Brown, and R. F. Gaines, for appellant.

SMITH, J. The complaint in this action alleges that between the 15th and 20th days of December, 1908, the defendant engaged and employed the plaintiff as a notary public to take the depositions of certain witnesses in the case of *Ethel Berry* against the Northern Pacific Railway Company, then pending in the district court of Silver Bow county, which depositions were then and there taken before plaintiff, as notary public, at the instance and request of the defendant, "for which plaintiff was entitled to the sum of \$61.80, fees as provided by the laws of Montana," and by reason of the premises defendant became indebted to plaintiff in the sum mentioned, for which judgment is demanded. The answer was a general denial. The tes-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

timony shows that plaintiff was employed by John G. Brown, Esq., one of the attorneys for the defendant, to take the depositions; that he, as notary public, swore the witnesses; whereupon their testimony was taken in shorthand by one Frank Riley, a stenographer employed by the defendant. After the testimony was transcribed by Riley, plaintiff attached his certificate to each deposition as notary public. He made no objection to the employment of Riley, and the latter has been fully paid for his services by the defendant, at statutory rates; the plaintiff being notified of such payment. The district court of Silver Bow county held that, if Brown employed Riley, plaintiff was entitled to recover the full amount claimed, but that, if Riley was employed by the plaintiff, then the latter was not entitled to recover. Plaintiff's position was that he was entitled to full compensation under the statute, regardless of whether he did the manual labor or not. He was not present during all of the time when the witnesses were testifying, but, as he says, he "supervised the whole thing." The district court directed a verdict in favor of the plaintiff for \$61.80, judgment was entered thereon, from which judgment, and an order denying a new trial, defendant has appealed. The cause originated in a justice of the peace court, and was taken to the district court by appeal.

We think the district court entertained an erroneous view as to the plaintiff's rights. The statute relied on for recovery reads, in part, as follows: "Sec. 3165 [Revised Codes]. Fees of notaries public. * * * For drawing an affidavit, deposition, or other paper, * * * for each folio unless otherwise prescribed, twenty cents. For taking an acknowledgment or proof of a deed or other instrument, to include the seal and the writing of the certificate, for the first signature, one dollar. For each additional signature, fifty cents. For administering an oath or affirmation, twenty-five cents. For certifying an affidavit, with or without seal, including oath, fifty cents."

When the plaintiff was employed to take these depositions by Mr. Brown, it was his privilege to do one of three things, viz.: (1) He could write out the testimony himself, or (2) employ a stenographer to do so at whatsoever compensation might be agreed upon between them, or (3) allow the defendant to furnish the stenographer. In the first two cases he might legally charge full statutory rates for the work of taking and transcribing the testimony. In the third case he could not so charge, for the very obvious reasons: (1) That he did not perform the work; and (2) by failure to insist upon his right to furnish the stenographer, he impliedly consented to the employment of that person by the defendant. As Riley has been fully paid, it would be manifestly unjust to compel the de-

fendant to pay twice for the same services. The general policy of the law on the subject of double payment for services is clearly indicated by section 7199, Rev. Codes, which reads as follows: "In all cases where copies of pleadings, affidavits, or other papers are to be served, neither the sheriff nor clerk shall charge or receive a fee for making such copies when the same are furnished to such officer by the party to the action or his attorney."

We have not had the benefit of any argument, either written or oral, in behalf of the respondent, and are therefore unable to ascertain how he arrived at the amount claimed, to wit, \$61.80. The depositions contained 294 folios of testimony, which, at 20 cents per folio, would amount to \$58.80. This sum is \$3 less than the amount claimed; whereas, the amount actually due him was \$1.50 for certifying the three depositions, including the administering of the oaths. It does not appear that any tender or offer of judgment was made by the defendant, and it was therefore necessary for the plaintiff to invoke the aid of the courts in order to recover the amount due him.

The cause is remanded to the district court, with direction to reduce the judgment to the sum of \$1.50 and, as so reduced, it will stand affirmed. The order denying a new trial is affirmed. Let the costs of appeal be paid by the appellant.

Modified and affirmed.

BRANTLY, C. J., and HOLLOWAY, J.,
concur.

(41 Mont. 126)

OFFICER v. SWINDLEHURST et al.

(Supreme Court of Montana. April 18, 1910.)

1. PARENT AND CHILD (§ 9*)—FRAUDULENT CONVEYANCES (§ 96*)—CONVEYANCES BETWEEN PARENT AND CHILD—SERVICES.

Where an agreement by a parent to pay for services of a child has been made, it can be enforced; and a conveyance of property in payment for services rendered will be upheld in the absence of actual fraudulent intent.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 114; Dec. Dig. § 9;* Fraudulent Conveyances, Cent. Dig. §§ 239-322; Dec. Dig. § 96.*]

2. PARENT AND CHILD (§ 9*)—SERVICES OF CHILD.

A contract to pay for services rendered by a child to his parent may be inferred from circumstances, or may arise from operation of law.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 114; Dec. Dig. § 9.*]

3. WORK AND LABOR (§ 7*)—PARENT AND CHILD—GRATUITOUS SERVICES—PRESUMPTIONS.

The rule of law which denies to a child the right to recover for services rendered to the parent in the absence of a contract for compensation is founded only in the presumption

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the services were gratuitously rendered; and this presumption may be rebutted.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 11½–22; Dec. Dig. § 7.*]

4. FRAUDULENT CONVEYANCES (§ 96*)—SERVICES OF CHILD—CONVEYANCE BY PARENT—IMPLIED CONTRACTS.

When a daughter became 18 years of age, she was earning her own living away from home. Three years later her father became paralyzed, and she was called home, and gave her services and the money she could earn to the support of the parents and a small child. One year thereafter, in consideration of such past services and in consideration of future services and the improvements to the property, the father conveyed to her the land on which they were living, and she placed about \$5,000 worth of improvements on the land. *Held*, that the conveyance was not fraudulent as to an existing creditor, since the conveyance itself was a showing that there was an implied promise to pay for services already rendered; and hence, if there was anything due at the date of the conveyance, it was a valuable consideration therefor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 284–322; Dec. Dig. § 96.*]

Appeal from District Court, Park County; Frank Henry, Judge.

Suit by Kate M. Officer against J. E. Swindlehurst and another. From a decree for plaintiff and from an order denying a new trial, defendants appeal. Affirmed.

A. P. Stark, for appellants. John T. Smith & Son, for respondent.

SMITH, J. The plaintiff in her complaint alleges: That she is the owner in fee and in possession of a certain lot, 50 feet wide and 150 feet deep, situated at Hunter's Hot Springs, in Park county; that one W. C. Officer, formerly the owner of the lot, conveyed the same to her, for a valuable consideration, on the 27th day of June, 1902; that on December 1, 1904, a judgment for \$2,913.58 was recovered in the district court of Park county by the defendant Swindlehurst against said W. C. Officer, and thereafter, on June 26, 1905, an execution issued upon said judgment, and the defendant Robertson, as sheriff, sold all of the right, title, and interest of W. C. Officer in and to the premises to the defendant Swindlehurst for \$1,500, and issued to the latter a certificate of sale for the same. She prays that she be decreed to be the owner of the lot; that her title be quieted; that the claim of Swindlehurst be adjudged to have no validity; that the sale by the sheriff be declared null and void; and that the latter be restrained from issuing a deed to his codefendant.

The amended answer sets forth affirmatively that in 1894 three certain judgments were entered in the district court of Park county against W. C. Officer and one Fargo; that certain property was sold and the proceeds applied towards the satisfaction of said judgments, leaving a balance due on each judgment; that afterwards, and during the

year 1898, the deficiency judgments were all assigned to James A. Murray; that on October 26, 1904, the defendant herein, Swindlehurst, who was then the owner of the same, began an action on the several judgments against W. C. Officer, which action resulted in another judgment against Officer for the sum of \$2,913.58; that on May 19, 1905, execution was issued upon the last judgment, levied upon the land mentioned in the complaint herein, the same was sold to Swindlehurst for the sum of \$1,500, and a certificate of sale therefor issued to him. It is also alleged that the sale of June 27, 1902, from Officer to the plaintiff, who is his daughter, was made for the purpose of concealing his property from the holders of the aforesaid judgments, and to hinder, delay, and defraud the owners thereof; that the same was without consideration, was wholly voluntary, sham, fictitious, and void. Defendants also aver that W. C. Officer has owned no other property since February 4, 1895, and it was and is impossible to collect the amount of said judgment from him without resorting to the land in controversy.

For replication the plaintiff sets forth that she became 18 years of age in 1898, at which time she was residing with her father and mother at Hunter's Hot Springs; that her mother was an invalid and unable to work; that plaintiff had three brothers, minors of tender age, who were unable to be of any considerable assistance to her parents in gaining a livelihood for the family; that she remained at home, assisting in the household duties, except during a portion of the time when she was at school in Bozeman, during which time she worked for her board and that of a younger brother; that on April 23, 1901, her father was injured and became paralyzed, and has since been an invalid, unable to work or support his family; that on account of the injury to her father she was called home to support the family; that she henceforth remained at home, "took in sewing and washing and such other work as she could procure from the hired men and guests at the Hunter's Hot Springs Hotel, and also took boarders, and thereafter, on the 27th day of June, 1902, she not hitherto having received any compensation for her services, her father, for and in consideration of her services so rendered and of an agreement on her part that she would continue to care for, support, and maintain her father, he and her mother made and executed the deed to the property mentioned in the complaint;" that she has fully carried out the agreement on her part; "that in the year 1903 she cleared the sum of \$1,400 by boarding men, and with that money and other money which she has earned since she has constructed a frame building on the premises, in which she resides with her father and mother and in which they keep a small notion store; that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

at the time she received the deed to the property none of the judgments mentioned was a lien upon the same; that she purchased in good faith and has since improved the same to the extent of about \$4,000, all of which money she has invested in good faith, relying upon the title conveyed to her by her father, and all of which improvements were placed thereon by her while the defendant Swindlehurst and his assignor, Murray, well know that she was so investing her money and improving the property, and that Swindlehurst and Murray are both estopped from disputing her title."

The cause was tried to the district court of Park county, sitting with a jury. The following special verdict was returned:

"Interrogatory No. 1. Was there any consideration passed from the plaintiff to W. C. Officer for the transfer to her of the property described in the pleadings; and, if there was, what was such consideration? Answer: Yes. Labor and services.

"Interrogatory No. 2. Was W. C. Officer, at the time he executed the deed to Kate M. Officer, on the 27th day of June, 1902, indebted to the said Kate M. Officer for labor and services rendered by her to him after she became 18 years of age? Answer: Yes.

"Interrogatory No. 3. Did the plaintiff at the time she purchased the land from W. C. Officer take the deed in good faith, and without any design on her part to hinder, delay, or defraud the creditors of the said W. C. Officer in the collection of their debt? Answer: Yes.

"Interrogatory No. 4. Did the plaintiff at the time she received the deed from W. C. Officer and wife agree, as a part of the consideration for said conveyance, with the said W. C. Officer that she would improve the said premises, and allow the said W. C. Officer and wife, her parents, to remain with her, and that she would help support and maintain them; and, if your answer to this interrogatory thus far is in the affirmative, has the plaintiff since hitherto carried out her contract with the said W. C. Officer and wife, and fully performed the conditions of the same, as to improving the said premises and caring for and maintaining the said W. C. Officer and wife? Answer: Yes; she has."

The jury also returned the following general verdict: "We, the jury impaneled and sworn in the above-entitled action, find for the plaintiff." The court adopted the findings of the jury, and entered a decree thereon in favor of the plaintiff for the relief demanded in her complaint. From the judgment and an order denying a new trial, the defendants have appealed.

The testimony of the plaintiff tended to substantiate the allegations of her replication, so far as the same relate to the services performed by her and the improvements she has caused to be placed upon the property. She also testified: "The consideration that

passed from me to my father for these premises was my agreement to look after it to the best of my ability and improve it and make a home for father and mother and my small brother. * * * A part of the consideration for the deed was my promise to improve the premises and make a home for my parents and smaller children. * * * Father and mother went to Livingston to have the deed made. * * * There was nothing unusual about their leaving home at that time which particularly impressed it upon my mind, except the fact that I was to receive this piece of property for my services. * * * From 1898 until the execution of this deed, all my time and everything I earned was turned in to support the family, except my own board and clothes. About 1901 I was in Bozeman going to school, and was called home on account of an injury to my father, and he has never recovered from it. * * * In May, 1904, the improvements on the place were commenced. The money to build the house was earned cooking for a crew of men that put in the waterworks at the springs, and doing anything else that I could get to do from that. Mr. Murray was about the springs the summer of 1904, and lived right next door to us. I had conversation with him about these improvements in the summer of 1904. He made no claim whatever to the property. * * * I became of age in 1898. * * * I supposed that all of these old judgments had been satisfied when everything father owned had been taken for his debts, with the exception of this one lot, and I didn't know there was anything against this place until after it was in my possession." When the plaintiff was asked by her counsel to tell what services she performed for the family prior to the date of the conveyance, the defendants' counsel objected to the question on the ground that no claim is made in the complaint "that the consideration for the conveyance was for past services rendered." The objection was overruled and an exception noted, but no error is now predicated upon the ruling; so that we may assume that the case is presented to us solely upon the questions hereafter considered, regardless of any question of pleading. We are, then, to determine what the relative rights of the parties are as disclosed by the evidence.

Two contentions are advanced by the appellants, viz.: (1) That, in the absence of an agreement between plaintiff and her father that she was to receive compensation for her services after she became of age, any services which she did render are presumed to have been gratuitous on account of the relationship of the parties, and do not constitute a valid consideration for the conveyance of property as against the father's creditors; and (2) that an agreement on her part to support her father and mother in the fu-

ture is either prima facie or conclusively fraudulent, and void as to existing creditors of her father.

It may first be noted that no question of inadequacy of consideration is involved. In fact, there is no testimony as to the value of the lot at the time of the conveyance from Officer to his daughter. The contention of the appellants is that the conveyance was in the light of the testimony fraudulent as a matter of law. One of the cases confidently relied upon by the appellants is *Guffin v. First National Bank of Morrison*, 74 Ill. 259. In that case the court said: "No principle is better settled than where a son or daughter remains in the father's family after becoming of age, in the absence of a contract, such person can recover nothing for services rendered, and whatever the father may choose to give in after years is nothing more than a mere gift. He is under no legal obligation to make any recompense. The son or daughter is presumed to have rendered such services gratuitously." In the case of the *Ionia County Savings Bank v. McLean*, 84 Mich. 625, 48 N. W. 159, it appeared that a daughter lived with her father as a member of his family for some 11 years after attaining her majority, and performed services during that time, but without any contract for hire. It was held that she had no valid claim which could be enforced either against him or his estate. See, also, to the same effect, *Sanders v. Wagonseller*, 19 Pa. 248; *Snyder v. Free*, 114 Mo. 360, 21 S. W. 847. The Supreme Court of Iowa in *Harris v. Brink*, 100 Iowa, 396, 69 N. W. 684, 62 Am. St. Rep. 578, stated the second rule relied upon by the appellants thus: "The authorities proceed upon the theory that it is the legal duty of a debtor to pay his debt rather than to provide for his future support." See, also, 20 Cyc. 533-570.

On the other hand, it is almost uniformly held that, where an agreement to pay for services has been made, it can be enforced, and a conveyance of property in payment for services rendered will be upheld, in the absence of actual fraudulent intent. See *Mitchell v. Simpson*, 62 Kan. 343, 63 Pac. 440; *Byrnes v. Clark*, 57 Wis. 13, 14 N. W. 815; *Leque v. Stoppel*, 64 Minn. 152, 66 N. W. 124; *Citizens' State Bank v. Weston*, 103 Iowa, 736, 72 N. W. 542. And the contract may be inferred from circumstances or may arise by operation of law. The Supreme Court of Wisconsin, in *Byrnes v. Clark*, supra, said: "If there is an express contract to pay for the services, the child thereby becomes the servant of the father in respect to such services, and may recover quantum meruit." See, also, *Schouler's Domestic Relations* (5th Ed.) § 269. In *Snyder v. Free*, supra, the Supreme Court of Missouri said: "The ordinary presumption as to such services (that they were gratuitous) may be overcome by proof of an express or implied contract which

looks to compensation as a reward for services rendered." A contract to pay may be inferred from circumstances. *House v. House*, 6 Ind. 60. We must not forget that the rule of law which denies a right of recovery to the child, in the absence of a contract for compensation, is at best founded only in presumption. In the absence of proof to the contrary, such services are presumed to have been gratuitously rendered. The great majority of the decided cases dealing with the subject relate either to causes like the one at bar, or to those involving claims against the estate of a deceased parent; and the presumption appears to have arisen from the necessity of affording protection to creditors and others in the circumstances. But we are inclined to the opinion that, where the circumstances of the particular case tend to rebut the presumption, those circumstances may well be taken into consideration, especially by a court of equity, in determining whether the claimant to compensation may rely upon an implied promise to pay for the services rendered. Assuming, then, that the agreement to look after and improve the property and make a home for the father and mother was not a sufficient consideration for the transfer in this case as against existing creditors, it still remains to be determined whether the father was not bound as upon implied contract to pay what the daughter's services were reasonably worth.

In the case of *Reando v. Misplay*, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13, it was held that where a daughter rendered services to her insane mother, in taking care of her, and intended, while so doing, to charge for the same, and such services were necessary for the comfort and well-being of the mother, the daughter might recover for the services. It was there said, however, that if the services were rendered as acts of gratuitous kindness, and as a member of the family, with no intention of charging for the same, the daughter could not recover, and that in such latter case it would make no difference how meritorious and valuable they may have been. In the case of *Fisher v. Fisher*, 5 Wis. 472, it was held that where a son continued to reside with, and labor for, his father after arriving at the age of majority, there might be circumstances, short of an express promise to pay on the part of the father, entitling the son to recover for his services. The court said: "But it would manifestly have been incumbent upon the son to show that the ordinary relation of child and parent did not subsist between him and his father, and that it was the understanding of the parties that he should have compensation for his services." The Supreme Court of Indiana has said: "It is a general rule that where a child continues with the parent after becoming of age, no express contract for wages being shown, the

presumption is no wages are to be paid. But a contract to pay a reasonable compensation may be inferred from circumstances tending to rebut the presumption that there was to be no compensation." *Adams v. Adams*, 23 Ind. 50. And the Supreme Court of North Carolina in *Young v. Herman*, 97 N. C. 280, 1 S. E. 792, recognized the same rule. See, also, *Hilbish v. Hilbish*, 71 Ind. 27; *Hart v. Hess*, 41 Mo. 441; *Fitch v. Peckham*, 16 Vt. 150; *Miller v. Miller*, 16 Ill. 296. In the case of *Mitchell v. Simpson*, supra, the Supreme Court of Kansas said: "That after an adult child has performed services without an agreement for compensation the parent, as an inducement to remain in the service of the family, may lawfully promise to pay for what before that time had been performed without an agreement, cannot, as we think, be questioned. If bona fide, the transaction is unassailable." The case of *Freeman v. Freeman*, 65 Ill. 106, very well illustrates the situation of the plaintiff in this case. It there appeared that a son, some time after his majority, left his parents, commenced business on his own account, and was afterwards induced by his father to return, all his other sons having left him, and he continued to labor for his father for many years, managing his affairs and supporting his parents, for which he received nothing but his board, scanty clothing, and a little spending money. The proof also showed that the father intended to compensate him by devising his farm to him, but was killed before he had made his will. It was held that it was but reasonable to presume that the father intended to pay and the son to receive pay for his labor, either in money or by devise in the father's will, and that a verdict in favor of the son for services against the father's estate would not be disturbed.

The transcript before us has not been prepared in accordance with paragraph 3 of rule 7 of this court (57 Pac. vi), in that: this being an equity case wherein questions of fact arising upon the evidence are submitted for review, the testimony should have been presented by question and answer. Mention is made of this simply to emphasize the idea that the judge and jury below were in a much better situation to draw proper conclusions than are the members of this court. We are obliged, therefore, to place a greater reliance upon the findings than would otherwise be necessary. It appears that the first judgment against Officer was recovered more than 10 years before the commencement of this action, and that after everything which he owned, with the exception of the lot in controversy, had been taken for his debts, the balance was allowed to remain wholly unsatisfied until it was no

longer a lien upon the lot. In the meantime the plaintiff became of age and left home, going to Bozeman to school, during which time she worked for her board and that of a younger brother. On April 23, 1901, her father received an injury which seems to have incapacitated him for further physical exertions in behalf of himself or family, and requested her to return home. She was then 21 years of age, and, according to the undisputed testimony, was depending upon her own labor, not only for her own education and support, but for the support of her younger brother as well. She may well be considered as having severed her relations with her father's family when she went to Bozeman, and as having returned at his request, not merely as a daughter, but as one who was to furnish practically all of the maintenance for her family from that time on. Indeed, we think under the circumstances the jury would have been justified in finding an implied promise to pay for the services without any further testimony. But there is more. The father himself, evidently realizing the injustice and inhumanity of allowing her to expend the best years of her life in hard labor without compensation, finally agreed to recompense her for what she had done and for her future services. It is true that in one aspect this agreement was illegal as to existing creditors, but the fact that it was made demonstrates beyond a doubt that neither Officer nor his daughter regarded the services as gratuitous. This being so, an implied promise to pay quantum meruit immediately arose, and, if anything was due her on June 27, 1902, the amount then due was a valuable consideration for the conveyance which she received on that date, provided the transaction was had in good faith, and as to that there can be no doubt under the testimony. It appears that she had worked for, nursed, and supported the family for about 14 months prior to the time when she received the deed, and she herself says: "I was to receive this piece of property for my services." There is no testimony as to what her services were worth, but neither is there any as to the value of the lot; and, as defendant Swindlehurst's predecessor in interest made no effort to subject it to the satisfaction of his judgment, although he lived in the vicinity, it may fairly be presumed that its value was small prior to the time when plaintiff improved the same.

We think the right party had judgment in the district court, and that the order denying a new trial should be affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(41 Mont. 141)

THURMAN v. PITTSBURG & M. COPPER CO. et al.

(Supreme Court of Montana. April 18, 1910.)

1. PLEADING (§ 63*)—STATUTORY ACTIONS.

Where a party relies for recovery on a special statute creating a liability where none existed before, he must set forth in ordinary and concise language a statement of facts showing his right to recover under that statute.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 133; Dec. Dig. § 63.*]

2. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—ACTION—PLEADING—STATUTORY PROVISIONS.

Under Rev. Codes, § 5248, declaring that every corporation operating any mine shall be liable for injuries to employés when such injuries are caused by the negligence of any superintendent, foreman, shift boss, hoisting or other engineer, or crane-man, a complaint for injuries to an employé charging defendants with primary negligence in failing to use ordinary care to furnish plaintiff a safe place to work, and not alleging any specific acts of negligence of any vice principal within the statute, does not state a cause of action within the statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 822; Dec. Dig. § 258.*]

3. MASTER AND SERVANT (§ 264*)—INJURIES TO SERVANT—ACTION—PLEADING—VARIANCE.

Where a complaint for injuries to a miner counts on primary negligence of the master in not furnishing a safe place to work, proof that plaintiff was bound to timber an excavation before drilling any further, and that he entered into the work of timbering without taking preliminary measures for his safety, through the negligent direction of a foreman that the place was safe, does not support the cause of action alleged, and a motion of nonsuit was properly granted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 872; Dec. Dig. § 264.*]

4. MASTER AND SERVANT (§ 199*)—INJURIES TO SERVANT—FELLOW SERVANTS—SHIFT BOSS IN MINE.

A shift boss in a mine whose duty extends no further than to guide and direct the employés under him in the performance of the particular work in which he is engaged with them is at common law a fellow servant of the employés.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 491; Dec. Dig. § 199.*]

5. MASTER AND SERVANT (§ 219*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—MINING RISKS.

Where, when excavations in a mine had proceeded a certain distance, it was necessary to timber the place so as to preserve the safety of employés working there, an employé who had been working as a miner 17½ days came to work in the morning, and was testing the ground in the excavation to see that it was safe, so that he could proceed with timbering it, and was told by the foreman that it was safe, and the employé left the place to get timber and stayed away for 8½ hours, and then returned and made no further tests to determine whether it was then safe, he assumed the risk of injury from a falling rock, since the danger was obvious and his right to rely on the foreman's statement ceased from lapse of time and the changing conditions, which he should have known.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 620; Dec. Dig. § 219.*]

6. MASTER AND SERVANT (§ 211*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—MINING RISKS.

Though generally it is the duty of the master to use ordinary care to furnish a reasonably safe place to work, and while this duty cannot be delegated, in mining one of the necessary incidents of the employment of servants is the making of the place in which he works; and any dangers arising from the work as it progresses caused by changing conditions or in making dangerous places safe is assumed by the employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 557; Dec. Dig. § 211.*]

7. MASTER AND SERVANT (§ 211*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—DUTY OF MASTER.

The general rule that in mining the servant assumes the risk of injury as the work proceeds because such servant is making his own place to work does not apply after the place is completed as it is then the duty of the master to use ordinary care to keep it safe, and he must perform the duty of inspection and repair to preserve that condition, and he is liable for any injuries suffered by his servants through any neglect of duty in that behalf.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 557; Dec. Dig. § 211.*]

8. MASTER AND SERVANT (§ 311*)—INJURIES TO THIRD PERSONS—INDIVIDUAL LIABILITY OF FOREMAN.

A foreman in a mine cannot be charged, so as to render him personally liable for injuries sustained to an employé, with the negligence of a shift boss whereby the servant was injured, where the foreman was not present at the time of the injury, and the shift boss was in the employ of the master and not of the foreman, and the foreman omitted no duty with which he was personally charged.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1236; Dec. Dig. § 311.*]

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Action by Court Thurman against the Pittsburg & Montana Copper Company and another. From a judgment for defendants and from an order denying a new trial, plaintiff appeals. Affirmed.

Mackel & Meyer, for appellant. Kremer, Sanders & Kremer, for respondents.

BRANTLY, O. J. This action was brought by plaintiff to recover damages for personal injuries received by him during the course of his employment by the defendant corporation in its mine in Silver Bow county, and while working under the direction of the defendant Ray, its foreman. The complaint alleges with much detail the circumstances surrounding the accident. It states substantially the following: That during the month of May, 1907, the plaintiff was in the employ of the defendant company as a machine man, competent to operate a compressed-air drill; that he was directed to work at a place in the mine, a particular description of which he cannot give, which had not been timbered; that it was the duty of the defendants to furnish timbermen to timber such places as had been excavated during

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the progress of the work, and, when the timbermen failed to do the required timbering, to require the shifts of men who had made the excavations to timber them; that the defendants had failed to furnish timbermen and had failed to require the outgoing shift to timber the said place, and thus failed to exercise ordinary care to furnish plaintiff a reasonably safe place in which to work; that the ground at the point where the plaintiff was directed to work was unstable and likely to cave and fall, from slacking upon exposure to the air, if jarred or shaken to the slightest extent; that, notwithstanding this fact, the defendants caused to be operated at various points on the same level upon which plaintiff was working several large compressed-air drills in such close proximity to plaintiff that the blows struck by them against the walls of the mine shook and jarred the ground for a considerable space adjacent thereto, and particularly at the place where the plaintiff was working; that it was exceedingly dangerous to work at that place after an excavation had been made and before it had been properly timbered, and the danger was increased by the operation of the drills, a fact not known to the plaintiff, but well known to the defendants; that the defendants carelessly and negligently directed plaintiff to work in the said place, and that, while he was so engaged at work "and because of the carelessness and negligence complained of," a piece of rock became loose and fell upon his back, causing the injury. It proceeds: "That at the said time plaintiff was acting within the scope of his employment and acting and working under the orders and directions of the defendants herein, and that at the time he was so injured, he was setting up and preparing his said drill and getting the same ready and in position, preparatory to drilling holes in the wall at the place wherein plaintiff was at the said time employed, and that all of the things which plaintiff was at the said time doing and performing was a part of plaintiff's employment, and he was acting in the discharge of the duties of, and within the scope of, his employment when he was so injured." Then follow allegations detailing the character of the injury and plaintiff's resulting disability, with demand for judgment. General and special demurrers, interposed by the defendants, having been overruled, they answered, denying all the material allegations of the complaint, and alleging the usual defenses of contributory negligence, assumption of risk, and that the injury was caused by the negligence of a fellow servant of plaintiff. At the close of plaintiff's case the defendants each moved for a nonsuit, upon the grounds, among others, that the evidence fails to show that either of them was guilty of the negligence alleged in the complaint, and hence that there is a fatal variance between the allegations contained in the complaint and

the evidence adduced in support thereof, and that it affirmatively appears that the plaintiff assumed the risk. The motion for nonsuit was sustained and judgment ordered for defendants. From the judgment and an order denying his motion for a new trial the plaintiff has appealed.

Though counsel make three assignments of error, they all present the same question, to wit: Did the court err in granting the motion for nonsuit? Before entering upon the examination of the evidence, we shall consider briefly the theory of the action adopted by counsel for plaintiff, as shown by the allegations contained in the complaint.

Section 5248, Rev. Codes, declares: "That every company, corporation, or individual operating any mine, smelter or mill for the refining of ores shall be liable for any damages sustained by any employes thereof within this state, without contributing negligence on his part, when such damage is caused by the negligence of any superintendent, foreman, shift boss, hoisting or other engineer or cranimen." The purpose and effect of this provision is to declare who among the agents and employes of the owner of a mine, or mill, or smelter, are to be deemed vice principals for whose negligence the owner may be held liable to other employes, upon the principle embodied in the maxim, "respondet superior"; in other words, to classify the employes by declaring who among them are vice principals. In so far as it puts into that class employes who under the common-law rule were held to be fellow servants because engaged with other employes in a common employment for a common purpose, it modifies the common-law rule that the master is not liable for injuries caused to an employe by the negligence of a fellow servant. It creates a liability where none existed before its enactment by taking away a defense which was theretofore available to the master. In *Kelly v. Northern Pacific Ry. Co.*, 35 Mont. 243, 88 Pac. 1009, this court discussed provisions of a statute having the same purpose and effect with reference to persons and corporations engaged in operating railways. Rev. Codes, § 5251. The cases in which were involved and determined questions touching the form of pleading, which must be adopted in order to state a cause of action under similar provisions, were examined. Following what we deemed the best reasoning upon the subject, the court, through Mr. Justice Smith, said: "In order to settle the rule in this state, we decide that, where a party relies for recovery upon a special statute creating a liability where none existed before, he must set forth in ordinary and concise language a statement of facts showing his right to recover under that statute." Testing the complaint in this case by this rule, it falls far short of stating a cause of action under the statute. The defendants are charged jointly with primary negligence. Arranging the allegations in log-

ical order, the substance of the charge is that the ground where the plaintiff was occupied was soft and likely to cave and fall because of slacking when exposed to the air; that the danger was increased by concussion produced by the drills; that this fact was known to defendants, and not to plaintiff; that it was the duty of the defendants to furnish timbermen to timber the ground in order that it be properly supported; that defendants failed to do this; that they carelessly and negligently ordered him to work in the excavation before it was timbered, and that because of this negligence, while he was engaged in setting up his machine, a piece of rock fell upon him, inflicting the injury complained of. As observed by Mr. Justice Smith, in the *Kelly Oase*, supra, in adopting the form he did in charging the negligence upon which is predicated the right to recover, the plaintiff lost sight of the distinction between the acts of the corporation, which, though done by an agent, are yet primarily the acts of the corporation, and those for which it may be held liable upon the principle of the maxim, "respondent superior." The complaint does not invoke the principle of respondent superior upon which the statute is based, but counts exclusively upon the violation, by both of defendants, of their common-law duty to use ordinary care to furnish the plaintiff with a reasonably safe place in which to do his work. It does not allege any specific act of negligence by Ray, the foreman, which it imputes to the corporation. We must therefore examine the evidence with a view of determining whether it tends to support the cause of action thus stated.

The facts established by the evidence are these: The plaintiff was employed as a machine man, but he was engaged with others in excavating a drift or tunnel on the 800-foot level of the defendant company's mine. His duties included drilling, blasting, and, when the conditions required it, he had to do or to assist in doing the timbering, necessary to furnish support to the ground as the excavation progressed. As soon as the excavation at any time progressed far enough to permit the putting in of a set of timbers, the miners on duty were required to put it in. If they failed to put it in, or if the men on any shift on duty neglected to timber as soon as the excavation had progressed far enough, it was customary for the shift boss to stop the work of excavation, and direct them to put in the timbers. The last set had been put in by the plaintiff and another miner who was on shift with him. When they went off shift, the excavation had progressed nearly to the point at which another set of timbers was required. When they returned at the usual time on the next day to resume work, no additional timbering had been done, but the excavation had progressed nearly far enough to require two sets. These sets were six feet in length.

When plaintiff went off shift, no timbers had been provided. There were none when he returned. The first thing plaintiff did upon his return was to make an examination of the ground to ascertain if it was safe, and in doing so he picked down any portions of rock that he found loose or likely to fall. While he was so engaged, one Johnson, the shift boss, came by, and, having looked over the place, said: "That's all right. Go ahead and put in the timbers." He also used the words: "That ground is all right." The plaintiff then, having examined the ground and being satisfied from his examination and the statements of the shift boss that it was safe, went out to the shaft to obtain timbers. He did not return until some time later; or, as he himself states, until after the lapse of 3½ hours. He was waiting for the timbers to be brought down from the surface. Whether it was his duty to go to the surface for them does not appear. It does appear that he waited at the shaft until timbers were sent down. Having secured them, he returned, and, assisted by his companion, proceeded to put them in without further examination, however, to ascertain if the ground was still safe. While in a stooping position removing some material from the place where he intended to set a timber, a piece of rock fell upon him from the roof of the excavation, and inflicted the injury complained of. It was customary for the miners in timbering to protect themselves by putting temporary lagging overhead to prevent the fall of rock from above. During the absence of the plaintiff drilling was in progress in the vicinity of the excavation, but none of the witnesses state definitely whether the concussion produced was sufficient to affect the stability of the ground in the excavation, though the jar was perceptible for some distance in any direction from the places where the drills were in operation. The ground in the vicinity, other than that in the excavation in which the plaintiff was at work, did not generally require timbering.

It thus appears that at the time he was injured the plaintiff was not engaged in setting up his machine under the direction of the defendants, or either of them. He was engaged in making the place safe, so that he and his associates might be protected from the very peril from which he suffered the injury. His complaint is that the defendants failed to furnish timbermen to timber the place, and that he was directed to work there without knowledge of the conditions which actually existed; whereas, if it be assumed that Johnson was at the time acting in the capacity of vice principal, the negligence which the evidence tends to show is that the plaintiff by reason of the assurance given him by Johnson that the ground was safe neglected to take the precautions for his own safety which he otherwise would have taken; in other words, he was, through the negligence of Johnson, induced to go in-

to a place of danger, when otherwise he would not have done so. Thus it appears that the evidence does not in any way tend to support the cause of action alleged. In personal injury actions, as in all others, the plaintiff may recover only upon proof establishing substantially the cause of action alleged. *Flaherty v. Butte Electric Ry. Co.*, 40 Mont. —, 107 Pac. 416. Hence the motion for nonsuit was properly granted on the ground of variance. In referring to the language used by Johnson, the shift boss, we use the term "assurance." We do so in order to give it the construction most favorable to the plaintiff. To say the least, it is doubtful whether it is susceptible of this construction.

The motion was also properly granted on the ground that the plaintiff assumed the risk. The evidence does not tend to show what the duties of Johnson were. The witnesses refer to him merely as "shift boss." This court has heretofore held that under the common-law rule a laborer employed by and acting under the orders of a section foreman of a railroad is a fellow servant of the foreman, and also of the engineer and foreman of a yard engine, and that he cannot recover for injuries suffered through their negligence. *Goodwell v. Montana Central Ry. Co.*, 18 Mont. 233, 45 Pac. 210; *Hastings v. Montana Union Ry. Co.*, 18 Mont. 493, 46 Pac. 264; *Mulligan v. Montana Union Ry. Co.*, 19 Mont. 135, 47 Pac. 795. The same rule applies to a shift boss in a mine, whose authority over his associates extends no further than to guide and direct them in the performance of the particular work in which he is engaged with them. *Allen v. Bell*, 32 Mont. 69, 79 Pac. 582. The only purpose of the Legislature in enacting the Code provision, supra, was to work a change in this rule. If, in fact, Johnson was engaged in the performance of duties which could not be delegated by the company, he was a vice principal; otherwise he was a mere fellow servant of plaintiff, and any negligence of which he was guilty could not be imputed to the company. Under the view we have taken of the case, however, the plaintiff cannot recover even if it be conceded that Johnson was a vice principal.

The plaintiff, as a reasonable man, must have known of the existing conditions. He had been working there for 17½ days—not as a machine man, as he alleges, but as a miner. His duties required him not only to make the place, but also to make it safe by timbering as the work of excavation progressed. When the shift boss came to him, he was engaged in testing the ground to ascertain if it was safe. Having been directed to proceed with the timbering, with the assurance that the ground was then safe, and having tested it further, he went to procure the timbers. He was away about 3½ hours. In the meantime the drilling had been in

progress, and the slacking process had been going on. If he had gone into the place at once and engaged in the work of timbering, he might with some propriety have claimed that he had relied upon the assurance of Johnson that the place was safe; but after the lapse of time during which he was absent—and it does not appear that the defendants were in any way to blame for this loss of time or even knew of it—he, as a reasonable man, with knowledge of the changing conditions, had no right to rely upon the assurance; for, at most, it was made with reference to the conditions as they existed at that time, and did not include conditions as they would exist in the future. Upon his return he went into the place, and, without taking the precautions to make further tests and omitting the precaution, usually taken, of putting up temporary lagging to protect himself, went to work to put in the timbers. The perils were open and obvious, and, as he chose to encounter them without exercising that degree of care and circumspection which the law requires of every reasonable man placed in like circumstances, he assumed the risk, and must be held responsible for his own injury. Under the rule recognized by this court, the defendants were entitled to a nonsuit on this ground. *Longpre v. Big Blackfoot Milling Co.*, 38 Mont. 99, 99 Pac. 131.

Again, while under the general rule it is the duty of the master to use ordinary care to furnish the servant a reasonably safe place in which to work, and while this duty cannot be delegated to others so as to free the master from liability (26 Cyc. 1321) in mining and similar industries, one of the necessary incidents of the employment of the servant is the making of the place in which he works. The conduct of industries of this character is dependent upon the doing of work which itself brings about the dangers to which the servant is exposed from time to time as it progresses. Either the master must himself do the work and personally assume all the attendant risk, or he must employ some one else to do it. Therefore the necessity of the case requires the servant, when he enters such employment, to assume the risk of the same dangers, and this assumption on his part is an incident of the contract. *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515. On this subject Mr. Labatt says: "The rule that it is the duty of a master to exercise ordinary care to provide a reasonably safe place of work for his servants is held not to be applicable to cases in which the very work which the servants are employed to do is of such a nature that its progress is constantly changing the conditions as regards an increase or diminution of safety. The hazards thus arising as the work proceeds are regarded as being the ordinary dangers of the employment, and by his acceptance of the employment

the servant necessarily assumes them." *Labatt, Master & Servant*, § 269. In the case of *Finalyson v. Utica Mining & Milling Co.*, 67 Fed. 507, 14 C. C. A. 492, wherein the facts are somewhat similar to those before us, Judge Sanborn, speaking for the court, said: "But this rule cannot be justly applied to cases in which the very work the servants are employed to do consists in making a dangerous place safe, or in constantly changing the character of the place for safety as the work progresses. The duty of the master does not extend to keeping such a place safe at every moment of time as the work progresses. The servant assumes the ordinary risks and dangers of his employment that are known to him, and those that might be known to him by the exercise of ordinary care and foresight. When he engages in the work of making a place that is known to be dangerous, safe, or in a work that in its progress necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the dangerous place and the increased hazard of the place made dangerous by the work are the ordinary and known dangers of such a place, and by his acceptance of the employment the servant necessarily assumes them." After the place has been completed, however, it becomes the duty of the master to use ordinary care to keep it safe, and, under the application of the general rule, he must perform the duty of inspection and repair, from time to time, to preserve that condition, and he is liable for any injury suffered by his servant through any negligence of duty in that behalf. Illustrative applications of this rule are found in *Kelley v.*

Fourth of July Mining Co., 16 Mont. 484, 41 Pac. 273, and *Union Pacific Ry. Co. v. Jarvi*, 53 Fed. 65, 3 C. C. A. 433. If, for instance, the employes are engaged in driving a tunnel which requires timbering as it progresses, the risk of the dangers incident to the work as it progresses is assumed by the employes, after the master has discharged the duty of furnishing suitable appliances and materials for the work. Nevertheless the duty to inspect and make repairs in the completed portion appertains exclusively to the master. If Johnson be regarded a mere fellow servant, and the statement made by him to the plaintiff be construed as the usual direction given to the employes, when occasion required, to proceed with the timbering, then, under the rule as declared in the cases cited above, the injury was the result of one of the ordinary hazards of the business which the plaintiff assumed as an incident to his contract of employment.

So far we have made no reference to the alleged connection of foreman Ray with the accident. The evidence fails entirely to connect him with it in any way. He was not present at the time. The shift boss was not in his employ, but in that of the company. No negligence of which the shift boss may have been guilty is properly imputable to him; for he was merely an intermediate agent who could not be held responsible except for the omission of some duty with which he himself was personally charged.

The judgment and order are affirmed.

Affirmed.

SMITH and HOLLOWAY, JJ., concur.

(58 Wash. 293)

WALTERS v. SPOKANE INTERNATIONAL RY. CO.

(Supreme Court of Washington. May 6, 1910.)

1. EVIDENCE (§ 118*)—RES GESTÆ—DISCRETION OF COURT.

Statements need not always be contemporaneous with the principal act to be admissible as *res gestæ*, if they arise naturally therefrom, and directly tend to explain it; the determination of whether the statement is sufficiently contemporaneous to render it admissible being largely in the sound discretion of the trial court where the surrounding circumstances and conditions are shown.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 297-302; Dec. Dig. § 118.*]

2. EVIDENCE (§ 123*)—RES GESTÆ—STATEMENTS AFTER EVENT—STATEMENTS OF EMPLOYEES.

Immediately after intestate, a brakeman, and another were severely injured in a derailment, the conductor went forward to the engine where intestate was, saw the derailed engine and the condition of the track, rails, and ties, and returned to the caboose, and attempted to telephone to the general offices for assistance, and, being unable to do so ran about a mile to a farmhouse, telephoned for a relief train, and returned to the derailed engine almost two hours after the accident. The conductor was in charge of the train, and was the superior of intestate and other trainmen. *Held*, that statements made by the conductor to another, upon his return, that the derailment was caused by spikes pulling out and letting the rail turn, and that the track was bad, were admissible as *res gestæ*; the circumstances under which the conductor acted making his statements spontaneous and unpremeditated.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351-368; Dec. Dig. § 123.*]

3. TRIAL (§ 56*)—RECEPTION OF EVIDENCE—CUMULATIVE EVIDENCE.

Where, in an action for a railroad brakeman's death in a derailment, claimed to have been caused by defective track, the railroad company was permitted to introduce evidence showing in detail proper methods of constructing the track, and material that should be used, and was allowed every reasonable opportunity for introducing evidence which would aid in determining whether the track was safe, there was no error in excluding evidence to show that the roadbed and track at the place of derailment were in as good condition as was customary on roads of like age and traffic capacity.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 131; Dec. Dig. § 56.*]

4. DAMAGES (§ 1*)—AMOUNT—PERSONAL INJURIES.

Verdicts in personal injury actions must be compensatory only where punitive damages are not claimed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 1; Dec. Dig. § 1.*]

5. DEATH (§ 99*)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

A railroad freight brakeman when killed was 44 years old, had been a stage driver, bridge carpenter, miner, stationary engineer, locomotive fireman, and at the time of the accident was making from \$100 to \$120 a month. His life expectancy was 26 years. *Held* that a verdict for \$20,000 in an action for his death was excessive, and would be set aside, unless \$5,000 thereof was remitted.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

Rudkin, O. J., dissenting in part.

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Katie Walters, for herself and as guardian ad litem for others, against the Spokane International Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, unless plaintiff accepts a reduced verdict, in which event judgment for the reduced sum is affirmed.

Allen & Allen and Graves, Kizer & Graves, for appellant. Charles P. Lund and Hamblen & Gilbert, for respondent.

CROW, J. This action was commenced by Katie Walters, in her own behalf and as guardian ad litem of John S. Walters and William H. Walters, minors, against the Spokane International Railway Company, a corporation, to recover damages for the death of William H. Walters, husband and father of the plaintiffs. From a judgment in their favor, the defendant has appealed.

William H. Walters, while serving the appellant as head brakeman on a freight train, was so badly scalded in a derailment of the engine on which he was riding that he died the next day. The respondents alleged the accident was due to negligence of appellant in permitting its roadbed, track, rails, and ties to be and remain in an unsafe condition. The appellant alleged that the accident occurred in Idaho; that under the laws of that state William H. Walters was a fellow servant of George E. Kendall, the engineer, who caused the wreck by negligently running the train at a dangerous speed, and that Walters was guilty of contributory negligence in failing to set the brakes. The jury returned a verdict for \$20,000, and answered interrogatories propounded at appellant's request, as follows: "(1) Was defendant's roadbed in a weak and insecure condition at the point where the wreck occurred? Yes. (2) If you answer that it was, state in what respects it was weak and insecure. Answer: The track was not properly surfaced and ballasted; and that a large percentage of the ties were culls; and a large percentage of the ties were of black pine, and the roadbed was too narrow. (3) Were the rails insecurely fastened to the ties at the point where the wreck occurred? Answer: Yes. (4) At what rate of speed was the train running at the time it left the rails? Answer: Between sixteen and twenty miles per hour. (5) At what rate of speed was it reasonably safe to run a train like the one that was wrecked, over the track at the place where it was wrecked? Answer: We are unable to state. (6) Was the wreck occasioned by a defective condition of the track and roadbed, or by the rate of speed of the train, or by the condition of the track and roadbed and the rate of speed jointly? Answer: The wreck was caused wholly by the defective condition of the track and roadbed."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appellant first contends the evidence was not sufficient to sustain a recovery, and that the trial court erred in denying its motion for a directed verdict. As stated by appellant's counsel, "The record in this case is of fear-inspiring bulk." The evidence is too voluminous to be stated in this opinion. We find sufficient to sustain a verdict in respondent's favor. There was competent evidence that appellant's track, although new, was in a dangerous condition; that inferior and unsafe ties had been used in its construction; that the rails had not been spiked to all the ties; that the track had not been properly surfaced; that the road had not been ballasted; that the train was running at a moderate and safe rate of speed, and that the unsafe condition of the track caused the rails to spread and ditch the engine. Other evidence offered by appellant tended to show that the track, although new, was safe, well constructed, and in good condition; that it was being constantly examined and repaired by appellant's employes; that the accident was caused by the act of the engineer who ran the train at a reckless and dangerous rate of speed, and that the appellant was without fault. This conflicting evidence was properly submitted to the jury, and it is manifest from their verdict and special findings that they accepted and credited the statements of the respondent's witnesses.

Immediately after the accident J. D. Lahey, the conductor in charge, went forward from the rear end of the train, saw the ditched engine, the condition of the track, rails, and ties, and the injured men. Returning to his caboose, he attempted to attach a telephone instrument to the wires, and call appellant's head offices at Spokane, 19 miles distant. Failing in this, he ran about one mile to a farmhouse, where he obtained the use of a long distance telephone and occupied about 25 minutes in calling Spokane and arranging for a relief train, and assistance for the injured men. He then walked back to his train. Living at the house was one Samuel Williams, who dressed himself, and, accompanied by one Scharpenberg, followed the conductor. The accident occurred about 10:45 p. m., and it was almost two hours later when Williams reached the train. Walters, the head brakeman, and the engineer Kendall were fatally injured. They had been removed to the conductor's caboose, where they were awaiting medical assistance. Williams, as a witness for respondent, testified in part as follows: "Q. Just state what the conductor said there at that time. A. Well he said that it was caused by a rail, the spikes pulling out and letting the rail turn over and the spreading of the track. * * * Q. What did he say at that time about the condition of the roadbed or about the company maintaining a roadbed? * * * A. Well, he said it was a bum track." These alleged statements were admitted as part of the *res gestæ*, and the appellant now insists

that the trial court erred in overruling its objections thereto; that the statements were incompetent, immaterial, and hearsay, being made long after the accident, and that they constituted no part of the *res gestæ*. It appears that Williams and his companion were the first persons to reach the train after the accident, other than those upon the train; that the conductor was appellant's chief representative then upon the scene and in charge of the train. He had the injured brakeman and engineer in his care. Both of them were severely injured, suffering intensely, in need of immediate medical attention, and were receiving such assistance only as the remainder of the train crew could give. The conductor was in a condition of responsibility and anxiety which directly tended to render his statements spontaneous, impulsive, and truthful, and to negative the idea that they might be the result of reflection. Appellant insists that his statements were too remote in point of time from the actual ditching of the train, to be admissible. Although it is the usual rule that contemporaneous declarations, explanatory of the principal occurrence, made under circumstances excluding the idea of premeditation, are competent as part of the *res gestæ*, it is not always essential to their admissibility that the declarations and principal occurrence shall be identical in point of time. In many instances the former may succeed the latter by a considerable period. This court has so held in numerous cases. *Roberts v. Port Blakely Mill Company*, 30 Wash. 25, 70 Pac. 111; *Lambert v. La Conner T. & T. Co.*, 30 Wash. 348, 70 Pac. 960; *Dixon v. Northern Pacific R. Co.*, 37 Wash. 310, 73 Pac. 943, 68 L. R. A. 895, 107 Am. St. Rep. 810; *Starr v. Ætna Life Ins. Co.*, 41 Wash. 199, 83 Pac. 113, 4 L. R. A. (N. S.) 636.

It is not always necessary that statements or admissions should be exactly concurrent with the principal act if they arise naturally therefrom, without evidence of premeditation, and directly tend to characterize or explain it. The surrounding circumstances and conditions may be shown, and the determination of the competency and admissibility of the declarations as a part of the *res gestæ* will then as a general rule rest largely in the sound discretion of the trial judge. Mr. Wigmore, at section 1750, vol. 3, p. 2256, of his work on Evidence, says: "It is to be observed that the statements need not be *strictly contemporaneous* with the exciting cause; they may be subsequent to it, provided there has not been time for the exciting influence to lose its sway, and to be dissipated. The fallacy, formerly entertained by a few courts, that the utterance must be strictly contemporaneous (post, § 1756) owes its origin to a mistaken application of the verbal act doctrine: * * * Furthermore, there can be no definite and fixed limit of time. Each case must depend upon its own circumstances. * * * Since the application of the

principle thus depends entirely on the circumstances of each case, it is therefore impossible to regard rulings upon this limitation as having in strictness the force of precedents. To argue 'from one case to another on this question of 'time to devise or contrive' is to trifle with principle, and to cumber the records with unnecessary and unprofitable quibbles. There is a lamentable waste of time by Supreme Courts in here attempting either to create or to respect precedents. Instead of struggling weakly for the impossible, they should decisively insist that every case be treated upon its own circumstances. They should, if they are able, lift themselves sensibly to the even greater height of leaving the application of the principle absolutely to the determination of the trial court. Until such a beneficent result is reached, their lucubrations over the details of each case will continue to multiply the tedious reading of the profession." The authorities differ as to the instances in which such declarations should be admitted. The circumstances of each case should be carefully weighed by the trial judge in exercising his sound discretion and in arriving at a correct determination. *Grant v. Oregon R. & Nav. Co.*, 54 Wash. 678, 688, 103 Pac. 1126.

In *State v. McDaniel*, 68 S. C. 304, 310, 47 S. E. 384, 386, 102 Am. St. Rep. 661, 666, the court said: "When the declarations are not precisely concurrent with the transaction, a delicate and complex question is presented to the trial judge in determining their admissibility, and each case must be decided upon its own circumstances. In the nature of the case, there can be no hard and fast rule as to the precise time near an occurrence within which declarations explanatory thereof must be made in order to be admissible. The general rule is that the declarations must be substantially contemporaneous with the litigated transaction, and be the instinctive, spontaneous utterances of the mind while under the active, immediate influences of the transaction, the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations. * * * These circumstances of time and place do not alone necessarily prevent a declaration from being part of the *res gestæ*, but they are factors, with other circumstances, in determining whether the declarations were the spontaneous utterances of the mind under the immediate influence of the transaction. * * * Questions of this kind must be very largely left to the sound judicial discretion of the trial judge, who is compelled to view all the circumstances in reaching his conclusion, and this court will not reverse his ruling, unless it clearly appears from undisputed circumstances in evidence that the testimony ought to have been admitted or rejected as the case may be."

It necessarily devolves upon the trial judge to pass upon the competency of the evidence offered. In *Roberts v. Port Blakely Mill*

Company, *supra*, the declarations of the superintendent were made about three hours after the accident. In passing upon their admissibility as part of the *res gestæ*, this court said: "The declarations of Mr. Tew were not the narration of a past event, but were the natural declarations growing out of the event, and were so nearly contemporaneous with the accident as to be held to be in the presence of it, and were made under such circumstances as necessarily to exclude the idea of design or deliberation. They were made by one having the control and management of the road. Under these circumstances we think the declarations were admissible."

The appellant, citing the recent case of *Henry v. Seattle Electric Company* (Wash.) 104 Pac. 776, contends that it is controlling here. That case can be readily distinguished. The conductor had left the scene of the accident, had proceeded with his usual employment, had taken his car to the end of his run, had returned on another trip, and could not have anticipated that he would again meet the driver of the wagon at the place where the collision had occurred. It was a fortuitous circumstance that he did so. He had ample time to devise, contrive and reflect, and his statements made after his return were properly excluded as hearsay, and not a part of the *res gestæ*. Although the conductor in this case had left his train, he did so under compulsion, for the purpose of procuring assistance. His train remained in the ditch at the place of the accident, and was still in his charge. He was the principal representative of the appellant. Two of his crew who had been fatally injured were without medical attention. Much responsibility rested upon the conductor. He had telephone instruments to communicate with his superiors in case of necessity. When needed these instruments failed to perform their functions. His trip to the farmhouse one mile distant was one of necessity, made in the midst of grave responsibilities. Before the evidence of Williams was admitted the respondents called the conductor, and had him narrate the details of his trip and the length of time he thus occupied. The trial judge saw him and the witness Williams, and heard them both testify. He heard other evidence describing the accident, and the surrounding circumstances. He was in a position to exercise his sound discretion and determine whether the alleged declarations should go to the jury for their consideration as a part of the *res gestæ*, and we cannot find that his discretion was abused. The conductor was permitted to, and did, deny the evidence of the witness Williams. The jury were able to pass upon their credibility, and conclude whether the alleged declarations were made, and if made, whether they were spontaneous and truthful, or the result of reflection. A vast amount of evidence, showing all the circum-

stances, was introduced and considered by the jury, and we do not feel that we would be justified in concluding that the trial judge has so abused his discretion in admitting this evidence as to constitute prejudicial error and necessitate a new trial.

Appellant further contends that the trial court erred in refusing its offer of evidence to show that its roadbed and track were in as good condition as is customary with roads of like age and carrying like traffic. The appellant was permitted to introduce evidence of experienced railroad men showing proper methods of construction, the ties, rails, and other material that should be used, how the grade should be made, how the track should be surfaced and ballasted, the tendency of a new attack to settle after rains, and in fact all details on the subject. The record is of sufficient length to satisfy the most critical that much latitude was accorded both parties in the introduction of evidence. The appellant was granted every reasonable opportunity for showing facts which would aid the jury in finding whether the track was in as reasonable and safe a condition as it should be.

The appellant further insists the judgment is excessive. This contention must be sustained. The evidence shows that the deceased was a man 44 years of age; that he had been stage driver, bridge carpenter, miner, stationary engineer, locomotive fireman, and brakeman; that at the time of the accident he was making from \$100 to \$120 per month; and that his life expectancy was 25 years. Verdicts must be compensatory only. After full compensation has been reached, no further award should be made. The judgment is excessive. It is ordered that, if within 30 days after the filing of the remittitur the respondents shall serve upon the appellant and file with the clerk of the superior court their written consent to remit \$5,000 of the damages awarded, the judgment as thus reduced, with interest from the date of the trial, be affirmed, and that otherwise a new trial will be granted. The appellant will recover its costs in this court.

DUNBAR, MOUNT, and PARKER, JJ.,
concur.

RUDKIN, C. J. I cannot agree that statements made by the conductor under the circumstances disclosed by the record, two hours after the accident, were a part of the res gestæ, and I therefore dissent.

(58 Wash. 262)

CHURCH et al. v. WILKESON-TRIPP CO.
et al.

(Supreme Court of Washington. May 4, 1910.)

1. CONTRACTS (§ 261*)—BREACHES—RESCISION.

One employed by the promoters of a corporation to sell on commission the bonds of the

corporation, secured by real estate represented by the promoters to be owned by them, and to be by them conveyed to the corporation, may, on the failure of the corporation to obtain title to the property, rescind the contract and sue the promoters for the damages sustained.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1174–1180; Dec. Dig. § 261.*]

2. PARTNERSHIP (§ 199*)—RIGHT TO SUE—STATUTES.

Where a contract was made with two persons as individuals, and they subsequently filed the certificate required by Laws 1907, c. 145, showing that they were doing business under an assumed name as partners in a firm in which they were the only members, the individuals as partners could sue on the contract.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 363; Dec. Dig. § 199.*]

3. CONTRACTS (§ 227*)—CONSTRUCTION—CONDITIONS—WAIVER.

A stipulation in a contract between the promoters of a corporation and an individual employed to sell the bonds of the corporation that the individual agrees to sell the bonds within a specified time after receiving written notice of the happening of a specific event, etc., fixes the time within which the bonds are to be sold, and is intended to protect the promoters from having the bonds placed on the market before they are properly secured and ready for delivery, and the written notice may be waived.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1039; Dec. Dig. § 227.*]

4. CONTRACTS (§ 233*)—COMPENSATION—EXPENDITURES.

Where one employed to sell corporate bonds for a commission, which includes his expenses, sued for all the commissions he would have earned had he sold the entire issue, he could not recover the expenses incurred, and evidence thereof was immaterial.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1098; Dec. Dig. § 233.*]

5. CONTRACTS (§ 349*)—BREACH—ACTIONS—EVIDENCE.

Promoters of a corporation to exploit coal mines held an option on coal lands for \$65,000. One of the promoters placed in escrow a deed from himself to the company of the lands, reciting a consideration of \$175,000. The option was never taken up. Held, in an action for breach of contract of employment to sell the bonds on commission, that the admission in evidence of the promoter's deed was error; there being no issue as to the title to the lands.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 349.*]

6. DAMAGES (§ 36*)—BREACH OF CONTRACT—LOSS SUSTAINED.

In an action for damages for breach of a contract, plaintiff may recover such losses as he has actually sustained.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 36.*]

7. DAMAGES (§ 40*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Where the direct purpose of a contract is to enable one of the parties thereto to earn profits, he may recover profits actually lost as his damages for the breach of the contract by the adverse party, but it must appear that the loss was reasonably certain, and not a fictitious one.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 74; Dec. Dig. § 40.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

8. EVIDENCE (§ 498*)—OPINIONS—BREACH OF CONTRACT—DAMAGES.

In an action for loss of profits for breach of contract for the sale of property on commission, the jury must determine the probable results of the efforts made by plaintiff in making the sales; and the opinion of a witness that the property could have been sold but for the breach of the contract is not proper as a basis of computation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2289; Dec. Dig. § 498.*]

9. DAMAGES (§ 190*)—BREACH OF CONTRACT—EXTENT OF DAMAGES.

In an action for breach of contract employing plaintiff to sell on commission bonds of a corporation secured by real estate, the evidence showed that the corporation proposed to issue \$300,000 in bonds, and secure them by real estate which had been recently sold for \$65,000. Plaintiff showed sales, or probable sales, to the amount of \$25,250. *Held*, that plaintiff could only recover the commissions earned on such sum.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 513; Dec. Dig. § 190.*]

Department 2. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by L. K. Church and another, partners as S. Drake & Co., against the Wilkeson-Tripp Company and others. From a judgment for plaintiffs, certain of the defendants appeal. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellants. Reynolds, Ballinger & Hutson, for respondents.

CROW, J. This action was commenced by L. K. Church and Sidney Drake, copartners as S. Drake & Co., against Wilkeson-Tripp Company, a corporation, James C. Drake, A. G. Bennett, Victor E. Tull, Frank Hanford, James M. Ashton, J. D. Lowman, and C. H. Hanford, to recover damages arising out of the defendants' alleged breach of the following written contract: "Memorandum of agreement, made in duplicate this twenty-fourth (24th) day of January, 1908, by and between James C. Drake and A. G. Bennett —(Trustees for and representing the promoters and organizers of the Wilkeson-Tripp Company, hereinafter named)—parties of the first part and L. K. Church and Sidney Drake of Spokane and Seattle, Washington, hereinafter called the parties of the second part, witnesseth: That whereas, the parties of the first part together with their associates, J. D. Lowman, Victor E. Tull, Frank Hanford, C. H. Hanford and James M. Ashton, are the organizers of a certain company now in the process of incorporation, known as the Wilkeson-Tripp Company, and as such they are the owners of those certain coal properties with the rights and privileges in connection therewith, located in Pierce county, in the state of Washington, more particularly described as follows: The east half (E. ½) of section fourteen (14) in township eighteen (18) north, range six (6) east. And whereas, when said company is organized,

it is the purpose and intent of the parties of the first part and their associates, to bond its properties for the sum of three hundred thousand dollars (\$300,000). And whereas, the parties of the second part have undertaken to place and sell the bonds of said company for the compensation and upon the terms hereinafter mentioned. Now therefore, these presents witnesseth: That for and in consideration of the premises and the mutual benefits and compensations hereinafter referred to, the parties hereto hereby stipulate and agree in manner following: First: Said bonds are to be of the following denominations * * * the entire issue to have an aggregate face value of three hundred thousand dollars (\$300,000) as above stated. Second: The parties of the second part undertake to sell fifty thousand dollars (\$50,000) worth of said bonds within sixty (60) days from the time the bonds are deposited with the trustees, under the mortgage securing the same and written notice of the time such deposit is to be given to the parties of the second part or to one of them. The remainder of said bonds are to be sold by the parties of the second part within ninety (90) days after the expiration of said sixty (60) days. Third: All of the bonds are to be sold at par and the parties of the second part are to receive ten per cent. commission for their services in selling same, such commission to cover and include all expenses and outlay of every kind incurred by the parties of the second part. In this connection, however, it is distinctly understood that the parties of the second part are to have the exclusive right and privilege to sell the entire issue of said company's bonds during the times above mentioned, but, should any sale be effected by other parties acting for or under direction of any of the above organizers, such party shall be allowed by the parties of the second part, five per cent. commission upon such sale. Fourth: It is understood that the parties of the first part and their associates, shall proceed forthwith and perfect the organization of such company and take all proper steps in the way of drawing and recording the necessary mortgage, and the lithographing of bonds and stock, and all the other matters for the purpose of effecting the thorough organization and legally securing said bonds. Fifth: It is understood that the parties of the second part shall offer and deliver to every bond purchaser, a stock bonus of the equivalent to fifty per cent. of the par value of any bond or bonds, purchased by him, and that the parties of the first part and their associates are to protect the parties of the second part in so doing and see that such fifty per cent. bonus in the stock of the company is forthcoming and at the disposal of the parties of the second part for the purpose of making such delivery. Sixth: The

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

capital stock of said company is to be not less than six hundred thousand dollars (\$600,000), it being the intent that after the payment of one hundred and fifty thousand (\$150,000) in stock bonus above shown, there shall be four hundred and fifty thousand (\$450,000) dollars of the company's stock available, and that the balance of the \$450,000 worth of stock at par, the parties of the second part shall be entitled to receive as further compensation for their services in effecting the sale of bonds, a payment in stock equivalent to five per cent. of said \$450,000 provided the parties of the second part sell all of the aforesaid bond issue; in the event of their selling less than said issue, then the percentage of stock payable to them from said \$450,000 worth, shall diminish in the ratio and proportion that the amount of bonds which they do sell may bear to the entire issue. In witness whereof," etc. A nonsuit was entered in favor of defendants J. D. Lowman and C. H. Hanford, and a verdict for \$26,750 was returned against all other defendants, who have appealed from the final judgment entered thereon.

Appellants contend that the trial court erred in denying their several motions for a nonsuit and judgment. Construing the evidence most favorably to the respondents, the following facts are shown: That at the time the written contract was executed, James C. Drake and his associates did not hold title to the coal land; that they had an option to purchase it from one Tripp for \$65,000; that the Wilkeson-Tripp Company, a corporation, was formed; that most of its capital stock was subscribed, but that none was issued; that the contract was ratified by the board of trustees; that the bonds and a trust deed were prepared, executed, and left with the American Savings Bank & Trust Company of Seattle, as trustee; that the legal title not being in the Wilkeson-Tripp Company, the trust deed was not recorded; that a deed from Tripp to the appellant Frank Hanford had been placed in escrow to be delivered upon the payment of \$65,000; that Frank Hanford had executed and placed in escrow a deed from himself to the Wilkeson-Tripp Company, reciting a consideration for \$175,000; that the appellants intended to have all the title deeds and the trust deed delivered and recorded as soon as the \$65,000 was paid; that no written notice of the deposit of the bonds with the trustee was given to the respondents, or either of them, but that an oral notice was given them by Frank Hanford, he directing them to immediately proceed with the sales; that written notice was waived by the respondents for themselves, and also by Frank Hanford on behalf of himself and the other appellants; that at a meeting of the trustees of the Wilkeson-Tripp Company previously held, the respondents had been directed to take all orders from Frank Hanford, and to consult him on all matters pertaining to their con-

tract; that the appellants A. G. Bennett, James E. Drake, James M. Ashton, and Frank Hanford, all trustees, were present and participated in the proceedings; that the appellant Victor E. Tull subscribed for stock and had knowledge of respondents' acts; that in pursuance of the oral notice given by Frank Hanford, the respondents opened an office in Seattle, advertised in Seattle and Tacoma papers, issued a prospectus, and attempted to sell the bonds; that a stock book containing blank certificates of the Wilkeson-Tripp Company, signed by its president and secretary and its corporate seal, were left with respondents that they might issue stock to purchasers of bonds; that in March, 1908, respondents tendered \$250 to the trustee, and demanded the delivery of a bond, which they had sold for that amount; that the trustee refused to deliver the bond, being unable to do so for the reasons that the appellant corporation, Wilkeson-Tripp Company, had not yet obtained title, that the trust deed had not been recorded, that the \$65,000 purchase money due Tripp had not been paid, and that the bonds were not legally secured; that the respondents demanded of the appellants that they perfect their title, which they failed to do; and that the respondents thereupon notified appellants they would rescind the contract and hold the appellants for their commissions as damages sustained. Upon these facts the nonsuit was properly denied.

The appellants Ashton and Tull earnestly insist that neither of them gave or waived the written notice required by the contract, that they knew nothing of the acts of the respondents, and that Frank Hanford had no authority to represent them in giving an oral notice or in waiving a written one. The evidence offered tending to show the authority of Frank Hanford, although disputed, was sufficient to sustain the jury in finding such authority.

It is contended that the respondents are not entitled to maintain this action, because they failed to comply with chapter 145, Sess. Laws 1907, p. 288, by filing the certificate therein required, and that one Tom Church, having an interest in the contract, has not been joined as a party. The contract was made by the respondents L. K. Church and Sidney Drake as individuals. Before commencing this action they filed the required statutory certificate, showing that they were then doing business in the name of S. Drake & Co. The evidence shows they were the only members of the firm, and that Tom Church had no relation to the partnership other than as a clerk or employé.

Appellants next contend that the respondents were not entitled to proceed with the sale of the bonds, no written notice that they were ready being given. The notice contemplated was for the benefit of both parties. It fixed the time within which the bonds were to be sold, and the dates upon which the 60 and 90 day periods would ex-

pire. It was also intended to protect the appellants from having the bonds placed upon the market before they were properly secured and ready for delivery. The respondents testified that they did not know the appellants had not acquired title; that Frank Hanford had told them the title was perfect; that the bonds were ready for sale and delivery; that the giving of the written notice would be waived; and that they relied and acted upon his statements. Under this evidence, and other evidence properly admitted, the jury could find, and must have found, that written notice had been waived by all of the appellants.

The respondents have sued for all commissions they would have earned, and the par value of all stock they would have received, had they sold the entire issue of bonds. Having done so, they are not entitled to reimbursement for expenses incurred, although the same were pleaded. By the terms of their contract their commission was to cover and include all expenses and outlay of every kind incurred by them; yet on the trial they were permitted to introduce evidence that they had incurred advertising, office, and other expenses in large amounts. Contracts for advertising were introduced and specific items of expense were shown. The appellants objected to all this evidence, and now insist that it was erroneously admitted. The respondents on the trial, disclaiming any attempt to recover for expenses incurred, introduced other evidence to show how many bonds it did sell, and could have sold had there been no breach of the contract. This action being for the recovery of all the commissions, and the respondents having contracted to bear their own expenses, it is difficult to conceive any theory upon which evidence showing their expenses became material. The evidence should have been excluded.

The complaint alleged, and the answer admitted, that the appellants had not acquired any title to the coal land. There was no issue as to the delivery of the deed from Tripp to Frank Hanford, or from Frank Hanford to the Wilkeson-Tripp Company. During the trial it appeared that Frank Hanford was to pay \$65,000 to Tripp for his deed, and the respondents offered in evidence the deed from Frank Hanford to the Wilkeson-Tripp Company, which recited a consideration of \$175,000. To this offer the appellants objected, contending there was no issue as to the title, or failure of title. It having appeared that Frank Hanford was only to pay \$65,000 for the land, it can be readily understood how knowledge of the fact that he immediately conveyed it to the Wilkeson-Tripp Company by a deed reciting a consideration of \$175,000, in the absence of any explanation, which he was not required to make, would prejudice the jury, and affect the amount of the verdict. There was no good reason for permitting the jury to see the deed

or know its contents. It tended to prove no issue in the case. This is not an action involving any issue of fraud, but is one arising out of an alleged breach of contract, upon which the respondents predicate their right of recovery. Assuming that Frank Hanford was attempting to defraud his associates—a fact not proven—that circumstance could not, and should not, have any bearing upon respondents' recovery or right of recovery. The failure of title, after being admitted by the pleadings, was not in issue. The trial court erred in admitting the deed in evidence.

The jury returned a verdict for \$26,750, which the appellants now claim was excessive. The respondents were to receive a stock bonus and a 10 per cent. commission on all bonds sold. The evidence shows that they procured a written contract from one Gordon for \$5,000 of bonds, on which he paid \$200; that they sold by oral contract \$10,000 of bonds to one Worms, on which he made a cash payment of \$1,400; that they had the oral promise of one Thompson to purchase \$10,000 of bonds, no payment being made, and that one Pratt purchased and paid for a \$250 bond. No other contracts of sale, written or oral, were made. Respondents claim they had other inquiries from prospective purchasers who were investigating the bonds, but there is no satisfactory evidence to show probable sales to any of these parties, who at the best only contemplated an investigation of the bonds. One J. R. Moore, a broker of quite limited experience in handling securities, testified that he had investigated the bonds and respondents' methods for selling them; that in his opinion they could have all been sold at a total expense of 6 per cent. of their face value; that he as an employé of respondents had tried for about three weeks to make some sales; that he had made none, but that he had interested several unnamed parties. This, in substance, is all the evidence showing how many bonds the respondents did sell or could have sold. In an action for damages arising out of the breach of a contract, the plaintiff is entitled to recover such losses as he has actually sustained. When the direct purpose of the contract is to enable one of the parties to earn commissions or profits, he is entitled to recover profits actually lost as his damages for the breach of the contract by the other party. As a condition precedent to a recovery of damages for loss of contemplated profits, it must as a general rule appear that such loss was reasonably certain, and not a fictitious or imaginary one; that fact being established, the damages are to be ascertained by the jury, although not always capable of being precisely measured by exact methods of computation. "Special damages may be recovered where the party in default had notice of the special circumstances out of which such damages naturally arose, but not in the absence of such notice. Remote, speculative,

or conjectural damages are not recoverable. As a general rule, mere prospective profits are too remote to be considered in estimating damages. Profits are not excluded because of anything inherent in their nature, but because they are remote and contingent, and they may be recovered if proven with reasonable certainty. Profits must be certain in their nature, and in respect to the cause from which they proceed." 13 Current Law, 1184-1185, and cases cited. The usual rule of excluding profits in estimating damages does not apply where the earning of the profits is directly contemplated in the contract which has been breached. "In order to recover profits in case of a breach of contract, such profits must have been within the contemplation of the parties at the time that the contract was made, and where such profits do not enter into the contract itself, they will be denied. Anticipated damages, different from those which would ordinarily be sustained, are not always recoverable, but will only be awarded when in view of special circumstances they may be regarded as the natural and direct result of the breach, and are not problematical, but are capable of being foreseen and of being estimated with reasonable accuracy. In all cases the damages claimed should be capable of being definitely ascertained. Where the damages claimed are so speculative and dependent upon numerous and changing contingencies that their amount is not susceptible of actual proof with any reasonable degree of certainty, no recovery can be had." 13 Cyc. 36.

In *Witherbee v. Meyer*, 155 N. Y. 446, 50 N. E. 58, the court says: "The grounds upon which is founded the general rule of excluding profits in estimating damages are: (1) That in the greater number of cases such profits are too dependent upon numerous and changing contingencies to constitute a definite and trustworthy measure of damages; (2) because such loss of profits is ordinarily remote, and not the direct and immediate result of a nonfulfillment of the contract; (3) the engagement to pay such loss of profits, in cases of default in performance, does not form a part of the contract, nor can it be said, from its nature and terms, that it was within the contemplation of the parties." The mere fact that the respondents entered into a contract for commissions upon contemplated sales does not conclusively show their ability to sell all or any of the bonds within the stipulated time. It is difficult to lay down an exact rule by which damages arising from a loss of contemplated profits may be justly measured. It is manifest that the opinion evidence of the witness Moore was not proper as a basis of computation. It was for the jury and not the witness, to arrive at a conclusion as to the probable results of the efforts made by the respondents. In *Federal Iron & Brass Bed Co. v. Hook*, 42 Wash. 668, 670, 85 Pac. 418, 419, this court, discussing profits as an element of damages,

said: "Ofttimes in the breach of a contract of this character, the only damages sustained are those of future profits. These may be of a substantial character in contemplation of law, and such as the injured party should be entitled to recover from the party who has without justification broken the contract. The recovery must, of course, be limited to the amount which from all the surrounding conditions may be deemed to have been reasonably certain had the breach not occurred."

In a case of this character much liberality in the admission of evidence tending to show profits lost should be permitted. The circumstances surrounding the parties are to be considered as bearing upon the amount of probable sales the respondents would have made. In an effort to estimate the probable sales and profits arising therefrom, all facts affecting the value and character of the property which secured the bonds should be considered. With this purpose in view, let it be assumed that the appellants had acquired good title to the coal land; that Tripp had been paid; that the title deeds and the trust deeds securing the bonds had been recorded; and that the bonds had been ready for delivery. What amount of bonds could the respondents then have sold? As men of ordinary business capacity and intelligence, they should have anticipated that prospective investors, before subscribing for the \$300,000 issue of bonds, or for any considerable portion thereof, would investigate the nature, value, and extent of the security covered by the trust deed. They would not rely only upon the advertisements and the prospectus prepared by the interested parties. Upon investigation they would have learned that the only security for the \$300,000 issue of bonds actually covered by the trust deed was a half section of coal land, for which the appellant had recently paid \$85,000 only. To conclude that investors would have purchased all or any considerable portion of these bonds under such conditions involves considerable credulity, and is to assume that they were to be misled as to the actual facts, or that they would invest large amounts without any sufficient security, and depend upon future advances in value for their protection. Careful investors do not transact business in any such manner. The parties who had severally purchased \$5,000 and \$10,000 of the bonds, and had made payments thereon, had recently sustained intimate and confidential business relations with one of the respondents, and they undoubtedly confided in him and relied upon his representations. The only other payment actually made was one of \$250. If this were an action for damages resulting from personal injuries, in which the jury would be permitted much latitude in making an award, an excessive verdict would not be sustained. While, as before stated, a liberal rule should be adopted for estimating the damages in this action, we fail to see how a verdict for \$26,-

750 can be sustained. The entire compensation the respondents could have earned in cash and in stock at par had they fully performed the contract would have been 17½ per cent., or \$52,500. The only probable sales shown were those to Gordon, \$5,000; to Worms, \$10,000; to Pratt, \$250; to Thompson, \$10,000—\$25,250 in all. All other evidence offered to show probable sales is too visionary to become the basis of an award. The utmost that could have been earned on these sales in commissions and in stock at par would have been \$4,418.75, and the evidence, which we have liberally construed in favor of the respondents, is not sufficient to sustain a verdict for damages in any greater sum.

Other assigned errors, predicated upon instructions given and refused, need not be discussed, as the points involved are fully covered by what we have heretofore said. Although we have found that, under the issues framed, the trial court erred in admitting evidence of expenses incurred and the deed from Frank Hanford to the Wilkeson-Tripp Company, reciting a consideration of \$175,000, our conclusion is that such error could have been prejudicial only in so far as it may have affected and increased the amount of damages awarded, and that it will not be necessary to direct a new trial except at the election of the respondents. It is therefore ordered that, if within 20 days after the filing of the remittitur herein the respondents shall serve upon the appellants, and file with the clerk of the superior court, their written election to remit all of the judgment entered in excess of \$4,418.75, with interest thereon from the date of the trial, the judgment as thus reduced will be affirmed. Otherwise a new trial will be awarded. The appellants will recover their costs on this appeal.

PARKER, DUNBAR, and MOUNT, JJ., concur.

(58 Wash. 258)

WHIPPLE v. LEE et al.

(Supreme Court of Washington. May 3, 1910.)

1. APPEAL AND ERROR (§ 781*)—DISMISSAL—SUPERSEDEAS BOND.

From a decree for plaintiff for specific performance, granting a certain time for payment and obtaining a conveyance, plaintiff appealed on the ground that it required too great a payment. *Held*, that there was nothing for him to supersede, and so, though he gave no supersedeas bond, and the time granted for payment has expired, appeal will not be dismissed on the ground that he can no longer make payment and demand a deed, and that therefore the controversy is ended; as if he shows too great a payment was exacted, he will be entitled to a reversal and a reasonable extension of time to make payment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3122; Dec. Dig. § 781.*]

2. SPECIFIC PERFORMANCE (§ 126*)—PARTIES ENTITLED TO PERFORM.

A corporation controlled by L. made a contract of sale of land to a partnership, composed of L. and plaintiff. Plaintiff sued the corporation and L. for specific performance. L. contended and testified that the contract had been forfeited, and that the contract price was greater than claimed by plaintiff, and aided the corporation throughout the litigation, but insisted that, if specific performance be granted, he was entitled to participate in the fruits of the litigation. *Held*, that plaintiff's interest was not increased by the inconsistent acts of L., so as to entitle him, on specific performance being granted on the terms claimed by him, to alone perform on the part of the purchasers, to the exclusion of L.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 126.*]

3. EVIDENCE (§ 450*)—PAROL EVIDENCE—AMBIGUOUS CONTRACT.

A contract whereby A. agrees to sell, and L. agrees to buy, certain land, amounting to 158.25 acres, for \$150 per acre, reciting that there are certain mortgages thereon, and that on payment by L. of \$6,000 A. will release a certain 40 acres thereof, and on payment by L. of an additional \$8,000 A. will release a certain other 40 acres thereof, and that L. agrees to pay the mortgages as they become due, and if not so paid the contract shall become inoperative as to the land still covered by mortgage, is ambiguous as to whether the consideration is \$150 an acre, or that and the mortgages; and so admits of extrinsic evidence to aid in its interpretation.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 450.*]

4. SPECIFIC PERFORMANCE (§ 17*)—PROVISION FOR PARTIAL RELEASE OF MORTGAGE.

Provision in a mortgage that certain of the land shall be released on payment of a certain part of the mortgage debt may be enforced by the mortgagors or their vendees.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 17.*]

Department 2. Appeal from Superior Court, King County; John B. Yakey, Judge.

Action by W. W. Whipple against D. H. Lee and others. From part of the decree for plaintiff, he appeals. Modified and affirmed.

Holcomb & Kirkpatrick, for appellant. S. M. Brackett and Walker & Munn, for respondents.

CROW, J. This action was commenced by W. W. Whipple against D. H. Lee, the American Investment & Improvement Company, a corporation, and others, to enforce specific performance of a contract for the sale of real estate. An opinion on a former appeal, affirming an order appointing a receiver, is reported in Whipple v. Lee, 46 Wash. 266, 89 Pac. 712. The plaintiff now seeks specific performance of the contract, as successor in interest to J. R. Young. A decree of specific performance was entered. The plaintiff, however, has appealed, contending that the decree requires him to pay an excessive consideration for the land. One hundred and twenty days were granted by the decree to the appellant within which to pay for the land and obtain a conveyance.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

No supersedeas bond has been given, and the 120 days have expired. The respondents now contend that the appellant cannot hereafter make payment, or demand a deed; that the controversy has ceased, and therefore move to dismiss the appeal. There was nothing for the appellant to supersede. Whether his time for performance would or could be extended by an order of this court in the event of an affirmance we need not now discuss. The appellant considered himself aggrieved, in that the decree required him to pay too large a consideration. He was entitled to an appeal without giving a supersedeas bond. The trial court did not intend to, nor did it, deprive him of his right to an appeal by fixing a time for payment, which would expire before his appeal, if taken, could be heard in this court. If, on consideration of his appeal, it is established that the decree did require him to pay an excessive price for the land, he would be entitled to a reversal and a reasonable extension of time within which to make payment, under such a decree as this court might order. He might have been unwilling or unable to pay the excessive consideration which he contends was erroneously fixed by the trial court, but willing and able to pay the lesser consideration. In the event of a reversal, he should be accorded the latter privilege. The motion to dismiss is denied.

A number of questions have been raised, but as, in all respects save one, we concur with the findings and conclusions of the trial judge, we will confine ourselves to a consideration of appellant's contention, that the trial court erred in finding that J. R. Young and D. H. Lee had contracted to pay \$150 per acre for the land sold, and in addition thereto had also contracted to pay three mortgage liens amounting to \$26,500. The record includes a voluminous statement of facts. It is therefore manifest that a detailed discussion of the evidence upon which we predicate our conclusions cannot be incorporated in an opinion of reasonable length. Some statements, however, must be made. During the year 1904, the American Investment & Improvement Company, hereinafter called the investment company, acquired title to a large tract of land, including 158.25 acres involved in this action. On 53.25 acres it executed a mortgage to the Robertson Mortgage Company, a corporation, for \$7,500, and on all the remainder it executed first and second unpaid purchase-money mortgages to Knight & Williams, copartners, for about \$16,000 and \$3,000, respectively. On November 20, 1905, it sold the 53.25 acres covered by the Robertson Company mortgage, and about 105 acres or part of the land covered by the Knight & Williams mortgages, to D. H. Lee and J. R. Young, by the written contract upon which this action is based, the contract reading as follows:

"This agreement, made and entered into

at Seattle, Washington, by and between the American Investment & Improvement Company, a corporation, party of the first part, and D. H. Lee and J. R. Young, copartners doing business under the firm name and style of Lee & Young, parties of the second part, witnesseth: That, whereas, the party of the first part is the owner of the following described lands, situated in the county of King, state of Washington, to wit (description of 153.75 acres); and whereas, the said party of the first part is desirous of disposing of the said lands in large tracts; and whereas, the said parties of the second part are a co-partnership formed for the purpose of dealing in real estate and particularly for handling and selling outlying properties: Now, therefore, in consideration of one dollar, and other valuable consideration, the party of the first part hereby agrees with the parties of the second part to sell to the parties of the second part or their assigns, the above-described lands, upon the agreed price of one hundred and fifty dollars (\$150.00), per acre, and the parties of the second part hereby agree with the party of the first part to buy from the said party of the first part the said lands, and to pay therefor at the rate of one hundred and fifty dollars (\$150.00) per acre, and the commissions and compensation for selling and handling the said real estate or any portion thereof, by the said parties of the second part, shall be whatever sum the parties of the second part shall receive over and above the one hundred and fifty dollars (\$150.00) per acre, and none other. The party of the first part further agrees with the parties of the second part that whereas, there are certain mortgages on the said lands, to become due, and interest and taxes to become due thereon, and on the payment of the sum of six thousand dollars (\$6,000.00), by the parties of the second part to the first part, that it, the first party will release the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ section 27, township 28 N., R. 4 E., Willamette Meridian, and on the payment of another and additional six thousand dollars (\$6,000.00) by the parties of the second part to the party of the first part, the first party agrees to release from the said mortgage lot three (3) and sufficient of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ same section, township and range, to make forty (40) acres. The said parties of the second part further agree with the party of the first part to pay all the taxes and interest and the mortgage or mortgages, as the same or any of them become due and payable, on the said lands, and if not so paid by the parties of the second part, then and in that event this agreement shall become inoperative as to the lands still covered by such mortgage or mortgages and agreed by the party of the first part to be conveyed to the parties of the second part, and the same shall revert to and remain the property (together with all its rights, privileges and franchises) of the par-

ty of the first part. * * * It is finally mutually agreed that the agreements, covenants and promises herein contained shall extend to the successors and assigns of the party of the first part, and to the heirs, executors, administrators or assigns of the parties of the second part. In witness whereof," etc.

On April 19, 1906, the interest of J. R. Young was assigned to the appellant Whipple, and the copartnership of Lee & Young was succeeded by the copartnership of Lee & Whipple. Shortly thereafter the investment company, aided by D. H. Lee, attempted to cancel the contract and terminate all rights of Lee & Young and Lee & Whipple thereunder. Other contracts, agreements, and conveyances, both before and subsequent, some affecting only the land here involved and others affecting the entire or larger tract of which it was a part, were executed by the investment company and by D. H. Lee with various parties. Differences, disputes, and litigation ensued, causing receivers to be appointed, but the controlling question now before us, all others being eliminated, is how much consideration were Lee & Whipple, as successors to Lee & Young, required to pay the investment company for the 158.25 acres of land. The appellant contends they were to pay \$150 per acre only; while the respondents insist they were to pay, in addition thereto, all three mortgages above mentioned, amounting to \$26,500. In other words, that they were to pay \$150 per acre, and in addition thereto discharge the mortgage lien, not only on the land they were buying, but also on all of the larger tract retained by the investment company. Although D. H. Lee, partner of the appellant Whipple, contends the contract has been forfeited and terminated by the investment company, he insists that, if it is to be specifically enforced, he is entitled to participate in the fruits of this litigation. At the same time he contends that the consideration for the land includes full payment of all the mortgages, as also does the respondent investment company. Throughout this litigation he has continually aided and abetted the investment company, apparently against his own interest. This conduct can only be explained upon the theory that his interests and those of the investment company are identical. If the company wins, he wins; but if, on the other hand, the appellant succeeds, he, as a member of the firm of Lee & Whipple, insists on sharing the fruits of that victory, the appellant contends that respondent Lee, by reason of his attitude, is not entitled to share in the benefits of a decree enforcing specific performance of the contract, and that the appellant alone should be permitted to perform the contract upon the part of the vendees. It is apparent that the appellant's interest cannot be increased by reason of any inconsistent acts of Lee. Appellant's con-

tention in this regard cannot be sustained.

A careful perusal of the contract shows that it is ambiguous, and that extrinsic evidence must be admitted to aid in its interpretation. The trial court, assuming that this court might consider the contract ambiguous, to aid its interpretation, admitted evidence of surrounding circumstances, contemporaneous agreements, the construction of the parties themselves, and their acts pertaining thereto. Upon consideration of this evidence we conclude that the purchase price was to be \$150 per acre only; that \$19,500 thereof was to be applied as payments on the mortgage indebtedness so as to release from the mortgage all of the land sold; that any remainder was to be paid to the investment company, and that Lee & Whipple, upon performance by them, were to be entitled to all other interests in the land. Respondents contend that 158.25 acres at \$150 per acre would not produce sufficient funds to pay \$26,500, the total amount of principal mentioned in the three mortgages. In the light of the evidence we do not construe the contract as directing an application of the purchase money to the payment of the entire \$26,500. By the terms of the mortgages to which the contract referred, the payment of \$19,500 only was needed to discharge the three mortgage liens on all of the 158.25 acres sold to Lee & Young. The Knight & Williams mortgages expressly stipulated that all of the land subject to their liens, and afterwards sold to Lee & Young, was to be released upon the payment of \$12,000. This being true, such payment when made would entitle any interested party to demand the release. Should the mortgagees refuse, the investment company or Lee & Whipple, its grantees, could have compelled them to execute and deliver the releases. 27 Cyc. 1415; Gammel v. Goode, 103 Iowa, 301, 72 N. W. 531; Lane v. Allen, 162 Ill. 426, 44 N. E. 831; Obern v. Gilbert, 6 Dak. 119, 50 N. W. 620.

J. R. Young, Lee's former partner, who is not interested in the result of this litigation, testified that, before Whipple acquired his interests, Lee & Young attempted to negotiate a sale of the 158.25 acres at \$200 per acre, which would yield them a profit; that he and Lee participated in these negotiations, Lee also representing the investment company. It is manifest from this evidence that, if they had previously contracted to pay \$150 per acre, and also the mortgage liens for the land, they were striving to sell for less than cost and not at a profit. These statements, although denied by Lee, harmonize with the evidence of other witnesses, also denied by him, to the effect that at other times he repeatedly offered to sell for less than he now contends Lee & Young were to pay for the land.

To reach the conclusion for which the respondents contend, we would be compelled to rely upon, credit, and accept evidence of D. H. Lee, which we think has been effectually

contradicted and refuted by undisputed circumstances, other written contracts, records of court proceedings, and the testimony of numerous witnesses. Although the trial judge admitted extrinsic evidence to aid in an interpretation of the contract in case such evidence should be held proper by this court, we incline to the view that he must have reached his own conclusion from the contract itself, without the aid of extrinsic evidence, and that in so doing he erred.

We regret that the volume of the record forbids a detailed statement and discussion of the facts upon which we predicate our conclusions. This cause is before us for trial *de novo*. Having examined all the evidence, we cannot accept the statements of D. H. Lee upon which the respondents are compelled to rely, and do rely. He has controlled the business affairs of the investment company since its organization. All of its acts have been performed at his instance. He has dominated its policy. With the exception of two minor officers of the corporation, who seem to be subject to his dictation and control, he has disagreed and found fault with nearly every person with whom he has come in contact. He has criticized one Owen, a former secretary of the investment company, accusing him of wrongfully doing away with the original minute book. He has charged Knight & Williams with wrongful and fraudulent acts. He charges that J. R. Young, his first partner; the appellant Whipple, his second partner; the Vanderventer-Davis Company, a corporation; and one Hayes, its manager—have violated their agreements with him, and he has attempted to forfeit their contracts. In his evidence he by innuendo accused the receiver, the receiver's attorneys, and other parties, with mutilating the minute book of the corporation in an attempt to discredit him. He positively contradicted statements of many disinterested witnesses. In brief, he seems to be in harmony with no one, and unable to transact business satisfactorily on any occasion. He was voted and claims to have earned a salary of \$5,000 from the corporation, although its records and business affairs have assumed a most deplorable tangle during his administration. During the same period he contracted to give substantially all of his time to the business of Lee & Young. The minute book which he introduced in evidence to sustain his contentions is, by reason of its history and condition, unworthy of serious consideration. A written contract between the investment company and Lee & Young, as parties of the first part, and Vanderventer-Davis Company, as party of the second part, executed January 20, 1906, sustains the appellant's position as to the purchase price, although the respondents vigorously contend that it cannot be so construed. In referring to the contract upon which this action is predicated, it contains the fol-

lowing note: "And whereas, the said American Investment & Improvement Company made a contract on the 20th day of November, 1905, with D. H. Lee and J. R. Young, co-partners as Lee & Young, for the sale and purchase of the said lands at the set price of one hundred and fifty dollars (\$150.00) per acre, to be paid by the said Lee & Young to the American Investment & Improvement Company." Later statements in this contract to which respondents refer do not in our opinion negative this statement. Further discussion is unnecessary.

We hold that the price to be paid by the appellant and D. H. Lee was \$150 per acre only, and that it should be first applied to the satisfaction of the mortgage liens on the 158.25 acres only. It is ordered that the decree of the trial court be modified in accordance with this opinion; that a further extension of the time, to be fixed by the trial court, be granted the appellant for the performance of the contract, and that otherwise the judgment be affirmed. The appellant will recover his costs on this appeal.

RUDKIN, C. J., and PARKER, DUNBAR, and MOUNT, JJ., concur.

(58 Wash. 233)

KIRK v. SEATTLE ELECTRIC CO.

(Supreme Court of Washington. May 5, 1910.)

1. CARRIERS (§ 359*)—STREET CAR PASSENGER—DISOBEDIENCE OF RULES—EFFECT AS TO RIGHT TO TRANSFER.

A rule forbidding passengers riding on the front platform of a street car is reasonable, and where a passenger refused to obey the same, he thereby lost his rights as a passenger, and was not entitled to a transfer, so that on entering a second car he was not entitled to ride without paying a second fare.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1439; Dec. Dig. § 359.*]

2. CARRIERS (§ 357*)—STREET CAR PASSENGER—POWER TO WITHHOLD TRANSFER—METHOD OF TESTING.

A street car passenger desiring to test the company's power to withhold a transfer from him, or to refuse him carriage without payment of another fare on a second car, should have withdrawn when the company asserted its position adverse to his claim to a transfer, and tested his rights in the courts, and should not have remained on the car without paying fare, and invited application of force to eject him.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1433; Dec. Dig. § 357.*]

3. CARRIERS (§ 355*)—EJECTION OF STREET CAR PASSENGER—FAILURE TO PAY FARE OR PRESENT TRANSFER.

A street car conductor is justified in demanding that a passenger pay his fare or present a transfer, and need not accept his contention that he is already a passenger because of payment of the first fare, and, failing and refusing to do that, he has no lawful right to passage, and the conductor is justified in ejecting him.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1416-1422; Dec. Dig. § 355.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. CARRIERS (§ 365*)—EJECTION OF PASSENGER—FORCE WHICH MAY BE USED.

A street car conductor, justified in ejecting a passenger, is only protected in the use of necessary force, beyond which the company must answer for his act, and the amount lawfully within his right must be measured by the stubbornness of the passenger's resistance.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1450-1452; Dec. Dig. § 365.*]

5. CARRIERS (§ 365*)—EJECTION OF PASSENGER—NECESSARY FORCE—DETERMINATION BY COURT OR JURY.

Neither the court nor jury should be required to weigh with too much nicety the amount of force necessary to eject in the face of offered resistance.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1450-1452; Dec. Dig. § 365.*]

6. CARRIERS (§ 358*)—PAYMENT OF PASSENGER'S FARE—OFFER BY THIRD PERSON—NECESSITY OF ACCEPTANCE.

It is immaterial to the carrier from whom it receives a fare, and, if another than the passenger offers to pay, it is the same as if the passenger himself offers to do so, and the conductor is bound to accept, but such payment must be acquiesced in by the passenger, either by express or silent assent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1437; Dec. Dig. § 358.*]

7. CARRIERS (§ 358*)—EJECTION OF PASSENGER—TENDER OF FARE BY OTHERS.

An ejected passenger who did not tender his fare; and expressly repudiated a tender of his fare by others, cannot claim any benefit from their offers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 358.*]

8. EVIDENCE (§ 471*)—OPINION EVIDENCE—ACTION FOR ASSAULTING PASSENGER.

In an action for assault in ejecting plaintiff from a street car, he was permitted to interrogate witnesses as to expressions of sympathy on the part of the passengers, and that he appealed to them to determine his action, and they insisted on his remaining. *Held*, that questions of this character, irrespective of the answers, should not have been allowed, as they called for expressions of opinions, which were not competent and could not be testified to by either the speaker or the hearer.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.*]

9. WITNESSES (§ 405*)—IMPEACHMENT—IMMATERIAL AND COLLATERAL MATTERS.

In an action for assault in ejecting plaintiff from a street car, it was error to permit him to impeach a motorman in regard to his testimony as to his age, as such matter was immaterial and collateral.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1273, 1275; Dec. Dig. § 405.*]

10. EVIDENCE (§ 496*)—OPINION EVIDENCE—EXTENT OF DAMAGES.

In an action for personal injuries, it was error to permit plaintiff to give his opinion of the monetary extent of his damages.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2284; Dec. Dig. § 496.*]

11. DAMAGES (§ 42*)—PERSONAL INJURIES—EVIDENCE—STATEMENT OF EXPENSE.

In an action for assault, plaintiff was permitted to introduce an itemized statement of the expenses of himself and wife while traveling over the country for over a year, including railway fares, meals, sleeping car berths, and board bills, from Seattle to Los Angeles, Columbus, Ohio, and other places, amounting to nearly \$1,000. *Held*, that this was error, as it in-

cluded items that could not be properly characterized as damages naturally and proximately flowing from injuries complained of, though if, on advice of his physician, he went to Los Angeles to subject himself to conditions which were necessary and proper for his recovery, necessary transportation and other expenditures which would not have been incurred at home would be proper elements of damage, as would be like expense of his wife, if his condition was such that he could not make the trip alone.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 42.*]

12. DAMAGES (§ 40*)—PERSONAL INJURIES—LOSS OF PROFITS.

Where loss of profits are based on an estimate of what could have been earned had plaintiff been in good health and earning power, they become speculative and remote, and are not recoverable in an action for personal injuries, but the proper element of damage in such cases is loss of earning power, if any.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 72-88; Dec. Dig. § 40.*]

13. DAMAGES (§ 100*)—PERSONAL INJURIES—LOSS OF EARNING POWER—DETERMINATION.

The loss of earning power as an element of damage in a personal injury case can be arrived at by determining what plaintiff was capable of earning before and after his injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 237-241; Dec. Dig. § 100.*]

14. DAMAGES (§ 40*)—PERSONAL INJURIES—ESTIMATED PROFITS AND COMMISSIONS IN BUSINESS.

In an action for personal injuries, estimates of profits and commissions in plaintiff's business, of assisting in getting out special editions of newspapers, his commissions depending on the financial success of the venture, are too speculative and remote.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 72-88; Dec. Dig. § 40.*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by John W. Kirk against the Seattle Electric Company. From a judgment for plaintiff, defendant appeals. Reversed.

James B. Howe and A. J. Falknor, for appellant. Charles A. Riddle and Wm. M. Watson, for respondent.

MORRIS, J. In this action respondent sought damages for injuries sustained in an assault, claimed to have been committed upon him October 2, 1907, by appellant's servants in charge of its car No. 530. The theory of the complaint is that respondent was a passenger, having paid his fare upon car No. 311; that the passengers upon car 311 were transferred to car 530 and transfers issued to them, but that a transfer was refused respondent and, upon entering the second car, he became entitled to carriage without additional payment of fare. The conductor of the second car refused to carry him without a fare, and, when payment was refused, he alleges he was set upon by the conductor and motorman and severely beaten. He also sets forth that, at the request of the conductor of the second car, he was arrested and taken to the police station, where no charge being made against him he

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was discharged. The answer sets forth a rule of the company forbidding passengers from riding upon front platforms of cars; that respondent refused to obey such rule when his attention was called to the same, but insisted upon remaining upon the front platform, and that the car was finally run into appellant's car barn, and all the passengers thereon transferred to the second car, except appellant who was refused a transfer, upon the theory that, having violated a reasonable rule of the company and refusing to abide thereby, he forfeited his rights as a passenger, and was not entitled to a transfer upon car 530; that immediately upon entering the second car, he was informed that he could not ride thereon without the payment of fare, which he refused, and the employees of the company thereupon undertook to eject him, using no more force than was necessary for that purpose, and, being unable to do so, called a policeman to remove him. This affirmative matter being denied, the case went to the jury upon the issues thus raised, and a verdict was returned awarding respondent \$6,000. A new trial being denied, the case is brought here for review.

Many questions are presented upon the appeal, it being contended, first, that a demurrer should have been sustained to the complaint, upon the ground that several causes of action were improperly united. There was but one cause of action pleaded—that for assault. The allegation of the subsequent arrest was no part of this cause of action, nor was it the setting forth of a second cause of action. Had the complaint been moved against upon this ground, the reference to the subsequent arrest would doubtless have been stricken. It was, however, good as against a demurrer, in that it was not set forth as an independent cause of action and then improperly united with the first cause of action pleaded.

Upon the main issue involved, as to the relative rights of the parties, we deem the law well settled. The rule forbidding passengers riding upon the front platform was a reasonable one, and it was the duty of respondent to obey the same when his attention was called to it, and, if he willfully refused to be bound by the rule and enter the body of the car, he thereby lost his rights as a passenger, and the company was not required to issue a transfer to him. Upon entering the second car he was not entitled to ride thereon without the payment of a second fare, and, upon demand being made, he should have complied; or if, as there is some evidence to indicate, he desired to test the power of the company to withhold a transfer from him or to refuse him carriage without the payment of another fare upon the second car, it was his duty to withdraw when the company asserted its position, and test his rights in the courts. There was no need, and it was an imprudent act on his

part, to insist upon remaining upon the car without the payment of fare, and thus invite the application of force to eject him. The proper way for him to test the question if he desired to do so was in the lawful and peaceable procedure of the courts, and not in opposing strength to strength, and permitting the superior force to determine the rights involved. When respondent entered the second car, and thus indicated his purpose to seek carriage thereon, the conductor was justified in demanding that he pay his fare or present a transfer. The conductor was under no duty to accept his contention that he was already a passenger because of the payment of the first fare. Respondent could only lawfully continue upon the car by paying fare or producing a transfer. Failing and refusing to do that, he had no lawful right to passage, and the conductor was justified in ejecting him. In doing so, however, he would only be protected in the use of necessary force. Going beyond that the company must answer for his act. The amount of force lawfully within the right of the conductor must be measured by the stubbornness of respondent's resistance. He had the right to use such force as was necessary to overcome respondent's resistance, and to remove him from the car, and while the amount of force lawfully to be used in the accomplishment of such removal is dependent upon the force used in resisting it, the measurement of force with force with exactness is a difficult problem for either court or jury, and hence it has become established that neither court nor jury should be required to weigh with too much nicety the amount of force necessary to an ejection from the car in the face of the resistance offered. *Clark v. Great Northern Ry. Co.*, 37 Wash. 537, 79 Pac. 1108.

This, then, was the issue to be submitted to the jury: Did the employees of the company, in their endeavor to eject respondent from the car, use and employ more force than was necessary to overcome the resistance offered by respondent, accompanied by proper instructions as to the rights of the parties as herein indicated? Respondent contends that, while he did not personally offer to pay his fare, other passengers proffered a fare for him. It is immaterial to the company from whom it receives its prescribed fare. If another offered to pay respondent's fare, it was the same as if respondent himself had offered to do so, and the conductor would be bound to accept it. *Louisville & N. R. Co. v. Garrett*, 78 Tenn. 438, 41 Am. Rep. 640. But such payment on the part of others must be acquiesced in by those in the position of respondent, either by an express assent or by silence which will be construed as an acceptance. *Gates v. Quincy, O. & K. C. Ry. Co.*, 125 Mo. App. 334, 102 S. W. 50.

In the record before us, it appears that, when tenders of fare were made by outsiders,

the respondent said to them: "Don't pay my fare for me. I paid my fare and I am entitled to ride home." Respondent, having thus expressly repudiated such payment, cannot thereafter claim any benefit from the offers. This rule is likewise subject to this additional modification: Such offer on the part of others or on the part of those whom it is sought to eject must come before the attempted ejection. In *Hoffbauer v. D. & N. W. R. Co.*, 52 Iowa, 342, 3 N. W. 121, 35 Am. Rep. 278, it is said: "The rule that a passenger may test the regulations of the company and the firmness of the conductor by refusing to pay full fare, and still save himself from expulsion by tendering full fare after expulsion had commenced, is not only uncalled for for the just protection of the recusant passenger, but would tend to encourage a practice which if indulged in would interfere with the convenience of the company and the dispatch and quiet to which other passengers are entitled." A like rule is announced in *O'Brien v. N. Y. Cent. & H. R. R. Co.*, 80 N. Y. 236, and *Pease v. D. L. & W. R. R. Co.*, 101 N. Y. 367, 5 N. E. 37, 54 Am. Rep. 699. *Hutchinson on Carriers* (3d Ed.) § 1085, thus cites the rule, and gives many authorities in support: "The prevailing rule and the one supported by the better reason is that, even though he may once have refused to pay his fare or show his ticket, he may at any time before the process of ejection is begun comply with the demand and continue his journey on that train; but that where he so refuses and persists in his refusal, after being accorded reasonable time and opportunity to comply, until the conductor has the right, and it is his duty to eject him, and the conductor has begun the process of ejection either by stopping the train or applying force to the passenger when necessary, the passenger thereupon forfeits his rights as a passenger and his ejection may be completed even though he may thereafter tender the performance demanded." No error was committed by the court below in its instructions upon these rules of law of which we have been speaking, but inasmuch as they are involved in determining the respective rights of the parties, and we have decided to grant a new trial for errors committed, we have thought it best to consider them in order to simplify and determine the rules which should govern the court in the new trial.

Respondent was permitted to interrogate witnesses as to expressions of sympathy on the part of the passengers, and that he appealed to them to determine his action, and that they insisted on his remaining. This was clearly error. Questions of this character, irrespective of the answers, should not have been allowed, as they called for expressions of opinions on the part of the passengers, which were not competent, and could not be testified to by those expressing such sentiments or by those who heard them.

Respondent was also permitted to impeach

the motorman of the first car in regard to his testimony as to his age. This was error. The age of the first motorman was an immaterial matter, and there was no necessity for any inquiry in regard to it. It was clearly a collateral matter, and, if respondent was permitted to cross-examine the witness as to his age, he was bound by his answer and could not subsequently impeach him. It is too well established to require citation that a witness may not be impeached in a collateral matter.

Respondent was permitted to give his opinion of the monetary extent of his damages. This was also error. It was for respondent to give to the jury the character of his damage, but it was for the jury to determine its extent and fix the compensatory amount of his loss.

Respondent was also permitted to give to the jury an itemized statement of the expenses of himself and wife while traveling over the country for over a year, including railway fares, meals, sleeping car berths, and board bills, from Seattle to Los Angeles, Columbus, Ohio, and other places, amounting to the sum of \$964. This was error, as the itemized bill manifestly included items that could not be properly characterized as damages naturally and proximately flowing from the injuries complained of. If, upon the advice of his physician, respondent went to Los Angeles to subject himself to conditions which were necessary and proper elements in his recovery, the necessary transportation and other expenditures of the trip, incurred for items which would not have been included in his necessary expenditure had he remained at home, would be proper elements of damage. The like expense of his wife, if respondent's condition was such that he could not make the trip alone, would also be an item of damage. Such, also, would be the amounts necessarily paid for medicine and medical attendance. To such extent only were the items included in the expense statement admissible.

The court charged the jury that the respondent was entitled to recover for "loss of profits, commissions, and pecuniary rewards, by reason of said injuries." This was error, as under the evidence such profits and commissions were highly speculative in their nature. There may be cases where there can be a recovery for loss of profits where, by reason of some definite contract, such profits can be definitely ascertained, but where as in this case they are based upon an estimate of what could have been earned had respondent been in good health and earning power, they become speculative and remote and are nonrecoverable. The proper element of damage in cases of this character is loss of earning power, if any. If, by reason of his injuries respondent's earning capacity was diminished, the extent of such diminution was a proper element of recovery, and could be arrived at by determining what he was

capable of earning before and after his injury. But estimates of profits and commissions in his business, which was that of assisting in getting out special editions of newspapers in all sections of the country, respondent's commissions depending upon the financial success of the venture, were altogether too speculative and remote.

Other errors are assigned in the instructions of the court, but what has heretofore been said is determinative of them, and there is no necessity for special reference to them.

The judgment is reversed, and the cause remanded for a new trial.

RUDKIN, C. J., and FULLERTON, CHADWICK, and GOSE, JJ., concur.

(58 Wash. 276)

MASON v. YEARWOOD et ux.

(Supreme Court of Washington. May 4, 1910.)

1. WATERS AND WATER COURSES (§ 19*)—RIPARIAN RIGHTS—APPROPRIATION.

The rule that, where rights to lands across which a stream flows are acquired or initiated prior to any appropriation of the waters of the stream, the rights of the riparian proprietors are determined by the rules of the common law governing riparian proprietors in force in the state, and not by any rule of prior appropriation, applies to springs existing from time immemorial, or of new creation, and they may only be appropriated if existing or appearing on the land to which no title has been acquired from the government, or initiated looking to such acquirement; and, where an owner of land made no appropriation of the waters of springs until long after initiatory steps had been taken by others to acquire title to the land on which the springs appeared, the latter could hold the springs and claim the waters as against any claim of prior appropriation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 11; Dec. Dig. § 19.*]

2. WATERS AND WATER COURSES (§ 101*)—RIPARIAN RIGHTS—SPRINGS.

Though one may have riparian rights in a stream, though its source is but a spring on the land of another, it must be a stream that was wont to flow from time immemorial, and the owner of land on which a new spring breaks out may make such use of the waters as he pleases, though the waters, if unmolested, would cause a stream to flow across another's land.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 110, 111; Dec. Dig. § 101.*]

3. EASEMENTS (§ 5*)—ACQUISITION—ADVERSE USER.

An easement is acquired in the land of another by an adverse user for the period of limitations.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 13; Dec. Dig. § 5.*]

4. WATERS AND WATER COURSES (§§ 127, 143*)—WATER RIGHTS—ACQUISITION—ADVERSE USER.

A claim to government land, first settled on prior to 1880, was perfected, and title was obtained. In 1882 or 1883, springs broke out on the land and produced a stream which flowed across the land of another, who for more than 10 years used the waters of the stream. *Held*, that the latter acquired by prescription a right

to the use of such water, but the right was limited to the quantity used during the period.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 144, 152; Dec. Dig. §§ 127, 143.*]

5. WATERS AND WATER COURSES (§ 127*)—WATER EASEMENTS—ACQUISITION—ADVERSE USER.

The use of waters flowing across or arising on the land of another may be acquired by adverse user.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 144; Dec. Dig. § 127.*]

Department 1. Appeal from Superior Court, Kittitas County; E. B. Preble, Judge.

Action by Ruth Mason against John A. Yearwood and wife. From a judgment for defendants, plaintiff appeals. Affirmed, without prejudice to the right to bring a new action.

O. O. Felkner, for appellant. Hovey & Hale, for respondents.

FULLERTON, J. This is an action to enjoin the diversion of water. From the record it is gathered that the appellant, who was plaintiff below, owns land situated in sections 12 and 13 in township 18 N., range 17 E., of the Willamette Meridian. That the respondents own land in section 11 in the same township and range. To the south of the respondents' land, and in the same section, is land belonging to one Haywood. In 1879 one Alanson T. Mason filed a homestead application for the lands now owned by the appellant, together with that owned by Haywood, and thereafter procured title to the same under the homestead laws of the United States. The appellant and Haywood have obtained their titles through mesne conveyances from Alanson T. Mason. The land owned by the respondents was first settled upon prior to 1880. The claim passed from one to another until it reached one Pardee, who settled thereon in March 1884, and in due time obtained title thereto from the government. The respondents derive their title through him. The lands mentioned have a general slope to the east and southeast, and are arid in the sense that they require irrigation to produce crops. Some time in the year 1882 or 1883 springs broke out on the southwest corner of the land now owned by the respondent, which caused a swamp to form immediately below and surrounding them, which drained down through a draw extending across the land now owned by Haywood, but which then belonged to Alanson T. Mason, onto the land now owned by the appellant. In 1884 Mason caused a ditch to be dug through this draw to a point on his own land immediately below the swamp formed by the springs through which he took the water from the swamp across the Haywood land to the land now owned by the ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pellant, where he put it to a beneficial use. This ditch he and his successors in interest have maintained until the present time. In 1890 or 1891 the respondent dug a small ditch leading from the springs to his house, and took water therefrom for stock and domestic purposes. In 1902 the defendants for the purpose of draining the swamp formed by the springs, constructed a ditch on the east side of the swamp conveying the water to their south line, where it entered a ditch constructed on the Haywood land. Subsequently the appellant connected this with her own ditch, and from that time until the spring of the year 1908 the water therefrom continually flowed down onto her premises, where she used it for purposes of irrigation. On the last date mentioned the respondents constructed a new ditch from this latter ditch eastward on their own land which had the effect of diverting a considerable part of the water from the springs away from the appellant's ditch. It is to restrain this diversion that the present action is prosecuted.

At the trial there was evidence tending to show that the springs which give rise to the marsh or swamp on the respondents' lands had no existence prior to the year 1882, or, if they flowed at all, it was only for a short time in the spring of the year when the snow of the winter was melting; that what is now swamp and marsh land was then dry, so that it could be ridden or driven over at any season of the year. In fact witnesses testified to cutting hay thereon with a mower as early as the month of June. It was given in evidence also that the springs began to be active only after the owners of the lands to the west and above the springs began to irrigate their lands, that the flow increased as irrigation increased, and that this increase has been continuous; there being much more water flowing from the springs now than did flow therefrom even a few years ago. It appears also that the swamp itself is constantly increasing in size, being much larger now than it was even 10 years ago. It does appear, however, that for more than 25 years a continuous stream has flown from the springs into the swamp and from the swamp into the drainage and irrigating ditches of the appellant, and from there to her lands where it has been used continuously for the purposes of irrigation. Moreover, it appears that all of the water coming from the springs, except the small quantity taken by the respondent in 1901, which he uses for domestic and household purposes, has been so used, and that its use was without interruption until the respondents made the diversion which gave rise to this action.

The appellant on this appeal makes three principal contentions. She contends, first, that she is entitled to the water from these springs in virtue of a prior appropriation; second, that she is a riparian proprietor on the stream that flows from the spring, and

is entitled as such to have the same flow on to her lands as it was wont to flow in a state of nature, without waste or unnecessary diminution by the land proprietors on the stream above her land; and, third, that she is entitled to the water by prescription, since she has had the open and notorious possession and use of the same for a period of time longer than the time of the statute of limitations, all the while claiming the right to such possession and use adversely against all the world.

The trial judge passing on the contentions made in the court below held that neither the first nor second was maintainable under the evidence, and we think his conclusions in that regard were just. As we held in *Nesalhou v. Walker*, 45 Wash. 621, 88 Pac. 1032, the common-law doctrine of riparian rights prevails in this state, and that where rights to lands across which a stream of water flows are acquired or initiated prior to any appropriation of the waters of the stream, the rights of the riparian proprietors are determined by the rules of the common law relating to riparian proprietors, and not by any rule of prior appropriation. The same rules would apply to springs, whether existing from time immemorial or of new creation. They could only be appropriated if existing or appearing on land to which no title had been acquired from the government or initiated looking to such acquirement. So in this case it seems to us clear that the appellant's predecessor in interest made no appropriation of the waters of these springs until long after initiatory steps had been taken by the respondents' grantors to acquire title to the land on which they appeared. Such being the case, the respondent is entitled to hold them and claim the waters therein as against any claim of prior appropriation.

The contention that the appellant can enjoin a diversion of the water on the ground that she is a riparian proprietor on the stream flowing from the marsh is also without foundation. While one may have riparian rights in a stream even though its source be a spring upon the land of another (*Hollett v. Davis* [Wash.] 103 Pac. 423; *Miller v. Wheeler* [Wash.] 103 Pac. 641, 23 L. R. A. [N. S.] 1065), yet it must be a stream that was wont to flow from time immemorial. The owner of land upon which a new spring breaks out may make such use of the waters as he pleases, notwithstanding it would, if unmolested, cause a stream to flow across another's land. Any other rule would make his estate involuntarily servient to a use to which it was not subject when he acquired it.

The third contention is not discussed in the written opinion filed by the trial judge, and we are not advised as to the reasons which prompted him to deny relief on that ground. It has seemed to us that the appellant can

justly claim a right by prescription to a portion of the flow from these springs. It is clear from the evidence that the appellant and her predecessors in interest have appropriated and used the waters flowing from the spring, with the exception of that before mentioned, which the respondents have diverted for domestic uses, for a period of nearly 25 years. While there is no direct statute governing the matter, the courts generally hold that an easement is acquired in the lands of another by an adverse user for the period of the statute of limitations. *Wasmund v. Harm*, 36 Wash. 170, 78 Pac. 777; *Ricard v. Williams*, 7 Wheat. 110, 5 L. Ed. 398. So in this case the appellant is entitled to the continuous use of so much of the waters flowing from these springs as she has had the continuous adverse use of for a period of 10 years immediately preceding the time the respondents diverted it. This does not mean all of the water flowing through her flumes at the time of the diversion, but a quantity equal to the quantity that was wont to flow thereon 10 years prior to that time. Since the spring has materially increased in size and flow during the last 10 years, the respondents are entitled to check it if they may, or appropriate to their own use the increase of flow. Their estate in their land needs stand servient only to the easement they are estopped to dispute from lapse of time. They are not estopped to interfere with the increase of flow occurring within the 10-year period, for otherwise their whole estate might become servient to this particular use.

The appellant cites *Dickey v. Maddux*, 48 Wash. 411, 93 Pac. 1090, to the point that a right to a use of waters arising from springs on the land of another cannot be acquired by adverse use, but this point was not decided in that case. It was the opinion of the writer that the question was there presented, and should have been met and determined, but the court determined the question on other grounds. The doctrine that prescriptive rights in the use of waters flowing across or arising on the land of another may be acquired by adverse user has been repeatedly recognized, if it has not been expressly decided, by this court. *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 38 Pac. 147; *Spring Hill Irr. Co. v. Lake Irr. Co.*, 42 Wash. 379, 85 Pac. 6; *Matheson v. Ward*, 24 Wash. 407, 64 Pac. 520, 85 Am. St. Rep. 955; *Hollett v. Davis* (Wash.) 103 Pac. 423.

The record, however, is not sufficiently complete to enable us to direct the proper judgment to be entered. While it shows that the respondent in 1903 diverted a considerable proportion of the waters then flowing from the springs, probably greater than he was entitled to as of right, it fails to show what the excess was. This could only be determined by ascertaining the quantity of water flow-

ing into the appellant's ditches and flumes at a time 10 years prior to the time of the diversion, and subtracting that quantity from the quantity now flowing from the springs, but there is nothing in the evidence that enables us to do this, as the appellant seemingly tried her case on the theory that she was entitled to all of the waters flowing from the springs. This was, of course, the fault of the appellant, but we do not think that she should because thereof lose her right to recover such proportion of the water as is legally her due. Nor do we think the respondents should be obligated to bear the burden of the cost of the trial of the cause or its appeal to this court. The judgment of the court will be, therefore, that the judgment appealed from stand affirmed, but without prejudice to the right of the appellant to bring a new action for the ascertainment of the quantity of water she is entitled to by prescription, and to perpetually enjoin the respondents from interfering therewith. No costs will be allowed either party in this court.

RUDKIN, C. J., and CHADWICK and GOSE, JJ., concur.

(59 Wash. 530)

WRIGHT et ux. v. SUYDAM et al.

(Supreme Court of Washington. May 3, 1910.)

1. SPECIFIC PERFORMANCE (§ 126*)—RELIEF AWARDED.

Defendant S. contracted to convey to plaintiffs 10 acres of land for \$8,000, \$100 being paid down. The 10 acres were a part of a tract of 40 acres owned by defendant L., on which S. had an option at the time of entering into the contract with plaintiffs to purchase for \$24,000, and subsequently entered into a contract with L. for the purchase of the 40 acres for that sum on which he paid \$6,000. In an action for specific performance plaintiffs alleged that S. had no interest in the property other than that derived through said option and contract, and further alleged that they were ready to take the property, provided good title was shown by proper abstract, and were ready to pay in full the balance of the purchase price of the property. In its answer, L. alleged that it was ready and willing to convey the land under the terms of its contract to the person or persons entitled to such conveyance upon the performance of the terms and conditions of the contract. *Held*, that plaintiffs were not entitled to a decree to have the balance due from them applied in payment of the obligation of S. to L., and that they then have conveyance of the 10 acres, either from L. to S. or from L. direct, as L. cannot be required to convey upon any different terms than that expressed in its contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 405; Dec. Dig. § 128.*]

2. SPECIFIC PERFORMANCE (§ 25*)—CONTRACTS ENFORCEABLE.

The contract for which specific performance is prayed must be such that the court can make an efficient decree for its specific performance, and can enforce its decree when made.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 56; Dec. Dig. § 25.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. SPECIFIC PERFORMANCE (§ 128*)—ALTERNATIVE RELIEF—RECOVERY OF DAMAGES.

Where the facts do not warrant a decree for specific performance at the time of commencement of the action or any time thereafter and this is known to plaintiffs, the question of their damage will not be considered.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 412; Dec. Dig. § 128.*]

En Banc. Appeal from Superior Court, King County; A. W. Canfield, Judge.

Action by W. Hammond Wright and Frances R. Wright against Hendrick Suydam and the Stevenson Sanders Land Company. Judgment for defendants, and plaintiffs appeal. Affirmed.

Wright & Kelleher and Wm. Hickman Moore, for appellants. Roberts, Battle, Hulbert & Tennant and C. J. France, for respondents.

PARKER, J. This is an action to enforce specific performance of a contract for the sale of land. A trial resulted in judgment denying the relief prayed for by plaintiffs, and they have appealed to this court.

The facts are much involved, and some of them are seriously in dispute. However, we think certain of the facts shown by the record beyond controversy will enable us to determine the rights of the parties. These, so far as necessary for us to notice, are as follows: On August 14, 1908, the respondent Hendrick Suydam executed and delivered to appellant W. Hammond Wright the following contract for the sale of 10 acres of land in King county: "\$100.00. Received of W. Hammond Wright the sum of one hundred dollars as part payment upon purchase price of the following described real estate: [Here follows description.] The balance of the purchase price of the said premises is seventy-nine hundred dollars to be paid in cash, upon delivery of deed. The undersigned owners of said premises agree within fifty days to deliver to the purchaser an abstract of title prepared and certified by a reputable and approved abstract company, showing title to said property in said owners in fee simple free from all liens and encumbrances as herein stated, and good and marketable, and to convey such title to the purchaser, his heirs or assigns, by warranty deed prepared by the purchaser with full covenants satisfactory to the purchaser. If upon investigation title to said premises shall be found to be insufficient in any of the respects aforesaid, either in fact or as shown in the abstract, or shall be unsatisfactory to the attorney for the purchaser, the purchaser may at any time thereafter at his option elect to have the sums of money theretofore paid by him as part payment of the purchase price, immediately repaid to him, and in the event of such election the owners shall return such sums and all further obligation upon their part shall then cease; provided, how-

ever, that such election can not be exercised until after thirty days after the objections to title are pointed out in writing to the owners, which length of time is allowed to them to remedy the same. If title to the said described premises shall not be subject to objection in any of the respects aforesaid, and shall be satisfactory to the attorney for the purchaser and the purchaser shall fall upon his part to perform any of the terms of this agreement, then the said sum of money first above mentioned, shall be retained by the undersigned owners as liquidated damages, and they shall also be entitled to a return to them of the said abstract, and neither party shall be under any further liability. Deed is to be executed immediately upon examination of abstract, or within time allowed to owners to cure objections. Purchaser is to have twenty days after delivery of abstract within which to examine title. Time is of the essence of each of the provisions of this agreement. Dated at Seattle, Washington, this August 14, 1908. Hendrick Suydam, Owner." Since July 14, 1908, the respondent Stevenson Sanders Land Company has been the owner of a certain tract of land containing 40 acres, 10 acres of which tract is the same land mentioned in the contract above set forth. The only interest the respondent Suydam has ever had in this 10 acres was under an option he held to purchase the whole 40 acres executed by the respondent land company on July 14, 1908, and under a contract to purchase the same entered into by the land company with him on August 15, 1908. By the terms of this contract Suydam was to pay the land company as the purchase price for the entire 40 acres the sum of \$24,000, \$6,000 of which he paid in cash, and the balance to be paid, \$6,000 on or before July 1, 1909, \$4,000 on or before July 1, 1911, \$4,000 on or before July 1, 1912, and \$4,000 on or before July 1, 1913. At the time of rendering the final judgment in this case no part of the purchase price had been paid upon this contract other than the \$6,000 paid at the time of its execution, so that \$18,000 remained unpaid thereon. Suydam is not entitled to a conveyance under this contract until the payment of the whole of the purchase price with 7 per cent. interest per annum on deferred payments. Time is made the essence of this contract, and a failure to make payments as therein agreed would result in a forfeiture of all of Suydam's rights thereunder. In their complaint the appellants refer to both the option and contract under which Suydam acquired his right to purchase the 40 acres, referring to the record of the option and contract in the Auditor's office of King county by volumes, pages, and dates, and allege that "the defendant Suydam has no right, title, or interest in said property other than such as is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

derived through the said written agreements." We mention this to show appellants' knowledge prior to the commencement of this action of the nature and extent of Suydam's interest in the land. The appellants, knowing that Suydam did not own the land in fee, and that he for that reason could not convey good title, have never offered unconditionally to pay him the balance of the purchase price upon the contract for the 10 acres, and signified their willingness to take from him a conveyance of such title as he possessed. The nature and extent of their offer is best shown by the allegation in their complaint as follows: "The plaintiffs now are, and at all times herein mentioned have been ready, willing, and anxious, provided good title is shown by proper abstract, to proceed with the purchase of said property under the terms of said option shown in the said Exhibit A, and now are and at all times have been ready to pay in full the balance of the purchase price of the said property." The Exhibit A mentioned is the contract for the 10 acres above set forth. The respondent land company by its answer admits the execution by it of the contract of August 15, 1908, by which it agreed to sell the 40 acres to Suydam, and alleges affirmatively that Suydam has paid \$6,000 on the purchase price and no more; and further alleges, "that this defendant does not know and cannot pass upon with safety to itself the difference between the said plaintiffs and the said defendant Hendrick Suydam, but has been at all times ready and willing, and is now ready and willing, to convey the said lands and premises under the terms of said option to the person or persons entitled to such conveyance upon the performance of the terms and conditions of said option by said person or persons, and hereby tenders performance of said option to such person or persons as the court may adjudge entitled to a conveyance herein." The word "option" in this allegation clearly means the contract to sell Suydam the 40 acres of August 15, 1908. The land company prays that it be not subjected to costs, and that its rights be fully protected. The affirmative matter in this answer is not replied to, so it stands as admitted.

Learned counsel for appellants, as we understand them, contend that in view of the attitude of the respondent land company, and its willingness to convey to Suydam or whomsoever the court may determine is entitled to succeed to his interest, the appellants have the right to have such a decree entered in their favor as to cause the balance of the \$7,900 due upon their contract with Suydam for the 10 acres to be applied in payment of Suydam's obligation necessary to perfect his title to the 10 acres, and that they then have conveyance of the 10 acres either from the land company through Suydam or from the land company direct. This contention is based upon what we regard as

an erroneous assumption as to the nature and extent of the offer made by the land company. The land company does not offer to convey the 10 acres upon the payment to it of any certain sum due from appellant to Suydam, but offers to convey under the terms of its contract with Suydam. This offer can mean nothing less than an offer by the land company to convey when it has been fully paid the balance of the purchase price upon the whole 40 acres. If the contract between the land company and Suydam was for the sale of the 10 acres only, which Suydam agreed to convey to appellants, and the balance due from appellants to Suydam was sufficient to pay the balance due the land company from Suydam, and thus perfect Suydam's right to specific performance as against the land company, then the specific performance which is here prayed for might be possible in the manner sought to bring it about. The trouble with enforcing specific performance is that the land company cannot be required to convey upon any different terms than that expressed in its contract of August 15, 1908, wherein it agrees to convey to Suydam the 40 acres upon payment of \$24,000. Upon no other conditions can the land company be required to convey either to Suydam or to any one who may succeed to his interest. It is clear that, if the whole of the balance of \$7,900 due to Suydam upon his contract for the sale of the 10 acres to appellants were applied towards the payment of the \$18,000 due from him to the land company, still neither he nor any one claiming under him would be entitled to a conveyance from the land company. The condition upon which the land company is required to convey would still fall far short of performance. There is nothing in this record showing that the land company has ever offered or is required to convey this 10 acres except by a conveyance of the whole 40 acres upon payment to it of the balance of the purchase price named in its contract for the sale thereof. Suydam did not at any time prior to the rendering of judgment in this case have title to the land involved so that he could convey the same, nor was his interest in the land of such nature that the court could by its decree place appellants in such position as his successor in interest that they would be entitled to a conveyance from the land company of the 10 acres, even by payment to it of the whole of the balance of \$7,900 due from appellants to Suydam. The court has no means of compelling Suydam to perfect his title, except possibly by directing the application of the balance due him from appellants, if that would accomplish such result; and, since that sum is clearly insufficient to satisfy the conditions upon which the land company can be compelled to convey, we are of the opinion that the court cannot decree specific performance by directing the land company to convey, and a decree requiring Suydam to convey would be

an idle and fruitless thing. It is elementary that "the contract must be such that the court is able to make an efficient decree for its specific performance, and is able to enforce its own decree when made." 4 *Pomeroy's Equity Jurisprudence* (3d Ed.) § 1403; 2 *Warvelle on Vendors* (2d Ed.) § 752; *Mauvin on Marketable Title to Real Estate*, 480; *Snell v. Mitchell*, 65 Me. 48; *Ormsby v. Graham*, 123 Iowa, 202, 98 N. W. 724; *Pack v. Gaither*, 73 N. C. 95; *Chartier v. Marshall*, 51 N. H. 400.

The facts not warranting a decree for specific performance at the time of commencement of the action or any time thereafter, and being known to appellants, the question of their damage is not in this case. *Peters v. Van Horn*, 37 Wash. 550, 79 Pac. 1110; *Morgan v. Ball*, 3 Wash. St. 554, 28 Pac. 925, 16 L. R. A. 614.

Other contentions made by counsel relate to disputed facts touching the alleged forfeiture of appellants' rights under their contract with Suydam. These need not be noticed since they in no event would change the result. We conclude that the judgment should be affirmed. It is so ordered.

RUDKIN, C. J., and CROW, MOUNT, CHADWICK, DUNBAR, FULLERTON, and GOSE, JJ., concur.

(58 Wash. 239)

CARSTENS PACKING CO. v. SOUTHERN PAC. CO.

(Supreme Court of Washington. May 3, 1910.)

1. CONTRACTS (§ 144*)—RIGHTS AND LIABILITIES OF PARTIES—WHAT LAW GOVERNS.

The general rule is that the law of the place of a contract controls in determining the rights and liabilities of the parties.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 724; Dec. Dig. § 144.*]

2. CONTRACTS (§ 101*)—VALIDITY—WHAT LAW GOVERNS—EFFECT OF COMITY BETWEEN STATES.

No rule of comity requires the courts of this state to ignore the declared public policy of the state, in order that a contract made in another state should be recognized as valid here, simply because valid where made.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 455; Dec. Dig. § 101.*]

3. CARRIERS (§ 218*)—CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY.

Limitation by contract of the liability of a carrier of live stock to gross negligence is clearly against the public policy of the state declared in *Laws 1907, c. 249*, providing that no contract shall exempt from liability of a carrier of live stock which would exist had no contract been made, and will not be recognized here, though valid in the state where the contract was made.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 686; Dec. Dig. § 218.*]

4. CARRIERS (§ 218*)—CARRIAGE OF LIVE STOCK—CLAIMS FOR LOSS OR DAMAGE.

Contracts for carriage of live stock provided that claims for loss or damage should be made in writing within 10 days after unloading,

and that failure to make such claim should operate as a waiver and release. A shipper filed a separate claim for damages for each shipment, the purport of which was a claim for loss and damage, and due to rough handling and improper facilities for loading and unloading at an intermediate point, and that the stock were badly bruised and depreciated in value. The carrier was also given notice and opportunity to inspect on arrival at destination. *Held*, that this substantially complied with provisions of the contract, especially in view of the notice and opportunity to inspect, and that the shipper was entitled to prove any damage which was the natural and probable result of such cause, without furnishing a bill of particulars showing the items.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 947; Dec. Dig. § 218.*]

5. CARRIERS (§ 227*)—CARRIAGE OF LIVE STOCK—ACTION FOR LOSS OR DAMAGE—EVIDENCE—ADMISSIBILITY.

In an action against a carrier based on written claims for loss and damage to cattle, due to rough handling and improper facilities for loading and unloading at an intermediate point, and that they were badly bruised and depreciated in value, evidence of shrinkage was admissible, though not mentioned as one of the items making up the total amount of damages claimed.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 956; Dec. Dig. § 227.*]

6. CARRIERS (§ 228*)—CARRIAGE OF LIVE STOCK—EVIDENCE OF NEGLIGENCE.

Ordinarily, in an action for negligence as to stock accompanied by the shipper, he must prove something more than the mere damaged condition when received from the carrier, but if the nature and extent of damage proven is such that the jury may infer it was caused by rough handling of the train, it would sustain a finding that the damage was caused by the carrier's negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 960; Dec. Dig. § 228.*]

7. CARRIERS (§ 228*)—CARRIAGE OF LIVE STOCK—EVIDENCE OF NEGLIGENCE.

Evidence in an action against a carrier of live stock for negligence in operation of its trains, and for failure to provide reasonably safe unloading facilities where stock were unloaded for water, food, and rest, *held* to support a verdict for plaintiff.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 960; Dec. Dig. § 228.*]

En Banc. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by the Carstens Packing Company against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Wm. D. Fenton, R. A. Leiter, and Peters & Powell, for appellant. Ellis, Fletcher & Evans, for respondent.

PARKER, J. This was an action to recover for loss and injuries to cattle in four shipments from points in California to Tacoma in this state. Each shipment was made the basis of a separate cause of action. The loss and injuries occurring in the second, third, and fourth shipments it is alleged were caused by the defendant's negligence in the operation of its trains, and also

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by its failure to provide reasonably safe unloading facilities at Gazelle, Cal., where the cattle were unloaded for water, food, and rest. The loss and injuries occurring in the first shipment are alleged to be the result of defendant's negligence in the operation of its trains. The defendant by its answer denied all negligence upon its part, and alleged that the shipments were made under written contracts upon the terms and conditions of which, and not otherwise, it undertook to transport the cattle from the several points in California to Tacoma, setting forth the contracts, containing the following: "That in no event is first party or its lessors to be liable for any loss of or damage to said livestock not proven to have been caused by the gross negligence of first party in the performance of or failure to perform some duty which under the terms of this contract, is due from first party to second party as to said livestock." Defendant also alleged that under the law of California, where the contracts were made, such agreed exemption from liability is permissible, and set forth the sections of the Civil Code of California showing that such stipulated exemption is valid in that state. The trial resulted in a verdict in favor of the plaintiff upon each cause of action. Judgment was entered thereon, and, upon the denial of defendant's motion for a new trial, it appealed to this court.

The learned trial court instructed the jury, in substance, that the defendant could not stipulate against its own negligence, and refused to give instructions requested by appellant's counsel, to the effect that it could be held liable for its gross negligence only. This is assigned as error by counsel for appellants, upon which assignment it is contended that since this contract was executed in California, and the law of California sustains the validity of the provision therein limiting the liability of appellant as against its own negligence other than gross negligence, the law of California must govern in determining the construction and validity of that part of the contract and the respective rights of the parties thereunder. Of course, the general rule is that the law of the place of the making of a contract controls in determining the rights and liabilities of the parties thereto. This rule it is contended by learned counsel for respondent has its exceptions and qualifications, and does not control in this case, because the limitations attempted to be placed upon appellant's liability resulting from its negligence other than its gross negligence is in contravention of the public policy of this state, and therefore, when sought to be enforced in the courts of this state should be regarded as void, and that appellant's liability for its negligence should be determined regardless of such provision. At the time of the making of the contracts it was a part of the statute law of

this state. Laws 1907, p. 692: "That no contract, receipt, rule or regulation shall exempt any corporation engaged in transporting live stock by railway, from liability of a common carrier, or carrier of live stock, which would exist had no contract, receipt, rule or regulation been made or entered into." It hardly needs argument to demonstrate that this is a declaration of public policy. Clearly its enactment was prompted by a concern for the public welfare. It is in keeping with the law existing in many of the states of the Union, touching the power of public carriers to limit their liabilities and lessen their duties as such, by rule or contract. Upon the question of attempting to so limit their liability against their own negligence, in *Moore on Carriers*, 313, it is stated: "The doctrine is established by the great weight of authority in this country that a carrier cannot by stipulation or contract relieve or exempt itself from liability for losses or injuries caused by its own negligence or want of care and skill, or that of its servants, or by its own or their willful default, misfeasance or tort. Public policy and every consideration of right and justice, it is held, demands that the right of the owners to absolute security against the negligence of the carrier, and of all persons engaged in performing its duty, shall not be taken away by any reservation in its receipt, or by any arrangement, contract or stipulation entered into. Such contracts are, therefore, declared to be void as being unreasonable and contrary to public policy and afford no protection to the carrier."

This court has recently recognized this rule in *Bartelt v. O. R. & N. Co.*, 106 Pac. 487. In view of the importance of the question involved, we deem it appropriate to notice the reasons upon which this doctrine rests. They have been ably stated by Justice Bradley speaking for the Supreme Court of the United States in the case of *Railroad Co. v. Lockwood*, 84 U. S. 357, 378, 21 L. Ed. 627, we quote from that decision at some length, commencing at page 378:

"It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. * * *

"Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

"The carrier and his customer do not stand on a footing of equality. The latter is only

one individual of a million. He cannot afford to higgie or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. * * *

"If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contract assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society,

and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule that he must be responsible at all events. Hence, the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law. * * *

"Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public operate with full force to divest the transaction of validity."

It is clear that if this contract had been made within the state of Washington for shipments from and to points within the state the provisions thereof attempting to limit the liability of the appellant against its negligence would be regarded as void. What, then, is the effect of such a provision in a contract made in a state where the law regards it as binding upon the parties, when such contract is to be performed at least in part in our own state? Must the law of the place of executing the contract control when rights such as here involved are brought in question in our courts? Does the comity which exists between sovereign states compel us to measure the rights of the parties by such a provision even though it violates the public policy in our state? It may be conceded that in many of the states of the Union the law of the state wherein such contracts as here involved are made is held to govern even though the public policy of the state in which the contract is sought to be enforced is thereby violated. In this state the question is here presented for the first time, and we are therefore not bound by any previous decisions or expressions of our own upon the subject. In solving the problem, then, we feel constrained to follow the views of the Supreme Court of the United States. Not only because it is the highest authority in our land, but because those views appeal to our sense of right and are, we think, most in keeping with the spirit of

the age. Let us notice some of the decisions of that court.

In the case of *Oscanyan v. Arms Co.*, 103 U. S. 261, 28 L. Ed. 539, a consul general of the Turkish government residing in this country entered into a contract whereby in consideration of a certain percentage he agreed to use his influence in favor of an arms company with his government—to promote a sale of arms by the company to his government; and the sale having been consummated he sued to recover his percentage. It required but little argument to show that such a contract was against public policy in this country. It is true the contract was made in this country, but it was pointed out that the Turkish government did not object to its officer taking commission on such contract. The court disposed of the case as though that were the fact, and treated the contract somewhat as though it had been made in Turkey. Justice Field speaking for the court, said at page 277 of 103 U. S.: "But admitting this to be otherwise, and that the Turkish government was willing that its officers should be allowed to take commissions on contracts obtained for it by their influence, that is no reason why the courts of the United States should enforce them. Contracts permissible by other countries are not enforceable in our courts, if they contravene our laws, our morality, or our policy. The contract in suit was made in this country, and its validity must be determined by our laws. But had it been made in Turkey, and were it valid there, it would meet with the same reprobation when brought before our courts for enforcement. The general rule undoubtedly is that the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; but to this, as to all general rules, there are exceptions, and among these Story mentions contracts made in a foreign country to promote or reward the commission of crime, to corrupt or evade the due administration of justice, to cheat public agents, or to affect the public rights, and other contracts which in their nature are founded in moral turpitude, and are inconsistent with the good order and solid interest of society. 'All such contracts,' he adds, 'even although they might be held valid in a country where they are made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality, or even of natural justice, are allowed to have their due force and influence in the administration of international jurisprudence.' Story, *Conflict of Laws*, § 258."

In the case of *The Kensington*, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190, the effect of our public policy upon the attempted enforcement of a contract, made in a foreign country, similar to the contract here involved, was brought in question. In that case there was involved a loss of baggage of a passenger upon a steamship bound from Antwerp

to New York. Among other conditions printed upon the ticket of the passenger, and which formed a part of the contract, it was provided that the shipowner should not be liable for loss of baggage from any act, neglect, or default of the shipowner's servants. This limitation of liability appeared to be valid under the laws of Belgium, where the ticket was purchased and the contract for passage made. Justice White, in discussing the effect of such provision when it was attempted to be invoked as a defense in a suit for the loss of the baggage in a federal court of this country, commencing at page 268 of 183 U. S., at page 104 of 22 Sup. Ct. (46 L. Ed. 190), said: "It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary. We content ourselves with referring to the cases of the *Baltimore & Ohio*, etc., *Railway v. Voigt*, 176 U. S. 498, 505, 507 [20 Sup. Ct. 385, 44 L. Ed. 560], and *Knott v. Botany Mills*, 179 U. S. 60, 71 [21 Sup. Ct. 30, 45 L. Ed. 90], where the previously adjudged cases are referred to and the principles by them expounded are restated. * * * Testing the exemptions found in the ticket by the rule of public policy, it is apparent that they were void, since they unequivocally sought to relieve the carrier from the initial duty of furnishing a seaworthy vessel, for all neglect in loading or stowing, and, indeed, for any and every fault of commission or omission on the part of the carrier or his servants. And seeking to accomplish these results, it is equally plain that the conditions were void if their legality be considered solely with reference to the modifications of the general rule created by the act of 1893. *Knott v. Botany Mills*, supra. As, however, the ticket was finally countersigned in Belgium, and one of the conditions printed on its face provides that 'all questions arising hereunder are to be settled according to the Belgium law, with reference to which this contract is made,' it is insisted that such law should be applied, as proof was offered showing that the law of Belgium authorized the conditions. The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the *lex loci* governs, and it is also true

that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught. Story, *Conflict of Laws*, §§ 38, 244. Whilst, as said in *Knott v. Botany Mills*, the previous decisions of this court have not called for the application of the rule of public policy to the precise question here arising, nevertheless, that it must be here enforced is substantially determined by the previous adjudications of this court. In *Liverpool & Great Western Steam Co. v. Phoenix Insurance Co.*, 129 U. S. 397 [9 Sup. Ct. 469, 32 L. Ed. 788], the question arose, whether conditions, exempting a carrier from responsibility for loss caused by the neglect of himself or his servants, could be enforced in the courts of the United States, the bill of lading having been issued in New York by a British ship for goods consigned to England. Despite the fact that conditions, exempting from responsibility for loss, arising from negligence, were valid, by the laws of New York, and would have been upheld in the courts of that state, it was decided that, in view of the rule of public policy applied by the courts of the United States, effect would not be given to the conditions. In the very nature of things, the premise, upon which this decision must rest, is controlling here, unless it be said that a contract, made in a foreign country, to be executed in part in the United States, is more potential to overthrow the public policy, enforced in the courts of the United States, than would be a similar contract, validly made, in one of the states of the Union. Nor is the suggestion that, because there is no statute expressly prohibiting such contracts, and because it is assumed no offense against morality is committed in making them, therefore they should be enforced, despite the settled rule of public policy to the contrary. The existence of the rule of public policy, not the ultimate causes upon which it may depend, is the criterion. The precise question has been carefully considered and decided in the District Courts of the United States. In *The Guildhall*, 58 Fed. 796, it was held that a stipulation in a bill of lading issued at Rotterdam on goods destined to New York, exempting the carrier from liability for negligence, would not be enforced in the courts of the United States, although such a condition was valid under the law of Holland. In *The Glenmavis*, 69 Fed. 472, the same rule was applied to a bill of lading issued in Germany by a British ship for goods consigned to Philadelphia."

Are not these considerations sufficient to show that no rule of comity requires us to ignore the declared public policy of our state, in order that the terms of a contract made in another state shall be recognized as valid here, simply because such terms are valid

where made? Is it not as much our right and duty to withhold the aid of our courts from the enforcement of such a provision, as if it were made part of a contract entered into here? Is not the state of Washington as much a sovereign as the nation as to the matter here involved? We see no more reason for yielding our public policy to the end that this attempted limitation upon appellant's liability may be enforced here than there would be for the highest court of the nation overriding a rule of public policy to the end that a contract made in a foreign country might be enforced here. We are of the opinion that the provisions of this contract sought to be invoked as a defense by the appellant are clearly in violation of the public policy of our state, and should not be recognized as valid here although admitting it is valid and enforceable in the state where it was made. The action of the learned superior court in giving instructions and refusing those requested by appellant upon this question was not erroneous.

The contracts provided, among other things, that claims for loss or damage sustained by the shipper should be made in writing within 10 days after unloading the stock, and failure to so make such claim should operate as a waiver and release. Respondent filed four separate claims for damages, one for each shipment. They differ somewhat in their language, but the purport of each was a claim for loss and damage due to rough handling and improper facilities for loading and unloading at Gazelle, Cal., and that the cattle were badly bruised and depreciated in value. The evidence also shows that appellant was given notice and opportunity to inspect the cattle on arrival at Tacoma. It is contended on behalf of appellant that the trial court erred in admitting evidence of abnormal shrinkage in the weight of the cattle resulting from their shipment. This contention is based on the alleged want of notice of such claim, as the claims did not mention shrinkage in weight as one of the items going to make up the total amount of the damages claimed. However, these claims gave appellant notice of the cause of the damage so it could by prompt investigation become fully informed relative thereto. We think this was a substantial compliance with the provisions of the contract, especially in view of the notice and opportunity given appellant for inspection upon the arrival of the cattle, and that respondent was entitled to prove any damage which was the natural and probable result of such cause, without furnishing with its claim a bill of particulars showing the items of damage. We think evidence of shrinkage was admissible, conceding, though not deciding, that the question is not controlled by the law of 1907 above quoted.

It is also contended that the evidence was wholly insufficient to support respondent's

fourth cause of action which related to the first shipment. There was evidence tending to show that the loss and injuries in connection with this shipment occurred while the cattle were upon the appellant's road. Such fact could be fairly inferred by the jury from the evidence of the condition in which the cattle were delivered to appellant for shipment, the condition in which they were received at Tacoma, and the evidence tending to show that the injuries did not occur while on the Northern Pacific Road between Portland and Tacoma. Witness Belcher testified as to the nature and extent of the injuries to the cattle in this shipment consisting of five car loads, upon their arrival at Tacoma, as follows: "Q. Now, what was their condition? A. Well, on the first shipment, I don't remember whether it was a cow or steer, one particular animal had the whole loin knocked out; had to be trimmed up on account of being bruised and the others were bruised. The sides were bruised. The hind quarters were badly bruised, indicating that they had been down somewhere and gotten their legs bruised, and they had to be trimmed so that there was practically—part of them practically—nothing but their ribs left. No meat on them at all. Q. How extensively? Any number of the cattle on this first shipment that were not bruised more or less? A. They were all bruised more or less. I only took a record of those that were bruised so badly that they could not be turned out or sold as fresh meat; had to be trimmed up. Q. Do you remember how many there were? A. I believe there was 98 in that bunch. Q. That were injured so that they could not be turned out? A. Yes, sir. Q. What do you mean by turned out? A. Sold to our trade just as they stood. Q. And how about the rest of them? A. They were all bruised. They all had bruises on them more or less. I didn't think it worth while to make a note of those that were not bruised badly enough to have to be cut up. Q. Were the rest of them damaged in value to any extent? A. They were. Q. To what extent? A. Well, you would have to average it. The entire shipment I should say was damaged to the extent of about three or four cents a pound at least. Q. That is taking these that were absolutely and entirely damaged and those that were partially damaged and averaged together? A. Yes, sir. Mr. Powell: Do I understand that you mean to say, Mr. Belcher, testify here that the whole shipment of all the cattle averaging would be a damage of three or four cents? A. I do. Q. Per pound? A. I do. * * * Q. Mr. Belcher, do you know how much from these cattle in the first shipment we are inquiring about, had to be trimmed off and not used at all? A. I think there was about three-quarters of the animals that went into the cutting room

that had to be turned into fertilizer. Q. Do you mean three-fourths of all of the animals? A. No, three-fourths of 98. Probably a quarter of the 98 was good. Q. A quarter of the 98? A. Yes."

One Pauley, an employé of respondent accompanied the train which carried the cattle as the contract provided, but he could not be secured as a witness at the trial so respondent had to rely upon evidence of the nature above mentioned, not having witnesses with personal knowledge of what occurred to the cattle while in transit. Appellant's counsel argue that where the shipper accompanies the shipment under the contract, the burden is upon him to show that the injuries to the stock were caused by the negligence of the carrier, and not by the stock themselves or the negligence of the shipper, and the proof of the damaged condition in which the stock were received was not sufficient; as it might be in case of a shipment without being accompanied by the shipper. It may be conceded that ordinarily in such case the shipper must prove something more than the mere damaged condition of the property when received from the carrier, but if the nature and extent of the damages proven is such that the jury may reasonably infer therefrom that it was caused by the rough handling of the carrier's train, it seems to us that such proof would be sufficient to sustain a finding that the damage was caused by the carrier's negligence. The evidence tending to show the nature of the bruises upon the cattle, the great number of them so bruised and injured, their abnormal shrinkage, together with their general condition at the end of the journey, we think was sufficient to warrant the jury in finding such injuries were the result of appellant's negligence. The evidence in support of the other cause of action is also challenged, but since it is of substantially the same nature as that relating to the first shipment, and has the additional support of testimony of witnesses who accompanied the shipments it was sufficient to support the verdict.

We are of the opinion that the judgment should be affirmed. It is so ordered.

FULLERTON, GOSE, DUNBAR, CROW, MOUNT, and CHADWICK, JJ., concur.

(58 Wash. 236)

STATE v. SMITH et al.

(Supreme Court of Washington. May 2, 1910.)

1. GAMING (§ 71*)—PLAYING POKER—STATUTES.

Under Ballinger's Ann. Codes & St. § 7260 (Pierce's Code, § 1877), providing that any person who shall deal, play, or carry on, or open or caused to be opened, or who shall conduct either as owner, proprietor, employé, whether

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for hire or not, any game of poker, shall be guilty of a misdemeanor, one who merely plays at a game of poker, not having any interest in the place, is within the statute.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 71.*]

2. STATUTES (§ 37*)—OMISSION OF WORDS—ENROLLED ACTS.

The word "play" in Ballinger's Ann. Codes & St. § 7260 (Pierce's Code, § 1877), providing that each person who shall deal, play, or carry on a game of poker, etc., shall be guilty of a misdemeanor, which word was omitted in the Code of 1881, § 1253, is in the law, since in the original enrolled section 1253 the word "play" is used.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 37.*]

3. GAMING (§ 75*)—PLAYING POKER—FELONY.

Under Laws 1903, c. 51, making one who conducts or carries on as owner, proprietor, employé, or assistant or in any manner whatsoever, whether for hire or not, any poker game, etc., guilty of a felony, merely playing a game of poker, having no interest in the place, is not within the statute.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 75.*]

4. GAMING (§ 103*)—PLAYING POKER—VERDICT—SUFFICIENCY.

Under an information for playing a game of poker, the court erroneously supposed that the information charged a felony under Laws 1903, c. 51, making an owner or proprietor of a poker game guilty of a felony when it merely charged a misdemeanor under Ballinger's Ann. Codes & St. § 7260 (Pierce's Code, § 1877), making one merely playing at a game guilty of a misdemeanor, and instructed the jury to bring in a verdict in one of three forms, one of which was guilty of "conducting a game of poker," which was made applicable by the instructions to the misdemeanor. *Held*, that a verdict in that form was sufficient to convict of a misdemeanor, though technically defective.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 103.*]

Department 2. Appeal from Superior Court, Franklin County; O. R. Holcomb, Judge.

A. F. Smith and others were convicted of gaming, and they appeal. Affirmed.

Henry J. Sulvely and H. B. Noland, for appellants. A. A. Hinman, for the State.

PARKER, J. The defendants were charged by information as follows: "That the said A. F. Smith, C. Griffith, F. T. Allison, and John Lewis in the county of Franklin, state of Washington, on the 21st day of February, 1909, then and there being, did then and there willfully, unlawfully, and feloniously, conduct, deal, play, and carry on a certain game of poker, the same having been played and operated for checks then and there being representatives of value, to wit, representatives of money, and that said game was played, carried on, and conducted in a certain room of a certain building known as 'Sylvester's Pool Room,' in the town of Pasco, the same being a place where persons then and there resorted for the purpose of playing said game." They each pleaded not guilty,

and upon a trial before the court and a jury were found guilty. They moved for a new trial, and also for arrest of judgment, which motions being denied judgment was entered upon the verdict fining each of them \$50. From this judgment the defendants have appealed.

This conviction was had under section 7260, Ballinger's Ann. Codes & St. (Pierce's Code, § 1877), which provides: "Each and every person who shall deal, [play], or carry on, or open, or cause to be opened, or who shall conduct, either as owner, proprietor, employé, whether for hire or not, any game of faro, monte, roulette, rouge-et-noir, lansquenette, rondo, vingt-un (or twenty-one), poker, draw poker, brag, bluff, thaw, tan or any banking or other game played with cards, dice, or any other device, whether the same be played for money, checks, credits, or any other representative of value, shall be guilty of a misdemeanor." The principal contention of learned counsel for appellants is that this conviction cannot be sustained because the evidence shows that the only thing the defendants did was to play at a game, and that this did not constitute an offense under section 7260; it being argued that this law is not aimed at those who only play at the games named, but is aimed at owners and proprietors. We will proceed upon the theory that the appellants had no interest in the place as owners, proprietors, or employés, and that they were only playing at a game of poker, and only in that sense did they conduct, deal, play, or carry on such game for checks representing value. Under our previous holdings, these facts will sustain a conviction under section 7260. *State v. Gaasch*, 105 Pac. 817; *State v. Preston*, 49 Wash. 298, 95 Pac. 82.

It is further contended that the word "play" is not in fact in this law, and, with that word eliminated, there would be nothing left in the law which could be construed as referring to any persons other than owners, proprietors, and employés. Our former decisions seem to assume that the word "play" is a part of the law. In *re Dietrick*, 32 Wash. 471, 474, 73 Pac. 506; *State v. Preston*, 49 Wash. 298, 300, 95 Pac. 82. However, since this question is presented for the first time, we have given it some attention. The contention that the word "play" is not in the law is apparently prompted by the manner in which it has been printed in Ballinger's Code and also its omission from section 1253 of the Code of 1881. In the former, it will be noticed, the word appears in brackets, thus suggesting some uncertainty as to its correctly being there. Referring to section 1253 of the original enrolled act of 1881 in the office of the Secretary of State, relating to crimes and punishments, we find the word "play" therein. It is evident that the word is in the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

law, and that its omission from the Code of 1881 is an error.

It is contended that the verdict is insufficient upon which to base a judgment; the argument being that the constituent elements of the offense are not covered by the verdict, the verdict being "guilty of conducting a game of poker." It will be noticed that the verdict does not simply find the defendants "guilty," nor does it in terms refer to the offense charged in the information. Either of these forms would no doubt be sufficient, though section 6961, Ballinger's Ann. Codes & St. (Pierce's Code, § 2210), seems to contemplate the using of the words "guilty" or "not guilty" as the case may be, without anything further. Such a verdict would be in proper form in this case, since there is but one offense charged, being that defined by section 7260, Ballinger's Ann. Codes & St. This record indicates that both the prosecuting attorney and the court regarded this charge as one of felony under chapter 51 of the Laws of 1903, including the misdemeanor under section 7260. By our former holdings, it is plain that this information does not charge a felony, since it does not charge the defendants as owners, proprietors, or employes; hence it only charges the misdemeanor defined by section 7260. *State v. Gaasch*, 105 Pac. 817. The trial court, being of the opinion that the information charged both the felony and misdemeanor, instructed the jury accordingly, and instructed them to return one of three verdicts, furnishing them this with two other forms, at the same time instructing them in such manner as to plainly indicate they should use this form in case they found the defendants guilty under section 7260. In view of the court's instructions, there can be no doubt of the jury's intention to find the defendants guilty of the misdemeanor defined by section 7260, though it is somewhat technically defective. We are of the opinion that the evidence was sufficient to sustain the verdict, and find no prejudicial error in the record.

The judgment is affirmed

RUDKIN, C. J., and DUNBAR, CROW, and MOUNT, JJ., concur.

(58 Wash. 696)

STATE v. SYLVESTER.

(Supreme Court of Washington. May 2, 1910.)

Department 2. Appeal from Superior Court, Franklin County; O. R. Holcomb, Judge. N. R. Sylvester was convicted of gaming, and he appeals. Affirmed.

Henry J. Snively and H. B. Noland, for appellant. A. A. Hinman, for the State.

PER CURIAM. The questions involved in this case are the same as in the case of *State v. A. F. Smith et al.* 108 Pac. 618, just decided. The judgment is affirmed.

WILSON v. MCGILLIVRAY.

STATE ex rel. WILSON v. SUPERIOR COURT OF KING COUNTY.

(Supreme Court of Washington. May 5, 1910.)

1. APPEAL AND ERROR (§ 82*)—APPEALABLE ORDER—FINALITY—RECORD.

An order vacating a judgment and quashing the service of the summons, but not dismissing the action, is not final, and so not appealable, though the record shows defendant is without the state, so that personal service cannot be made, it not showing that substituted service by attachment may not be had, as finality of the order must appear on the face of the record; and, where it does not so appear that the order in effect determines the action and prevents a final judgment therein, facts outside the record, which may show the action is finally determined by the quashing of the summons, may not be looked for.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 478; Dec. Dig. § 82.*]

2. CERTIORARI (§ 5*)—SCOPE OF REMEDY—ORDER VACATING JUDGMENT.

The order vacating a judgment and quashing service of the summons not being a final one, and being reviewable on final judgment, writ of review may not be had therefor.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 5; Dec. Dig. § 5.*]

Department 2. Appeal from Superior Court, King County; Wilson R. King, Judge.

Action by Marie Wilson against Catherine McGillivray. From an order, plaintiff appeals. She also applies for writ of review to the Superior Court of King County, R. B. Albertson, judge thereof. Appeal dismissed. Application denied.

Brady & Rummens, Peters & Carr, and McMartin & Dricken, for appellant. James F. McElroy, for respondent.

MOUNT, J. This appeal is from an order vacating a judgment and quashing the service of summons. It appears that the appellant brought an action against the respondent and obtained service by leaving a copy of the summons with an employé of an apartment house in Seattle where the respondent once occupied an apartment. Thereafter, on November 11, 1909, the complaint and return of service were filed and an order of default was entered against the respondent. On the same day a judgment was entered in favor of the plaintiff for \$20,000. Thereafter, on November 29, 1909, the respondent appeared specially and moved the court to quash the service of the summons and to vacate the judgment, upon the ground that no service of the summons had been made. This motion was granted, and the court, on December 15, 1909, made an order vacating the judgment and quashing the service of the summons. The action was not dismissed. The plaintiff appeals from that order, and the respondent moves the court to dismiss the appeal.

This motion must be sustained. In *Tatum v. Geist*, 40 Wash. 575, 82 Pac. 902, after citing several cases we had theretofore decided

upon this point, we said: "The rule deducible from these decisions is this: If an order vacating a judgment or quashing a summons or the service thereof is or may be followed by further proceedings in the cause, and the entry of a final judgment therein, such order may be reviewed on appeal from the final judgment, and is not itself appealable. If, on the contrary, the order vacating the judgment, or quashing the summons or the service thereof, in effect determines the action or proceeding and prevents a final judgment therein, the order itself is a final one, and is therefore appealable." This case is one which may be followed by further proceedings, for the action was not dismissed, but is still pending.

It is suggested by counsel for appellant that the record shows that the respondent is without the state, and that personal service cannot be made. But the record does not show that substituted service by attachment may not be had. Where the action is not dismissed, and it does not appear upon the face of the record that the order in effect determines the action and prevents a final judgment therein, we cannot look outside the record for facts which might show that the action is finally determined by the quashing of the summons. Finality of the order must appear upon the face of the record as it did in the cases cited in *Tatum v. Geist*, before the order may be held final and, therefore, appealable.

Application is also made for a writ of review in case the appeal is dismissed; but, because the order is not a final one and may be reviewed upon final judgment, this application must also be denied.

RUDKIN, C. J., and CROW, DUNBAR, and CHADWICK, JJ., concur.

(58 Wash. 223)

R. J. MENZ LUMBER CO. v. E. J. McNEELEY & CO.

(Supreme Court of Washington. May 2, 1910.)

1. SALES (§ 77*)—CONTRACTS—CONSTRUCTION—SHIPMENT "F. O. B. CARS."

Acceptance of an order for shipment "f. o. b. cars" means that the goods shall be delivered free on board of cars and loaded without expense to the purchaser, and implies that the seller shall procure the cars for loading.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 212; Dec. Dig. § 77.*]

For other definitions, see Words and Phrases, vol. 3, p. 2636; vol. 8, p. 7659.]

2. SALES (§ 77*)—CONTRACTS—CONSTRUCTION—FURNISHING CARS FOR SHIPMENT.

Statements in the seller's acceptance of an order that they "accept and enter the same for shipment," and "anticipate making shipment," implied that the seller was to furnish the cars for loading.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 77.*]

3. SALES (§ 88*)—CONSTRUCTION OF CONTRACT—PROVINCE OF JURY—CONTRACTS.

Where the order and acceptance were in writing, and constituted the contract of sale, the court should have construed them, if unambiguous, and, if ambiguous, should have received parol testimony to explain them, and it was error to require the jury to determine what the contract was from all the evidence.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 248-250; Dec. Dig. § 88.*]

4. SALES (§ 58*)—CONTRACTS—PRINTED MATTER ON ORDER.

Where the seller's acceptance stated that the order was entered in accordance with the terms of the order, printed matter on the letter heads of the buyer's letter containing the order, which was not referred to in it or the acceptance, was not a part of the contract.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 58.*]

5. CUSTOMS AND USAGES (§ 17*)—VARYING CONTRACT.

Parol evidence of usage or custom either general or in a particular trade or business is not admissible to vary or modify the terms of a written contract of sale.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 34; Dec. Dig. § 17; Evidence, Cent. Dig. §§ 1945-1952.]

6. CUSTOMS AND USAGES (§ 17*)—PAROL EVIDENCE—VARYING CONTRACT.

Where the acceptance of an order for shingles was unconditional, and the time of delivery was not stated so that the law would imply delivery within a reasonable time, the seller could not show a custom in the trade making delivery subject to the exigencies of transportation, and that the contract of sale could not be binding if delivery could not be made within a reasonable time.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 27, 28; Dec. Dig. § 17; Evidence, Cent. Dig. §§ 1945-1952.]

7. SALES (§ 81*)—CONTRACT—TIME OF DELIVERY.

Where a contract of sale stated no time of delivery, the law would imply delivery within a reasonable time, and, in determining what was a reasonable time, the conditions of transportation making it difficult to secure cars, as well as the fact that shipment was required in the winter season through the mountains, could be considered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 218; Dec. Dig. § 81.*]

8. SALES (§ 172*)—FAILURE TO DELIVER—EXCUSE.

The rule that, where performance of a contract depends upon the continued existence of a certain person or thing, impossibility of performance resulting from the death of such person or destruction of such thing excuses performance, does not apply to excuse performance of a contract to deliver goods sold for delivery within a reasonable time on the ground that the conditions of transportation made it impossible to procure cars for shipment, though that fact could be considered in determining what was a reasonable time for delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 427; Dec. Dig. § 172.*]

9. SALES (§ 71*)—QUANTITY—CAR LOAD LOTS.

Where an order for goods purchased in car load lots does not specify the size of the car, damages for failure to deliver are assessable on the basis of an average sized car used in shipping such goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 191; Dec. Dig. § 71.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

10. SALES (§ 418*) — BREACH BY SELLER — MEASURE OF DAMAGES.

The measure of damages for breach of a contract to sell and deliver shingles in car load lots is the difference between the contract price and the value of the shingles at the date of demand and refusal to deliver.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1175; Dec. Dig. § 418.*]

Chadwick, J., dissenting.

Department 1. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by the R. J. Menz Lumber Company against E. J. McNeeley & Co. From a judgment dismissing the complaint, plaintiff appeals. Reversed, with directions.

Shank & Smith, for appellant. F. A. Huffer, for respondent.

GOSE, J. The appellant, the plaintiff below, commenced this action against the respondent to recover damages for failure to deliver four car loads of shingles and mixed lumber and shingles. The case was tried to a jury, which returned a verdict for the respondent. From a judgment of dismissal entered upon the verdict, the plaintiff has appealed.

The complaint states four causes of action based upon four separate orders. In the third cause of action, which is illustrative of the others except as hereafter noted, it is alleged, in substance, that the appellant and the respondent entered into a contract of purchase and sale as evidenced by an order and the reply thereto, which, omitting immaterial parts, is as follows:

"Seattle, Wash., Jan. 17, 1907.

"E. J. McNeeley & Co., Tacoma, Wn.

"Order No. 729X. (For conditions upon which this order is accepted see other side of this sheet.)

"Cars to be consigned from R. J. Menz Lumber Co. (Always show us as shippers.)

"Bill of Lading to read: Ship to R. J. Menz Lumber Co. at Minnesota Trfr., Minn. Route: N. P. Prices: F. O. B. Mill.

"Terms: 90 per cent. advance. Settlement on receipt of consignee's report and expense bill (less usual 2 per cent. discount.) All underweights to mill 50 cent rate.

"Quantity: One (1) Car.

Description.	Price per M.	Guaranteed Weight per M.
6-2 Plain Dimension R. C. Shingles at Any sized—large preferred	\$2.50	160

"Please acknowledge acceptance of this order on enclosed postal card, by return mail. Very Truly Yours, R. J. Menz Lumber Co., per E. B. Day."

"Tacoma, Wash., Jan. 18, 1907.

"R. J. Menz Lumber Co., Seattle, Wash.

"Dear Sirs: Your order No. 729X has been received. We accept and enter same for shipment in accordance with the terms thereon. We anticipate making shipment on or about ——. At prices annexed, we would like to move the following stock: ——. Yours very truly, E. J. McNeeley & Company, per ——".

The order in the first cause of action is for 50,000 described shingles, with directions to "Fill car 6-2 Ex. * A * R. C. Shingles." The order in the second cause of action is for 75,000 designated shingles with directions: "Balance 6-2 extra. * A * R. C. Shgls." And "Small car preferred." Shipping directions in the fourth cause of action were: "Ship to order of Bonds Foster Lumber Company at Aurora, Nebraska. How ship: Billings care B. & M. R. When: Soon as possible. Terms: Regular f. o. b., Aurora, Nebraska. Sixty cent rate." This cause of action was assigned to the appellant. Each of the acceptances, except on the third cause of action, was upon the respondent's stationery, which had printed thereon, above the typewritten acceptance, the name of the respondent, illustration of shingles, capacity of its mills, specialties, etc., including the words: "Quotations subject to change without notice. Contracts made at home office only and contingent upon exigencies of transportation and accidents beyond our control." Similar typewritten matter was upon the letter heads of the appellant. The respondent interposed three affirmative defenses to each cause of action except the third, which in substance are: (1) That it accepted the order by letter upon its letter head which contained the printed matter just quoted; that at the time of the acceptance of the order and continuing until April 5, 1907, there was a great shortage of railroad cars in the state of Washington and in the country generally for use in transporting lumber and shingles, and that cars could not be procured for such purpose except in limited numbers inadequate for the handling of the lumber and shingle business of the state and of the country generally; that by reason thereof manufacturers and sellers of such commodities were unable to procure cars, which facts were at all times known to the appellant; that between January 28 and April 5, 1907, by reason of storms, washouts, and other acts of God preventing railway companies operating in this and other lumber producing states, railroads could not furnish any cars for transporting lumber and shingles; that the car embargo could not have been foreseen; that, on account thereof, the market price of lumber and shingles appreciated. (2) That there was a general custom and a special one between

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the appellant and the respondent that such contracts were contingent upon the exigencies of transportation and accidents beyond the control of the parties; that when delivery of such commodities has been delayed until a reasonable time has expired in which to make delivery, without fault on the part of the seller, and where delivery would inflict a loss upon either of the parties, compliance with the contract is excused; that this custom was well known to the parties, and the contract was made with reference thereto. The car embargo and the rise in the price of lumber and shingles is alleged as in the first defense. (3) That there is a particular custom in the lumber trade known to the appellant, and in giving or accepting an order the parties contracted in reference thereto; that all orders in writing are accepted contingent upon the exigencies of transportation and accidents beyond the control of the parties. The shortage of cars and the rise in the price of lumber is alleged as in the first defense. The first affirmative defense is omitted as to the third cause of action; the acceptance there being on a postcard not containing the printed matter on the respondent's letter head. The failure of respondent to deliver the material is admitted, and it seeks to excuse performance in the manner pleaded.

It now asserts, however, that it was the duty of the purchaser to furnish the cars for loading, and that, failing to do so, there can be no recovery. Notwithstanding the fact that this view is inconsistent with the claim that the acceptance of the order was subject to the exigencies of transportation, we will consider it as it may arise upon a retrial of the cause. Where the contract is otherwise silent as to who shall furnish the cars, the term "f. o. b. cars," as applied to ordinary commercial commodities, means that the goods shall be free on board the cars—that is, loaded without expense to the purchaser, and that the seller shall procure and load them. *Hurst v. Altamont Mfg. Co.*, 73 Kan. 422, 85 Pac. 551, 6 L. R. A. (N. S.) 928, 117 Am. St. Rep. 525; *Vogt v. Schienebeck*, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. Rep. 989; *John O'Brien Lumber Co. v. Wilkinson*, 117 Wis. 468, 94 N. W. 337; *Elliot v. Howison*, 146 Ala. 568, 40 South. 1018. In the *Hurst Case*, 73 Kan. 429, 85 Pac. 554, 6 L. R. A. (N. S.) 933 (117 Am. St. Rep. 525), it is said: "It is our understanding that the phrase or formula 'f. o. b. cars' has by long usage and custom acquired throughout the business circles of this country a definite and specific meaning generally understood by all business people. When such phrase or formula is used in a business contract between a buyer and seller of ordinary commercial commodities, where the use of a common carrier is necessary, the parties intend thereby that the seller will at his own expense do all that may be necessary to accomplish the loading and con-

signment of the goods to the buyer, including the placing of cars upon which to load the commodities sold; and, when nothing appears to modify or limit this meaning, courts should enforce the contract so as to effectuate this intent. This rule is reasonable. It harmonizes with existing business conditions, and is the universal practice among business people. It is conceded that, by this phrase, the seller is bound to deliver the goods to the buyer by placing them on board the cars. How can he do this unless he secures the cars? Why say that this duty belongs to the buyer? The language of the contract is silent upon this question. By the letter of the agreement it may be said that neither party has agreed to perform this duty, but it may not be said that there was no understanding upon this subject. Without such an understanding, the contract would be incomplete and not enforceable. What the parties intended upon this subject can only be ascertained by interpretation, and to do this the situation of the parties when the contract was made, the subject-matter thereof, and all the attendant circumstances and conditions must be considered." In the *Vogt Case*, discussing the meaning of the phrase (122 Wis. 499, 100 N. W. 823, 67 L. R. A. 760 [106 Am. St. Rep. 989]), the court said: "Whether such meaning includes under the circumstances of this case the duty of the seller to procure the cars in place for his use in loading the merchandise, and that evidence is not permissible to show the existence of a custom which the parties contract with reference thereto, is not altogether plain, but we are constrained to hold that it is." In the *Elliot Case*, 146 Ala., at page 591, 40 South., at page 1027, it is said: "In the case at bar the seller undertook to accomplish the delivery of the things sold free on board the cars. We think it comports with reason to hold that by necessary implication he agreed to supply all means to accomplish such result—the cars upon which the shipments of piles were to be made." The authorities cited by the respondent, holding that the term implies that the buyer shall procure the cars, are discussed, distinguished, and disapproved in the case of *Hurst v. Altamont Mfg. Co.*, *supra*. It must, however, be conceded that there is a conflict of authority on this question, but we think, not only that the rule we have stated is a correct interpretation of the phrase, but that universal usage in this state has given it the meaning which the language imports. The language, however, in this case, "We accept and enter same for shipment. * * * We anticipate making shipment," cannot be given any other rational meaning.

The court instructed the jury, in substance, that they should determine from all the evidence what the contract was; that in so doing it was proper for them to consider whether the printed matter on the letter heads forms a part of the contract; that

ordinarily such matter, if not repugnant to the contents of the letter itself, may be considered as a part of the contract if the parties make their contract with reference thereto and knowledge thereof. This instruction was erroneous. The order and the acceptance were in writing and constituted the contract, and it was the duty of the court to construe them, if not ambiguous, and, if ambiguous, to receive parol testimony to explain the ambiguities. The printed matter on the letter heads was not referred to in either the order or the acceptance, and is not a part of the contract. 2 Page on Contracts, § 600; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; *Summers v. Hibbard, Spencer, Bartlett & Co.*, 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872. In the *Sturm* Case the court said that a printed bill head could not control, modify, or alter the terms of the contract, and that, "the contract being clearly expressed in writing, the printed bill head of the invoice can, upon no well-settled rule, control, modify, or alter it." In the *Summers* Case, at page 108 of 153 Ill., at pages 900, 901 of 38 N. E. (46 Am. St. Rep. 872), the court, in considering the precise question, said: "The mere fact that appellants wrote their acceptance on a blank form for letters at the top of which were printed the words, 'All sales subject to strikes and accidents,' no more made those words a part of the contract than they made the words there printed, 'Summers Bros. & Co., Manufacturers of Box-Annealed Common & Refined Sheet Iron,' a part of the contract. The offer was absolute. The written acceptance, which they themselves wrote, was just as absolute. The printed words were not in the body of the letter, or referred to therein. The fact that they were printed at the head of their letter heads would not have the effect of preventing appellants from entering into an unconditional contract for sale." The construction contended for by the respondent would make that which is an absolute, unqualified acceptance upon its face a conditional one by reference to a letter head which was not referred to by either of the parties. The language of the acceptance, "We accept and enter same for shipment in accordance with the terms thereof," is clear and its meaning plain. The respondent agreed to ship the goods according to the terms of the order, not according to the terms of the printing on the letter heads. The respondent has cited *Yorston v. Brown*, 178 Mass. 103, 59 N. E. 654, and *Delta & Pine Land Co. v. Wallace*, 88 Miss. 656, 36 South. 263. In the *Yorston* Case the order on which the plaintiff relied for a recovery specially referred to the printed headlines on the order, and the contract was made by reference thereto. The court ruled that it was competent for the defendant to refer thereto on the blank furnished him by the plaintiff for his use in making the order. In the *Delta* Case it was

held that written and printed matter in a contract will be reconciled when it can be done.

The court instructed the jury that in determining whether there had been a breach of the contract they should consider whether there was a general custom which formed a part of the contract, whether it was the custom of the respondent to accept such orders only upon the conditions expressed in its letter heads, which was brought to the knowledge of the appellant so that it made the contract in view of the provision and adopted it as a part of the contract, that they should determine when the contract expired whether in a reasonable time if the parties were unable to fill it so that it was canceled and no longer obligatory, and, if so, there could be no recovery. This instruction the appellant contends was erroneous. We think it was clearly so. Parol testimony of usage or custom, either general in the community or special between the people engaged in a particular trade or business, is not admissible to vary, modify, or control the terms of the contract. *Williams v. Ninemire*, 23 Wash. 393, 63 Pac. 534; *Vollrath v. Crowe*, 9 Wash. 374, 37 Pac. 474; *Miller v. Bean*, 13 Wash. 516, 43 Pac. 636; *Commercial Bank v. Hart*, 10 Wash. 303, 38 Pac. 1114; *City of Covington v. Kanawha Coal & Coke Co.*, 121 Ky. 681, 89 S. W. 1126, 3 L. R. A. (N. S.) 248, 123 Am. St. Rep. 219; *Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 101 Ala. 446, 14 South. 672; *Partridge v. Phoenix Mut. Ins. Co.*, 15 Wall. 373, 21 L. Ed. 229; *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987; *Mercantile Banking Co. v. Landa* (Tex. Civ. App.) 33 S. W. 681; *Scott v. Hartley*, 126 Ind. 239, 25 N. E. 826; *McMillan v. American Express Co.*, 123 Iowa, 236, 98 N. W. 629; *Bigelow v. Legg*, 102 N. Y. 852, 6 N. E. 107. In the *City of Covington* Case, 121 Ky. 686, 89 S. W. 1127 (3 L. R. A. [N. S.] 248, 123 Am. St. Rep. 219), it is said: "But in all cases of this sort the rule for admitting the evidence of usage or custom must be taken with this qualification, that the evidence be not repugnant to, or inconsistent with, the contract; for otherwise it would not go to interpret and explain, but to contradict, that which is written." In the *Sheffield Furnace Company* Case the contract provided for a sale of coke at a price "f. o. b. cars, Sheffield, Alabama." Sheffield was the point of destination of the coke. The court held that evidence of a general custom in the coke trade was inadmissible for the purpose of showing that the purchaser should advance the freight. In *Barnard v. Kellogg* it was held that usage cannot be allowed to subvert the settled rules of law or defeat the essential terms of the contract; that its office is to explain words or phrases of doubtful meaning, or which may be understood in different senses according to the subject-matter to which they are applicable. In the *Partridge* Case the plaintiff, having been discharged from the employment of the defend-

ant, sought to recover for services rendered as agent, and asserted a right to a commission on the annual premiums paid or to be paid on policies issued through his agency. To establish this, he undertook to prove a usage between insurance companies and their agents. He introduced in evidence a letter of the company in reply to one asking information as to the relation he sustained to the company, which stated: "Concerning your status in Missouri, it is simply this: You are working up a business for yourself, and are paid the highest commissions which we pay." At page 230 of the law edition (21 L. Ed., 15 Wall. 573), the court, speaking through Mr. Justice Miller, said: "It appears to us, as it did to the circuit court, that the testimony offered would have established a new and distinct term to the contract. It would have established a contract very different from the written one introduced by plaintiff. The language of the letter was neither ambiguous nor technical. It required and needed no expert, no usage to discover its meaning. To have admitted the usage offered in evidence in this case would have been to make a contract for the parties differing materially from the written one under which they had both acted for some time." And that: "No such extension of the doctrine is consistent either with authority or with the principles which govern the law of contracts." The respondent has cited in support of this construction *Bliven v. New England Screw Co.*, 23 How. 420, 16 L. Ed. 510, *Robinson v. United States*, 13 Wall. 363, 20 L. Ed. 653, and *Lillard v. Kentucky Distilleries & Warehouse Co.*, 134 Fed. 168, 67 C. C. A. 74. These cases recognize the rule which we have stated, but hold that it is inapplicable to the particular facts before the court. The *Bliven Case* in its application of this principle of law to the facts before it tends to support the instruction. But, as we read the *Robinson* and the *Lillard Cases*, the facts are so different that they are not pertinent to the issue. In the *Robinson Case* a contractor had agreed to deliver 1,000,000 bushels of barley to the government between certain dates, but the contract did not specify the manner of delivery. After making certain deliveries in the sack, a large quantity was tendered loose in wagons. The tender being refused, it was held in a suit by the government that, the contract being silent as to the mode of delivery and there being two modes essentially different, evidence of the customary mode of delivery was admissible. In the *Lillard Case* it was held that, where a distiller had contracted to deliver the total product of slop at a "feeding lot" supplied by him, the contract not expressing the mode of delivery, evidence of custom was admissible to show how a delivery was to be made. In the case at bar it seems to us that the instruction of the court permitted the jury to find a contract wholly different from that made by the parties. The accept-

ance of the order was unconditional. The time of delivery not being stated, the law would require a delivery within a reasonable time. The instruction permitted the jury to transform an unconditional acceptance into a conditional one, which made the delivery subject to the exigencies of transportation and subject to the further condition that, if the goods could not be shipped within a reasonable time, the contract was no longer obligatory upon either party. This was clearly repugnant to the contract.

A contract definite in its terms cannot be made subject to a custom of trade that, if it cannot be performed in a reasonable time, it need not be performed at all. There is a principle of law that, in contracts where the performance depends on the continued existence of a specified person, animal, or thing, a condition is implied that the impossibility of performance arising from the death of the person or animal or the destruction of the thing excuses the performance. This principle has no application to this case. The acceptance required a delivery within a reasonable time. In determining what was a reasonable time, the circumstances of the difficulty or impossibility of getting cars up to April 2, 1907, the date when the car embargo was removed, should be considered. One of the defenses is that there was a great shortage of cars when the contract was made, and that the appellant had knowledge of that fact. If this is true, it would be a circumstance in determining what a reasonable time would be. The fact that the contract called for shipment through the mountains in the winter season would be another circumstance to be considered. We are not dealing with a contract where a fixed date of shipment or delivery was agreed upon. The appellant, however, is not complaining because a delivery was not made during this period, but because of the refusal of the respondent to deliver within a reasonable time after transportation of lumber and shingles was resumed. The question of whether the washouts, deep mountain snows, and slides, preventing transportation for a given period, were the acts of God, need not be considered, because, as we have stated, the appellant is not complaining on account of a failure to deliver while these conditions obtained. 2 Page on Contracts, §§ 1875, 1877; *Buffalo, etc., Co. v. Imp. Co.*, 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951; 9 Cyc. 627; *Summers v. Hibbard, etc.*, supra; *Jones v. Anderson*, 82 Ala. 302, 2 South. 911; *Fleishman v. Meyer*, 46 Or. 267, 80 Pac. 209; *Eugster v. West*, 35 La. Ann. 119, 48 Am. Rep. 232.

The respondent contends that, if it could not ship within a reasonable time owing to lack of cars, it was excused from shipping at all, and cites *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 220, and *Raisin Fertilizer Co. v. Barrow*, 97 Ala. 694, 12 South. 388. In the *Stewart Case* a manufacturer of butter and cheese agreed with certain in-

dividuals to convert their milk into cheese and butter, sell the products, and divide the proceeds according to the contract. The factory was destroyed by fire, and a quantity of milk, butter, and cheese was lost. The court recognized the exception that we have noticed, and held that the destruction of the factory, if it occurred without negligence on the part of the owner, relieved it of liability for damages. In the Raisin Fertilizer Company Case the engagement to deliver was conditional upon "water transportation" permitting. Where the order does not specify the size of the car, the damages are assessable on the basis of an average sized car used in shipping such commodities. *Floyd v. Mann*, 146 Mich. 356, 109 N. W. 679; *Bullock v. Finley* (O. C.) 28 Fed. 514. Under the circumstances of the case, the measure of damages is the difference between the contract price and the value of the commodities at the date of the demand and refusal to perform the contract. *Summers v. Hibbard*, supra; *Roberts v. Benjamin*, 124 U. S. 64, 8 Sup. Ct. 393, 31 L. Ed. 334; *Brown v. Sharkey*, 93 Iowa, 157, 61 N. W. 364; *Trask v. Hamburger*, 70 N. H. 453, 48 Atl. 1087; *United Railways, etc., Co. v. Wehr*, 103 Md. 323, 63 Atl. 475. The instructions requested by the appellant state the law of the case applicable to the issue, and should have been given as an entirety. The length of this opinion forbids a statement of the substance of the instructions, but it is sufficient to say that they were in harmony with the view we have taken of the case.

The judgment will be reversed with directions to proceed in conformity with this opinion.

RUDKIN, C. J., and FULLERTON and MORRIS, JJ., concur. CHADWICK, J., dissents.

(25 Okl. 404)

SMITH et al. v. EAGLE MFG. CO.
(Supreme Court of Oklahoma. Jan. 11, 1910.)

(Syllabus by the Court.)

JUDGMENT (§ 256*)—VERDICT TO SUSTAIN.

In a trial by jury the judgment must be supported by the verdict, and a judgment which goes beyond the verdict is erroneous.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. § 256.*]

Error from Seminole County Court; T. S. Cobb, Judge.

Action by the Eagle Manufacturing Company against J. F. Smith and others. From the judgment, defendants bring error. Reversed and remanded.

Crump, Rogers & Harris and B. B. Blakey, for plaintiffs in error. J. A. Baker, for defendant in error.

KANE, C. J. The petition in this action was in two paragraphs; the first stating a

cause of action on account, and the second was in form an action in conversion, for the recovery of the value of the same merchandise itemized in the account sued on. The cause in the court below was entitled *Eagle Manufacturing Company, a Corporation, Plaintiff, v. J. F. Smith, N. B. Smith, and J. W. Smith, Partners under the Firm Name and Style of J. F. Smith Hardware Company, Defendants*. J. F. Smith and J. W. Smith answered together; their answer amounting to a general denial. N. B. Smith answered separately, alleging, in substance, that on or about the 11th day of September, 1906, he purchased the implements described in plaintiff's petition; that at the time he purchased said implements he was not a member of, and had no interest in, the J. F. Smith Hardware Company; that on or about the 1st day of March, 1907, he settled said account with plaintiff and paid said account in full; that, in payment of said account, he executed to said plaintiff his promissory note and secured the same with collateral notes, and that, by reason of said settlement, he is not indebted to said plaintiff for the goods, wares, and merchandise. Then follows a prayer to the court to require said plaintiff to produce said note given in payment of said account and the collateral notes securing the same, that the same may be used as evidence at the trial of this cause. On the issues thus joined the case came on to be heard before the court and a jury, which resulted in a verdict, omitting the caption, in the following form: "We, the jury, find the issues in favor of plaintiff, Eagle Manufacturing Co., as against defendant N. B. Smith, in the sum of \$442.80, with interest at 8 per cent. per annum from Oct. 1, 1907, and as against the defendants J. W. Smith and J. F. Smith, in the sum of \$525.00, with interest at six per cent. per annum from January 7, 1907." Upon this verdict the court rendered judgment as follows: "It is therefore ordered, adjudged, and decreed by the court that the plaintiff, Eagle Manufacturing Company, a corporation, do have and recover of and from the defendant N. B. Smith the sum of \$1,083.95, with interest thereon at the rate of 8 per cent. per annum from this date until paid, and that said plaintiff do have and recover of and from said defendants J. W. Smith and J. F. Smith the sum of \$567, with interest thereon at the rate of 6 per cent. per annum from this date until paid, and it is further ordered by the court that a payment of any part of this judgment shall be pro tanto a payment on the judgment against all defendants, and that the said plaintiff recover of said defendants all costs herein incurred." To reverse this judgment, plaintiffs in error commenced this proceeding in error in this court.

Counsel for plaintiffs in error contend that the main error committed by the trial court

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was disregarding the joint liability of the partners; that, as the plaintiff brought this action to recover against the firm of copartners, the judgment rendered must be a joint judgment against all the copartners. The theory of the court below, which no doubt determined the form of the verdict, and the judgment rendered thereon, is disclosed by the instructions. Instruction No. 3 reads as follows: "The undisputed evidence shows that defendant N. B. Smith made said contract, and that he either alone or jointly with others received said goods as per contract, that notes were subsequently executed to plaintiff by said N. B. Smith therefore, which are now held by plaintiff, and that plaintiff has neither received payment for said goods or said notes. You will therefore render a verdict against the said N. B. Smith in the sum of \$967.80, but in determining the liability of the defendants J. W. and J. F. Smith you will observe the instructions herein given you." This instruction assumes the defense of J. B. Smith to have been established as far at least as giving his promissory note in payment of the goods is concerned. It is only upon this theory the court could have instructed the jury to render a verdict against N. B. Smith in the sum of \$967.80, as that was the total amount involved in the claim. The theory upon which judgment was rendered against J. W. and J. F. Smith is disclosed by instruction No. 11 given by the court. It reads as follows: "If you find from the evidence that the \$525 worth of goods delivered to defendants at Seminole were received by said copartnership in payment of N. B. Smith's interest therein with defendants J. W. and J. F. Smith having such knowledge of or concerning said original contract as would make them innocent purchasers as herein defined, you will find for the defendants J. F. and J. W. Smith, but, if you believe from the evidence that when said partnership received said goods they, defendants J. W. and J. F. Smith, could not be deemed innocent purchasers as herein defined, you will find for the plaintiff as against said defendants J. W. and J. F. Smith. In case you find for plaintiff under this phase of the case, your verdict will be for \$525." Instruction No. 12 reads: "On the amount of your verdict against N. B. Smith, you will find interest at 8 per cent. per annum on said \$967.80 from October 1, 1907. In case you find against defendants J. W. Smith and J. F. Smith, you will allow interest on the amount so found at the rate of 6 per cent. per annum from January 7, 1907." It seems to us the court misapprehended the proper theory of the case, and that the jury misapprehended the instructions of the court. The action was brought against the three Smiths as general partners, the first paragraph of the petition charging them with liability on an account stated, and the second for conversion of the same mer-

chandise stated in the account. Section 3836, Wilson's Oklahoma Statutes, provides that "every general partner is liable to third persons for all the obligations of the partnership, jointly with his copartners." The defense of N. B. Smith was that he was individually liable for the purchase of the merchandise, and that he gave his promissory note, secured by collateral notes, in payment thereof. The court instructed the jury that the undisputed evidence showed this defense to be established, and that, therefore, a verdict should be rendered against N. B. Smith in the sum of \$967.80, which was the full amount sued for. If N. B. Smith was individually liable, and the undisputed evidence established his liability, there should have been an end to the case, for the others could not have been liable as partners or otherwise on the same account. The jury, however, seemed to take a different view of the case from the court, and found in favor of the plaintiff and against defendant N. B. Smith in the sum of \$442.80, and against J. W. Smith and J. F. Smith in the sum of \$525. The court, disregarding the verdict of the jury so far as it related to N. B. Smith, entered judgment against him in the sum of \$1,083.95 and against J. W. Smith and J. F. Smith in the sum of \$567, which, with interest added, approximated the amount found by the jury to be due from J. W. and J. F. Smith to the plaintiff. The court further added that "a payment of any part of this judgment shall be pro tanto a payment on the judgment against all defendants." This was error in itself. The court should have ordered judgment entered in conformity with the verdict. "A judgment must be supported by the verdict or findings in the case, and a judgment which goes beyond the verdict is erroneous. There is no principle of law more firmly established than that the judgment must follow and conform to the verdict or findings." 11 Enc. of P. & P. p. 904.

Counsel for defendant in error insists that this sort of a verdict and judgment were proper under the rule laid down in *Duncan v. Capehart*, 40 Colo. 446, 90 Pac. 1033. Without approving or disapproving the rule laid down in the Colorado case, we are of the opinion that it has no application here. If the court had entered judgment against N. B. Smith for the full amount of the claim, without entering judgment against the others for a certain part of it, the case would have been in point. The contention of plaintiff was that the defendants were jointly liable. There was evidence reasonably tending to support this contention, and it was upon this theory the case should have been tried and submitted to the jury.

The judgment of the court below must therefore be reversed, and the cause remanded, with instructions to grant a new trial.

DUNN, WILLIAMS, HAYES, and TURNER, JJ., concur.

(25 Okl. 778)

SEIBERT v. FIRST NAT. BANK OF OKEENE.(Supreme Court of Oklahoma. March 8, 1910.
Rehearing Denied May 10, 1910.)*(Syllabus by the Court.)***1. APPEAL AND ERROR. (§ 327*)—NECESSARY PARTIES.**

All persons who are parties to the proceedings in the trial court, and whose interest will be adversely affected by a reversal of the judgment, must be brought into the appellate proceedings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1814; Dec. Dig. § 327.*]

2. APPEAL AND ERROR (§ 336*)—DEFECT OF PARTIES.

If the interests of those who are brought into the appellate proceedings as parties will be injuriously affected by a reversal or modification of the judgment complained of without a reopening of the case as to the other parties as to whose interest the judgment has become final, by the failure to appeal, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1870; Dec. Dig. § 336.*]

Error from District Court, Blaine County.

Action by the First National Bank of Okeene against J. H. Seibert. Judgment for plaintiff, and defendant brings error. Dismissed.

I. H. Lookabaugh, Dale, Blerer & Hegler, for plaintiff in error. H. N. Boardman and Robberts & Curran, for defendant in error.

KANE, J. This action was commenced in the district court of Blaine county, by the defendant in error, First National Bank of Okeene, as plaintiff, against the plaintiff in error, J. H. Seibert, and one B. H. Horn, as defendants, to recover the possession of about 3,500 bushels of wheat. The plaintiff based its right of possession upon a chattel mortgage. The defendant Seibert answered, setting up a claim to the wheat and right of possession based upon a chattel mortgage later in date than that of the plaintiff, but he claimed that the first mortgage did not cover the same wheat, and that therefore his right to possession was superior to that of the plaintiff. The evidence showed that Seibert had taken possession of the wheat, and claimed to have given Horn credit on his note and chattel mortgage for its value. The court found in favor of the plaintiff, finding that Horn was indebted to it in something like \$3,000, secured by chattel mortgage, and rendered judgment against Horn and Seibert jointly for the possession of the wheat in controversy, and, in case the delivery of the same cannot be had, that then the plaintiff have and recover of and from said defendant the sum of \$1,145.65, the value of the wheat as found by the court. From this judgment Seibert attempted to appeal without making Horn a party. The case-

made was not served upon Horn, and he made no appearance in this court.

The defendant in error insists that the appeal should be dismissed, for the reason that Horn is a necessary party to it, and was not joined therein in time as a party plaintiff in error or defendant in error. The rules for determining this question seem to be well settled by this court as follows: (1) All persons who are parties to the proceedings in the trial court and whose interest will be adversely affected by a reversal of the judgment, must be brought into the appellate proceedings. (2) If the interests of those who are brought into the appellate proceedings as parties will be injuriously affected by a reversal or modification of the judgment complained of without a reopening of the case as to the other parties as to whose interest the judgment has become final by the failure to appeal, the appeal will be dismissed. *Outcalt v. Collier*, 8 Okl. 473, 58 Pac. 642; *Gillette v. Murphy*, 7 Okl. 91, 54 Pac. 413; *Wedd v. Gates et al.*, 15 Okl. 802, 82 Pac. 808; *Stange v. Crismon*, 98 Pac. 937; *Board of Commissioners v. Lemley*, 101 Pac. 109; *Continental Gin Co. v. Huff* (decided at this term of court, and not yet officially reported) 108 Pac. 369.

Counsel for plaintiff in error in their brief do not question the correctness of the rules above laid down, but contend that, if the plaintiff in error obtains a reversal, the effect thereof will be to sustain plaintiff in error in his contention that the property for which this replevin suit was brought by the plaintiff was rightfully in his possession under his mortgage; that no new trial will be necessary, but the court must find that judgment shall be rendered in favor of the plaintiff in error on the pleadings, and therefore Horn will not be affected by such reversal. There is no doubt that a reversal of the case in this court will annul and set aside the judgment against Horn in the court below. Under such circumstances there are several ways that suggest themselves to our minds whereby his interests may be adversely affected by such reversal, one of which will be sufficient to notice here. Section 2752, *Wilson's Rev. & Ann. St. 1903*, provides: "The detriment caused by the wrongful conversion of personal property is presumed to be: First, the value of the property at the time of the conversion, with the interest from that time; or, second, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and, third, a fair compensation for the time and money properly expended in pursuit of the property." The judgment of the court below, as far as the record shows, advantageously disposed of \$1,145.67 of the indebtedness of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Horn to the bank. It must be presumed that Horn is satisfied with this judgment, for he has made no attempt to appeal therefrom. The judgment was rendered in the district court on the 18th day of October, 1907. There must of necessity have been many changes in the value of the wheat in controversy up to this time, and many other changes may take place before a verdict could be returned if the case should be reversed. Under the section of the statute above quoted, Horn's interest would be affected by every change in the value of the wheat, and upon retrial he may find himself in a less advantageous position, and with a largely augmented cost bill to pay. Moreover, as the relief prayed by the plaintiff in error, if granted, would necessarily bring about the reversal of the judgment against Horn, with which he is satisfied, he ought to have his day in court. "The rule requiring parties having an interest that may be materially affected by the judgment to be brought before the appellate tribunal is in no sense a technical one; on the contrary, it is a rule of great importance, and is required in order to secure a litigant 'his day in court.' It is, when justly understood, a salutary rule, and one required by the constitutional principle that the rights of a party cannot be adjudicated without notice. The right of a party to notice is, indeed, fundamental, for without notice it cannot be truly said that there is due process of law." Elliott on Appellate Procedure, § 143.

The appeal is dismissed, at the cost of plaintiff in error.

DUNN, C. J., and WILLIAMS, HAYES, and TURNER, JJ., concur.

(24 Okl. 114)

MUSKOGEE CRYSTAL ICE CO. v. RILEY BROS.

(Supreme Court of Oklahoma. Jan. 13, 1909.
Rehearing Denied May 10, 1910.)

(Syllabus by the Court.)

1. WAREHOUSEMEN (§ 24*)—"ORDINARY CARE."

In the protection and care of property entrusted to them, it is the duty of warehousemen to use ordinary care, which is such care and diligence as ordinarily prudent persons in that business are accustomed to exercise towards such property.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 48; Dec. Dig. § 24.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5029-5042; vol. 8, pp. 7739, 7740.]

2. WAREHOUSEMEN (§ 34*)—INJURY TO GOODS—QUESTIONS FOR JURY.

Whether the defendant used ordinary care in the case at bar was a question for the jury, and, the jury having found against it on evidence reasonably tending to support such a finding, their verdict is conclusive.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 84; Dec. Dig. § 34.*]

Appeal from the United States Court for the Western District of the Indian Territory; William R. Lawrence, Judge.

Action by Riley Bros. against the Muskogee Crystal Ice Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

W. F. Schurmeyer and Maxey & Runyan, for plaintiff in error. Davis & White, for defendants in error.

KANE, J. This was an action brought by the defendants in error, plaintiffs below, against the plaintiff in error, defendant below, for damages claimed to have been sustained by plaintiffs, who placed certain meats in the cold storage warehouse of the defendant. The plaintiffs for cause of action alleged, in substance, that in May, 1905, they orally contracted with the defendant company to store meat in one of the rooms, in its cold storage plant, and stated the contract to be as follows: "For and in consideration of the sum of \$20 to be paid each month by plaintiffs to the defendant, the said defendant company agreed to furnish plaintiffs cold storage in which to store meat to be used by them in conducting their business as above stated. Said defendant through its officers or agents guaranteeing that any meat placed by plaintiffs in the cold storage so furnished by the defendant would be properly cared for and preserved." Then follows an allegation to the effect that the plaintiff placed in the cold storage about 50 dressed beeves, which were fresh and in good condition; that owing to latent defects in said cold storage, namely, that the room was lined with lumber which was not properly seasoned for use in cold storage, and gave off a pine or other odor which was absorbed by the fresh meat, rendering the same valueless, and that said cold storage was not properly aired and cooled before the meat was placed therein, and did not preserve the meat as represented and guaranteed by the defendant company, and as a consequence, all of said 50 beeves placed in said cold storage became tainted, spoiled, and unfit for use. The defendant answered, first, by denying specifically every allegation in the complaint; and further alleged, in substance: That during the spring of 1905 it erected a cold storage plant in the city of Muskogee, Okl.; that before the same was completed a man by the name of Morrow, who was then running a meat market in the city of Muskogee, known as the "East Side Meat Market," applied to it, the defendant, for space in which to store meat to be used in his meat market. The defendant rented to him one-half of one of the rooms in said cold storage plant for the sum of \$20 per month. That the only thing that it agreed to furnish was the one-half of said

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room, and keep the temperature proper for the preservation of the meat stored therein. That it (the defendant) had nothing whatever to do with the storing of the meat in said room, and had nothing to do with taking it out. That it did not guarantee anything but to keep the room at the proper temperature; that, after renting same to said Morrow, the plaintiffs herein, Riley Brothers, bought out the business of the said Morrow, and succeeded to the rights of the said Morrow under his said contract to use said space in said cold storage plant, and did use the same for some time thereafter. That defendant at no time made any representations, promises, or contract with the plaintiffs, other than the one made with the said Morrow, and that it has fully carried out its contract in every respect, and that if plaintiffs suffered any damage it was on account of their own fault and negligence, and not on account of any dereliction on the part of the defendant. Upon the issues thus formed, the parties went to trial on the 13th day of April, 1907, before the court and a jury, which trial resulted in a verdict for the plaintiffs in the sum of \$350.

The verdict being for the plaintiffs, where there is any particular difference between the parties as to the facts, they must be resolved against the defendant. The evidence shows that the meat was placed in cold storage by the plaintiffs, and that it was spoiled by becoming impregnated with a strong taste of pine or some other pungent wood while thus stored. There was no contention that the temperature was not kept at the proper degree of coldness to preserve the meat, and the defendant contends that was all the duty it owed the plaintiffs. It seems to be the general rule that, although a warehouseman is under no obligation to make his building secure from all possible contingencies, yet it must be reasonably and ordinarily safe against common, ordinary occurrences, and he is liable where injury results from a lack of reasonable skill and diligence in its construction. *Cowles et al. v. Pointer*, 26 Miss. 253; *Neal & Co. v. Wilmington, etc., R. Co.*, 53 N. C. 482; *Godley v. Hagerty*, 20 Pa. 387, 59 Am. Dec. 731; *Walden et al. v. Finch et al.*, 70 Pa. 460; *Wilson et al. v. Kelly*, 52 Ill. App. 124.

In the protection and care of property intrusted to them, it is the duty of warehousemen to use ordinary care, which is such care and diligence as ordinarily prudent persons in that business are accustomed to exercise towards such property. Whether the defendant used ordinary care in the case at bar was a question for the jury, and, the jury having found against it on evidence reasonably tending to support such a finding, their verdict is conclusive. There was also conflicting evidence on the question as to what the contract really was; the plaintiff

testifying that he placed the meat in the cold storage in good order, and that the warehouseman was to take care of it. The defendant and others testified that the meat was stored under a contract to the effect that it would keep the cold storage at the proper temperature. On this proposition the jury found in favor of the plaintiffs, and, there being evidence reasonably tending to support the finding, it must be held to be conclusive. The case at bar is in a good many respects similar to the case of *Ledy v. Quaker City Cold Storage & Warehouse Company*, 180 Pa. 323, 38 Atl. 851. In that case Mr. Justice Green, who delivered the opinion of the court, says: "In an action against the owner of a cold storage warehouse to recover damages for the loss of chickens and squabs injured by mould and decay, it is not necessary to prove some specific act of negligence which produced the injury; but the case is for the jury, where the evidence for the plaintiff tends to show that the chickens and squabs were in good condition when they were placed in the warehouse, that they were mouldy and rotten when taken therefrom, that the room where they were kept was damp and would cause rot, notwithstanding the fact that the chickens and squabs had been previously stored in another warehouse for a year, and the evidence offered by the defendant tends to show that the temperature of its warehouse was never above 22 degrees, that its machinery was the best of its kind, and never out of order, and that plaintiff's goods were treated the same as all others of a similar kind."

We believe the above case is decisive of the point raised by plaintiff in error in the case at bar.

The judgment of the court below is affirmed. All the Justices concur.

(32 Nev. 378)

Ex parte PROSOLE. (No. 1,877.)

(Supreme Court of Nevada. April 30, 1910.)

1. STATUTES (§ 184*)—CONSTRUCTION—INTENTION OF LEGISLATURE — GIVING EFFECT THERETO.

If the will of the Legislature is apparent, the court should give such construction to the language of a statute as will give it force, and not nullify its manifest purpose.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 262, 263, 268; Dec. Dig. § 184.*]

2. ARSON (§ 45*)—BURNING INSURED PROPERTY—PUNISHMENT.

Comp. Laws, § 4711, designates certain acts as constituting arson in the second degree, and prescribes the punishment therefor, and section 4712 provides that one willfully burning insured property to injure or defraud "shall be adjudged guilty of arson in the second degree and punished accordingly." *Held*, that the words quoted refer to and are intended to supply

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the same punishment provided for that offense in the preceding section.

[Ed. Note.—For other cases, see Arson, Dec. Dig. § 45.*]

3. STATUTES (§ 206*)—CONSTRUCTION—STATUTE AS A WHOLE.

It is elementary that effect must be given, if possible, to every word, clause, and sentence of a statute by construing it so as to make all parts harmonize with each other, and render them consistent with its general scope and object.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 283; Dec. Dig. § 206.*]

4. STATUTES (§ 208*)—CONSTRUCTION—STATUTE AS A WHOLE.

All parts of the same act must be considered together, and if one part, standing alone, is obscure, its meaning may be disclosed by another, and consideration of the entire act may expand or restrict the terms of a particular clause.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 282, 285; Dec. Dig. § 208.*]

5. STATUTES (§ 183*)—CONSTRUCTION—INTENTION OF LEGISLATURE.

In construing all statutes, the object is to ascertain the legislative intent, and words must not be narrowed to exclude what it was intended to embrace, but the intent must be gathered from the words, and they must be such as to leave no room for reasonable doubt on the subject, and it must not be defeated by a forced and overstrict construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 261; Dec. Dig. § 183.*]

6. STATUTES (§ 181*)—CONSTRUCTION—INTENT OF LEGISLATURE.

The rule as to the construction of statutes to ascertain the legislative intent does not exclude application of common sense to avoid absurdity.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

7. STATUTES (§ 241*)—CONSTRUCTION—PENAL STATUTES.

The rule of strict construction of penal statutes is not violated by permitting words to have their full meaning, or the more extended of two meanings, as the wider popular instead of the narrow technical one; but the words should be taken in such sense as will best manifest the legislative intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.*]

In the matter of the application of John Prosole for a writ of habeas corpus to obtain release from imprisonment. Petition denied.

James T. Boyd, A. N. Sallsbury, and G. W. Shutter-Cottrell, for petitioner. R. C. Stoddard, Atty. Gen., and L. B. Fowler, Deputy Atty. Gen., for the State.

TALBOT, J. Petitioner was indicted by the grand jury of Washoe county for the crime of arson in the second degree, and charged with maliciously and feloniously setting fire to and burning certain goods, wares, and merchandise situated in a building in Reno which were insured with the Globe & Rutgers Fire Insurance Company of the city of New York in the sum of \$3,000 against loss by fire, with intent to defraud that company. Trial was had, and the jury brought in a

verdict finding him guilty as charged in the indictment, and the court rendered judgment finding him guilty of the crime of arson in the second degree, and ordering that he be punished therefor by imprisonment for a term of four years in the State Prison, to which place he was committed, and where he now languishes.

The indictment, trial, and conviction were under section 4712 of the Compiled Laws, being section 58 of the act relating to crimes and punishments: "Every person who shall willfully burn, or cause to be burned, any building, or any goods, wares, merchandise, or other chattel, which shall be at any time insured against loss or damage by fire, with intent to injure or defraud such insurer, whether the same be the property of such person, or of any other, shall, upon conviction, be adjudged guilty of arson in the second degree, and punished accordingly." It is alleged that he is unlawfully restrained of his liberty because the district court "acted wholly without jurisdiction in passing judgment upon this petitioner and in sentencing and ordering this petitioner to be confined in the Nevada State Prison, as aforesaid, for the reason that said section 4712 provides no punishment for the crime charged in the said indictment against this petitioner and for the charge upon which this petitioner was tried and convicted as aforesaid, and for the reason that the laws of the state of Nevada provide no punishment for the offense charged in the said indictment against this petitioner, and for which petitioner was tried and convicted and sentenced."

Has the Legislature designated any punishment for the crime for which he was indicted and convicted? Section 4710 of the Compiled Laws provides that every person who shall willfully and maliciously burn, in the nighttime, any dwelling house in which there shall be some human being, shall be deemed guilty of arson in the first degree, and shall be punished by imprisonment for not less than two years, and which may extend to life. Section 4711, which directly precedes the one assailed by petitioner, provides that every person who shall willfully and maliciously burn any dwelling house, or cause to be burned any kitchen, office, shop, barn, stable, storehouse, warehouse, or other building, or stacks or stocks of grain, hay, cordwood, lumber, or other designated property of the value of \$50 or more, "shall be deemed guilty of arson in the second degree, and upon conviction thereof shall be punished by imprisonment in the State Prison for a term not less than one year nor more than ten years; and should the life or lives of any person or persons be lost in consequence of such burning, as mentioned in this and the preceding section, such offender shall be deemed guilty of murder, and shall be indicted and punished accordingly." If the will

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the Legislature is apparent, it is the duty of the court to give effect to its intention, and such construction should be placed upon the language of the statute as will give it force and not nullify the manifest purpose of that section, which should be construed in connection with the preceding one. We are unable to conclude otherwise than that by designating in section 4711 that certain acts shall constitute arson in the second degree, and that persons convicted thereof shall be punished by incarceration in the State Prison for a term not less than one nor more than ten years, it was, by the provision in the following section that "every person who shall willfully burn any building, any goods, wares or merchandise, which shall be at the time insured against loss or damage by fire, with intent to injure or defraud such insurer, whether the same be the property of such person or any other, shall, upon conviction, be adjudged guilty of arson in the second degree and punished accordingly," the intention of the Legislature to make persons committing the acts last designated guilty of arson in the second degree, the same as if these acts had been specified in the previous section among those constituting that crime as there designated, and that the words "shall be adjudged guilty of arson in the second degree and punished accordingly" refer to, and are intended to supply, the same punishment which is provided for that offense in the preceding section, as clearly and fully as if the last section had repeated the language of the former one, providing that offenders upon conviction "shall be punished by imprisonment in the State Prison for a term not less than one nor more than ten years." Any other construction would nullify section 4712 entirely and set aside the evident intention of the Legislature contrary to the ordinary rules for construing statutes.

The language assailed and the provision for punishment for the crime of arson in the second degree are the same in sections 4711 and 4712 of our Compiled Laws as in the California statute of 1856 (Cal. St. 1856, p. 132; Woods' Digest 1856-1860, 336). In *People v. Hughes*, 29 Cal. 257, an indictment and conviction for arson in the second degree for burning an insured building with intent to defraud the Hartford Insurance Company was sustained under the section of the statute corresponding to the one under which petitioner was convicted. It was sought to reverse the judgment of the trial court there on other grounds.

In *Davis v. State*, 51 Neb. 318, 70 N. W. 990, it was said: "A criminal statute is not void for uncertainty which prescribes as a punishment for the doing of a certain act the same punishment that is prescribed for doing another named act, when the same Criminal Code defines the latter act and prescribes its punishment." As quoted by the Supreme Court of Alabama from Marshall, C. J., in *U. S. v. Wiltberger*, 5 Wheat. 76 (5 L. Ed.

37): "It is the Legislature, not the court, which is to define a crime and ordain its punishment. Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the Legislature; nor is the maxim to be so applied as to exclude from the operation of the statute cases which the words in their ordinary acceptation, or in that sense in which the Legislature obviously used them, would comprehend." In *Huffman v. State*, 29 Ala. 44, the court said: "While we disclaim the right to extend a criminal statute to causes out of the letter, yet we hold it to be our duty to apply it to every case clearly within the cause or mischief of making it, when its words are broad enough to embrace such case." *Walton v. State*, 62 Ala. 199. The same language was quoted and adopted in *Holland v. State*, 34 Ga. 457; and it was further stated that the intention of the Legislature is to be collected from the words it employs, and that the construction contended for would render nugatory clauses embraced in the Penal Code. In *U. S. v. Athens Armory*, 35 Ga. 351, Fed. Cas. No. 14,473, it was said: "But, notwithstanding the rule that in statutes of this kind the intention is to be attained by strict interpretation, it is nevertheless the duty of the judge to give full expression to the legislative will, * * * 'to ascertain which will,' says Bishop (1 Crim. Law, § 231), 'is the great end of all interpretation.' *United States v. Eighty-Four Boxes of Sugar*, 7 Pet. 453 [8 L. Ed. 745]; *The Schooner Enterprise*, 1 Paine, 32 [Fed. Cas. No. 4,499]; *United States v. Wigglesworth*, 2 Story, 369 [Fed. Cas. No. 16,690]; *Taylor v. United States*, 3 How. 197 [11 L. Ed. 559]; *Attorney General v. Radloff*, 10 Exch. 84; per Gould, J., in *Myers v. State*, 1 Conn. 502." The following is a paragraph from *Meadowcroft v. People*, 163 Ill. 70, 45 N. E. 306 (35 L. R. A. 176, 54 Am. St. Rep. 447): "It is urged that the statute is penal, and must therefore be strictly construed. But the rule of strict construction does not prevent our calling in the aid of other rules and giving to each its appropriate scope; the ascertainment of the legislative will being the primary consideration after all. Bishop on Stat. Crimes, § 200. A strict construction is not violated by giving the words of a statute a reasonable meaning, according to the sense in which they were intended, and disregarding captious objections, and even the demands of an exact grammatical propriety. Id. § 212. And a statute which is made for the good of the public ought, although it be penal, to receive an equitable construction. 6 Bacon's Abr. 391; *People v. Bartow*, 6 Cow. [N. Y.] 290."

The rule for the interpretation of criminal statutes has also been well defined in the following cases: "It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute. In other words, a statute must re-

ceive such construction as will make all its parts harmonious with each other, and render them consistent with its general scope and object. *Follmer v. Nuckolls County*, 6 Neb. 204; *State v. Babcock*, 21 Neb. 599 [33 N. W. 247]. If we apply the foregoing rule in the interpretation of the law under consideration, it is not a difficult task to ascertain the Legislature's intent." *State v. Bartley*, 39 Neb. 358, 58 N. W. 174, 23 L. R. A. 67. "Another rule controlling the interpretation of statutes is that all the parts of the same act must be considered together, and if one part, standing by itself, is obscure, its meaning may be disclosed by another part of the same statute. The consideration of the entire act may expand or restrict the terms of some particular clause." *State v. Myers*, 146 Ind. 38, 44 N. E. 802. "The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear, it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the Legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and overstrict construction. The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity, which the Legislature ought not to be presumed to have intended. * * * The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the Legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent." *U. S. v. Hartwell*, 6 Wall. 395, 18 L. Ed. 830.

The petition for the applicant's release is denied.

NORCROSS, C. J., and SWEENEY, J., concur.

(56 Or. 492)

CATLIN et al. v. JONES.*

(Supreme Court of Oregon. May 10, 1910.)

1. APPEAL AND ERROR (§ 396*)—TRANSFER OF CAUSE—SERVICE OF NOTICE OF APPEAL.

B. & C. Comp. § 549, subd. 1, provides that a party to a judgment desiring to appeal may give notice, when the decision is rendered, that he appeals, and the notice shall thereupon be entered in the journal, or, if the appeal is not then taken, the party may serve notice on the adverse party or his attorney, and file the orig-

inal, with proof of service indorsed thereon, with the clerk of the court in which the judgment is entered. *Held*, that it is the service within the time limited therefor of an adequate notice of appeal on the proper parties that gives the higher court jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2099, 2102, 2150; Dec. Dig. § 396.*]

2. APPEAL AND ERROR (§ 427*)—TRANSFER OF CAUSE—SERVICE OF NOTICE OF APPEAL—EVIDENCE.

The only evidence of the service of a notice of appeal is the record entry of the oral information in open court, or the indorsement on the written notice, though the trial court may, by nunc pro tunc order, correct the omission by its clerk to record an oral notice of appeal, and the return of the officer appearing on a notice of appeal, filed with the clerk of the lower court, can be amended so as to make the brief statement of his doings under the process correspond with the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2165; Dec. Dig. § 427.*]

3. APPEAL AND ERROR (§ 427*)—TRANSFER OF CAUSE—SERVICE OF NOTICE OF APPEAL—INDORSEMENT SHOWING TIME AND MANNER OF SERVICE—NECESSITY.

Under B. & C. Comp. § 549, subd. 4, providing that when a party in good faith gives due notice of appeal, and thereafter falls through mistake to do any other act necessary to perfect the appeal, the appellate court may permit an amendment or the performance of the act omitted, the giving of proper notice by a party is made a condition precedent to the court's exercise of power to permit a corrective addition, and an indorsement on the notice of appeal, when it is filed, showing the time and manner of service, being an essential statutory requirement, the notice is insufficient without such indorsement, and cannot be corrected; the defect being jurisdictional.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2165; Dec. Dig. § 427.*]

4. COURTS (§ 24*)—JURISDICTION OF SUBJECT-MATTER—CONSENT OF PARTIES.

Though jurisdiction of the person may be conferred upon a court by consent, that of the subject-matter cannot be.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 76-78; Dec. Dig. § 24.*]

Appeal from Circuit Court, Marion County; J. W. Hamilton, Judge.

Action by Russell Catlin and another against S. W. Jones. Judgment for plaintiffs, and defendant appeals. On motion to dismiss. Motion allowed.

See, also, 52 Or. 337, 97 Pac. 546.

The defendant has undertaken to appeal from a judgment rendered by the circuit court for Marion county. He caused to be served upon and left with plaintiffs' attorneys the original notice of appeal, with proof of service thereon, and filed with the clerk of the lower court a copy thereof, without any such indorsement. An undertaking on appeal was served and filed, and the transcript sent up. The plaintiffs have moved to dismiss the appeal on the ground that the notice is insufficient. Application has also been made by them for an order extending the time 15 days in which to file a brief, in case this motion is denied, which request has

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied June 19, 1910.

been acceded to in writing by defendant's counsel.

Geo. G. Bingham and W. H. Holmes, for appellant. John A. Carson and Thomas Brown, for respondents.

PER CURIAM. A party to a judgment, desiring to appeal therefrom, may give notice in open court or before the judge, at the time the decision is rendered, that he appeals from the judgment to the court to which the appeal is sought to be taken, and the notice shall thereupon, by order of the court or judge, be entered in the journal. If the appeal is not taken at the time the judgment is given, then the party may cause a notice to be served on the adverse party, or upon his attorney, and file the original, with proof of service indorsed thereon, with the clerk of the court in which the judgment is entered. B. & C. Comp. § 549, subd. 1. It is the service, within the time limited therefor, of an adequate notice of appeal on the proper parties, that gives the higher court power to hear and determine the cause transferred to it. The only evidence of the service of a notice of appeal is the record entry of the oral information given in open court or before the judge, or the indorsement made upon the written notice. The requisite proof cannot be supplied by affidavit or in any other manner. This statement is not intended to deny the power of a trial court, by a nunc pro tunc order, to correct the omission by its clerk to record an oral notice of appeal, which failure is not attributable to the appellant, and when the evidence is so supplied it would seem to be the only proof permissible. Nor do we wish to be understood as holding that the return of a sheriff or other officer appearing on a notice of appeal filed with the clerk of the lower court cannot be amended so as to make the brief statement of his doings, under and pursuant to the process, correspond with the facts. In such case, there is a memorandum susceptible to amendment.

An indorsement, showing the time and manner of service, is an essential statutory requirement, and must appear on the notice of appeal when it is filed, since an omission thereof cannot be supplied, because the failure is jurisdictional. *Burchell v. A. H. Averill Machinery Co.*, 106 Pac. 403.

The plaintiffs' counsel were undoubtedly aware of the service on them of the notice of appeal, and, if jurisdiction of the subject-matter could be bestowed on this court by consent, their application for an extension of time to file a brief, in case the motion were denied, and the written consent of defendant's counsel to the request, might have waived the defect of filing a mere copy of the notice of appeal, without any proof of service indorsed thereon. Although

jurisdiction of the person might be conferred by acquiescence, that of the subject-matter cannot.

When a party in good faith gives due notice of an appeal, and thereafter fails through mistake, to do any other act, including the filing of an undertaking, necessary to perfect the appeal, the appellate court may permit an amendment, or the performance of the act omitted. B. & C. Comp. § 549, subd. 4. The giving of proper notice by a party is made by statute a condition precedent to the court's exercise of power to permit a corrective addition, which is limited to the giving of an undertaking, and then only when the party has acted in good faith. *Hanley v. Stewart*, 102 Pac. 2. This case does not come within that rule.

No competent evidence of the "due service" of the notice of appeal exists, and in its absence the appeal is dismissed.

(56 Or. 554)

BENBOW v. THE JAMES JOHNS.†

(Supreme Court of Oregon. May 10, 1910.)

1. MECHANICS' LIENS (§ 12*)—PROPERTY SUBJECT TO LIEN—PROPERTY OF QUASI PUBLIC CORPORATION.

The property of a quasi public corporation affected with a public use and necessary to the performance thereof is not, as a general rule, subject to a mechanic's lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 13; Dec. Dig. § 12.*]

2. MECHANICS' LIENS (§ 12*)—PROPERTY SUBJECT TO LIEN—QUASI PUBLIC PROPERTY.

The rule that the property of a quasi public corporation affected with a public use and necessary to the performance thereof is not subject to a mechanic's lien applies only so far as the property has become entirely the property of the corporation divested of specific liens, and a lien for the construction of the property acquired by the corporation exists.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 13; Dec. Dig. § 12.*]

3. MECHANICS' LIENS (§ 166*)—PROPERTY SUBJECT TO LIEN—QUASI PUBLIC PROPERTY.

A mechanic's lien is created by law and attaches as soon as the labor or material is furnished, and it is not dependent on any subsequent condition, express or implied.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 297; Dec. Dig. § 166.*]

4. MARITIME LIENS (§ 3*)—PROPERTY SUBJECT TO LIEN—QUASI PUBLIC PROPERTY.

One furnishing labor and materials for the construction of a vessel, built for a corporation having a franchise to operate a ferry across the Willamette river, may enforce a lien against the vessel, though it was constructed with the intention that it should be used as a ferryboat, and though it was used as a ferryboat, because the subject-matter of the lien is a detached piece of personal property, which previous to the attachment of the lien thereon had not been used as a part of the public franchise, and because the consideration of the lien is, in substance, a part of the purchase price.

[Ed. Note.—For other cases, see *Maritime Liens*, Cent. Dig. § 3; Dec. Dig. § 3.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied June 28, 1910.

5. MARITIME LIENS (§ 74*)—ENFORCEMENT—JURISDICTION—STATUTORY REMEDIES.

The jurisdiction of a state court to enforce a lien on a boat depends on whether the debt on which the lien is based is in fact for material and labor used in its construction, as distinguished from the repair of a boat while in use, and one seeking in a state court to enforce a lien against a boat must allege and prove that the subject-matter of the lien was in fact the construction of the boat at the time the lien attached.

[Ed. Note.—For other cases, see *Maritime Liens*, Cent. Dig. § 111; Dec. Dig. § 74.*]

6. MARITIME LIENS (§ 74*) — ENFORCEMENT — STATUTORY REMEDIES.

Where one seeking to recover for work and materials used in the construction of a vessel joined, in one action, the vessel, the owner, and the contractor, under B. & C. Comp. § 61, subd. 3, authorizing the taking of judgments against any or either of defendants severally, etc., he could take a nonsuit as to the vessel and the owner and recover a judgment against the contractor, and then afterwards enforce his lien against the vessel.

[Ed. Note.—For other cases, see *Maritime Liens*, Dec. Dig. § 74.*]

7. MARITIME LIENS (§ 74*)—ENFORCEMENT.

The right of action against a vessel, the owner, contractor, or subcontractor, for labor and materials furnished in the construction of a vessel, are not joint, but several, for that against the vessel is in rem, and that against the owner, contractor, or subcontractor is in personam, and the claimant may pursue his remedy against the vessel and against the owner separately.

[Ed. Note.—For other cases, see *Maritime Liens*, Dec. Dig. § 74.*]

8. JUDGMENT (§ 707*)—RES JUDICATA—IDENTITY OF PARTIES.

Judgments are conclusive evidence of facts only as between parties and privies to the litigation, and a former adjudication is no bar unless the parties thereto are the same as those in the subsequent proceeding, and, where a vessel was not a party to the judgment against the contractor to construct it because the action against the vessel was dismissed, the vessel was not bound by anything adjudicated in the action against the contractor.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1230; Dec. Dig. § 707.*]

9. PARTNERSHIP (§ 139*) — CONTRACTS — PARTIES BOUND.

The contracts of a firm are the contracts of each member thereof, and each is personally liable thereon, and an averment that a partner for himself and the firm contracted with a third person is not inconsistent with the averment that the latter contracted with such partner.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 206; Dec. Dig. § 139.*]

10. MARITIME LIENS (§ 40*)—LOSS OF LIEN.

The lien of a subcontractor given by B. & C. Comp. § 5706, making every vessel subject to a lien for all debts due to persons by virtue of a contract, expressed or implied, etc., is not extinguished by the taking of a judgment against the contractor, but the payment of the debt by satisfaction of the judgment is the only thing that will extinguish the right to enforce the lien against the vessel.

[Ed. Note.—For other cases, see *Maritime Liens*, Cent. Dig. § 78; Dec. Dig. § 40.*]

11. MARITIME LIENS (§ 74*)—ENFORCEMENT—DEFENSES.

B. & C. Comp. § 5708, providing that any person having a demand for services rendered

in the construction or repair of a vessel, etc., may, instead of proceeding for the recovery against the master, owner, agent, or consignee of the vessel, commence, at his option, an action against the vessel by name, etc., does not preclude a subcontractor from enforcing his lien against a vessel merely because he obtained a judgment against the contractor who is not an owner, master, agent, or consignee.

[Ed. Note.—For other cases, see *Maritime Liens*, Dec. Dig. § 74.*]

Appeal from Circuit Court, Multnomah County; Calvin U. Gantenbein, Judge.

Action by Charles A. Benbow against the ferryboat James Johns. From a judgment of dismissal, plaintiff appeals. Reversed and remanded.

This is an action to enforce, under the boat lien law of this state, a lien against the ferryboat James Johns for material and labor used in its construction by Bilyeu & Herstel, contractors of the owner, the St. Johns Transportation Company, a corporation. The labor and material are alleged to be of the agreed price of \$1,512.99, which became due July 7, 1907, and has not been paid. An action was brought first against the boat, the owner, and David Herstel, one of the firm of Bilyeu & Herstel, contractors, to recover the price of the work and material. Herstel not answering, a personal judgment by default was entered against him for the amount of the alleged debt. Subsequently, the case coming on for trial upon the answer of the St. Johns Transportation Company, the plaintiff, not being permitted to amend its complaint, applied for and was granted a nonsuit. Thereafter plaintiff brought this action against the boat to enforce the lien, a warrant was issued, and the boat seized. The St. Johns Transportation Company, as owner of the boat, appeared, filed an undertaking with sufficient surety conditioned to satisfy the amount which may be adjudged to be due and owing plaintiff, and secured the release of the boat, and thereupon answered, denying the material averments of the amended complaint, setting up four separate special defenses, which, briefly stated, are substantially as follows: First. That the boat was specially constructed by the corporation to meet the requirements of a contract which it had made with the city of St. Johns to construct and operate a ferry between the foot of Pittsburg street in that city and across the Willamette river to the opposite shore thereof. The contract is in the form of an ordinance of the city, granting a franchise to the St. Johns Transportation Company for operating such ferry under certain specified conditions and penalties, with a reservation to the city of a percentage of the earnings of the boat when in operation, and an option to purchase it at the end of a fixed period of time. It is averred that the boat was being constructed with the special object of fulfilling this contract, and that it is required for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the accommodation of the public, is necessary to the owner in carrying out its contract with the city, and, by reason of the character of public use attached thereto, is not subject, for reasons of public policy, to the statutory lien. Second. That the former action and judgment therein against David Herstel is an adjudication of the facts alleged therein, as to the party with whom plaintiff contracted when furnishing the labor and material, and that such adjudication estops plaintiff from now alleging a different state of facts. Third. That the former action and judgment against David Herstel is an extinguishment of a right to a lien, and the claim on which it is based being merged in the judgment, which, it is contended, will not support a lien. Fourth. That the former action and judgment therein against Herstel is a waiver of his right of lien by an election as to the remedy. A general demurrer was interposed to each of these separate defenses, which, being overruled, plaintiff further declined to plead, whereupon judgment was entered dismissing the complaint, and releasing and discharging the boat from arrest, and the parties from liability on their undertaking, from which judgment the defendant has appealed.

A. E. Clark (Wm. C. Benbow and C. M. Idleman, on the brief), for appellant. Geo. J. Perkins and Harrison G. Platt (Platt & Platt, on the brief), for respondent.

SLATER, J. (after stating the facts as above). It is sought by the first separate defense to resist plaintiff's right to a lien, on the ground that the boat is the property of a quasi public corporation, is necessary to the carrying out of the public purpose for which the corporation was established, and, therefore, impressed with a public use. As a general rule the property of a quasi public corporation, affected with a public use and necessary to the performance thereof, is not subject to a mechanic's lien. 27 Cyc. 26; Am. & Eng. Ency. L. (2d Ed.) 296.

As to what constitutes a quasi public corporation, and as to when the property of such a corporation is affected by a public use, the cases are not in entire harmony. But it is strongly urged by the corporation that it is a quasi public corporation, although its corporate powers are not alleged. It says it has contracted with the city to operate the ferry in question for the accommodation of the public; that the public is to be greatly accommodated thereby, and has an interest in an uninterrupted operation of the ferry; that the city is to receive a percentage of the tolls collected; that the owner is under penalty for failure to furnish and operate the boat; and that if the lien is allowed to attach, and the boat ordered sold, the company will be rendered unable to subserve the interest of the public under its franchise, and be subjected to the penalty imposed by its contract. Whatever merit there may be in the doctrine of

law relied upon to support this contention, we are clearly of the opinion that it cannot have such an unlimited application as to include the facts of this case. There is sound authority for saying that it cannot be applied at all, except so far as the property has become entirely the property of the company, divested of specific liens. When that has been accomplished, there may be reason in saying that a general creditor may not levy on or sell a part of the property of a company, which property is necessary to the carrying out of its assumed obligations to the public. That is one thing; it is an entirely different thing to say that such a lien shall not attach, when the company, by the very act of acquiring a particular article of personal property, creates either by contract, or by force of law, a specific lien in favor of the vendor or manufacturer, or would create it, unless hindered by public policy. *Hill v. La Crosse & M. R. R. Co.*, 11 Wis. 215; *Phillips on Mechanics' Liens* (3d Ed.) § 182.

It has also been held that the rule does not apply to the property of a public corporation when a mechanic's lien has attached to the property while it belongs to private individuals, and is afterwards conveyed to a city; but in such case the city takes the property subject to the lien. *City of Salem v. Lane & Bodley Co.*, 90 Ill. App. 560, affirmed 189 Ill. 594, 60 N. E. 37, 82 Am. St. Rep. 481. In *Briggs v. Lightboats*, 11 Allen (Mass.) 157, three lightboats were being constructed by one Andrews, under an agreement with the United States government, to be constructed and equipped according to certain specifications and to the satisfaction of an officer of the government, and to be delivered for a gross sum, payable on delivery and presentation of a certificate of approval by the inspecting officer. After the boats had been received, and Andrews had been paid the contract price, without any knowledge by the government of plaintiff's lien, the boats were seized under an action brought in the court of the state of Massachusetts for a materialman's lien. It was held that the lien was valid, and that the boats were taken subject to the lien; but, as the government was not subject to be sued in a state court, the plaintiff could not enforce the law in such court. And in *The Siren*, 7 Wall. 152, 19 L. Ed. 129, it was held that a prize ship, in charge of a prize master and crew, having collided with and done damage to the vessel of a private citizen, the latter had a valid lien upon the proceeds derived from the sale of the prize vessel, and that the claimants were entitled to have their damages assessed and paid therefrom, although title to the prize ship was afterwards adjudged to be in the United States.

The complaint states that the labor and material sued for were furnished by plaintiff between December 28, 1906, and July 1, 1907, upon a contract executed December 27, 1906, with David Herstel for himself

alone, and for and on account of the partnership firm of Bilyeu & Herstel, the original contractors with J. T. Peterson, P. J. Peterson, and John Smith, copartners as Peterson Bros. & Smith, who were then the owners of the boat; that about January 29, 1907, the two Petersons and Smith incorporated as the St. Johns Transportation Company, and in February following transferred the ownership of the boat to the corporation, which ratified and confirmed the previous acts of the partnership, relating to the construction of the boat, and thereafter contracted with Bilyeu & Herstel for other and different construction work and material to be used in the boat. The ordinance granting the franchise was approved by the mayor of St. Johns on January 22, 1907, and within 30 days thereafter the St. Johns Transportation Company filed with the city recorder its acceptance of the franchise.

It is not averred in the answer that, at the time plaintiff's alleged lien attached, the boat was or had been in use as a ferryboat, under the franchise granted to the St. Johns Transportation Company, but that it was being built and completed in compliance with the ordinance granting the franchise, and was intended to be operated under the terms thereof; and that it was being so used at the time of filing the answer. The lien is created by the law, and attaches as soon as the labor or material is furnished, and is not dependent on any subsequent condition, expressed or implied. *The Victorian*, 24 Or. 121, 139, 32 Pac. 1040, 41 Am. St. Rep. 838; *Dorr v. Waldron*, 62 Ill. 221, 225. The answer, therefore, does not aver that the boat in question was in fact impressed with a public use as a ferryboat at the time the lien attached, but only that it was being constructed with an intention on the part of its owner to use it in that capacity in the future, of which intention and purpose the plaintiff had knowledge.

The fact that after the lien attached the boat was used as a ferryboat would not prevent plaintiff from enforcing his lien, because the subject-matter of the lien is a detached piece of personal property, which previous to the attachment of the lien thereon had not been used as a part of the public franchise pleaded, and because the consideration of the lien is, in substance, a part of the purchase price thereof. Indeed, the jurisdiction of the state court to enforce a lien upon a boat depends upon whether the debt on which the lien is based is, in fact, for material or labor used in its construction, as distinguished from the repair of a boat while in use. *The Victorian*, supra. Therefore, before plaintiff could enforce the lien, he must allege and show that the subject-matter of the lien was in fact being constructed for a boat at the time the lien attached. It could not, therefore, be affected or impressed with a public use under the franchise granted by

the city ordinance, unless it had previously been used in such public capacity. The first separate answer is, therefore, subject to the demurrer.

In support of the second separate answer, it is urged that, by taking judgment against David Herstel in the former action, it was adjudicated that the labor and material sued for was furnished at the request of David Herstel, because it was so alleged in the complaint; and that by reason thereof plaintiff is now estopped from averring in this complaint that the same labor and material were furnished to the firm of Bilyeu & Herstel. No estoppel by former adjudication could arise therefrom for two reasons:

First. It appears that the former action was dismissed as to the boat on plaintiff's motion, and it is not, therefore, a party to the judgment in that action. The rights of action against the boat and against the owner, contractor, or subcontractor, are not joint, but several. That against the boat is in rem, and that against the owner, contractor, or subcontractor is in personam. The weight of authority seems to sustain the proposition that the remedy against the vessel and the remedy against the owner cannot be united or enforced in the same action. Certainly no case has been cited, or found by the court, disputing the right of the claimant to pursue them separately. *Providence Washington Ins. Co. v. Wager* (D. C.) 35 Fed. 364. And although they should be considered as capable of being joined in one action, and treated as joint and several causes of action, still a voluntary nonsuit may be taken as to one, and a judgment recovered as to the other (B. & C. Comp. § 61, subd. 3), and afterwards an action may be maintained against the one as to whom a voluntary nonsuit had been taken (23 Cyc. 1243; *Handley v. Jackson*, 31 Or. 552, 50 Pac. 915, 65 Am. St. Rep. 839; *Parks v. Dunlap*, 86 Cal. 189, 25 Pac. 916; *Hamill v. Ward*, 14 Colo. 277, 23 Pac. 330; *West v. Asher*, 38 Ind. 291; *James v. Leport*, 19 Nev. 174, 8 Pac. 47; *Eikenberry v. Edwards*, 71 Iowa, 82, 32 N. W. 183). Judgments and decrees are conclusive evidence of facts only as between parties and privies to the litigation; and, in case of a former adjudication set up in defense, it is no bar, unless the parties to the first judgment are the same as those to the second proceeding. 2 Black on Judgments (2d Ed.) § 534. The defendant boat was not a party to the judgment against Herstel, and is not bound by anything adjudicated in the action of which the judgment is the final result. When the action was dismissed as to the boat, it was as if no action had been brought against it.

Second. The matter now said to be inconsistent is not so in fact. David Herstel is alleged to be one of the firm of Bilyeu & Herstel. All contracts of the firm are contracts of each member of the firm; that is,

each member of the firm is personally liable for the partnership obligations. It is now alleged that the owners of the boat contracted with Bilyeu & Herstel for the construction of the boat, and that David Herstel, one of the firm, for himself and Bilyeu & Herstel, contracted with plaintiff in reference to the matter. This is not inconsistent with the averment in the former action that plaintiff contracted with David Herstel, and hence no estoppel by adjudication could in any event arise.

The third defense amounts to this: That whatever right plaintiff had to a lien was extinguished by taking judgment against Herstel. It is argued that the statute contemplates a lien based upon an account, and not on a judgment; but such is not the purport of the statute. The lien is given "for all debts due to persons by virtue of a contract, expressed or implied," etc. B. & C. Comp. § 5708. The proceeding is for the purpose of subjecting the security to the payment of the debt. It would seem upon principle and authority that nothing other than the payment of the debt by satisfaction of the judgment would extinguish the right to enforce the claim against the security. *Marean v. Stanley*, 5 Colo. App. 335, 38 Pac. 395; *Kirkwood v. Hoxie*, 95 Mich. 62, 54 N. W. 720, 35 Am. St. Rep. 549; *Anderson v. Huff*, 40 N. J. Eq. 349, 23 Atl. 654.

The fourth defense is practically the same as the third. It is that the plaintiff had the right to but one of two remedies; an action in personam against the person contracting for the work and material, and one in rem against the boat. The contention is based upon a construction of the following words of the statute: "Any person having a demand as aforesaid, instead of proceeding for the recovery thereof against the master, owner, agent, or consignee of the boat or vessel, may, at his option, commence an action against such boat or vessel by name." B. & C. Comp. § 5708. Particular emphasis is laid upon the words "instead of" and "at his option." If Herstel, against whom plaintiff obtained judgment, came within the class of persons named in the section of the statute above quoted, the question presented would be difficult to overcome; but he was not the master, owner, agent, or consignee of the boat or vessel. It is argued that the liability of the vessel is made to rest upon the theory of agency, and that Herstel, in contemplation of the law, is an agent; but it will be noticed that in declaring the lien section 5708 of the statute makes use of these words: "For all debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel, or with the agents, contractors, or subcontractors of such owner." Here contractors and subcontractors are expressly mentioned as a class distinct from the agents, and there is nothing

in the statute to indicate that it was intended that they should be considered as agents of the owner. The latter, therefore, must evidently mean an agent in fact, and not one implied by law, as in the mechanic's lien law. But in the section of the statute on which the argument is based contractors and subcontractors are not mentioned, and we therefore conclude that they are not included within the optional clause of that section.

If but one remedy is given by the statute as against the parties specially named therein, the reason of the statute would appear to be that, if judgment is obtained against the owner, master, agent, or consignee, execution thereof would be available against the boat, and therefore it should be deemed a waiver of a direct proceeding against the boat; but this would not be true of a judgment obtained against a contractor or subcontractor, because neither of such persons would have any property interest in the boat subject to execution. We are satisfied, however, that a subcontractor is not precluded by the statute from having his lien upon the boat because he obtained a judgment against the original contractor, who is not an owner, master, agent, or consignee of the boat.

The judgment is, therefore, in all things reversed, and the cause remanded for a new trial, with directions to the lower court to sustain the demurrer.

(37 Utah, 431)

EVANS et al. v. OREGON SHORT LINE R. CO.

(Supreme Court of Utah. April 29, 1910.)

1. DEATH (§ 68*) — DAMAGES — ADMISSIBILITY OF EVIDENCE.

Under Comp. Laws 1907, § 2912, providing that in a death action such damages may be given as under all the circumstances may be just, in connection with evidence that decedent had contributed to his family for support and maintenance, the wife and children may also show his affection for them, his disposition and deportment towards them, his counsel and advice and his care and solicitude for their welfare, in so far as such things were made effective by his acts, as bearing on the amount of damages.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 86; Dec. Dig. § 63.*]

2. DEATH (§ 68*) — ADMISSIBILITY OF EVIDENCE — CONDUCT OF DECEASED TOWARD FAMILY.

That a physician testifying to decedent's kind treatment of his wife on specific instances did not come into daily contact with the husband and wife, and therefore was unable to testify to their daily conduct towards each other for a connected period of months or years, did not affect the admissibility of his testimony, but merely went to its weight.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 86; Dec. Dig. § 63.*]

3. APPEAL AND ERROR (§ 232*) — OBJECTIONS BELOW — SUFFICIENCY.

Where defendant in the lower court objected to evidence as not proper for any purpose,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

it could not on appeal urge an additional specific objection.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 232.*]

4. DEATH (§ 69*)—ADMISSIBILITY OF EVIDENCE.

Where a physician testifying to the physical condition of decedent's widow in a death action stated that "she has been an invalid for nearly four years and suffers from a paralytic stroke on her right side," his further statement that she is almost unable to help herself, has had to be taken care of ever since she was paralyzed, cannot do any housework to amount to anything, but goes around the house unable to do much because she has lost the use of her right limb, though in form referring to her condition at the time of trial, in fact referred to such condition at a time prior to decedent's death.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 69.*]

5. DEATH (§ 69*)—ACTION—ADMISSIBILITY OF EVIDENCE.

In a death action for the benefit of decedent's widow and children under Comp. Laws 1907, § 2912, giving such damages as under all the circumstances may be just, evidence as to the poor physical condition of the widow, her inability to do housework, and the necessity for caring for her was admissible on the question of damages.¹

[Ed. Note.—For other cases, see Death, Cent. Dig. § 86; Dec. Dig. § 69.*]

6. TRIAL (§ 261*)—REFUSAL OF REQUESTS—INSTRUCTIONS INCORRECT IN PART.

It is not error to refuse a charge faulty in part.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 660; Dec. Dig. § 261.*]

7. DEATH (§ 95*)—MEASURE OF DAMAGES—CONTRIBUTIONS OF DECEDENT TO FAMILY SUPPORT.

If the true basis for recovery in a death action of what might be found that decedent would probably have contributed to his family, either for their support or as an addition to his estate, be the present value thereof, the discount should be made only from the time that it was found that such contributions would have been actually made had decedent lived, and not at the end of decedent's expectancy.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 112; Dec. Dig. § 95.*]

8. TRIAL (§ 234*)—INSTRUCTIONS—BURDEN OF PROOF.

Charges that it is the presumption of law that every man exercises due care for his own safety when in a place of danger, and the presumption is that decedent did so when he approached the crossing, and that plaintiffs need not affirmatively prove that decedent looked and listened for the train before coming upon the crossing, the presumption being that he did so, and that the burden of proof that he did not was on defendant and must be proved by a preponderance of the evidence, merely amounted to charges that the burden of proof upon the plea of contributory negligence was upon defendant, and, unless such negligence was established by a preponderance of the evidence, plaintiffs must prevail as to that issue, and did not place a presumption in the balance to be weighed by the jury against the evidence in support of defendant's plea of contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 537; Dec. Dig. § 234.*]

¹Spiking v. Con. Ry. & P. Co., 33 Utah, 339, 93 Pac. 847; Pool v. Southern Pac. Ry. Co., 7 Utah, 13, 26 Pac. 651.

9. TRIAL (§ 260*)—REFUSAL OF REQUESTS—REQUEST EMBRACED IN CHARGE GIVEN.

It is not error to refuse a charge embraced in instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

10. RAILROADS (§ 351*)—CROSSING ACCIDENT—INSTRUCTIONS.

In an action for the death of one killed at a railroad crossing, a charge that, though a railroad company may comply with the statutory requirements of ringing the bell or sounding the whistle in approaching a public crossing, yet it can nevertheless be negligent in failing to adopt such other reasonable measures for public safety as common prudence may dictate, considering the danger, travel, and surrounding circumstances, was not erroneous as authorizing the jury to speculate and base a verdict upon anything which in their judgment defendant ought to have done or omitted to do to prevent accidents at the crossing, where the court also charged that, before plaintiffs could recover, they should satisfy the jury by a preponderance of the evidence that some one of the negligent acts alleged in the complaint caused decedent's death, and, if they were so satisfied, their verdict should be for plaintiffs, unless they found that defendant had established its defense of contributory negligence, but simply stated an abstract proposition of law and gave a general definition of negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1201; Dec. Dig. § 351.*]

11. APPEAL AND ERROR (§ 1064*)—REVIEW—INSTRUCTIONS.

That instructions are long, and to some extent repeated, and hence to that extent unnecessary, will not affect the verdict or judgment otherwise without prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4224; Dec. Dig. § 1064.*]

Appeal from District Court, Cache County; W. M. Maughan, Judge.

Action by Samuel R. Evans and another, administrators of Jesse J. Price, against the Oregon Short Line Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

P. L. Williams, Geo. H. Smith, and F. K. Nebeker, for appellant. Powers & Marion-eaux and Geo. Q. Rich, for respondents.

FRICK, J. This is an action by respondents, as administrators of the estate of one Jesse J. Price, deceased, to recover damages which it is alleged resulted from his death to his surviving widow and eight minor children, for whose benefit the action was prosecuted. Jesse J. Price was killed on the 19th day of September, 1907, in a collision with a passenger train of appellant while attempting to cross its railroad track with a team and wagon at a public road crossing in the town of Richmond, Cache county, this state, and it is alleged that the collision and death of said Price was caused by the negligence of the appellant. The alleged acts of negligence, briefly stated, are: (1) Excessive speed of the train; (2) failure to keep a proper lookout before reaching the crossing by defendant's servants; (3) permitting weeds, willows, and other obstructions to

grow and remain on appellant's right of way at or near a public crossing; and (4) failure to sound the bell, blow the whistle, or give any other warning of the approach of the train. The case was submitted to a jury, who returned a verdict for respondents in the sum of \$15,300. The court entered judgment on the verdict, from which this appeal is prosecuted.

While the errors assigned are numerous, we shall only consider those that are relied on and are argued in the brief of appellant's counsel. In order to avoid repetition, we shall state the facts, so far as deemed necessary, in connection with the discussion of the several assignments. Appellant asserts that the court erred in admitting certain evidence respecting the relations existing between the deceased and his wife, one of the beneficiaries of this action, as testified to by the family physician of the deceased as the physician had observed the decedent's conduct some nine or ten months preceding his death. The substance of the evidence, which is correctly stated by counsel for appellant in their brief, is as follows: "I observed that Mr. Price's treatment of his wife was most kind—beyond the average. He had to help dress her and attend to her. He attended to her as a trained nurse would have done. I have never seen a man who would attend to a woman as kindly and as well as he did. He assisted to dress her, and during the confinement he gave me every assistance a man could. Mr. Price was a perfect specimen of manhood. He was robust, healthy, and strong. He was a well preserved man in every way." The contention is that this evidence should have been excluded upon the objection of counsel, which was upon the ground that the evidence is "immaterial, incompetent, and irrelevant." We think otherwise. Section 2912 of the Compiled Laws of the state of Utah of 1907, upon which this action is based, so far as material to the particular objection now under consideration, reads as follows: "In every action under this and the preceding section such damages may be given *as under all the circumstances of the case may be just.*" (Italics ours.) The question, therefore, is not merely whether a wife has lost a husband or a child a father, who in a mechanical way provided for their support from his earnings or other means. We think that, in connection with the evidence showing what the deceased has contributed to the family for support and maintenance, the wife and children may also show the affection the deceased entertained for them, his disposition and deportment toward them, his counsel and advice, and his care and kindly solicitude for their welfare in so far as these things were made effective by his acts, and that the jury may consider all these things in connection with the evidence of the amount the deceased contributed for support, as aforesaid, in arriving at the amount which the widow and minor children

shall receive as compensation for the injury sustained by them by reason of the death of the husband and father. We are of the opinion, therefore, that the court committed no error in overruling the objection and in admitting the evidence referred to.

It is, however, urged that the evidence was irrelevant and improper in any event, because the doctor's testimony referred to a specific instance or act relative to the deportment and disposition of the deceased, and to a time long prior to his death. The objection as stated above, however, was hardly broad enough to challenge the attention of either opposing counsel or court to this precise point. Assuming, however, for the purposes of this decision, that the objection was sufficiently broad, we are still of the opinion that the evidence was properly admitted. This objection, in any event, goes to the weight of the evidence rather than to its competency. There is no other way by which the decedent's affection, conduct, and treatment of his family could have been shown except as it was done, and the mere fact that the doctor did not come into daily contact with the husband and wife and was thus unable to testify to their daily conduct toward each other for a connected period of months or years in no way affected the admissibility of the testimony.

The next error assigned by appellant is very closely related to the one just discussed. This assignment relates to the admission of evidence relative to the physical condition of the widow of the deceased. The objection made to this evidence as disclosed by the record is "that it is not a proper element of damages." The court overruled the objection, and counsel saved an exception. The testimony given by a Mrs. Dent in brief is as follows: "Well, she is almost unable to help herself. She has had to be taken care of ever since she was paralyzed. Now she can't do any housework to amount to anything. She goes around the house and attempts to do some things, but not very much, because she has lost the use of her right limb." It is contended that the testimony should have been excluded upon the grounds: (1) Because it is not proper for any purpose; and (2) because the witness in describing the widow's physical condition did not limit her statement to a time anterior to the death of the deceased. A conclusive answer to the second ground of objection is that it is unavailing because this specific ground of objection was not stated at the time of trial, but the general objection that we have given only was interposed. If counsel at the time had called the attention of court and opposing counsel to the fact that the question did not limit the testimony to any particular time, no doubt the question would have been so framed as to obviate this objection, and, if the objection could not have been obviated and the court had nevertheless admitted the evidence over the specific

objection, the ruling could then have been reviewed with fairness and justice to all concerned. In view of the state of the record and the nature and form of the objection, this may not now be done. Another answer is that the witness, just before giving the testimony before quoted, in referring to the physical condition of the widow of the deceased, said: "She has been an invalid for nearly four years, and suffers from a paralytic stroke on her right side." It is apparent, therefore, that, while the statement of the witness as a matter of form referred to the wife's physical condition at the time of the trial, the witness nevertheless, in fact, referred to such condition at a time long prior to the death of the deceased. For these reasons the second ground of objection cannot be sustained.

Recurring now to the first ground of objection, it must be conceded that upon this point the authorities are in conflict. If, however, the cases are critically examined, and the statutes on which the decisions are based are kept in mind, the conflict among the courts will be found to be more apparent than real. In those jurisdictions where statutes like ours, or of similar import, are in force, it will be found that the courts with few exceptions, if any, have held evidence of the character now under consideration admissible and proper to be considered by the jury in determining the amount of damages to be allowed by them. The identical question was before the Supreme Court of California in the case of *Cook v. Clay Street Hill R. R. Co.*, 60 Cal. 609. That court held that under the provisions of the statute which we have quoted evidence of the physical condition of the wife is proper. Indeed, we cannot well see how any court can logically arrive at a different conclusion, unless the peculiar provisions of our statute are disregarded. The statute clearly implies that, in order to arrive at the real injury the wife or the minor children have sustained, the jury should be advised of just what they received from the deceased by way of pecuniary aid and assistance, and also what they received from him by way of comfort, advice, and companionship. The statute seems to contemplate that a husband is not necessarily an automaton who responds to the wants of his wife and minor children in a mechanical way merely, and does no more for them than to provide for their support and maintenance. Again, it seems to be assumed in the statute that the actual disposition and inclination of men differ, and that this difference is made manifest in their family relations. One husband and father may be of great comfort to his wife and minor children, and his society and advice may be of much benefit to them, while another man may render to his family but little, if anything, in this regard, yet both may provide money, or the means of support, in the same amount and to the same extent to their respective families. It is no doubt for

this reason that the statute provides that in each case "such damages may be given as under all the circumstances may be just." If all cases were to be treated alike, and the damages were to be limited strictly to the mere pecuniary value of the loss of support and maintenance, the language of the statute, no doubt, would have been framed in accordance with the statute of Illinois, which, as we shall see, limits the recovery strictly to the pecuniary value of the loss of support sustained by the wife and minor children. True, the loss under our statute in a large sense is a pecuniary loss merely, since nothing can be recovered by way of solace for injured feelings or for mental suffering of the family by reason of the death of the husband and father. Whatever is allowed by the jury must therefore be by way of pecuniary recompense for the loss sustained by the wife and minor children, and must be strictly limited (1) to what the evidence shows the deceased contributed, and thus would probably have continued to contribute to them in money or other means by way of support and as an accumulation to his estate; and (2) to the money value of the injury suffered by the wife and minor children by reason of the loss of the advice, comfort, and society which they enjoyed prior to the death of the deceased and which would have been continued for their benefit. If the evidence is to the effect that the widow and minor children suffered no loss upon the first ground because the deceased provided neither money nor other means of support, they still may be entitled to something upon the second ground, because the society of the deceased may have been a comfort and his advice of material assistance to them. Again, a wife and children may have lost little or nothing upon either or both grounds, and the jury should then compensate them only for what they have lost, and, in case they have lost upon both grounds, they should receive compensation to the extent of their loss. The jury should be informed that any allowance they may make must be limited to what the wife and children received from the deceased upon either one or both grounds to which we have referred, and the jury should be admonished that in no event can the pecuniary interests or the physical requirements of the wife or children be considered for the purpose of enhancing the damages which are caused by the negligent acts complained of. In a very late California case involving death by wrongful act, namely, *Everts v. Santa Barbara, etc., Co.*, 8 Cal. App. 712, 86 Pac. 830, evidence of the health and physical condition of the widow was admitted seemingly without objection, and was considered as proper by the appellate court. In California the question that the health and physical condition of the dependent beneficiaries as well as the question that the real relation of husband and wife and his affection for and deportment toward, or treatment of his fami-

ly, may be considered as elements of damage, seem to be settled in favor of permitting those things to be shown. As additional cases where some phase of the foregoing questions have been considered and passed on by the Supreme Court of California, we refer to the following: *Dyas v. Southern Pacific Ry. Co.*, 140 Cal. 308, 73 Pac. 972; *Beeson v. Green Mountain, etc., Co.*, 57 Cal. 37; *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063; *Keast v. Santa, etc., Co.*, 136 Cal. 260, 68 Pac. 771. The question has also been considered and the view of the California Supreme Court sustained by the courts of other states, as appears from the following cases: *Hunt v. Connor*, 26 Ind. App. 41, 59 N. E. 50; *Hamann v. Milwaukee Bridge Co.*, 136 Wis. 39, 116 N. W. 854; *Baltimore & O. Ry. Co. v. Noell*, 32 Grat. (Va.) 394; *Mathews v. Warner*, 29 Grat. (Va.) 570, 26 Am. Rep. 396; *Merchants', etc., Co. v. Burns*, 96 Tex. 580, 74 S. W. 758. In *Spiking v. Con. Ry. & P. Co.*, 33 Utah, 339, 93 Pac. 847, this court in effect held to the doctrine announced in the foregoing cases in so far as that doctrine relates to the elements that may be considered by the jury in determining the amount of damages to be allowed, although the precise question now considered was not before us nor passed on. The same may also be substantially said with respect to the case of *Pool v. Southern Pacific Ry. Co.*, 7 Utah, 303, 26 Pac. 654. The Virginia Supreme Court of Appeals, under a statute no broader than ours, as appears from the foregoing cases, carries the doctrine even farther, and permits a recovery by way of solace for injured feelings. No other court, so far as we know, however, goes to this extent. It should be stated, however, that under the Virginia statute \$10,000 is the limit of recovery. In Indiana, as appears from the cases referred to, and other cases there cited, in addition to a recovery for the value of the daily contributions for support made by the deceased, his wife and children may also recover for "the value of his personal services in the superintendence and care of his family, the education of his children, and the performance of acts of paternal assistance to which he would be legally obligated and which might be reasonably expected." It may also be shown "that one of the children of the deceased is afflicted with a permanent disability." In the cases which we have cited others are referred to as supporting the doctrine we here invoke, but we shall not refer specially to those cases.

Appellant has also referred us to cases which hold that evidence of the health or physical condition of the wife or child is not relevant to any issue, and hence not admissible for any purpose. One of the leading cases cited by counsel is *Chicago, etc., Ry. Co. v. Woolridge*, 174 Ill. 330, 51 N. E. 701, in which the other Illinois cases are cited, and to which we shall make no separate reference. The Illinois cases are, however,

all based upon a statute which the Supreme Court of Illinois has held strictly limits the recovery in cases of death through negligence to the money value of the loss of support and maintenance. The Illinois cases, as well as all others that are based on similar statutes, are therefore not of controlling influence under a statute like ours. The case of *Seattle, etc., Co. v. Hartless*, 144 Fed. 379, 75 C. C. A. 317, is, however, based upon a statute similar to ours, but notwithstanding that fact the Illinois cases are followed by the federal Court of Appeals of the Ninth Circuit, as appears from the case just referred to. In the *Hartless Case*, supra, the following cases are cited, none of which sustains the ruling in that case. *Alabama G. S. R. Co. v. Carroll*, 84 Fed. 772, 28 C. C. A. 207, was an action for personal injury. The action was prosecuted by the injured person, and it was held that evidence of his poverty was immaterial and inadmissible. *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 204, *National Biscuit Co. v. Nolan*, 138 Fed. 6, 70 C. C. A. 436, and *Pennsylvania Co. v. Roy*, 102 U. S. 456, 26 L. Ed. 141, also cited in the *Hartless Case*, were all cases involving actions for personal injuries which were prosecuted by the injured persons to recover the damages sustained by reason of injuries inflicted upon them. In all those cases it was in substance held that neither the family relations nor the financial condition of the injured person was relevant or material. This, no doubt, is sound doctrine. One cannot well see how the injured person's financial straits could have any effect upon the damages he may have sustained by reason of the injuries inflicted upon him. Nor are the members of his family before the court, or entitled to consideration, in such an action. Whether his family be large or small, or whether he has one, is entirely immaterial in determining the amount of damages he should be allowed for the injuries he has sustained either to his person or to his business, or otherwise. The other cases cited by the court in the *Hartless Case*, supra, have no bearing upon the question now under consideration whatever. All that is decided in them is that improper evidence admitted upon a material issue tried to a jury ordinarily is sufficient ground for reversal. Under statutes like ours, we think the weight of authority is clearly in accordance with the ruling of the trial court. This assignment therefore must be overruled.

If the foregoing conclusions with respect to what constitutes proper elements of damages are sound, then the next assignment, namely, that the court erred in giving the instruction on the measure of damages, must also be determined against appellant's contention. The instruction complained of is very long and substantially conforms to the views hereinbefore expressed. In view that we have already substantially covered the subject no further comment is necessary.

It is also asserted that the court erred in refusing to charge the jury as requested by appellant in its request No. 11. In view that appellant's counsel specially rely upon this request we give it in full. The request is as follows: "In determining the amount of damages, if any, in a case like this, with reference to the earning capacity of the deceased, the jury will understand that the calculation is not to be made upon the basis of the total amount of probable earnings, but only upon such portion of these earnings as would probably have gone to the benefit of the plaintiffs in this case if the deceased had lived and acquired such earnings, but, when you determine what percentage or proportion of the probable earnings would have gone to the benefit of these plaintiffs, you have no right to award them in your verdict now the sum total that such proportion would amount to at the end of deceased's expectancy. All that the plaintiffs would be entitled to in the verdict so far as his future earnings and contributions go to constitute damages would be the present value of what would amount to such total sum at the end of such expectancy. You will consider all the evidence in the case to determine what such present value would be, and you must not award anything in excess of such present value. The measure of damages for the loss of human life, resulting from negligence, so far as future earnings and contributions go to constitute damages, is the present value of the contributions made by the deceased to the beneficiaries, ascertained by deducting the cost of his living and expenditures, from the net income, and no more can be allowed than the present worth of accumulations arising from such net income, based upon the expectancy of life. That is, having ascertained the total sum, its payment must be anticipated and capitalized, and no more than the present worth thereof can be awarded in damages." That this instruction fails to include all the elements that the jury may consider in determining the amount to be allowed under our statute we think is already made clear. The principal contention, however, is that the court erred in refusing the instruction upon the ground that it is the only direction to the jury limiting the amount of the recovery to the present value of what the jury may find that the deceased would probably have contributed to his family either for their support or as an addition to his estate. If we should concede that the present value rule should be taken as the true basis, as urged by counsel, yet the court did not err in refusing the particular instruction, because, as we have seen, it was faulty in other respects; but the instruction was properly refused, even though the present value rule were to be rigorously enforced, as an analysis of the instruction will demonstrate. With regard to the probable contributions to the beneficiaries by the deceased out of his probable earnings, the court in the request

is asked to charge the jury that they should take the total sum of such contributions as if made at the end of the deceased's expectancy of life, and then calculate the present value of such total sum. It is evident that under any circumstances, such a rule would not be a correct measure of damages, but the discount should be made only from the time that it is found that such contributions would have been actually made by the deceased to the beneficiaries had he lived. For example, if the jury found that out of the earnings of the deceased he would have contributed to the beneficiaries an annuity of \$100 from the time of his death for 30 years thereafter (the probable period of life), the present worth of such an annuity, payable at the end of each year for a period of 30 years, discounted at the rate of 5 per cent. per annum compound interest would be substantially the sum of \$1,537.20; while, if the jury were to follow the instruction requested and they had assumed such contributions to amount to \$3,000 payable at the end of the thirty years expectancy, the present worth of such sum of \$3,000 so payable, discounted at the same rate before stated, would amount to only \$693. In the foregoing illustration the contributions are assumed to be made annually by the deceased to his family. In actual family life all know that the contributions by the husband and father (except the accumulations to his estate) are made either daily, weekly, or, at least, monthly. But, in addition to such contributions, the husband and father may, and usually does, render assistance to his family in other ways than by merely making contributions in money for which the family, in case of his death, is entitled to be compensated, and the amount they should receive therefor is usually a matter which to a large extent at least must be left to the jury. In view of the complications which arise in such cases, it is apparent why some courts have refused to adopt the mathematical present value rule. In view of the foregoing, it follows that it becomes unnecessary to pass upon the question whether in this jurisdiction, in view of the provisions of our statute, the present value theory should prevail or not, and we do not pass upon that question.

We are not unmindful of appellant's contention that the large amount allowed by the jury in this case is probably attributable to the admission of the evidence objected to, the instruction on the measure of damages complained of, and the failure of the court to limit the recovery to the present value of whatever pecuniary contributions the deceased would probably have made for the benefit of his family. Even if counsel's theories were correct, these things, for the reasons we have stated, could not legally affect the verdict and judgment. But the amount allowed by the jury (which we freely concede is quite large) can readily be accounted for upon all the facts and circumstances that were

before the jury upon the question of damages. While the earnings of the deceased and his savings up to the time of his death were perhaps not extraordinary, yet, in view that he was in the very prime of life, that he was a man of frugal and temperate habits, his splendid physical health, his past experience, his general conduct towards his whole family, and his ministrations, advice, and assistance to them when either sick or well, as disclosed by the evidence, makes this case an exceptional one in so far as the amount of damages is concerned. In our opinion the explanation of the large sum allowed is to be found in the things that we have just enumerated rather than in the grounds assigned by counsel as aforesaid.

Appellant also insists that the court erred in giving the following portions of instructions, to wit: "It is the presumption of law that every man exercises due care for his own safety when in a place of danger, and the presumption is that the deceased did so when he approached the crossing." And, further, the following: "The court instructs the jury that the plaintiffs need not affirmatively prove that the deceased looked and listened for the train before coming upon the crossing. The presumption is that he did so, and the burden of proof that he did not is on the defendant railway company, and it must be proved by a preponderance of the evidence." It is conceded by counsel for appellant that those excerpts, in the absence of all evidence, do correctly state an abstract rule or proposition of law, but it is urged that it was error to give them in this case, because there were eye-witnesses to what occurred just before and at the time of the collision, and hence, it is contended, there was nothing left upon which a legal presumption could operate. It is further strenuously insisted that in view that appellant in its answer set up and relied on the plea of contributory negligence, and since the evidence upon that plea was before the jury, therefore the respondents could not be permitted to throw the presumption referred to in the instruction into the balance to be weighed by the jury against the evidence in support of appellant's plea of contributory negligence. Had the court done this by giving the instruction complained of, the contention of counsel would be sound. This is well illustrated by the authorities cited by counsel in support of their contention. But we are of the opinion that such was neither the intended nor the actual effect of the language used by the court in the two instructions quoted from above. What was said by the court was, in effect, no more than to call the jurors' attention to the fact that the burden of proof upon the plea of contributory negligence was upon appellant; and, unless such negligence was established by a preponderance of the evidence upon that subject, then the respondents must prevail as to that issue. Similar instructions

were assailed in the same way in *Steele v. Northern Pacific Ry. Co.*, 21 Wash. 287-302, 57 Pac. 820, and in *Baltimore & O. Ry. Co. v. McKenzie*, 81 Va. 77. By referring to those cases, it will be seen that instructions given in the manner and form as those complained of do not come within the objection passed on in the cases referred to by counsel for appellant. We are of the opinion, therefore, that this assignment should be overruled.

The criticism with respect to the tenth instruction is in our judgment without merit. The construction that counsel seemingly place upon that instruction is entirely too narrow, and we are satisfied that the jury were not misled by the language used by the court.

Nor did the court err in refusing the defendant's request No. 8 with respect to the duty of deceased before attempting to cross the railroad track. The law upon this feature of the case was sufficiently and correctly stated in other instructions, and hence the court did not err in its refusal to give the particular request.

The next assignment relates to the giving of instruction No. 14. In this instruction the court, in substance, told the jury that, although a railroad company may comply with the statutory requirements of ringing the bell or sounding the whistle in approaching a public crossing, yet it may nevertheless be guilty of negligence "in failing to adopt such other reasonable measures for public safety as common prudence may dictate considering the danger, travel, and surrounding circumstances." It is contended that, by this instruction, the court authorized the jury to speculate and base a verdict upon anything which in their judgment the appellant ought to have done, or omitted to do, in order to prevent this or other accidents at the particular crossing in question. We cannot assent to this contention. The court had in another instruction told the jury in explicit terms that, "before plaintiffs can recover, the plaintiffs must satisfy you by a preponderance of the evidence that some one of the negligent acts alleged in the complaint caused the death of Mr. Price. If you are so satisfied by a preponderance of the evidence, then your verdict should be for the plaintiffs, unless you find that the defendant has established its defense of negligence upon the part of the deceased." All of the instructions must be considered together, and, when so considered, it is manifest that the criticism of counsel is really without merit. The instruction complained of, therefore, simply and correctly stated an abstract proposition of law, and gave a general definition of what would constitute negligence. The jury must have understood that their verdict must be based upon one or more of the acts of negligence charged in the complaint, all of which were also set forth in the instructions, and their attention was es-

pecially directed to them as we have shown. It may be true that it was not necessary to give the instruction in question, but it is likewise true that it was not necessary to give quite a number of instructions which were given at the instance of both parties, some of which we have alluded to and others we have not. The instructions are very voluminous and cover every possible theory of both sides. Some of them are necessarily repetitions to some extent. It is apparent that the court gave many of the requests of counsel on both sides, and in that way some of the matters complained of crept into the record. The mere fact that instructions are long and to some extent repeated, and hence unnecessary, cannot be permitted to affect the verdict or judgment which is otherwise without prejudicial error. We are of the opinion that the jurors were not misled by anything that is contained in the instructions, nor do we think the respondents obtained any undue advantage or that the appellant was in any way prejudiced by anything that was omitted from the instructions.

The last assignment to be noticed relates to the refusal of the court to direct a verdict for appellant in accordance with its request. It is vigorously insisted that this case comes squarely within the principles laid down by the majority of this court in *Wilkinson v. O. S. L. Ry.*, 99 Pac. 466. In that case, in the opinion of this court, the evidence admitted of but one conclusion, which was that, if the injured person had looked at all before entering upon the crossing, he would have seen the approaching engine, and hence easily could have avoided the collision and consequent injury to himself. It was a clear case, therefore, of contributory negligence on the part of the traveler, which, in the judgment of this court, was inexcusable as a matter of law. In view of this there was nothing to submit to the jury. In the case at bar we, however, cannot say as a matter of law that the deceased was guilty of negligence in attempting to cross the track in view of all the facts and circumstances involved. Nor can we say as a matter of law that he did not look nor listen for the approaching train before attempting to cross the track. There are many circumstances which enter into a consideration of the question of the negligence of the deceased which it was proper to submit to the jury. The case is one which it was not only proper to submit to the jury upon the evidence, but it belongs to that class which it would have been error, under all the circumstances, not to have so submitted.

The judgment therefore is affirmed, with costs to respondents.

MCCARTY, J., and LEWIS, District Judge, concur.

(41 Mont. 236)

POOR v. MADISON RIVER POWER CO.
et al.

(Supreme Court of Montana. April 28, 1910.)

1. APPEAL AND ERROR (§ 273*)—OBJECTIONS—SPECIFIC OBJECTIONS—NECESSITY.

Rev. Codes, § 6746, subd. 5, prohibiting reversals for error in instructions unless specific objection is made thereto at the time of settlement in the trial court, and an exception taken, error in an instruction for conflicting with another instruction cannot be reviewed, where the objection to it was that it referred to an issue not involved.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 273; * Trial, Cent. Dig. §§ 689-696.]

2. MASTER AND SERVANT (§ 291*)—INJURIES—ACTIONS—INSTRUCTIONS—CONFORMITY TO ISSUE.

In an action against an electric power company for the death of an employé doing carpenter work upon a substation by throwing his arm across a charged electric wire to avoid a fall, which was tried upon the theory that the wires were dangerous, the only issue being whether intestate was warned of the danger, the court instructed that plaintiff did not contend that defendants were negligent in operating the wire as they did, but that the negligence claimed was in failing to warn intestate of its dangerous condition and in putting him to work where he might be expected to come in contact with it, so that plaintiff must show that he did not have sufficient knowledge to appreciate the danger of coming in contact with the wire, and that defendants failed to warn him of such dangers, and ordered him to work at a point where he might come in contact with it. *Held*, that the charge conformed to the theory of the case at trial.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133-1147; Dec. Dig. § 291.*]

3. TRIAL (§ 251*)—INSTRUCTIONS—CONFORMITY TO ISSUES.

In an action against an electric company for the death of an employé by throwing his arm across charged electric wires to avoid a fall, which was tried on the theory that the wires were dangerous, and that the only issue was intestate's knowledge of the danger and defendants' failure to warn him thereof, a charge that if defendants were negligent in not providing intestate "with a reasonably safe place in which to perform his work," and he did not know or appreciate the danger, and was not warned thereof by defendants, etc., and was killed because of the unsafe place in which he was permitted to work and defendants' failure to warn him of the danger, the jury should find for plaintiff, was erroneous, for submitting the question of negligence in furnishing a dangerous place to work when that was not an issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

4. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS—PREJUDICIAL EFFECT.

Since the instruction required a finding of negligence in maintaining the place of work in order to authorize a verdict for plaintiff, when that was not necessary to entitle him to recover, it was not prejudicial to defendants, and they cannot complain thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219-4224; Dec. Dig. § 1064.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. TRIAL (§ 349*)—INTERROGATORIES—SUBMISSION OF QUESTIONS—NECESSITY.

Rev. Codes, § 6758, providing that the court may instruct the jury, upon finding a general verdict, to find upon particular questions of fact, and require a written finding thereon, does not compel the court to submit particular questions of fact, though it may do so in its discretion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 823-827; Dec. Dig. § 349.*]

6. TRIAL (§ 352*)—INTERROGATORIES—FORM OF QUESTION—DOUBLE QUESTIONS.

In an action against a power company for an employe's death by throwing his arm across a charged electric wire to avoid a fall, a special issue tendered, as to whether a certain witness in intestate's presence made an experiment, and at the same time explained to intestate the dangerous nature of the wire on which he was killed, involved two questions, and should have been refused, as tending to confuse the jury in determining whether such witness explained to intestate the dangerous character of the wires.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 840-845; Dec. Dig. § 352.*]

7. TRIAL (§ 354*)—SPECIAL INTERROGATORIES—WITHDRAWAL—DISCRETION OF COURT.

Since it was within the court's discretion to submit a special question and require a finding thereon, it was also within its discretion to withdraw such question after submitting it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 844; Dec. Dig. § 354.*]

8. TRIAL (§ 354*)—ISSUES—WITHDRAWAL—IMPLIED WITHDRAWAL.

A special question submitted to the jury was in effect withdrawn by receiving the general verdict without requiring an answer to such question.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 844; Dec. Dig. § 354.*]

9. TRIAL (§ 362*)—SPECIAL FINDINGS—FURTHER FINDINGS—TIME FOR MAKING.

After the jury had been finally discharged and released from their oaths, so that they could not be recalled except by consent of both parties, to recall them at defendant's request, and require them to answer a material interrogatory, would violate plaintiff's right to trial by a jury selected and sworn, as required by statute.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 865-868; Dec. Dig. § 362.*]

10. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS—CONFLICTING EVIDENCE.

Where the jury could have found either way upon the questions of fact involved, the verdict will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Smith, J., dissenting in part.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

Action by J. R. Poor, as administrator of Amos R. Howerton, deceased, against the Madison River Power Company and another. From a judgment for plaintiff and an order denying a motion for new trial, defendants appeal. Affirmed.

Maury & Templeman and Hartman & Hartman, for appellants. Geo. Y. Patten, for respondent.

BRANTLY, C. J. Action by the plaintiff as administrator of Amos R. Howerton, deceased, for damages for the death of said Howerton, caused by his coming in contact with a highly charged wire in the electric substation of defendant at Bozeman, in Gallatin county, while he was in the employ of the defendants therein as a carpenter. A statement of the case sufficient to give a clear idea of the issues involved will be found in the opinion of this court on a former appeal. 38 Mont. 341, 99 Pac. 947. At the close of the evidence on the first trial, the district judge, on motion of defendants, directed a verdict in their behalf. The judgment entered thereon and an order denying plaintiff's motion for a new trial were reversed by this court, and a new trial ordered, on the ground that the court erred in withdrawing the case from the jury. A second trial resulted in a verdict and judgment for the plaintiff. The case is now before this court upon defendants' appeal from the judgment and order denying their motion for a new trial. Though before the trial the complaint was amended in some particulars, the issues remained substantially the same. The evidence introduced on the trial was also substantially the same, except as will hereafter be noted.

In the paragraph of the opinion devoted to a consideration of the issues involved this court on the former appeal, speaking through Mr. Justice Smith, said: "Appellant's counsel contend that under the admissions in the pleadings and the undisputed proofs on the trial there was and is only one question in the case, namely, whether Howerton was warned of the danger; and we are inclined to agree that this is the principal question involved. No complaint is made that the substation was not properly constructed, or that any of the appliances were defective or insufficient. It is alleged in the complaint, and tacitly admitted in the answer, that the wires were dangerous. * * * The real grievance complained of is the failure to warn the plaintiff of the danger, inasmuch as he was ignorant of it. * * * The question of the failure of the defendants to furnish approved or different appliances is not in the case." At the trial the parties proceeded upon the theory of the case thus outlined, the plaintiff undertaking to show that the defendants, knowing and appreciating the dangerous character of the place, employed Howerton, the deceased, who was ignorant of its character, and directed him to work there without warning him of the danger or giving him information with respect to it, and were thus guilty of actionable negligence. The defendants sought to show that the deceased was not only sufficiently warned of the danger lurking in the place, but fully understood and appreciated it. Of course, having adopted this theory of the case, both parties pro-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

nature of the agency employed, and not because of any negligence on the part of the defendants in maintaining it as they did.

The principal contention now made is that the district court erred in its instructions in submitting the case to the jury. Our attention is called especially to instruction 8, requested by the plaintiff, and instruction 13, requested by defendants. These are as follows:

"No. 8. You are instructed that if you believe from a preponderance of the evidence that the defendants were guilty of negligence in failing to provide the deceased, Amos R. Howerton, with a reasonably safe place in which to perform his work, and that said deceased did not know or appreciate the danger to which he was subjected in the place where he was working, and was not warned thereof by the defendants, or either of them, and under the circumstances as a reasonably prudent man ought not to have known or appreciated the danger at the place where he was working, and while engaged in his work for the defendant Madison River Company he was killed by reason of the unsafe place in which he was permitted by defendants to work, and their failure to warn him of such danger, your verdict should be for the plaintiff."

"No. 13. The complaint does not charge, nor the plaintiff contend, that the defendants were negligent because they maintained and operated their power house and high tension wire upon which Howerton met his death in the manner in which the evidence shows the same were maintained and operated, and, in fact, that the same was maintained and operated as the evidence shows it was, does not constitute negligence. The negligence charged is the failure to warn Howerton of the dangerous condition of the wire and the putting him to work at a place in the power house where he might be expected to come in contact with the wire. It is therefore not sufficient for the plaintiff to show the maintenance of the wire upon which Howerton met his death in the position in which the evidence shows it to have been. He must also show that Howerton had not sufficient knowledge of the dangers of the wire to appreciate the danger to himself in coming in contact with the same; that the defendants, or either of them, failed to warn him of such dangers, and permitted or ordered him to go to work at a point in the power house where he might come in contact therewith, and this must be shown by a fair preponderance of the evidence."

The specific objection made to the former of these instructions is that the first clause of it, ending with the words "in which to perform his work," is erroneous, in that it has reference to an issue not involved in the case, and is therefore misleading. In the argument in the brief counsel insist that this por-

tion, is in direct conflict with instruction 13. Under the statute (Rev. Codes, § 6746, subd. 5), this court cannot reverse a judgment and direct a new trial for error in any instruction, unless specific objection was made to it, pointing out the error alleged, at the time of settlement in the trial court, and an exception preserved to the action of the court in overruling the objection. For present purposes it may be conceded that the two instructions are in substantial conflict. Even so, under the rule declared by the statute, the error thus committed cannot be made a ground of reversal. *Yergy v. Helena L. & Ry. Co.*, 39 Mont. 213, 102 Pac. 310; *Robinson v. Helena L. & Ry. Co.*, 38 Mont. 222, 99 Pac. 837; *Lehane v. Butte Electric Ry. Co.*, 37 Mont. 564, 97 Pac. 1038.

Instruction No. 13 was formulated upon the theory that it was only incumbent upon the plaintiff to establish (1) that Howerton had not sufficient knowledge of the character of the place to appreciate the danger; and (2) that the defendant permitted or directed him to work there without warning him of the danger so that he might guard against it. This is entirely in accord with the theory developed by the parties in introducing their evidence. The portion of instruction No. 8 to which the objection was directed did submit to the jury an issue which had been eliminated from the case. Under it, in order to recover, the plaintiff must have shown (1) that defendants failed to furnish the plaintiff a reasonably safe place in which to work; (2) that plaintiff did not know of the dangerous conditions existing there and appreciate them; and (3) that defendants permitted and directed him to work there, without warning him of the danger. In view of the theory upon which the parties proceeded, the court should have assumed that the defendants' wires, highly charged, as they were, with electricity, were dangerous, and told the jury definitely that such was the case. It should also have informed them that the plaintiff did not claim that the defendants were negligent in maintaining them as they did. It should then have required them to find upon the remaining two issues. Thus the incongruity contained in this instruction would have been eliminated. In effect, however, the incongruity could not have prejudiced the defendants. It merely required the jury to find as an essential element of plaintiff's right to recover an additional fact which it was not necessary to find, to wit, that the defendants were guilty of negligence in maintaining the place as they did. This cast a burden upon the plaintiff which he was not bound to assume. Since this was so, the defendants, in view of plaintiff's admission that they were not in fact negligent in maintaining the place, were put in a more advantageous position than they otherwise

would have been, had the issue been entirely eliminated; for, under this instruction, standing alone, though the jury had found that deceased was ignorant of the conditions, and that defendants failed to warn him of them, they must still have found for the defendants, unless they further found that the defendants were negligent in maintaining the place as they did. Such being the situation, the defendants cannot complain.

At the request of defendants, the court submitted to the jury the following special interrogatory: "Did the witness Barclay, in the presence of Amos R. Howerton, make an experiment and at the same time explain to said Howerton the dangerous nature of the wire on which Howerton was killed?" The witness mentioned had not testified at the previous trial. At the time the accident occurred, he was employed by the defendant company for general work about the substation. He testified that during the time of his employment there he and Howerton and McCabe, another carpenter employed with Howerton, had discussed the dangerous character of the wire with which Howerton came in contact; that by an experiment then conducted by the witness, in their presence, in another place in the station, he had shown them how the current would leave the wire when another conductor was brought near it; and that he told them that the wire used in the experiment was the same one which passed near the place where Howerton was working. He stated, further, that both Howerton and McCabe said at the time that they realized that it was dangerous to come in contact with a charged wire, and that they would thereafter keep away from it. It was admitted by McCabe that the experiment was conducted by Barclay, but he stated that nothing was then said about any danger or that the wire was the same as that by which Howerton was killed. The purpose of the interrogatory was to have the jury find from the testimony of Barclay that Howerton had been fully warned of the danger and fully appreciated it. The jury failed to answer it, and the court accepted the general verdict without requiring them to do so, and discharged them. At that time Mr. Hartman, one of counsel for defendants, who had taken no active part in the trial, was present, but did not know of the submission of the interrogatory. A few days after the trial, counsel moved the court to recall the jury and require them to answer it. This motion was denied. It is argued that the action of the court in the premises was such an irregularity as to warrant the granting of a new trial. There is no merit in this contention. Under the statute (Rev. Codes, § 6758) the court may, in its discretion, submit to the jury a particular question of fact, and require them to find upon it; but it is not bound to do so. *Hollingsworth v. Davis-Daly Estates Copper Co.*, 38 Mont. 143, 99 Pac. 142. The interrogatory, in the form in

which it was drawn, should not have submitted to the jury in the first instance, because it involves two questions, the first of which must upon the testimony of Barclay and McCabe have been answered in the affirmative, while the second might have been answered in the affirmative or negative. The direct tendency of such an interrogatory was to confuse the jury, rather than to elicit the finding of a single material ultimate fact, to wit, that Barclay fully explained to Howerton the dangerous character of the wire. *Powell v. Chittick*, 89 Iowa, 513, 56 N. W. 652. And, if upon further consideration of it the court had formally withdrawn it from the jury, no valid objection could have been taken to its action. Even had it been in proper form, its withdrawal could not have been made the ground of exception, because, it being within the court's discretion to submit it in the first instance, it could likewise in its discretion withdraw it. *Florence Machine Co. v. Daggett*, 135 Mass. 582. This was in effect what was done by the reception of the general verdict, without requiring an answer by the jury. *Robinson v. Palatine Insurance Co.*, 11 N. M. 162, 66 Pac. 535; *City of Wyandotte v. Gibson*, 25 Kan. 236; *National Bank v. American Surety Co.*, 69 App. Div. 153, 74 N. Y. Supp. 692. Nor was the refusal of the court to recall the jury error of which defendants may complain. They had been finally discharged from consideration of the case, with the result that they had become again members of the community at large, freed from the obligations of their official oaths, and could not have been recalled except upon consent of all the parties. The interrogatory involved consideration of one of the fundamental issues in the case. To recall them after their discharge and to require them to answer it would have been tantamount to a resubmission of the whole case to a body of men not bound by the obligations of an oath, which would clearly have been violative of the plaintiff's right to a trial by a jury selected and sworn in the mode pointed out by the statute. *Williams v. People*, 44 Ill. 478.

It will not be necessary to enter into an analysis of the evidence to answer the contention of the defendants that it is insufficient to justify the verdict. In the opinion on the former appeal the testimony of McCabe and Davidson, the principal witnesses, is stated in full. With reference to the contention then made that the evidence did not disclose the manner and efficient cause of Howerton's death, it was said: "It is reasonably certain that Howerton's death was due to contact with the highly charged wire; and, if the jury believed McCabe's testimony, they might have concluded that deceased was engaged in doing what he was directed to do by the defendants, and had no knowledge that there was any danger to be apprehended from touching the wire." The evi-

dence adduced by the parties on the second trial was substantially the same as at the first, except that of Barclay and McCabe touching the experiment conducted by the former. This pertains exclusively to the question whether Howerton was informed of the danger of coming in contact with the charged wire, and the statements of these witnesses are in direct conflict. The jury might have found one way or the other, not only as to the manner and cause of the death, but also upon the issue as to whether Howerton knew of and appreciated the danger. Upon this condition of the record we may not disturb the verdict.

The judgment and order are affirmed.
Affirmed.

HOLLOWAY, J., concurs.

SMITH, J. (dissenting). I am unable to agree with my associates in the disposition made of the specifications of error arising upon the instructions in this case. Upon a retrial but one question was presented: Did the defendants negligently omit to warn Howerton of the danger? This was a question to be determined by the jury under proper instructions. Instruction No. 8 was erroneous, and in my judgment prejudicial, because it introduced into the case an element of alleged negligence which had no foundation in the testimony. I could agree with the majority opinion as to the effect of this instruction, if the district court had in any other instruction directed the attention of the jury to the only act of negligence upon which a recovery could be predicated; that is, a negligent failure to warn. As it is, the jury must either have based their verdict upon a negligent failure to provide a reasonably safe place in which to work (a matter which was confessedly not in the case), or upon a failure to warn, regardless of whether or not such failure involved an act of negligence. Assuming that the jury followed that portion of instruction No. 13 wherein they were told that no claim was made that the defendants were guilty of negligence in maintaining and operating the power house and high tension wire, then we have a verdict and judgment against the defendants in a case in which they have been convicted of no negligent act. While this point was not specifically raised in the objections to instruction No. 8, still I think it is fairly comprehended within the objections, for the reason that the court's attention was called to the fact that the only alleged act of negligence upon which it was proposed to instruct the jury was outside of the issues. This is, in my judgment, a very close case upon the facts, and, believing as I do that the jury's attention was never directed to the real and only issue in the case, I respectfully dissent from the orders of affirmation.

(41 Mont. 175)

DA RIN v. CASUALTY CO. OF AMERICA.
(Supreme Court of Montana. April 25, 1910.)

1. INSURANCE (§§ 540, 543*) — NOTICE AND PROOF OF DEATH.

The giving of the notice and furnishing of proof of death are distinct and separate acts, but proof of death, seasonably made, may serve the purpose of both notice and proof, since the formal statement of facts made in the proof ordinarily must include all the information imparted by the notice, but a mere informal notice does not ordinarily supply the place of formal proof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1338, 1347; Dec. Dig. §§ 540, 543.*]

2. INSURANCE (§ 612*)—RECOVERY ON DEATH POLICY—CONDITIONS PRECEDENT.

Both notice and proof of death are conditions precedent to a recovery on a life policy, whether conjunctively or separately given, unless there has been an express or implied waiver by the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1520-1523; Dec. Dig. § 612.*]

3. INSURANCE (§ 543*) — PROOF OF DEATH — SUFFICIENCY OF EVIDENCE.

Whether there has been due proof of death to comply with the requirement thereof in a life policy is to be determined by the court according to the rules of evidence, and not by the insurer, but the proof need not, under the express provisions of Rev. Codes, § 5628, be such as would be necessary in a court of justice, it being sufficient if the best evidence available at the time be given, and such evidence may include evidence of any degree, which would tend to establish a disputed fact, from which the court must in each case determine whether it gives substantially the information stipulated for in the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1347; Dec. Dig. § 543.*]

4. INSURANCE (§ 558*)—NOTICE OF DEATH—SUFFICIENCY.

When the notice and proof of death is incorporated in the same communication to the insurer, and the proof of the cause of death, with the attending facts, meets all the requirements of the policy, except that it is not as full and explicit as it might be, the silence of the insurer is a waiver of his right to object, and a report consisting of a notice and cause of the death of insured, made the day after the death, stating as the cause that insured went "to rescue a man who was knocked out by gas, and inhaled gases which caused his death," giving the name and address of the mining company in whose mine he was killed, the name, address, and occupation of the decedent, the weekly wages paid him, the place where the accident occurred, name of the foreman, the hospital call made, name of the attending physician, and the names and addresses of all persons who witnessed the accident, was affirmative evidence of the cause of death, and sufficient to put the insurer on inquiry to determine its rights in the premises; and, if it desired further evidence, it should have called for it without unreasonable delay, and, having made no objection, it must be deemed to have waived its right to demand the affirmative proof required by a provision of the policy requiring affirmative proof of death within two months from the time of death, under Rev. Codes, § 5630, providing that delay of presentation to an insurer of notice or proof of loss is waived if he omits to make objection promptly upon that ground.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1382-1390, 1405; Dec. Dig. § 558.*]

5. INSURANCE (§ 461*)—UNNECESSARY DANGER—ATTEMPT TO SAVE HUMAN LIFE.

The law has so high a regard for human life that it will not impute negligence to one who attempts to save it, unless the attempt be made under such circumstances as to constitute it rashness in the estimation of prudent persons, and the rule covers not only an attempt to save life under spontaneous impulse, aroused by sudden perception of the peril, and without thought of the chances of injury or loss of life to him who makes the attempt, but also an attempt made after such calculation as the circumstances permit, the rescuer believing that he can save the life without the loss of his own, the exposure in the latter case being voluntary in a sense; and, where an injured miner and his companions, knowing that a fellow workman was in danger, went to his rescue, and found him lying about five feet from the entrance of the drift, unconscious from gas, and hurried up a ladder to reach the place, insured apparently thinking that he could go that distance with safety, and in attempting to drag the man out was overcome by the gas, and died from the injuries, the danger he encountered was not as matter of law unnecessary, within a provision of the policy absolving the insurer from liability for injuries resulting from insured's exposing himself to unnecessary danger.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1180, 1181; Dec. Dig. § 461.*]

6. INSURANCE (§ 665*)—ACTION ON POLICY—CAUSE OF DEATH—SUFFICIENCY OF EVIDENCE.

In an action on a life policy, evidence held to support a finding that insured died from the inhalation of gas.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1707-1728; Dec. Dig. § 665.*]

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by Peter Da Rin, administrator of Joseph Battista Pinazza, against the Casualty Company of America. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Kremer, Sanders & Kremer, for appellant. Jesse B. Roote and Jas. E. Murray, for respondent.

BRANTLY, C. J. Action by the plaintiff, as administrator of Joseph Battista Pinazza, deceased, to recover on a policy of insurance for the death of his intestate, caused by accident. On May 20, 1908, one Labek, a miner working underground in a drift in one of the mines of the Boston & Montana Consolidated Copper & Silver Mining Company (hereafter referred to as the mining company), in Silver Bow county, was overcome by gas. Upon discovery of his condition, through the outcry of his companion, Pinazza, with others who were working with him near by, ran to his assistance. Pinazza preceded the rest, and while attempting to drag the injured man out into the other workings where the air was better and he could have relief, he was himself overcome, and thereafter, on the same day, died from the effects of the inhalation. Prior to that time, and for the benefit of the miners and others in its employ, including Pinazza, the mining company had

negotiated with the defendant a policy of insurance, under the terms and stipulations of which the latter insured these employees against bodily injuries, whether resulting in death or not, "suffered directly through external, violent and accidental means, on account of an accident occurring during the term" of the policy, by reason of the business operations therein stated, and "while on the premises of the company or upon the ways immediately adjacent thereto, provided for the use of such employees or the public." The policy, among other special agreements, contains the following:

"(A). If the death of any employee shall so result within ninety days from such injuries, independently of all other causes, the company will pay to the assured a sum equal to fifty-two weeks' wages, computed at the rate per week received by such injured employee at date of accident; but such sum shall not exceed one thousand five hundred dollars."

"(F). Recovery may be had for the benefit of the same employee under one of the foregoing clauses only as respects the result of injuries caused by any one accident; and in no event shall the company's liability for a casualty resulting in injuries to or death of several persons, exceed ten thousand dollars. * * *

"(G). It is further understood and agreed that injuries, fatal or otherwise, resulting from poison or anything else accidentally absorbed or inhaled while actually engaged in operations connected with business of the assured, are covered by this policy."

It also contains the following general agreements:

"General Agreements.

"1. The assured, upon the occurrence of a casualty covered hereby shall give immediate written notice thereof, with the fullest information obtainable at the time, to the company's duly authorized local agent or to its home office in New York City; and shall also give immediate written notice, with full particulars, of any and all claims which shall be made on account of a casualty covered hereby; and shall at all times render to the company all possible co-operation and assistance.

"2. Affirmative proof of death, or loss of limb or sight, or of duration of disability must be furnished to the company within two months from the time of death, loss of limb or sight, or termination of disability. Legal proceedings for recovery hereunder may not be brought within three months from date of filing final proofs at the company's home office; nor brought at all unless begun within six months from time of death, loss of limb or sight, or termination of disability. * * *

"10. This policy does not cover disappearance, or suicide—sane or insane; nor injuries of, which there is no visible mark upon the body, nor injuries resulting from voluntary

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

overexertion, exposure to unnecessary danger or violation of law," etc.

There was indorsed upon it the following, as an amendment to paragraph 10 of the General Agreements: "Endorsement: It is understood and agreed that the clause in paragraph 10 of the General Agreements reading 'nor injuries of which there is no visible mark upon the body,' is not to apply to death or permanent disability, resulting directly from an accident covered by this policy, provided that affirmative proof is given to the company that said death or permanent disability was the direct, sole result of an accident as aforesaid."

The policy was taken by the mining company in its own name, but the premium paid for it was obtained by deductions by the mining company from the monthly wages of all the employes for whose benefit it was negotiated. These deductions were made by their consent. At the time of his death, Pinazza had been receiving wages at the rate of \$28 per week. It is alleged in the complaint that the death of Pinazza occurred during the term of the policy; that the mining company, on behalf of deceased and on or about May 23, 1908, gave to the defendant written notice of the casualty, and furnished to it affirmative proof of the resulting death, with the fullest information concerning it, according to the terms of the contract, using for that purpose a blank form supplied by the defendant, that the mining company and the plaintiff have performed all the conditions of the contract to be by them performed, and that under the agreements and stipulations contained in it there is due and owing to the plaintiff \$1,456, no part of which has been paid, though demand has been made. Judgment is demanded for this amount. The answer of the defendant, after denying generally the material allegations of the complaint, alleges, as affirmative defenses, the following: (a) That the plaintiff failed to comply with clause 1 of the General Agreements; (b) that he likewise failed to comply with clause 2 of these agreements; (c) that the deceased exposed himself to unnecessary danger, thus causing his own death; and (d) that the plaintiff failed to comply with paragraph 10 of the General Agreements, as amended by the clause indorsed upon the policy. There was issue by reply. The plaintiff had verdict and judgment. The defendant has appealed from the judgment and an order denying its motion for a new trial.

Though the policy in terms designates the mining company as the insured, no question is made but that the defendant is directly liable to the plaintiff, if he, or any one else on behalf of the deceased, furnished the proof required by the terms of the policy. The principal contention is that the evidence is insufficient to justify the verdict, in that it does not show that affirmative proof that the death of Pinazza was the direct, sole result of

poisoning by an inhalation of poisonous gas was furnished to the defendant within two months, or at all.

The defendant did not introduce any evidence. Plaintiff's evidence tends to show the following: On the next day after the death there was delivered to the local agent of the defendant, signed by the foreman of the mining company, a report on the death of Pinazza, giving the name and address of the mining company, the name, address, and occupation of the deceased, together with the weekly rate of wages paid him, the place where the accident occurred, the name of the foreman in charge, the hospital call made, the name of the attending physician, the alleged cause of the death, and the names and addresses of all persons who witnessed the accident. This was made upon a printed blank furnished by the defendant. The cause of the death is stated as follows: "Battista Pinazza went to 955 to help rescue a man who was knocked out by gas, and inhaled gases which caused his death." There is no evidence as to how or upon what information this report was made up other than the following: Mr. Burns, a clerk of the mining company, testified: "What I have to do with the accident, part of it, is to receive the report of the accident that comes from the different timekeepers at the mines, enter them in this book [record of accidents], and turn them over to whoever is in charge—the superintendent—for his signature. * * * The original is sent to their [defendant's] agents here, and the copy that I keep placed on file." Thomas, one of the local agents of the defendant, stated: "I said I received a report similar to this; I never received any other report than this, in connection with this, to my knowledge or recollection. I believe this was the only report served on me; that is to the best of my recollection." There is not any evidence tending to show that there was any communication of any kind between the defendant and the mining company, or the plaintiff, after the delivery of the report. From this evidence it is a fair inference that the report was made up by Burns, the clerk, from the statements of the timekeeper, upon one of a supply of blanks kept for that purpose, and that it was signed by the foreman as a part of the routine business of the office. It is conceded that the report was a sufficient notice of the death. The question, therefore, is whether it is sufficient as affirmative proof of the cause of death, required by paragraph 2 of the General Agreements and the indorsement amendatory of paragraph 10.

The giving of the notice and the furnishing of proof are distinct and separate acts. Proof of death, seasonably made, may serve the purpose of both notice and proof, because the formal statement of facts made in the proof ordinarily must include all the information imparted by the notice. But a mere informal

notice does not ordinarily supply the place of formal proof. *O'Reilly v. Guardian Mut. L. Insurance Co.*, 60 N. Y. 169, 19 Am. Rep. 151; *May on Insurance*, § 460; *Joyce on Insurance*, § 3285. However, the two acts may be done, whether conjunctively or separately; both are conditions precedent, which must be complied with in order to render the insurer liable, unless there is an express or implied waiver. *Joyce on Insurance*, § 3286. In the absence of an express stipulation as to the form and character of the evidence which must be furnished, it is difficult to determine in a given case whether the provision as to proof has been complied with. The determination of the question, however, does not rest with the insurer alone. Mr. Joyce, speaking on this subject, says: "The provision requires such notice and proof as may appear to a court to be in accordance with the rules of evidence; and, if such notice and proof have been given, then there has been a compliance with the provision. The question, then, as to what is due proof is to be determined by the court according to the rules of evidence, and not by the insurers." Section 3290. This statement seems to imply that the evidence furnished must be such as would be adjudged by a court admissible under the rules applicable in judicial proceedings. To the same effect is the statement of the rule in *Taylor v. Aetna Life Insurance Co.*, 13 Gray (Mass.) 434; and in *O'Reilly v. Guardian Mut. Life Insurance Co.*, supra. In the latter case it is said: "The condition can only be performed by furnishing evidence in some form of the truth of the fact stated in the notice, and upon which the right of action depends. It need not be that full, clear, and explicit proof which would be required upon the trial of an issue upon the question, but it must be such reasonable evidence as the party can command at the time, to give assurance that the event has happened upon which the liability of the insurers depends. * * * The purpose of the condition is that the insurer may be able intelligently to form some estimate of his rights and liabilities before he is obliged to pay, and some proof must be exhibited." Our statute (section 5628, Rev. Codes) declares: "When preliminary proof of loss is required by a policy, the insured is not bound to give such proof as would be necessary in a court of justice; but it is sufficient for him to give the best evidence which he has in his power at the time." While this provision, when read in connection with the preceding and following sections, would seem to apply to fire insurance policies exclusively, it applies as well to life and accident insurance. Rev. Codes, § 5249.

The rule stated by the foregoing authorities is vague and indefinite, and the provision contained in the statute is not less so; nevertheless the evident purpose of the Legislature in enacting it was to dispense with the necessity of the production, in the first instance, of formal depositions or sworn statements

of eyewitnesses, and declare evidence in any form sufficient when it is substantial and trustworthy enough to enable the insurer to form an intelligent estimate of his rights and liabilities under his contract, and is the best evidence which the insured has in his power at the time. It makes it entirely clear that any succinct and intelligent statement, giving the information called for by the stipulation in the policy, whether verified or not, or whether by eyewitnesses or not, is sufficient to put the insurer upon inquiry to determine whether he is liable. It recognizes evidence other than that which falls within the range of judicial evidence, as defined in section 7844, Rev. Codes, such as the sworn testimony of witnesses, delivered orally or by deposition, or, in some cases, by affidavit or the like. It includes evidence of any degree which would tend to establish a disputed fact; and the court must in each case determine whether, in whatever form it may be furnished, it gives substantially the information stipulated for.

The report set forth in the statement herein was furnished to the defendant on the next day after Pinazza died. The statement contained in it, touching the cause of his death and the attendant circumstances, is brief, and does not enter into particulars, yet it contains the information that he died from inhaling poisonous gas while in the company's mine. It is not sworn to; but this formality was not required. It purports to be a statement of an eyewitness, and there is no suggestion in the pleadings or the evidence that it is not a true statement. It tends to show that death was caused solely and exclusively by the inhalation of poisonous gas, because the statement is: "He inhaled gases which caused his death." This direct statement, while not sufficient to establish the fact of death and the cause of it in a judicial investigation, because not sworn to, was nevertheless affirmative evidence of the fact, and was sufficient to put the defendant on inquiry to determine its rights in the premises. If it desired evidence more conclusive because entering more into detail, it should have called for it without unreasonable delay. The names and residences of all the witnesses and of the attending physician were stated; thus the opportunity was afforded to the defendant, if such course was deemed necessary. Having made no objection, it must be deemed to have waived its right to demand more explicit proof. Rev. Codes, § 5630. We do not mean to be understood as saying that, if the report had amounted to nothing more than a mere notice of the death, any duty would have rested upon the defendant to demand the affirmative proof required by the policy. Mere silence does not under such circumstances amount to a waiver on the part of the insurer. *O'Reilly v. Guardian Mut. L. Insurance Co.*, supra. We do mean to say, however, that when the insured undertakes to incorporate the notice and the proof in the

same communication to the insurer, and the proof of the cause of death, with the attending facts, meets all the requirements of the policy, except that it is not as full and explicit as it might be, the silence of the insurer is a waiver of his right to object.

What we have already said is sufficient answer to a further contention by counsel that the required proofs were not furnished to the defendant within two months from the death of Pinazza, as required by paragraph 2 of the General Agreements, and that the action was therefore prematurely brought.

Contention is made that recovery cannot be had because it appears affirmatively that Pinazza voluntarily exposed himself to unnecessary danger, within the meaning of paragraph 10 of the General Agreements. When it became known to deceased and his companions that a fellow workman was in danger, and they went to his rescue, they found him lying about five feet from the entrance of the drift. They had hurried up a ladder to reach the place. Pinazza, apparently thinking that he could go in that distance with safety, did so, and, in attempting to drag the injured man out, was overcome, and while the rest of the party were engaged in rescuing the two, he was so far injured that he died. The presence of gas was apparent as soon as the party reached the place. The general rule on this subject is that the law has so high a regard for human life that it will not impute negligence to one who attempts to save it, unless the attempt be made under such circumstances as to constitute it rashness in the estimation of prudent persons. 1 Labatt on Master & Servant, § 360; Thompson on Negligence (2d Ed.) 5435. Thus stated, the rule is broad enough to cover, not only an attempt to save life under spontaneous impulse, aroused by sudden and unexpected perception of the peril, and without thought or calculation of the chances of injury or loss of life to him who makes the attempt, but also an attempt which is made after such calculation as the circumstances permit; the rescuer acting upon the conclusion that he can save the life without the loss of his own. In the latter case the exposure is voluntary in a sense, yet, if under the same circumstances a prudent man would obey the impulse to save a life, the exposure ought not to be held to be voluntary, within the meaning of the contract. At any rate, the danger is not under the circumstances unnecessary. This rule we think is fairly deducible from the adjudicated cases. *Thomas v. Quartermaine*, 18 Q. B. Div. 685; *Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173; *Fidelity & Casualty Co. v. Sittig*, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359; *Cottrill, Adm'r, v. Chicago, Milwaukee & St. Paul Ry. Co.*, 47 Wis. 634, 3 N. W. 376, 32 Am. Rep. 796; *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914; *De Loy v. Travelers' Ins. Co.*, 171 Pa. 1, 32 Atl. 1108, 50 Am. St. Rep. 787; *Williams v. United States Mut. Acc. Ass'n*, 60 Hun, 580, 14

N. Y. Supp. 728; *Tucker v. Mutual Benefit Co.*, 50 Hun, 50, 4 N. Y. Supp. 505; *United States Mut. Acc. Ass'n v. Hubbell*, 56 Ohio St. 516, 47 N. E. 544, 40 L. R. A. 453; *Smith v. Aetna Life Ins. Co.*, 115 Iowa, 217, 88 N. W. 368, 56 L. R. A. 271, 91 Am. St. Rep. 153; *Indemnity Co. v. Dorgan*, 58 Fed. 945, 7 O. C. A. 581, 22 L. R. A. 620; *Schneider v. Insurance Co.*, 24 Wis. 28, 1 Am. Rep. 157; *Providence L. & I. Co. v. Martin*, 32 Md. 310.

The rule which applies to this provision of the policy is analogous to that which governs the defense of contributory negligence. The engineer who stands at his throttle in the presence of imminent danger of collision or the derailment of his train by an obstruction on the track, in an effort to save his passengers, and is killed or injured, cannot be said as a matter of law, to be guilty of contributory negligence. He voluntarily exposes himself to the peril, but not unnecessarily so. The circumstances demand that he do his duty, and he does so in obedience to those higher impulses which must govern the conduct of the average prudent man. He may use his best judgment as to whether he can save his passengers by assuming the risk, and it is for the jury to say whether in doing so he is guilty of contributory negligence. So, also, in other practical affairs of life. Emergencies often arise calling for immediate action. In all such cases, though action may be accompanied by danger, yet while the exposure to it is voluntary, the danger cannot in any sense of the term be said to be unnecessary. On this subject the court in *Fidelity & Casualty Co. v. Sittig*, supra, said: "For one to leap into a turbulent stream, rush into a burning building, or do any other hazardous thing to save human life, would be a voluntary exposure to danger, but not to unnecessary danger. So, too, many emergencies in the lives of men occur where the most urgent necessity requires their presence at some particular place at some particular time, and where to miss a train would involve serious consequences. In such a case a voluntary exposure to danger might not be unnecessary. The presence of a physician or surgeon at some critical period in the illness or injury of a human being might be necessary to save life, and it might be necessary for him to expose himself to danger to reach his patient, or in some other respect to perform his professional duty. The necessity implied in the provision of the policy does not mean only that which is unavoidable or inevitable, but also any object or purpose which men of moral responsibility and prudence would regard as of such serious importance in the performance of duty as to demand or justify the incurring of risk of danger to accomplish it." Under the circumstances, the question whether the exposure of himself, by Pinazza, was unnecessary, was for the jury.

Contention is made that the evidence does not show that Pinazza's death was caused by the inhalation of gas. There is no merit in

this contention. The evidence establishes the presence of gas in the drift; that Labek was overcome by it; that Pinazza went in to rescue him, and was apparently overcome just as was Labek; that his companions suffered more or less from it during the process of rescue; and that they were finally compelled to make use of helmets to protect themselves, before they succeeded in accomplishing it. There was no medical testimony introduced as to the specific cause of death, but, taking the evidence as a whole, it is amply sufficient to justify a finding that the cause of it was the inhalation of gas, as alleged.

Fault is found with certain of the instructions. In the preparation of their brief counsel failed to comply with the rule as to the specifications of error in this regard (Rule X, subdivision "b" [103 Pac. x]); we have nevertheless given attention to the criticisms made, and conclude that they are also without substantial merit.

The judgment and order are affirmed.
Affirmed.

SMITH and HOLLOWAY, JJ., concur.

(41 Mont. 138)

WHITE et al. v. BARLING.

(Supreme Court of Montana. April 18, 1910.)

1. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS—CONFLICTING EVIDENCE.

Findings of the court on conflicting evidence will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

2. APPEAL AND ERROR (§ 931*)—REVIEW—PRESUMPTIONS—CONSIDERATION OF EVIDENCE.

It is presumed that the court considered competent testimony which was admitted in a trial without a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3765; Dec. Dig. § 931.*]

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

Action by William D. White and another against Fred W. Barling. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

T. S. Hogan, for appellant. O. F. Goddard, for respondents.

SMITH, J. This cause has been in this court once before. At the first trial, held before Judge Loud, in Yellowstone county, the jury found that the capacity of plaintiffs' ditch was 30 miners' inches of water. Upon motion of the plaintiffs a new trial was ordered. The defendant appealed, and the order was affirmed. *White v. Barling*, 36 Mont. 413, 93 Pac. 348. The second trial took place before Judge Fox, without the aid of a jury. The court made the following findings of fact and conclusions of law:

"Findings of Fact.

"(1) That at the time the defendant made his appropriation of the waters of Blue creek, the plaintiffs' ditch would carry and deliver upon their lands 90 inches of water, statutory measurement, which amount of water the plaintiffs had before the appropriation of the defendant appropriated and used for irrigation and other useful purposes on their respective lands described in the complaint.

"(2) That while Blue creek at the dry seasons of the year runs dry in places, the water sinks and rises again and is, with the exception of a few days at a time, a running stream so that some water would reach the dam and headgate of the plaintiffs, if not diverted by the defendant, and which could be used by the plaintiffs for the irrigation of their lands.

"(3) That the defendant, during the irrigating season of the years 1904 and 1905, diverted and used upon his lands for irrigation quantities of water of Blue creek which would, if it had been allowed to flow in the channel, have flowed down to the dam and headgate of the plaintiffs, and that it could have been used for beneficial purposes by the plaintiffs.

"Conclusions of Law.

"(1) That the plaintiffs are entitled to the exclusive and uninterrupted flow and use of all of the waters of Blue creek that will naturally flow down to their dam and headgate up to the quantity of 90 miners' inches, statutory measurement, before the defendant is entitled to divert or use any water from said creek.

"(2) That the plaintiffs are the owners of and entitled to the free and uninterrupted use of said 90 inches of the waters of Blue creek, as against the defendant at all times.

"(3) That plaintiffs are entitled to a permanent injunction against the defendant, restraining and enjoining him from interfering with the exclusive and uninterrupted use and enjoyment of the said 90 inches of the waters of Blue creek at all times."

Judgment was entered for the plaintiffs in accordance with the findings of fact and conclusions of law, and from that judgment and an order denying a new trial the defendant has appealed.

It is contended by counsel for the appellant that the testimony is insufficient to warrant the finding of the court as to the carrying capacity of plaintiffs' ditch prior to the defendant's appropriation; and also the findings that Blue creek, the stream in question, is, with the exception of a few days at a time, a running stream so that some water would reach plaintiffs' headgate, if not diverted by the defendant, and, if the defendant had not diverted the water in 1904 and 1905, it would have reached the plain-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tiffs' headgate in an amount sufficient for beneficial use. In order to correctly decide these questions, we have carefully read and analyzed all of the evidence. While the testimony of the defendant and his witnesses appears to us to have been much more definite and certain in character than that produced by the plaintiffs upon both of the main questions involved, the evidence as a whole is nevertheless conflicting, and we find substantial testimony in support of the court's findings. Under these circumstances, we cannot disturb them. *Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860.

Some complaint is made, in the brief, of the action of the court in rejecting certain testimony regarding the condition of Blue creek during the years from 1906 to 1909. Paragraph "b" of rule 10 of this court has not been complied with in bringing this matter to the attention of the court; but, notwithstanding this, we have considered it. We think the testimony was competent; but our examination leads us to the conclusion that the appellant finally succeeded in getting it all into the record, and the presumption is that it was considered by the court.

The judgment and order are affirmed.
Affirmed.

BRANTLY, C. J., and HOLLOWAY, J.,
concur.

(41 Mont. 211)

McGOWAN COMMERCIAL CO. v. MIDLAND COAL & LUMBER CO.

(Supreme Court of Montana. April 25, 1910.)

1. CORPORATIONS (§ 432*)—OFFICERS—AUTHORITY—PRESUMPTION.

Where defendant corporation employed another to do certain work in order to enable it to carry on its own work, it is presumed that its president and general manager had authority to bind it for supplies furnished to such other to enable him to carry out his contract with it.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1726-1729; Dec. Dig. § 432.*]

2. CORPORATIONS (§ 433*)—ACTIONS—JURY QUESTION—PERSON BOUND.

In an action against defendant corporation to recover for supplies furnished to another on the request of its president to enable such other to carry out a contract with it, whether defendant's president intended to bind himself personally, or the corporation, for the supplies furnished *held* a question for the jury.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1744; Dec. Dig. § 433.*]

3. FRAUDS, STATUTE OF (§ 159*)—PROMISES TO ANSWER FOR ANOTHER'S DEBT—ORIGINAL OR COLLATERAL PROMISE.

Where the question of whether a promise was original or collateral depends solely on its terms, which are established by undisputed testimony, the question is for the court, but where the language of the promise was used in connection with other facts and circumstances tending to show the intention of the parties at the time, it is for the jury to determine whether the promise was original or collateral.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 378; Dec. Dig. § 159.*]

4. FRAUDS, STATUTE OF (§ 23*)—PROMISE TO ANSWER FOR ANOTHER'S DEBT—ORIGINAL OR COLLATERAL PROMISE.

If a promise was original and not to answer for another's debt, the statute of frauds is not applicable to require it in writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.*]

5. FRAUDS, STATUTE OF (§ 23*)—PROMISE TO ANSWER FOR ANOTHER'S DEBT—ORIGINAL OR COLLATERAL PROMISE—CONSIDERATION DETERMINING.

In determining whether a promise was original or collateral to answer for another's debt, the subject-matter and language of the promise, the relationship of the parties, their intention as interpreted by their acts at the time and afterwards, and the surrounding facts and circumstances are important elements to be considered, and it is proper to ascertain whether the promisor had any immediate pecuniary interest in the transaction between the promisee and the person for whose benefit the promise was made.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.*]

6. FRAUDS, STATUTE OF (§ 26*)—PROMISE TO ANSWER FOR ANOTHER'S DEBT—ORIGINAL OR COLLATERAL PROMISE.

In determining whether the promise was original or collateral to answer for another's debt so as to bring it within the statute of frauds, the question of importance is to determine to whom credit was given.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 35-42½; Dec. Dig. § 26.*]

7. FRAUDS, STATUTE OF (§ 26*)—PROMISE TO ANSWER FOR ANOTHER'S DEBT—CREDIT GIVEN TO PROMISOR—CHARGES ON CREDITORS' BOOKS.

That goods sold were charged to the debtor to whom they were delivered strongly tends to show that the seller gave credit to him, and that he relied on him for payment, so as to make his promise to answer for the debt collateral, but the fact is not conclusive of that question, and must be explained.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 41; Dec. Dig. § 26.*]

8. CORPORATIONS (§ 521*)—ACTIONS—JURY QUESTION—SUFFICIENCY OF CONSIDERATION FOR CONTRACT.

In an action against defendant corporation for the value of goods delivered on the order of its president to one who contracted to do certain work for defendant to enable it to carry out the work in which it was engaged, whether defendant had such an immediate pecuniary interest in having the goods furnished to such other as to be a sufficient consideration for its promise to pay therefor *held* for the jury.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 521.*]

9. FRAUDS, STATUTE OF (§ 26*)—CREDIT GIVEN TO WHOM GIVEN.

In order to make a promise original or collateral to answer for another's debt, it must have been given exclusively to the promisor, he not being liable upon his oral promise unless credit is given to the person for whom the promise is made, though the collateral inducement was the principal inducement to the delivery of the goods, but the third party need not be released from liability unless the promisee pays a pre-existing debt.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 35-42½; Dec. Dig. § 26.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter

10. FRAUDS, STATUTE OF (§ 26*)—PROMISES TO ANSWER FOR ANOTHER'S DEBT—APPLICATION OF STATUTE.

Rev. Codes, § 5660, subd. 2, provides that a promise to answer for another's obligation is original, and need not be in writing, where the creditor parts with value or enters into an obligation in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the promisor the principal debtor, and the person in whose behalf it is made his surety. Defendant lumber company, to enable it to have logs removed which it desired to use in its business, contracted with G. to remove them, and the latter applied to plaintiff for credit for provisions which were necessary to enable him to do the work, and credit to him was refused, upon learning which defendant's president asked plaintiff, "Am I good?" and upon being assured in the affirmative, the former stated to plaintiff orally: "You let G. have what he requires—what he needs—and I will see that it is paid, and you keep our office notified from time to time what the amount is." Held that subdivision 2 was not applicable.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Dec. Dig. § 26.*]

11. FRAUDS, STATUTE OF (§ 159*)—ORIGINAL OR COLLATERAL PROMISE—JURY QUESTION.

In an action for the value of goods furnished at the request of defendant's president to another who had contracted to do certain work for defendant, whether defendant's promise to see that the price of such goods was paid was an original or a collateral promise held a jury question.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Dec. Dig. § 159.*]

12. APPEAL AND ERROR (§ 927*)—REVIEW—GRANTING NEW TRIAL AFTER NONSUIT.

In reviewing an order granting a new trial after judgment of nonsuit, the evidence before the trial court when the nonsuit was granted will be considered in the light most favorable to plaintiff, as the trial court must have considered it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3748; Dec. Dig. § 927.*]

Appeal from District Court, Sanders County; Henry L. Myers, Judge.

Action by the McGowan Commercial Company against the Midland Coal & Lumber Company. From an order granting a new trial after judgment of nonsuit, defendant appeals. Affirmed.

E. M. Hall, for appellant. Marshall & Stiff, Geo. R. Ogden, and Frank A. Roberts, for respondent.

HOLLOWAY, J. This action was brought by the McGowan Commercial Company, a corporation, against the Midland Coal & Lumber Company, a corporation, to recover the balance due on an account for goods, wares, and merchandise alleged to have been sold by the plaintiff to the defendant, and, at the special instance and request of defendant, delivered to D. J. Gibson. The answer is in effect a general denial of the allegations of the complaint. At the close of plaintiff's case the defendant moved for a nonsuit, and the motion was granted. Thereafter plaintiff moved for a new trial, and this motion was likewise

granted. From the order granting a new trial, the defendant appeals.

There is not any dispute or inconsistency in the facts as they appear from the record. Those facts are: In January, 1908, the defendant company was engaged in business at Plains, Mont. It had purchased the logs from certain lands near there, and was anxious to have them removed, and to that end contracted with Gibson to do the work. In order to carry out his contract, Gibson required groceries and other provisions to supply his men engaged in the work, and, being without sufficient ready means, it became necessary for him to obtain credit. He applied for credit to the plaintiff company, which was engaged in the general mercantile business at Plains, and the officers of that company, after investigation, determined that Gibson was not financially responsible; that he would not be able to make any profit from his contract, and they therefore declined to extend credit to him. E. B. Clark, the president and general manager of the defendant company, was informed of this conclusion, and the following took place: An officer of the plaintiff company said to Clark: "Mr. Gibson has applied to us for credit to carry on his logging operations, and we have decided we cannot give him any credit, as we do not think him good," to which Mr. Clark said: "You don't; am I good?" "I [McGowan] said, 'You certainly are,' and he said: 'All right; you let Gibson have what he requires—what he needs—and I will see that it is paid, and you keep our office notified from time to time what the amount is.'" An officer of the plaintiff company then sought out Gibson, and induced him to trade with the plaintiff, and during January, February, March, and April, 1908, Gibson secured goods from the plaintiff to the amount of \$769.05. These goods were charged on the books of the plaintiff to Gibson, and upon the first of every month an itemized bill of the goods delivered to Gibson during the preceding month was sent to him, and the defendant company was notified of the amount of goods thus delivered to Gibson. Upon April 13th the bookkeeper of the defendant company gave to the plaintiff this notice: "You will please not give any more goods to Mr. Gibson under the guarantee of Mr. E. B. Clark." After that date there were no more goods furnished Gibson by the plaintiff on that account. About May 19th E. B. Clark came to the plaintiff's store and paid \$300 on Gibson's account, and stated that, as soon as the logs which Gibson had delivered were scaled, "I will see that you get the balance of the money." In August following the plaintiff wrote a letter to the defendant company, at its office in Miles City, in which attention is called to the balance due on the account for goods delivered to Gibson, which letter concludes as follows: "Kindly let us hear from you at your earliest convenience

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as we presume Mr. Clark had neglected to inform Mrs. Clark, who handles your business here, that he had guaranteed this account to both the writer and our Mr. McGowan. Yours very truly, McGowan Commercial Company, per C. H. Rittenour, Secy." The testimony further tends to show that the plaintiff did not rely upon, or look to, Gibson for payment for the goods thus delivered, but extended credit solely upon the assurance given by the defendant, through Clark, and looked to the defendant alone for payment. It further appears that after Gibson had completed his logging contract, the plaintiff company did extend credit to him on his own responsibility, to the extent of about \$60. The defendant company having refused to pay the balance of the first account, this action was brought. The other facts will appear later.

Counsel for appellant contends that the court erred in granting a new trial (1) because the evidence is insufficient to show any authority in Clark to make a contract, on behalf of the defendant company, to answer for the debt of Gibson; (2) that the evidence shows that, if any promise was made by Clark on behalf of the defendant, it was to answer for the debt, default, or miscarriage of Gibson, and, not being in writing, it was void; and (3) that there is a fatal variance between the allegations of the complaint and the proof, in this: That the complaint charges upon an original obligation of the defendant company, whereas the evidence shows a collateral undertaking, if any.

1. As we view this evidence, it is wholly immaterial on this appeal whether Clark had authority to make a contract to pay the debt of Gibson, since the contract, if of that character, is void, not because of the lack of authority in Clark to make it, but because it was not in writing, and falls within the inhibition of section 5017, Rev. Codes. If, however, the agreement made between Clark and the officers of the plaintiff company amounted to an original promise, then the question might properly arise: Whose promise was it—the defendant company's or Clark's individual promise? If it was an original promise, and Clark intended to bind the defendant company, and not himself individually, we think there is a presumption that he had the authority to do so, arising from the fact of his employment as president and general manager of the defendant company, and the apparent interest which the company had in seeing Gibson so situated that he could carry out his contract. Story on Agency, § 56. But whether Clark intended to bind himself or the defendant company was a question of fact for the jury to determine from all that was said and done and from all other surrounding facts and circumstances. *Gerber v. Stuart*, 1 Mont. 172; 1 Am. & Eng. Ency. Law 2d Ed. 1121; 31 Cyc. 1553; 2 Ency. L. & P., 20-923.

2. Assuming that Clark intended to bind
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the defendant company by his declaration to the officers of the plaintiff, the appellant contends that the question, Does Clark's statement amount to an original promise to pay for the goods, or merely to a promise to answer for Gibson's debt? is one of law, and does not involve any element of fact for a jury's consideration. The general rule applicable in such cases is: "Where the question whether the promise was original or collateral depends alone upon its terms, and the language used is established by undisputed testimony, such question is one of law for the court. But the nature of the promise is usually to be determined by the jury as a question of fact, for it may appear that a promise, original in form, was in fact made and intended as collateral, * * * or a promise to be 'responsible' may be found to be collateral, or promises deemed *prima facie* collateral may be adjudged original." 29 Am. & Eng. Ency. Law (2d Ed.) 906. If this record presented only the language used by Clark to the officers of the plaintiff company, stripped of any attending facts or circumstances which could possibly throw light upon the intention of the parties at the time, then the only question presented would be one of law. But it is a well-recognized rule that, whenever the language of the promisor was used in connection with other facts and circumstances which can fairly be said to illustrate the language employed, or to throw light upon the intention of the parties at the time the promise was made, then it becomes a question of fact for a jury's determination, under proper instructions, whether the promise was original, or collateral to the promise of a third person. If the promise was original, then the statute of frauds is not applicable; but, if collateral, then it is void unless in writing. In *Smith on the Law of Frauds*, § 319, it is said: "The subject-matter of the promise, the relationship of the parties to the transaction, the language used, the surrounding facts and circumstances, and the intention of the parties as interpreted by their acts in recognition of the promise, its fulfillment, etc., are important elements in determining whether the promise is collateral and subject to the statute, or original and not subject to it."

To attempt to designate all the facts and circumstances which might be the subject of legitimate inquiry in determining the character of a promise thus made would be a hopeless task. Reference to some of them may be had. It is always proper to inquire whether the promisor had any immediate pecuniary interest in the transaction between the promisee and the person for whose benefit the promise was made. *Davis v. Patrick*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826. This court has said: "Wherever the main purpose and object of the promise is not to answer for another, but to subserve some purpose of his [the promisor's] own, his promise is not within the statute, although

it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing the liability of another." *Carothers v. Connolly*, 1 Mont. 433. When the statute of frauds is invoked, the question of primary importance is: To whom was the credit given? 20 Cyc. 180. It is the province of the jury to determine to whom the credit was given, and their duty, in so doing, to consider the extent of the undertaking, the expression used, and the circumstances of the case. *Boykin v. Dohlonde*, 37 Ala. 577. Whenever from the language employed by the promisor reasonable men might draw different conclusions or inferences, then the intention of the parties at the time the promise was made becomes a subject of legitimate inquiry. "It is often difficult to determine from the mere words in which a promise is made whether an undertaking is collateral to the engagement or liability of a third person, or an entirely independent and original undertaking. In such cases courts must rely on the circumstances of each particular case and its general features, in order to ascertain the intent of the parties and how they viewed it, when it is doubtful whether it was a contract of suretyship or guaranty or an original undertaking." 20 Cyc. 164. As said by the Supreme Court of the United States, in *Davis v. Patrick*, above: "Counsel for Davis place stress on the form of expression attributed by Patrick to Davis, to wit: 'I will be personally responsible; I will see you paid'—and contends that the import of such language is that of a collateral promise. There is force in this contention, as it implies that some one else was also bound; but the real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties, and the question always is what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise." "It is for the jury to find what the real substance and spirit of the undertaking between the parties was." Wood on Statute of Frauds, § 98.

Some of the facts which the evidence in this case tends to prove, and from which a jury might infer a primary liability on the part of the defendant company, are: (a) Gibson needed credit, which he sought from the plaintiff company, in order to carry out his contract with the defendant company, and credit was refused him. With knowledge of this fact, the defendant made the promise. For Gibson to get the goods would apparently benefit the defendant company, in that Gibson would thereby be enabled to carry out his contract, and the defendant would get the logs delivered at once, a matter in which it appears to have been concerned. (b) The credit was given to the defendant company exclusively. (c) The defendant paid \$300 on Gibson's account. And (d) defendant asked to be informed of the amount of goods de-

livered to Gibson. Some of the facts from which a contrary inference might be drawn are: (a) The goods were charged on the plaintiff's books to Gibson, and an itemized statement sent to Gibson every month; (b) the plaintiff wrote to defendant in August that Clark had guaranteed Gibson's account; and (c) after Gibson's contract with defendant company expired, plaintiff extended credit to Gibson on his own responsibility. But all of these facts and circumstances are subject to explanation, and some of them at least are explained. For instance, in explanation of the charge on the books to Gibson, it is said that the defendant company was purchasing goods from plaintiff on credit during the same time that goods were delivered to Gibson, and that the goods so delivered to Gibson were charged to him in order to prevent confusing that account with the account of the defendant company for goods which it purchased for its own immediate use, and in order that plaintiff might comply with Clark's demand that the defendant company be kept informed of the amount of goods delivered to Gibson. The rule applicable in such a case is well stated, as follows: "Evidence that the goods sold were charged to the person to whom they were delivered strongly tends to show that the vendor gave credit to him, and relied upon him for payment, and therefore that the promise of another to be answerable for the debt was at most a collateral undertaking. However, this evidence is not conclusive, but is open to explanation, and the weight of it is for the jury." 20 Cyc. 183. Treating of this particular phase of the case under similar circumstances, the Supreme Court of Oregon, in *Mackey v. Smith*, 21 Or. 598, 23 Pac. 974, said: "It is enough to say that it was to prevent confounding the accounts, as already explained, that the charges were thus made on the books. With this explanatory evidence, the referee, who stands in the place of the jury, was satisfied; and, as it was proper evidence to be considered by him, it is not for us to weigh it or revise his findings."

It is urged by appellant that the evidence shows that at the time Clark is alleged to have made this promise, Gibson was getting goods from another firm in Plains; and this is true, but it does not appear to what extent Gibson was dealing with Peterson & Kruger, or whether he was paying cash or obtaining credit.

It is likewise urged that the evidence is not sufficient to show that the defendant company had such an immediate pecuniary interest in the transaction between Gibson and the plaintiff as would furnish a consideration for defendant's promise. But we think this is a question of fact for the jury. The evidence tends to show that the defendant company had a pecuniary interest in having the logs removed at once; that it had endeavored to secure the services of at least one other person to do the work, but, the price not being

satisfactory, it finally contracted with Gibson. Since it was necessary for Gibson to obtain the goods in order to carry out his contract at all, and his failure might result in financial loss to the defendant company, it might be a reasonable inference from these facts that the leading object which defendant had in view in giving its assurance to plaintiff under the circumstances was to subserve or promote its own interest, even though such assurance had the effect of paying what would otherwise have been the debt of Gibson; and particularly is this so in view of the further fact that Gibson's performance of the contract would render defendant his debtor, and it could protect itself in its settlement with him if the proceeds of the contract would defray the expense.

Counsel for appellant further contends in his brief that: "The evidence must show that the credit was extended exclusively to the promisor, and that the third party was absolutely discharged from liability, in order to take the promise out of the statute of frauds." With the first part of this statement we fully agree. The rule is stated as follows: "But in all such cases it is requisite that credit should be given exclusively to the promisor; if any credit be given to him for whose benefit the promise is made, the promisor is not liable unless his promise is in writing; and this is so although the collateral undertaking may have been the principal inducement to the delivery of the goods or the performance of the services." 20 Cyc. 181. But the authorities cited by counsel do not sustain the proposition that, in addition to showing that credit was extended to the promisor exclusively, it must also appear that the third party was released from liability. At first blush some of the cases would seem to support that contention, but a careful analysis will disclose that they do not go further than to hold to the general rule just quoted above. The effect of an original promise is to make the promisor the debtor in the first instance, even though the goods sold be for the benefit of another. It would be absurd to say in this case that credit was extended solely to the defendant company, and Gibson was released from liability; for if the defendant company was an original promisor—that is, if it was the only debtor in the first instance—then there never was any liability to be released. *Browne on the Statute of Frauds*, § 162. It is only when one agrees to pay the pre-existing debt of another that the principle of law invoked by appellant is applicable (20 Cyc. 186); and that principle has no application to the facts of this case, because defendant's promise, if made at all, was to pay for goods thereafter to be delivered to Gibson, and not to pay a pre-existing debt of Gibson's.

The language employed by plaintiff in its letter to the defendant, in August, 1908,

would seem to indicate that plaintiff then considered the defendant a guarantor of Gibson's debt; but the courts are not inclined to decide these cases upon the mere form of expression employed by either the promisor or promisee, unless the words stand alone, unaided by any facts or circumstances, and the reason for this is obvious. The average layman does not weigh his words in the light of technical legal definitions, and could hardly be expected to distinguish between an original and a collateral promise.

Whatever construction may be put upon subdivision 2, § 5660, Rev. Codes, we think the provision is not applicable to the facts so far as disclosed in this case. The case of *Meldrum v. Kenefick*, 15 S. D. 370, 89 N. W. 803, presents facts to which this subdivision is clearly applicable. Upon the several propositions which we have discussed under this assignment, the authorities are not altogether harmonious. But we think our views have the support of the decided weight of authority, and appear to us most consonant with reason. In view of these rules the trial court should have denied the motion for a nonsuit; but, not having done so, on consideration of the motion for a new trial it very properly reached the conclusion that the cause should have been submitted to the jury. What we have said under this assignment, disposes of the third one also.

In our consideration of this appeal we have treated the evidence from the standpoint of the trial court at the time the motion for nonsuit was interposed; that is to say, we accept the evidence as true for the purpose of this appeal, and view it in the light most favorable to plaintiff. This is the rule in this state.

We do not find any error in the trial court's ruling. The order granting a new trial is affirmed.

Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

(12 Cal. A. 739)

FISHER v. WESTERN FUSE & EXPLOSIVES CO. (Civ. 672.)

(Court of Appeal, Third District. California. March 8, 1910.)

1. NEGLIGENCE (§ 108*) — PLEADING—SUFFICIENCY.

In an action for negligence, it is sufficient, under the Code, to allege that the act complained of was negligently done by defendant, and that it caused damage to plaintiff.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 174-180; Dec. Dig. § 108.*]

2. MASTER AND SERVANT (§ 329*)—INJURIES TO THIRD PERSON — NEGLIGENCE OF SERVANT—COMPLAINT — SUFFICIENCY — "RECKLESS"—"HEEDLESS."

A complaint for injuries caused by the explosion of a powder magazine, which alleges that the explosion was the result of the reckless and heedless act of defendant's servant in ig-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

niting the powder, alleges negligence; the words "reckless" and "heedless" implying negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1268, 1269; Dec. Dig. § 329.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5999-6001; vol. 8, p. 7781.]

3. MASTER AND SERVANT (§ 300*)—INJURIES TO THIRD PERSONS—ACTS OF SERVANT—LIABILITY OF MASTER.

A master is civilly responsible for wrongs committed by his servant while acting about the business of his master within the scope of the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1209; Dec. Dig. § 300.*]

4. MASTER AND SERVANT (§ 329*)—LIABILITIES FOR INJURIES TO THIRD PERSONS—ACTS OF SERVANT.

A complaint in an action for injuries caused by the explosion of a powder magazine, which alleges that defendant had in its employ a servant whose duty it was "to handle, carry, and take charge of the powder in said magazine," and that the magazine exploded as a result of the servant's negligence, implies that it was a part of the duty of the servant to exercise care to prevent an explosion, and, where he negligently permitted or caused the explosion, he violated his duty as a servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1268, 1269; Dec. Dig. § 329.*]

5. MASTER AND SERVANT (§ 329*)—LIABILITIES FOR INJURIES TO THIRD PERSONS—ACTS OF SERVANT.

The complaint also shows by necessary implication that the servant acted within the scope of his authority, though there is no express allegation to that effect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1269; Dec. Dig. § 329.*]

6. NUISANCE (§ 3*)—PRIVATE NUISANCE—EXPLOSIVES.

To constitute the keeping of gunpowder a nuisance, there must be negligence in the fact or the manner of keeping and storing the gunpowder; and whether the storing of gunpowder is a nuisance depends on the locality, quantity, and surrounding circumstances.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 15; Dec. Dig. § 3.*]

7. NUISANCE (§ 3*)—PRIVATE NUISANCE—EXPLOSIVES.

Where a powder magazine was imperfectly constructed and improvidently maintained, and its location, manner of construction, and maintenance was dangerous to life and property, the magazine was a nuisance, and the owner thereof was liable for an explosion thereof.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 15; Dec. Dig. § 3.*]

8. EXPLOSIVES (§ 8*)—KEEPING OR STORING—LIABILITY—NUISANCE.

Where the maintenance of a powder magazine was a nuisance, the owner thereof was responsible for damages caused by an explosion, regardless of negligence in causing the explosion.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Xavier Fisher against the Western Fuse & Explosives Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 107 Pac. 332.

G. R. Lukens, for appellant. Reed & Nusbaumer, W. H. Orrick, M. C. Chapman, and A. A. Moore, for respondent.

BURNETT, J. The appeal is from the judgment on the judgment roll alone. The only question for determination concerns the ruling of the court below overruling a general demurrer to the amended complaint.

The action was brought to recover damages for the destruction of plaintiff's dwelling house, and the gravamen of the charge is contained in the following allegations: "That on the said 19th day of July, 1898, defendant carelessly, negligently, deceitfully, secretly, improvidently, and unsafely maintained a powder magazine, which was improperly constructed, containing not less than 5,000 pounds of powder, and situated upon the corner of Clark and A streets in Melrose.

* * * Defendant on said 19th day of July, 1898, had in its employ a careless, heedless, reckless, and dangerous servant, whose duty it was to handle, carry, and take charge of the powder in said magazine, and to whom it gave free access to said magazine at all times. Said servant was a Chinaman, called Ah Ung, and his carelessness, recklessness, heedlessness, and unfitness were at all times well known to defendant. On the said 19th day of July, 1898, the said powder stored in the said magazine was exploded as a result of defendant's aforesaid negligence, and by reason of the act of said servant in recklessly and heedlessly igniting said powder." The foregoing is followed by an averment that the said explosion damaged plaintiff's said property to the extent of fourteen hundred dollars.

Under the authorities, it is sufficient to allege that an act was negligently done by defendant, and that it caused damage to plaintiff. The rule is stated in *Stephenson v. Southern Pac. Co.*, 102 Cal. 147, 34 Pac. 619, as follows: "In adopting what is known as the Code system of pleading, courts in most of the states have excepted from the general rule, requiring a complaint to state the facts constituting the cause of action in ordinary and concise language, cases founded upon negligence, or rather, they have so far modified the rule as to permit the plaintiff to state the negligence in general terms, without stating the facts constituting such negligence. This modification of a rule of Code pleading is founded in wisdom, and grows out of a fundamental rule in common-law pleading, to the effect that 'no greater particularity is required than the nature of the thing pleaded will conveniently admit.' *Stephen's Pleading*, 367. * * * In cases of negligence the sufferer may only know the general, the immediate cause, of the injury, and may be entirely ignorant as to the specific acts or omissions which lead up to it. * * * The term 'negligence' for the purpose of pleading is a fact to be pleaded—an ultimate fact,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which qualifies an act otherwise not wrongful. Negligence is not the act itself, but the fact which defines the character of the act and makes it a legal wrong. The absence of care in doing an act which produces injury to another is actionable. The term 'negligence' signifies and stands for the absence of care. * * * As a result of the application of these principles to Code pleading in cases of negligence and to others of kindred character, it is held in this state, and in nearly all the United States, that it is sufficient to allege the negligence in general terms, specifying, however, the particular act alleged to have been negligently done." Here the particular act immediately causing the injury was the explosion of the gunpowder. This was the result of "the reckless and heedless" act of defendant's servant in igniting said powder. Both "reckless" and "heedless" imply "negligence or the want of care."

The only question, then, remaining arises from the fact that the negligent act is alleged to have been done by the "said servant" instead of by the defendant. The rule in such case is that the principal or master is civilly responsible for wrongs committed by his agent or servant while acting about the business of the principal or master and within the scope of the employment of the agent or servant. Thompson on Negligence, § 518. The same author in section 520 declares the rule more specifically as follows: "A mere statement of the rule suggests that the principal or master will in all cases be liable for wrongs committed by his agent or servant, while acting about the business of the former, and within the scope of his employment, through inattention, negligence, or want of skill. The cases already cited, and a great array of other adjudications, may be appealed to in support of this statement. It is perhaps the only branch of the doctrine upon which all the cases unite, and as to which there is no dispute. It is a rule so plain and easy of application that it could scarcely be made clearer by illustration." Among the many instances of the application of the rule cited by the author in section 521 we note only the following: "The defendant sent the servant to a factory to receive for her certain bags of paper shavings. It was arranged that the shavings should be thrown down through a hatchway beneath so as to prevent injury to passers-by. He failed to so guard it, and a person passing by was struck by one of the falling bags and injured. It was held that the defendant was liable, since her servant was acting about the very matter which he was sent to perform, the receiving of the goods. * * * The plaintiff placed her horse in care of the defendant, a livery stable keeper, to be boarded. The watchman of the defendant allowed three men, partially intoxicated, to go into the loft of the stable, which was full of dry hay, to sleep there during the night, knowing that they were smokers, and that they were in

the habit of carrying pipes and matches with them. An hour and a half later the stable took fire and the plaintiff's horse was burned to death. It was held that the livery stable keeper was responsible for the act of his watchman, and that whether the watchman was negligent in allowing the three men to sleep in the loft was a question for the jury. * * * A person contracted to give a pyrotechnic display, and committed the performance of the contract to his agent. He thereby became answerable in damages to a person who was hurt through the negligence of the agent in discharging a fire bomb." In the case at bar the business of the agent was "to handle, carry, and take charge of the powder in said magazine." In other words, the care, custody, and management of the powder were committed to the servant. This necessarily implies that it was a part of his duty to exercise care to prevent an explosion of said powder. If he therefore negligently permitted or caused said explosion, the case is presented of a clear and unmistakable violation of his duty as said servant. It thus appears by necessary implication that the servant was acting within the scope of his authority, and appellant is mistaken in its contention that an express allegation to that effect is required.

On this branch of the subject respondent cites the following cases: *Birnbaum v. Lord*, 7 Misc. Rep. 493, 28 N. Y. Supp. 17, was a suit to recover damages for negligence on the part of a driver of defendant's wagon in running over a 12 year old boy who was crossing a street in New York City. It is therein said: "The complaint was sufficient in alleging that the wagon belonged to defendant and was driven by one of their agents or servants, although it does not otherwise allege that the latter was engaged in the defendant's business; but that is involved in the allegation that the wagon was driven by their agent or servant, for, if the driver was not engaged upon his master's business, he would be neither agent nor servant, but his own master." In *Lewis v. Schultz*, 98 Iowa, 341, 67 N. W. 266, the Supreme Court of Iowa said: "Appellant insists that the case was tried and submitted to the jury upon an issue not made in the pleadings or supported by the evidence; i. e., that the loss was the result of the act of a servant within the scope of his employment. The petition alleges that defendants, their servants and agents, set out the fire. Surely this raised an issue as to whether the person who set out the fire was an agent of the defendants, and also as to whether the act was within the scope of his employment."

In *Louisville N. A. & O. Ry. Co. v. Kendall*, 138 Ind. 313, 36 N. E. 415, we find the question considered as follows: "The complaint alleges that upon the arrival of said train at defendant's depot in the town of Salem * * * plaintiff as a passenger undertook and did get on the platform of one of the

cars of said train to enter same, but that without fault or negligence on plaintiff's part, on account of the carelessness and negligence of one of defendant's agents, whose name is to the plaintiff unknown, he was by such employé of defendant pushed from the platform of said train just as the same was starting; * * * that all of said injuries were caused by and the direct result of said carelessness and negligence of one of defendant's agents in pushing plaintiff off its said train as aforesaid and wholly without the fault or negligence of plaintiff." It was held that the case was brought within the rule sustained by the authorities that "the master is liable for a tortious or negligent act of a servant committed while performing his master's service, though not previously authorized nor subsequently ratified by the master, if an injury result therefrom to one to whom the master owes protection from such injury." In *Lewis v. Chicago, St. Paul & K. C. Ry. Co.*, (C. C.) 35 Fed. 630, a demurrer to the complaint was overruled by Justice David J. Brewer, wherein he said: "I also take it to be settled under the rules of pleading that what was equivalent to a common count under the old practice is good now as against an objection, raised by demurrer; and I think that is all that can be said about this pleading. It alleges that the defendant by one of its employés committed an assault and battery upon the plaintiff, another employé. That is the allegation in the pleading of a substantive and ultimate fact. What the particular facts may be, whether that assault and battery was committed in the line of his employment and in the discharge of a duty which he owed the defendant, the master, as an employé, does not now appear." The foregoing decisions commend themselves to our judgment, and they support the action of the court below in overruling the demurrer to the amended complaint.

There is, also, another aspect of the complaint which should not be overlooked. This is presented in the allegations that the magazine was imperfectly constructed and improvidently maintained, and that this negligence was a contributing cause of the injury. We find thus exhibited the familiar case of a nuisance, and upon this theory a cause of action is stated. The question is elaborately reviewed in *Kinney v. Koopman*, 116 Ala. 310, 22 South. 593, 37 L. R. A. 497, 67 Am. St. Rep. 119, and a large number of cases cited. Therein it is held that "storing and keeping gunpowder and dynamite in large quantities near dwellings in a thickly settled portion of a city, and near a public street is not a nuisance per se. To constitute such keeping a nuisance and impose liability for an accidental explosion there must be negligence in 'keeping' or in the 'manner' of keeping and storing the gunpowder." And furthermore it is said: "We are of the opin-

ion that a count prima facie sufficiently shows a want of due care, which charges the storing of large quantities of gunpowder in a wooden building in a populous place in the city of Cullman. The demurrer was properly sustained to the count which merely charged the storing of gunpowder and its explosion without further averment showing that on account of location, quality, and surrounding circumstances it was dangerous." Here, as we have seen, the location, manner of construction, and of maintenance do appear so as to show that the said magazine was dangerous to life and to property. The distinction made in the *Kinney Case*, supra, is recognized and approved in *Kleebauer v. Western Fuse, etc., Co.*, 138 Cal. 497, 71 Pac. 617, 60 L. R. A. 377, 94 Am. St. Rep. 62. It was contended there by plaintiff that the mere fact of the storage of a large quantity of gunpowder where damage might result from an explosion amounted to a nuisance per se, and he requested the following instruction which was given by the lower court: "A magazine of powder so situated that in case of explosion from any cause it is liable to injure the persons and the dwellings of persons living in the vicinity is a nuisance; and therefore, if the jury believe from the evidence that the defendant corporation maintained at the time mentioned in the complaint, at the town, or village, or place called Melrose, a magazine, and kept stored therein large quantities of gunpowder, which, in case of explosion, was liable to injure the persons, dwellings, or other property of the residents of the said town, or village, or place called Melrose, your verdict should be for the plaintiffs." This was condemned by the Supreme Court and the other line of authorities was approved, holding that whether the storing of gunpowder is a nuisance depends upon the locality, quantity, and the surrounding circumstances. The Supreme Court said: "It does not appear that, when the defendant commenced its business, it was not located in a proper place, and at that time sufficiently removed from a residence neighborhood. It was carried on with the utmost care. The damage in question resulted from a cause entirely beyond its control, and without any carelessness or negligence on its part whatever, and under the more recent and better line of authorities, as shown under the circumstances it is not responsible."

Since by appropriate allegations it appears that the magazine as constructed and maintained constituted a nuisance, it is the contention of respondent that appellant was responsible for the damage caused the plaintiff without regard to the "precipitating cause of the explosion." In other words, the negligence of appellant sufficiently appears in the said averments showing the maintenance of a nuisance, and since, in the absence of this want of proper care, the injury would not

have resulted, a cause of action is stated, regardless of the further negligence in causing the explosion. This doctrine finds support in the authorities. The rule is stated in *Lafin & Rand Powder Co. v. Tearney*, 131 Ill. 322, 23 N. E. 389, 7 L. R. A. 262, 19 Am. St. Rep. 36, as follows: "As a general rule, the question of care or want of care is not involved in an action for injuries resulting from a nuisance. If actual injury result from the keeping of gunpowder, the person keeping it will be liable therefor, even though the explosion is not chargeable to his personal negligence"—citing a large number of cases. Under either view, therefore, the amended complaint is not open to attack by general demurrer. The proximate cause of the damage appears to have been the negligence of defendant in the construction and maintenance of its magazine and the reckless act of the servant acting within the scope of his authority—these two conditions coexisting at the time of the explosion and both contributing to the injury done to plaintiff.

The cases cited by appellant involve different facts, as will be seen from the following reference to them: The trouble in *Smith v. Buttner*, 90 Cal. 95, 27 Pac. 29, was that no fact was averred showing that the alleged negligence caused or contributed to the injury. As said by the court: "It is well settled that negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say, it was negligently done, without stating the particular omission which rendered the act negligent. But it must appear from the facts averred that the negligence caused or contributed to the injury. To illustrate, suppose a plaintiff injured by the falling of a sign negligently and insecurely fastened by defendant. It would not suffice for him to allege the negligence in hanging the sign; that plaintiff in lawfully and without negligence, passing under it, was thrown down and injured through such negligence. This would be a mere assertion of the cause. It would be necessary to show that the sign fell upon him in consequence of such negligence, thereby causing his injury." Here, as we have seen, "what was done" is stated—that is, the powder was negligently ignited—and this, superadded to the negligence in the construction and maintenance of the plant, caused the damage. In *Indianapolis & St. Louis Railroad Company v. Horst*, 93 U. S. 291, 23 L. Ed. 898, it is merely stated that "a plaintiff is bound to state his case, but not the evidence by which he intends to prove it." The vice of the complaint in *Going v. Dinwiddle*, 86 Cal. 633, 25 Pac. 129, was that no fact was alleged showing that the justice of the peace acted without jurisdiction; the action being for false imprisonment "on a pretended charge of contempt of court." The Supreme Court properly said that "it is clear that the

acts complained of were done by the defendant in his official character as a judicial officer and there is no averment in terms that said acts were without or in excess of his jurisdiction, nor are any facts averred from which such want of jurisdiction appears. And that a judicial officer is not liable for acts done in his official capacity and within his jurisdiction is as thoroughly established as any other principle of law." It necessarily followed that the omission to show affirmatively the want of jurisdiction was a vital error. An instruction of the court and not a question of pleading, as we have already seen, was involved in the case of *Kleebauer v. Western Fuse & Explosives Co.*, supra.

Of the cases cited by appellant in support of its position that the pleading should allege that the act was done within the scope of the servant's employment and duties, in only one—*Daniels v. Carney*, 148 Ala. 81, 42 South. 452, 7 L. R. A. (N. S.) 920, 121 Am. St. Rep. 34—was a question of pleading involved. This is in harmony with appellant's view, but, as remarked by respondent, the case is against the weight of authority. It was alleged that the defendant owned the steamboat, and that it was being operated by its servants. There would seem to be no difference in principle, as suggested by respondent; between such a case and one relating to an accident on a street railway. In the latter instance surely an allegation that the motorman in operating the car was acting within the scope of his authority would not be required. This element is implied in the averment that the agency which is being operated belongs to defendant, and that it is operated by defendant's servant.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(12 Cal. A. 685)

PEOPLE v. FREDONI. (Cr. 216.)

(Court of Appeal, First District, California.
March 3, 1910.)

1. CRIMINAL LAW (§ 20*)—ELEMENTS OF OFFENSE—INTENT.

One who innocently aids in the commission of a crime is not guilty within Pen. Code, § 31, making those persons guilty of a crime who aid and abet in its commission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 21, 24, 25; Dec. Dig. § 20.*]

2. CRIMINAL LAW (§ 823*)—INSTRUCTIONS—ERRORS IN INSTRUCTIONS CURED BY OTHER INSTRUCTIONS.

The error in an instruction defining principals as all persons aiding "or" abetting in the commission of a crime, while Pen. Code, § 31, makes those persons guilty who aid "and" abet, is cured by the charge that to find accused guilty, the evidence must show that he was unlawfully concerned in the commission of the crime, and that, if accused acted with another in its commission, each unlawfully aiding and abetting in its commission, he is guilty.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 823.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Where there was no evidence tending to show that accused innocently aided in the commission of the crime, the error in an instruction, defining principals as persons aiding or abetting in the commission of a crime, was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.*]

4. CRIMINAL LAW (§ 1086*)—APPEAL—QUESTIONS REVIEWABLE.

Where the record on appeal does not show that objection was made to evidence, the merits of the admissibility of the evidence will not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2794; Dec. Dig. § 1086.*]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

G. Fredoni was convicted of robbery, and he appeals. Affirmed.

Henry Brickley and W. D. Foote, for appellant. Attorney General Webb, for the People.

COOPER, P. J. The defendant was found guilty of the crime of robbery, and sentenced to a term of six years in the state prison at Folsom. He prosecutes this appeal from the judgment and the order denying his motion for a new trial.

The first claim made is that the court erred in instructing the jury that: "All persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid or abet in its commission, or, not being present, advise and encourage its commission, are principals in any crime so committed." This instruction was again substantially repeated in a different form; and it is said that the instruction was erroneous and injurious to the defendant, for the reason that section 31 of the Penal Code makes those persons guilty of a crime who "aid and abet in its commission." A person who innocently aids in the commission of a crime would not be guilty; and, if the instruction given was the only one upon the question, and if the evidence showed that the aid given by defendant might reasonably have been consistent with his innocence, the objection would be serious; but upon an examination of the record we find that the court elsewhere instructed the jury that in order to find the defendant guilty the evidence should show "beyond all reasonable doubt and to a moral certainty that the defendant was unlawfully concerned in the commission of the crime as charged in the information," and again, that if the jury find beyond all reasonable doubt that the crime as charged in the information was committed, and "that the defendant was unlawfully concerned in its commission, and that he, the said defendant, acted together with some other person or persons in the commission of said crime, each unlawfully aiding and abet-

ting in its commission in his own way, then I instruct you that it is all the law requires to make the defendant guilty of the crime charged." The court further charged the jury that, unless they believed beyond all reasonable doubt that a crime had been committed as charged in the information, and "that the defendant was unlawfully concerned in its commission, and that he, the said defendant, acted together with some other person or persons in the commission of said crime, each unlawfully aiding and abetting in its commission in his own way, then I instruct you that it is all that the law requires to make the defendant guilty of the crime charged." It therefore appears clear that the jury were instructed and understood that unless the defendant criminally aided in the commission of the offense, they could not find him guilty. This cured the defect in the instruction complained of. *People v. Dole*, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; *People v. Warren*, 130 Cal. 683, 63 Pac. 83. See, also, *People v. Price*, 9 Cal. App. 218, 98 Pac. 547, where it was held that the use of the disjunctive "or" instead of the word "and" could not have misled the jury, and was not injurious to the defendant. Not only this, but there was no evidence even tending to show that the defendant innocently aided in the crime, and therefore the jury could not have misapplied the instruction. *People v. Morine*, 138 Cal. 626, 72 Pac. 166.

The next contention is that the court erred in admitting, "over the objection of defendant," evidence tending to prove a subsequent and distinct robbery. It is sufficient to say that we have examined the record, and find that no objection was made to the evidence. Therefore we decline to discuss the merits of the contention.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

(12 Cal. A. 688)

GAGE v. BILLING. (Civ. 704.)

(Court of Appeal, First District, California. March 4, 1910.)

1. BROKERS (§ 86*)—ACTION FOR SERVICE—EVIDENCE—SUFFICIENCY.

Where, in an action for compensation for services rendered by an attorney in obtaining a proposition to purchase the property from defendant, the client proved that he agreed to pay a reasonable commission on the attorney securing a satisfactory purchaser, and that he failed to secure a purchaser, and the attorney merely testified that the client requested him to place the matter before parties whom he thought would handle the proposition, without denying the testimony of the client, a verdict against the client was contrary to the evidence, for the agreement testified to by the client was reasonable, and established the usual condition to such employment.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

2. PLEADING (§ 327*)—BILL OF PARTICULARS—EFFECT.

A claim set forth in a bill of particulars, though not strictly within the complaint as filed, must be considered as a part of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 994; Dec. Dig. § 327.*]

3. BROKERS (§ 48*)—EMPLOYMENT—COMPENSATION—WHEN EARNED.

A broker employed to procure a purchaser of real estate is not entitled to a commission, where he fails to secure a purchaser, in the absence of an express contract for compensation in case of failure.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 48.*]

4. BROKERS (§ 6*)—EMPLOYMENT—COMPENSATION—WHEN EARNED.

A claim by an attorney for services in obtaining a proposition to purchase from the client certain property is a claim for services as a broker, and not as an attorney, where it appeared that charges were also made for everything in the nature of counsel, advice, and interviews with the client.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 6.*]

5. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSION OF WITNESSES.

The testimony of an attorney that he was employed as an attorney, and not as a broker, was an expression of his opinion merely, and did not conclude the matter, which must be determined by the nature of the services rendered.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2170-2185; Dec. Dig. § 471.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by J. H. Gage against F. W. Billing. From an order denying a new trial after verdict for plaintiff, defendant appeals. Reversed.

Wyckoff & Gardner, for appellant. Emil Pohli, for respondent.

HALL, J. This is an appeal from an order denying defendant's motion for a new trial. It is alleged in the complaint: "That within two years last past the defendant became indebted to one Emil Pohli for and on account of services rendered by said Pohli to said defendant as said defendant's attorney at law, at said defendant's special instance and request, in the sum of \$2,000, the said last-mentioned sum being the reasonable value of said services." Plaintiff sued as assignee of Pohli. Upon demand of defendant plaintiff furnished a bill of particulars, in which he sets out three charges or items. The first item is for counsel and advice in regard to certain matters specified in the item, for which a charge is made of \$500. The second item is for services of said Emil Pohli, said plaintiff's assignor, in obtaining a proposition to purchase from said defendant, or from a corporation to be formed by said defendant, the right to all the lime deposits in and upon the San Vicente ranch, the property of the Santa Cruz Lime Company, for which a charge is made in the sum of \$1,000. The third item is for services in interviews with defendant

and his agents, and other services set forth, for which a charge is made in the sum of \$500. Thereafter defendant filed an answer denying the indebtedness, and denying that Pohli ever rendered any services to defendant as his attorney at law, or any service at all, save under an express agreement, by the terms of which defendant agreed to pay a reasonable sum therefor if Pohli should secure a purchaser satisfactory to the defendant, and at a price and upon terms satisfactory to the said defendant, for certain lands, and that said Pohli attempted to secure such purchaser, but has entirely failed therein, and has not secured such purchaser for such land, or any part thereof. The case was tried before a jury. At the trial Pohli admitted a set-off or counterclaim in the sum of \$750, which defendant had likewise pleaded. The jury returned a verdict for plaintiff in the sum of \$1,750, less the \$750, or a net verdict for \$1,000.

Appellant attacks the verdict as not sustained by the evidence. Upon this point his first contention is that defendant testified explicitly in accordance with his affirmative defense that all the services rendered by Pohli to defendant were rendered under an express agreement that he should receive no compensation unless a sale was effected, and that there is no evidence in the record to the contrary. So far as the evidence in the record relates to the second item in the bill of particulars for which a charge is made of \$1,000, we think that this contention is correct. Mr. Pohli testified in chief to the effect that in the latter part of 1905 defendant consulted him as an attorney in regard to his (defendant's) rights as a minority stockholder in the Santa Cruz Lime Company, which owned the San Vicente ranch, supposed to contain valuable deposits of lime, as well as valuable growths of timber. He also testified as to advice given and consultations regarding defendant's rights, and how they could best be protected and conserved. Among other things Pohli advised defendant that a practical way to deal with the question was to obtain from the controlling stockholder (Mr. Packard) an option, and attempt to take over the property himself; that a holding corporation should be formed. All this testimony was pertinent to the first item in the bill of particulars. In relation to his employment to obtain a purchaser of the property in question the witness, after giving testimony relating to the first item in the bill of particulars, said: "Mr. Billings at one time did claim he was capable of doing the whole business himself, but, being advanced in age, he would rather have some one else do it; he also claimed that he had means to do it himself; he requested me to place the matter before parties whom I thought could handle the proposition." The witness continued to the effect that he succeeded in interesting Mr. Gavin McNab, who

visited the property, but no sale was effected or any terms ever agreed upon. The defendant gave testimony as to the employment of Pohli. Upon this point defendant said: "I finally asked him if he had any chance to sell any property of any kind. He said he had one probable purchaser for the property, which I described to him at the time as good as I could, so we went on, and he wanted to know what commission he was to have, and I told him I would give him a very fair commission if he would make the sale; the property being so large we could not say beforehand what the commission would be, but I would be willing to give him a commission. Pohli agreed to it, and said that that is correct; he would receive no commission unless we get to a sale."

Although Pohli was a witness and in court, and must have known whether or not defendant told the truth, he did not contradict or deny the defendant's testimony, and we find nothing in his testimony given in support of plaintiff's cause of action that necessarily or at all contradicts the testimony of the defendant as to the terms upon which he was employed or requested to find a purchaser for the property. We are not unmindful of the rule that it is not always necessary that a witness be expressly contradicted to raise a conflict; for testimony may be so improbable or contradictory in itself as to justify its disbelief. But no such case as that is presented here. The agreement for a commission or compensation only in the event of a sale is not only reasonable, but it is the usual condition attached to such employment. Indeed, in the ordinary employment of a broker or agent to sell real estate, no compensation is earned unless a purchaser is procured willing to purchase on the seller's terms. Pohli simply testified that: "He requested me to place the matter before parties whom I thought could handle the proposition." He had been advised by defendant's pleading that he relied on an express contract, under which no compensation was to be paid unless a sale was effected, and yet neither before defendant testified to the terms of such agreement, nor afterwards did Pohli take the pains to give testimony on the vital point at issue. In this connection it is significant that Pohli rendered a bill to defendant before the action was brought, and after the services were completed, for a total sum of \$1,000, with a credit for the offset of \$750. The two persons who knew the facts were both in court. One, the defendant, gave specific testimony, not improbable, but entirely reasonable, and showing a contract in accordance with the usual custom in such cases. He was not impeached in any way; was not even cross-examined as to the evidence in question. The other person, Mr. Pohli, did not contradict such witness, and gave no testimony necessarily in conflict with this explicit testimony of the defendant. In such a case the testimony of the witness explicitly testifying to

the particular facts should be taken as true. *Newton v. Pope*, 1 Cow. (N. Y.) 109; *Lacy v. Wilson*, 24 Mich. 479; *Matthews v. Lanier*, 33 Ark. 91.

As to the first item in the bill of particulars, we have already set forth the testimony of Pohli that tends to sustain such item. His testimony shows advice and counsel given as an attorney at law before and independent of any employment to secure a purchaser of the property or any interest therein. So likewise as to the last item of the bill of particulars, the evidence of Pohli shows services of the same nature, and distinct from the charge set forth in the second item of the bill of particulars. But as the valuation placed upon the services set forth in the first and third items amounts to the sum of \$1,000 only, and Pohli admitted the correctness of the offset of \$750, the evidence relating to these items would only support a net verdict of \$250.

Appellant also contends that the evidence does not support the verdict for the reason that the services set forth in the second item of the bill of particulars are not services rendered as an attorney at law, but are the services of a broker, and are neither embraced within the allegations of the complaint, nor is the value thereof recoverable, for the reason that a broker or agent employed to effect a sale or to procure a purchaser is, under the general rules of law, entitled to compensation only when he has procured a purchaser ready and willing to purchase on the employer's terms. The services charged for in the second item of the bill of particulars are not strictly within the allegations of the complaint as filed, but they are clearly set forth in the bill of particulars, which, when filed, must be treated as part of the complaint. *Millet v. Bradbury*, 109 Cal. 172, 41 Pac. 805; *Chapman v. Bent*, 133 Cal. xix, 65 Pac. 959. They were thus brought within the issues presented by the complaint read in connection with the bill of particulars. They were, however, services of a broker to secure a purchaser, and the broker failed to secure such purchaser, and for this reason, in the absence of an express contract for compensation in case of failure, the broker was entitled to no compensation. *Ayres v. Thomas*, 116 Cal. 143, 47 Pac. 1013; *Wylle v. Marine Nat. Bank*, 61 N. Y. 416; *Caston v. Quimby*, 178 Mass. 153, 59 N. E. 653, 52 L. R. A. 785; *Fairchild v. Cunningham*, 84 Minn. 521, 88 N. W. 15. We are aware that it is not always easy to separate the services that an attorney at law may render as such from the services that he may render as a broker, or in some other capacity. But in the case at bar plaintiff himself made such segregation in his bill of particulars. The second item is for "services of said Emil Pohli, said plaintiff's assignor, in obtaining a proposition to purchase from said defendant, or from a corporation to be formed by said defendant,

the right to all the lime deposits in and upon the San Vicente ranch, the property of the Santa Cruz Lime Company." That this item was intended to cover only the mere matter of obtaining as a broker an offer to purchase is made perfectly clear by the charges in the other two items of the bill of particulars, where charges are made for everything in the nature of counsel, advice, interviews with defendant and his agents, the writing of letters, and communications over the telephone with defendant, examining an option, and preparing an acceptance thereof, and the like. It is clear to us that the charge of \$1,000 set forth in the second item of the bill of particulars is for Pohl's services as a broker. And that is so, notwithstanding that he testified that he was not employed as a broker. Such testimony was but his opinion, and does not conclude the matter. Whether or not he acted as a broker must be determined by the nature of the service for which the charge was made. This clearly appears to have been, so far as the \$1,000 charge is concerned, for obtaining an offer to purchase. This was the service of a broker. Plaintiff—that is, Pohl—made a separate and different charge for everything that he did in the matter that might be reasonably classed as the work of an attorney at law as such.

As plaintiff's assignor did not succeed in procuring an offer that was acceptable to defendant, no recovery can be had for the second item of the bill, and for this reason the verdict is not sustained by the evidence.

The instructions that appellant insists should have been given at his request were fully covered by two other instructions given by the court at defendant's request.

The order is reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

(12 Cal. A. 754)

In re TRIBUNE PUB. CO. OF PALO ALTO.
(Civ. 756.)

(Court of Appeal, First District, California.
March 9, 1910.)

NEWSPAPERS (§ 3*)—"NEWSPAPERS OF GENERAL CIRCULATION"—REGULAR INTERVALS.

Under Pol. Code, § 4460, defining a "newspaper of general circulation" as one which shall have been established, printed, and published at regular intervals for at least one year preceding the date of publication, etc., where a newspaper had been published weekly for part of a year and daily for the balance of the year preceding the filing of a petition to have it declared a newspaper of general circulation, it was published at "regular intervals" for one year within the statute, which does not require the interval between the dates of publication to be equal from beginning to end, but only to be regular, and not spasmodic or occasional.

[Ed. Note.—For other cases, see Newspapers, Cent. Dig. §§ 16-19; Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 5, pp. 4791-4794; vol. 8, pp. 7731, 7732.]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Application by the Tribune Publishing Company of Palo Alto, a corporation, to have the Palo Alto Tribune declared a newspaper of general circulation, contested by the California Press Association. From an order overruling a demurrer to the petition, contestant appeals. Affirmed.

McGowan, Squires & Westlake, for appellant. Willard, Swart, Ferrell & McGovern, for respondent.

KERRIGAN, J. This is a proceeding instituted under section 4458 et seq. of the Political Code to have the Palo Alto Tribune declared and adjudged a newspaper of general circulation, and entitled to print public or legal notices.

The only allegation of the petition material in this appeal shows that the said newspaper was printed and published in Palo Alto at regular weekly intervals from March 18, 1906, down to and including October 1, 1908, and that from said last mentioned date down to the commencement of this proceeding it was printed and published in said place at regular daily intervals. Section 4462 of said Code authorizes any one to appear and contest such a petition; and the contestant here, on behalf of the California Press Association (an organization of newspapers of general circulation), interposed a general demurrer to the petition and contested the same on the ground that the Palo Alto Tribune was not a newspaper of general circulation as defined by section 4460 of the Political Code, in that it had not been published for regular intervals for one year. This demurrer was overruled, and upon final hearing the prayer of the petition was granted. Section 4460 defines a newspaper of general circulation as follows: "A newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers, and which shall have been established, printed and published at regular intervals in the state, county, city, city and county, or town where such publication, notice by publication, or official advertising is given or made, for at least one year preceding the date of such publication, notice or advertisement."

The Palo Alto Tribune, as above stated, was published weekly during a part of the period of one year preceding the filing of the petition in the superior court, and daily during the remainder of that period; and the single question presented for determination is: Can it be said under those circumstances that such newspaper was published at regular intervals for one year? It does not appear that the efficiency of a journal would be at all impaired by a change from weekly to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

daily publication. It might perhaps be said, in answer to the claim of the contestant that the publication in this case was irregular, that a newspaper published every day is necessarily published every week, and the argument could be made that a newspaper published weekly for nine months, and thenceforth daily for three months, has been published weekly for a year. But we think it unnecessary to resort to such an argument, for it appears plain to us, bearing in mind the purpose of the act as well as the language of the provision in question, that the publication in this case constitutes a publication at regular intervals for one year. The section does not require the interval between dates of publication to be equal from beginning to end, but it must be regular; that is, not spasmodic or occasional.

The judgment appealed from is affirmed.

We concur: COOPER, P. J.; HALL, J.

(12 Cal. A. 694)

O'CONNELL v. WALKER et al. (Civ. 566.)

(Court of Appeal, Third District, California.
March 5, 1910.)

ATTACHMENT (§ 115*) — AFFIDAVIT — ALTERNATIVE FORM—SUFFICIENCY.

Under Code Civ. Proc. § 538, providing that the affidavit for attachment, where the claim arises upon a contract, must contain the statement that payment has not been secured, or if originally so secured that the security has become valueless, an affidavit alleging that payment of the debt has not been secured, "or" if originally so secured that such security has without any act of plaintiff become valueless, was insufficient to authorize the writ of attachment as the use of the word "or" does not state either alternative with certainty.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 315-322; Dec. Dig. § 115.*]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Action by Kate A. O'Connell, administratrix of the estate of George P. O'Connell, deceased, against David F. Walker and others in which a writ of attachment was issued against the property of Walter J. Bartnett. From an order refusing to discharge the writ, Bartnett appeals. Reversed, with directions.

Gray & Cooper, for appellant. Daniel O'Connell, for respondent.

HART, J. The court below declined to grant the motion of the appellant to discharge the writ of attachment issued in this action, and this appeal is from the order denying said motion.

The defendants were the directors of the California Safe Deposit & Trust Company for several years prior to and at the time that said company was declared to be insolvent by the state bank commissioners in

the month of December, 1907, and at the time said corporation was adjudged insolvent and a receiver thereof appointed, on the 18th day of January, 1908, by the superior court in and for the city and county of San Francisco. This action is against said corporation and the directors thereof. The complaint alleges that the plaintiff, as administratrix, etc., in the year 1907 deposited with the savings department of said company the sum of \$1,774, which it agreed to pay to her on demand, and "although she has demanded said money from said company, no part thereof has ever been paid to her, and the whole of said sum with interest thereon is still due and owing to this plaintiff." It is further alleged that during the incumbency in office of the defendants, other than the corporation, as directors of the latter, the moneys and funds of said corporation were loaned on inadequate security; that they were directly or indirectly borrowed by the directors and officers of said corporation; that the officers of the corporation overdrew their accounts; that dividends were made and paid from other than the surplus profits arising from the business of said corporation; and, in divers other ways, specifically alleged, it is declared that the funds of the corporation were wrongfully diverted and converted by said directors and officers. Subsequently to the filing of the complaint, there was filed on behalf of plaintiff an affidavit on attachment, upon which a writ of attachment was issued and executed against the property of the defendant and appellant, W. J. Bartnett.

The individual liability of the directors for the claim of the plaintiff is founded on the provisions of section 3 of article 12 of the state Constitution. That section provides that "the directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation, or joint-stock association, during the term of office of such director or trustee." It is claimed, however, among other contentions against the legality of the order from which this appeal is prosecuted, that the affidavit upon which the writ of attachment was issued is fatally defective in that it does not properly adhere to the requirements of the statute prescribing the conditions upon which, only, a writ may be issued, and that said writ was therefore irregularly issued.

Among other prerequisites which are required by the statute to be observed before a writ of attachment is authorized to be issued is that the affidavit upon which such writ may alone be issued, where the claim declared upon arises out of a contract, express or implied, for the direct payment of money, must contain the following state-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ment: "That the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless." Code Civ. Proc. § 538.

The allegation in the affidavit upon the subject of nonsecurity, etc., literally follows the language of the statute and reads as follows: "And the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless." The specific complaint against the validity of the affidavit as the foundation for the issuance of the writ lies in the alternative form in which it is therein declared that the claim sued on is not secured by a lien of any character. Under the decisions in this state, the point appears to be well taken. The respondent has filed no brief on this appeal, and therefore the point suggested is not combatted here.

In *Wilke v. Cohn*, 54 Cal. 212, an affidavit for a writ of attachment contained, as here, an allegation as to nonexistence of security for the claim which was the basis of the action in the alternative form, and the court, holding said affidavit to be insufficient and the attachment irregularly issued, says: "It would be proper to follow the language of the statute, in saying that payment had not been secured by any mortgage or lien upon real or personal property, because it includes two or more phases of the same fact, attended with the same results, namely, that no security had ever been given; but, to use the above language, and then say, 'or, if originally so secured, such security has become valueless', is not to state either with certainty. It does not say that no security was ever given; neither does it say that security was given, but that the same has become valueless." To the same effect is the case of *Winters v. Pearson*, 72 Cal. 553, 14 Pac. 304.

Our attention has been directed to no subsequent decision of the Supreme Court overruling the cited cases, and we assume that if the rule as therein stated had since been receded from counsel for the respondent would have called our attention thereto. As stated, under these decisions the affidavit was insufficient to authorize the issuance of the writ of attachment, and the motion to dissolve the writ should have been granted.

Some other points were made against the regularity of the issuance of the writ, but the first point suggested being decisive of the case, said points need not be noticed.

The order is reversed, with directions to

the court below to discharge the writ of attachment.

We concur: CHIPMAN, P. J.; BURNETT, J.

(12 Cal. A. 707)

In re CAMPBELL'S ESTATE. (Civ. 698.)
(Court of Appeal, Third District, California.
March 7, 1910. Rehearing Denied April
4, 1910; Denied by Supreme Court
May 6, 1910.)

1. APPEAL AND ERROR (§ 171*)—REVIEW—OBJECTION IN LOWER COURT.

Where there was no demurrer to the petition, and no objection in the lower court to any testimony as not within the issues presented by the petition and answer, and the case was tried on the theory that all material issues were properly presented, neither party on appeal may for the first time contend that there was no issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1069, 1161-1165; Dec. Dig. § 171.*]

2. BASTARDS (§ 3*)—PRESUMPTION OF LEGITIMACY.

Where there is a marriage in legal contemplation, the legitimacy of the wife's children born while it is in force is presumed, under Civ. Code, § 193, providing that all children born in wedlock are presumed to be legitimate, and such legitimacy may not be disputed, excepting by the husband or wife, or the descendants of one or both of them under the express provisions of section 195.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.*]

3. SLAVES (§ 14*)—PROPERTY—INHERITANCE FROM FATHER—"MARRIAGE."

Under the statutory definition of marriage in Missouri as a civil contract to which the consent of parties capable in law of contracting is essential, there could be no marriage in legal contemplation between slaves in that state, who had no capacity to contract; and hence, where a man and woman, slaves, "took up with each other" in Missouri, with their mistress' consent, according to the custom of slaves, the relation being merely temporary and subject to termination at any time, either by their own act or that of their mistress, there was no such marriage as would permit their children to inherit from their father.

[Ed. Note.—For other cases, see Slaves, Dec. Dig. § 14.*]

4. MARRIAGE (§ 40*)—PRESUMPTION—REBUTAL.

If there was a presumption of marriage from their cohabitation and repute, it was removed where it appeared that the man left Missouri, and afterwards was legally married to another woman in California during the lifetime of the woman with whom he previously lived.

[Ed. Note.—For other cases, see Marriage, Dec. Dig. § 40.*]

5. EVIDENCE (§ 35*)—JUDICIAL NOTICE—LAWS OF ANOTHER STATE.

The statute of another state must be proved like any other fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 51; Dec. Dig. § 35.*]

Appeal from Superior Court, Yolo County;
E. E. Gaddis, Judge.

Proceedings for settlement of the estate of Basil Campbell. Petition by G. Wyatt

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Wheeler and another for partial distribution. From an order denying the petition, petitioners appeal. Affirmed.

See 108 Pac. 676.

W. A. Gett and A. C. Huston, for appellants. Geo. Clark, W. A. Anderson, and A. G. Bailey, for respondent.

CHIPMAN, P. J. G. Wyatt Wheeler and John W. Wheeler filed their petition for a partial distribution of the above-entitled estate, claiming to be sons of Basil Campbell, deceased, by his wife, Mary Stephens, alleging that "the only other heir of said deceased is his surviving wife, Mary Jane Campbell" it is also alleged that the last will of deceased has been lately admitted to probate, and the said Mary Jane Campbell duly appointed executrix thereof. The petition was opposed by the executrix in her official capacity and by her individually, and by Leonora Williams, devisee and legatee under said will, denying the averments of the petition. The court found "that the said G. Wyatt Wheeler is not, nor is the said John W. Wheeler, the offspring or child of any marriage whatever between the person known as Mary Campbell, also known as Mary Stephens; that the said G. Wyatt Wheeler is not, nor is the said John W. Wheeler, a son or heir at law of the said Basil Campbell, deceased; that neither of said petitioners is entitled to succeed to any part of the estate of said deceased." The petition was denied by the court, and petitioners appeal from this order. The findings are challenged as unsupported by the evidence.

The will was not admitted in evidence, and respondent makes the preliminary point that the record does not show that petitioners are provided for in, or that they are omitted from, the will of Basil Campbell, deceased, "and this sufficiently justifies the finding that they are not entitled to share in the estate of deceased, and this one finding, not overthrown, is all the support the order appealed from needs." The point is apparently an attack upon the sufficiency of the petition. There was no demurrer to it, and no objection made to any of the testimony as not within the issues presented by the petition and answer. The cause was tried upon the theory that all the material issues were properly presented, with no objection from either party. The court will not allow either party now for the first time to say that there was no issue. *Carroll v. Briggs*, 138 Cal. 452, 454, 71 Pac. 501.

Petitioners claim that they are the sons of deceased, Basil Campbell, born to Mary Stephens while his wife. Contestants dispute the marriage, and also dispute the alleged parentage of the petitioners on the father's side. The controversy harks back to a period more than three score years ago, and is an echo of the old slave days. It seems to us that the questions presented relate to the principles of law as establish-

ed and applied to a condition of facts peculiar to the system of slavery, rather than to any controversy as to what the facts are. These principles, as we conceive them to have been settled, must control the case, and in them, we think, the judgment of the learned trial court finds support, although it be admitted that the principal facts, adduced by petitioners, are deemed to be true. We will state enough of the evidence to show the facts from which we are to determine whether or not, in legal contemplation, the relation of marriage ever existed between Basil Campbell and Mary Stephens.

Basil Campbell was born a slave about the year 1830, and belonged to Catherine Stephens, at Bunceton, Cooper county, Mo.; she purchased him, when he was a boy from the Campbell estate, and he was thereafter known as Basil or Bas Stephens; Mary Stephens was also a slave and belonged to Catherine Stephens; her age is not very satisfactorily shown, but it appeared that she was probably 20 or 25 years older than Basil. From the deposition of William Wheeler, a witness for petitioners, it appeared that he was 78 years old in 1903, which would make him about the same age as Basil; he was a "superannuated Methodist preacher." He testified: "Mary Stephens was my mother; she was a slave and went by the name of the people she belonged to; my father's name was Abraham Wheeler; Mary belonged to Catherine Stephens, and Abraham Wheeler belonged to Ben Wheeler. * * * My father was Mary's first husband; have no knowledge where they were married. * * * I think my father died in 1880; my mother was married twice; I think my mother had six or seven children; my mother's eldest child was Lewis; he lived in Cooper county and belonged to the same people I did; next child was Andy, and then Walsh; I don't know who was the father of Andy, Lewis, or Walsh; I think they were by different fathers; my mother lived with Catherine Stephens, and my father lived with Ben Wheeler until he was sold; the Wheeler place is distant 2½ miles from the Stephens place." (It appeared that Abraham was sold to Judge Usher of Sheridan county, Mo.) Other witnesses speak of Mary's marriage to Abraham; which latter was probably what is known as a "slave marriage." The date of the alleged marriage of Basil to Mary is not fixed definitely, but from all the evidence it would appear to have taken place when he was about 18 years old and when Mary was probably 40. One witness for petitioners, an old colored woman, Violet Glasgow, living near Bunceton, declared that "Bas and Mary were married right here below the mill by Uncle Rev. Bas Levins, a Baptist minister." On cross-examination she testified: "I wasn't present when Bas and Mary were married; my father and mother were there; I know they were married down there where I told you; I could not tell you when they were

married; it is so long ago; they told me they were married. * * * My father and mother told me that Basil and Mary were married, and I knew when they went to the wedding; I couldn't go; had to attend to the children, but I got some of the wedding cake and sweet potatoes; the Rev. Bas Levins was an old man; a colored man." No witness, other than Violet Glasgow, referred to any ceremony connected with the marriage of Bas and Mary, and the testimony of this witness generally, in other particulars, indicates that her memory was poor, and her statements not to be explicitly relied upon. Other witnesses who testified that Bas and Mary were married, witnesses familiar with the Stephens household and in a position to know the facts, testified that "they took up with each other," according to the custom among slaves, lived together and cohabited and had children, and were generally reputed to be man and wife, and on these facts they predicated their marriage.

Mr. W. H. Stephens, a resident of Bunceton, a witness for petitioners, deposed: That he knew Bas and Mary and the two boys, John and Wyatt. "I only knew of the relationship of these four negroes from what I have heard the black and white people of the neighborhood say, and Bas and Mary were considered by all of them as husband and wife in the way of the time. * * * Was there frequently between the time of the birth of John and Wyatt and the time Bas went to California in 1854; they all lived at Grandmother Stephens' place; Mary took Bas' leaving quite hard." He was asked if Bas and Mary were husband and wife according to custom, and answered: "Well, it was regarded as near as any couple; some of them had a big wedding, and some had a very private wedding, and some had none. Some had no wedding. These three were common. This didn't belong to the big class, or I would have heard about it." On cross-examination he was asked the custom among the slaves, and answered: "Some had big weddings, some private, some none—just took up with each other—so it was agreeable to the white folks, there was no objection; Bas and Mary just took up with each other, so far as I know." T. B. Stephens, a witness for petitioners, son of Catherine Stephens, 75 years old, residing near Bunceton, deposed: That he knew John and Wyatt Stephens and their mother, Mary. "Q. Who was the father? A. I could not say who their father was. Q. Who was their reputed father? A. Bas Campbell. Q. Did Bas and Mary live together on the place of your mother? A. Yes, they were together on the place. Q. What was the common understanding as to whether or not they were living together as man and wife? A. Well, that was the general understanding. Q. Your mother was living there on the place at the time? A. Yes. Q. Was this relationship

known to her? A. Yes, I suppose it was. * * * Mary had five children before John and Wyatt were born; before Bas came to the place cannot say Mary was ever married; a man visited her named Wheeler, who she claimed to be her husband; * * * It was supposed that Bas and Mary were cohabiting all the time; * * * was not present when Bas and Mary were married; never heard of any ceremony; so far as I know Bas and Mary were simply living together on Mary's place, and Mary had two children during the time, and Bas reputed to be their father; after Bas left in 1854, Mary never took up with any other man that I know of. * * * I think they slept together by the approval of my mother."

Thomas S. Stephens, residing at Bunceton, 74 years old, who describes himself as a "retired capitalist," was a witness for petitioners. He deposed: "Was acquainted with Basil Campbell; I reckon I knew him when I knew anybody; knew him right here at my mother's home. * * * I went to California in 1853. Bas went to California in 1854; he went with John D. Stephens in taking cattle across; Basil was then a married man; his wife was called Mary Stephens (after her owner); she was known as Big Mary; Bas was married a long time before he left for California; he had two children named John W. Wheeler and Wyatt." He testified to having herded cattle with Bas near Knights Landing. "No one else was with us; during that time Basil talked with me about himself and his family in Missouri; * * * he said he wanted to make money enough to buy them and take them out there; * * * I knew Basil before 1844; I knew him before his marriage to Big Mary; * * * I suppose the marriage that occurred between Basil and Big Mary was recognized by Catherine Stephens; that was the custom of the country; I reckon they were married, for the Stephenses did not allow them to live together until they were married." He described the houses where the negroes slept and the room that Bas and Mary lived in. "The custom was that if one of a married couple went clean out of the country, they had a legal right to marry again; the custom was if a nigger was sold down south to go to the cotton fields, and left his wife here, of course she had the right to marry again, and he could get a wife down there; but we never looked on Bas as leaving his wife to marry anybody else, because he was speaking about coming back here and taking her and his boys back; * * * unless a man was sent entirely out of the country, a marriage was supposed to continue between slaves; I can't tell you whether Mary was divorced or separated from Wheeler; there was no law from 1840 to the Civil War, by which slaves were divorced. * * * Wheeler was sold out of the neighborhood; he was sold to a

party living 40 or 50 miles away; don't know whether he got a divorce; niggers didn't get divorces; he never came back."

Jos Stephens, a witness for contestants, 72 years old, who came to California in 1854, and has lived here ever since, testified: "I have known Basil Campbell ever since I have known anybody. I knew Basil Campbell back in Missouri ever since I have known anybody. * * * I knew Big Mary. She had five or six or seven children when Bas came to California. Never while in Missouri did I hear any talk among any people in the neighborhood that Basil and Big Mary were married."

J. S. Tutt, a witness at the trial for contestants, 82 years old, formerly living near Bunceton, testified that he knew Bas and Mary there. He was asked what he knew as to whether Bas was a single or married man, and answered: "He was considered a single man, as far as I know." He testified that slave marriages were with the consent of the owners; that he knew nothing of Bas' marriage; "just my impression; I never heard of it." He was asked to explain "how a slave marriage would take place, or how one negro would get the privilege of being or staying with another." He answered: "Well, I don't know whether I can explain it exactly, Mr. Clark. In some instances they had their favorite girl or waiting maid that waited on the girls, and they generally gave them a pretty elaborate wedding, you know, and ceremony and dancing; but as a rule, you know, the other class—field hands—what we called 'outsiders,' why if a man had a notion that he wanted to live with a woman as his wife, he would go to the master and ask his permission, and if he got it, that was all there was to it." He testified that it was the right of the master to separate the slaves after they were married and allow them to have intercourse with other slaves. He testified: "My conception of a slave marriage in those days was that it was almost a marriage of convenience than anything else. It was a certain custom, too, but the man generally had the privilege, and exercised it a great deal, to quit whenever he felt like it." He testified that such intercourse as he had mentioned "was considered a slave marriage in the neighborhood," agreeable to custom there at that time. He also testified that, "in order for a negro man to cohabit with a negro woman, it was necessary to get the consent of the master," and that was considered a slave marriage "good in point of custom as long as it lasted." One or two other witnesses, who had known Bas and Mary in Missouri, testified that Bas' reputation was that of a single man.

It is undisputed that Basil came to California in 1854; that he never thereafter had any communication by letter or otherwise, with Mary; that in 1861 she went to

Texas and died there about 1887; that Basil was formally married in California to Rebecca Dolton in 1866, and, after her death, he married Mary Jane Campbell in 1893. It appeared without conflict that Mary's first slave marriage was with Abraham Wheeler, who was alive when Basil "took up" with Mary, and did not die until 1880, and was never divorced from her. There was evidence that Basil visited his old home in Missouri, in 1876, and then met John W. Wheeler, and that he, at that time, spoke of both John and Wyatt as his sons. It did not appear that he made any reference to Mary as his wife, who, with Wyatt, was then living in Texas. He was then married to Rebecca Dolton, and had been for 10 years. In 1894 John wrote Basil a letter in which, among other things, he said: "I wrote you several letters since you was out here in 1876 and you didn't seem to recognize me as your son tho I always feel interested in you because I was always taught so by mother and all the white ones of the family." Basil made no reply, nor had John W. heard from him after his visit in 1876. John was never in California.

Section 1387 of the Civil Code provides that: "The issue of all marriages null in law, or dissolved by divorce, are legitimate." The section also declares that: "Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child." No claim is here made that any such acknowledgment occurred. Nor is there any claim that Basil made such acknowledgment as is mentioned in section 230 of the Civil Code, as that section is interpreted in *Estate of De Laveaga*, 142 Cal. 158, 75 Pac. 790. Subdivision 5 of section 1962, Code Civ. Proc., provides that: "The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." But this latter section presupposes a marriage. The only claim to the legitimacy of petitioners, therefore, having any standing in the case must rest upon sufficient evidence that there was a marriage between Basil and Mary, and such acknowledgment by Basil of his paternity of petitioners as appears in the evidence must be viewed only as bearing upon the question of his marriage to Mary, and not as in any sense tending to establish legitimacy by acknowledgment. The crux of the case is: Was there a marriage between Basil and Mary? If there was, in legal contemplation, a marriage, the presumption of legitimacy of their children follows (Civ. Code, § 193); and legitimacy of a child may be disputed "only by the husband or wife, or the descendants of both." Civ. Code, § 195.

In the case of *U. S. v. Roach, Ex.* (decided in 1875) 92 U. S. 27, 23 L. Ed., bottom of p. 597, the action was against the United States to recover the value of certain cotton seized

in 1863. The claimant, Hall, was a slave owned by Benjamin Roach, who filed an interpleader. Subsequently Roach died, and his executrix was made a party. Hall claimed under a contract of purchase from his master. The court said: "In order to see the proposition in its true light, it is necessary, as it were, to roll back the tide of time, and to imagine ourselves in the presence of the circumstances by which the parties were surrounded when and where the contract is said to have been made. * * * The case must be determined as if slavery had not been abolished in Mississippi, and the laws referred to were still in force there. The destruction of the institution can have no effect upon the prior rights in question." Holding against Hall's contention, the court said: "It was an inflexible rule of the law of African slavery, wherever it existed, that the slave was incapable of entering into any contract, not excepting the contract of marriage"—citing cases. "This regulation was harsher than that which obtained in regard to the Roman bondman, the Saxon villein, Russian serf, the German and Polish slave"—citing Cobb on Slavery, § 266. We derive but little aid from an examination of the decisions defining what may constitute a legal marriage generally between free men and free women capable of contracting. The statutory definition of marriage in the state of Missouri, as in our own state, precludes the possibility of a marriage between slaves. "Marriage is considered in law as a civil contract, to which the consent of parties capable in law of contracting is essential." In *State v. Bittick*, 103 Mo. 183, 15 S. W. 325, 11 L. R. A. 587, 23 Am. St. Rep. 869, the above is given as the statutory definition of marriage in that state. It is the same here. Civ. Code, § 55. In that case it was held, notwithstanding the statutes regulating the marriage ceremony, requiring license, etc., that a marriage according to the common law was valid. Speaking of the contract, the court said: "While it is here declared to be a civil contract, it is almost universally held to be something more than an ordinary contract. Marriage is a status, created by contract, and we formulate the definition of it as follows: Marriage is the civil status of one man and one woman capable of contracting united by contract and mutual consent for life, for the discharge, to each other and to the community, of the duties legally incumbent on those whose association is founded on the distinction of the sex. The contract of marriage in this case comes up to every requirement of this definition. It created the relation of husband and wife between defendant and Bertha, so long as they both should live. In form, then, the contract was good, and constituted a valid marriage at common law. 1 Bish. Mar. & Div. §§ 2, 3. This relation between them is indissoluble, except by death or a decree of court." The court reached its conclusion

with some reluctance, but mainly because there were no words in the act declaring marriage not in conformity to the statute null and void. In *Kilburn v. Kilburn*, 89 Cal. 50, 26 Pac. 637 (26 Am. St. Rep. 447), marriage was defined as a contract "according to the form prescribed by the laws by which a man and woman capable of entering into such a contract mutually engage with each other to live their whole lives together in the state of union which ought to exist between a husband and his wife." Said the Supreme Court of the United States, in *Maynard v. Hill*, 125 U. S. 211, 8 Sup. Ct. 730, 31 L. Ed. 659: "It is a relation for life and the parties cannot terminate it at any shorter period by virtue of any contract they may make."

We might cite a multitude of cases to like effect. Mr. Schouler expresses the rule as universally held to be sound: "The word 'marriage' signifies, in the first instance, that act by which a man and woman unite for life, with the intent to discharge towards society and one another those duties which result from the relation of husband and wife." Schouler on Dom. Rel. § 12. The relation here shown, between Basil and Mary, falls far short of measuring up to the requirements indispensable to a marriage. A relation which neither party has the capacity to create, and which either party could terminate at will, or which could be terminated by their master, is not a marriage relation, and it is mockery to speak of it as such. Nevertheless, there was a universal custom of marriage among slaves, as among white people, "but this custom was a thing separate and distinct from the law which governed the marriages of the free." 1 Bish. on Mar. & Div. § 654 (New Commentaries).

The case of *Johnson v. Johnson*, 45 Mo. 595 (decided in 1870), is cited by appellants. The action was for divorce by the wife. Both parties were negroes. Defendant was formerly a slave in Virginia, and whilst he lived there he married a negress, also a slave, by whom he had three children. His wife and children were sold to some person in Texas, and his master took him to Mexico, from whence he was brought to St. Louis, Mo. Later, in the year 1849, he married the plaintiff, then a free woman of color, and a year later he was emancipated by his master. Thereafter he continued to live and cohabit with plaintiff as his wife for about 13 years, when she left him, and commenced this proceeding for a divorce. It was pointed out in the opinion that by common consent, and universal usage existing among slaves, they were permitted to select their husbands and wives, and were known and recognized as husband and wife by their masters and the community in which they lived; "but whatever moral force there may have been in such connections, it is evident there was nothing binding or obligatory in law." *Howard v. Howard*, 51 N. C. 235, is cited, where it was said.

"Marriage is based upon contract; consequently the relation of man and wife cannot exist among slaves. It is excluded both on account of their incapacity to contract, and by the paramount right of ownership in them as property." So also it was said, as is further pointed out: "The duties and rights which are deemed essential to this contract are necessarily incompatible with the nature of slavery, as the one cannot be discharged, nor the other recognized, without doing violence to the rights of the owner. In other words, the subject of the contract must cease to be slaves before the incidents inseparable to the relation of marriage, in its proper sense, can attach." The court then, in the principal case, takes up the question whether slaves in a state of slavery could contract a marriage so as to be binding upon them after their emancipation. It was shown that the common law was changed in that state with reference to marriage, and the subject placed under municipal regulation. "But the authority of law was exclusively applicable to free persons, and did not reach those persons who were in a state of slavery when the marriage was contracted." In this view the court reverted to the common law and its analogous principles in the case before it. Said the court: "Though the slave could make no civil contract, and his marriage was absolutely void in legal contemplation, yet it is apparent there was the moral assent of the mind." Instancing the marriage of infants, and of insane persons, afterward held good when ratified or consummated, upon the removal of the disability, the court held that cohabitation and recognition of the relation after emancipation was an assent to and confirmation of the contract. The court said: "If, after the emancipation, there was no confirmation, by cohabitation or otherwise, it would be obvious there would be no grounds for holding the marriage as subsisting or binding." The court further said: "As the appellant, when he was emancipated, continued to live and cohabit with respondent, and constantly acknowledged her as his wife, the marriage should be recognized, and be deemed valid and binding. That in his earlier days he was previously married can make no difference. His first marriage in his then state of servitude had no legal existence; he was at liberty to repudiate it at pleasure; and by his continuing to live with respondent and acknowledging her as his lawful wife after he had obtained his civil rights, he disaffirmed his first marriage and ratified the second." This case seems to hold that had there been no subsequent ratification the court would have been forced to hold that there was no marriage.

The case of *Lee v. Lee*, 161 Mo. 52, 61 S. W. 630, is also cited by appellant. In that case, however, the legality of the slave marriage was not before the court; the question being as to the right of their children to inherit under the Revised Statutes of 1899. In

the case of *Roche v. Washington*, 19 Ind. 53, 81 Am. Dec. 376, the controversy arose out of the relation of a white man and an Indian woman. The stipulated facts showed a marriage according to Indian custom, consummated by living and cohabiting together as husband and wife. Among other contentions it was urged that the marriage must be recognized under the law of nations; the Indian tribes being treated as states. Said the court: "What, then, constitutes the thing called a marriage? What is it in the eye of the *jus gentium*? It is the union of one man and one woman, 'so long as they shall both live,' to the exclusion of all others, by an obligation which, during that time, the parties cannot, of their own volition and act, dissolve, but which can be dissolved only by authority of the state. Nothing short of this is marriage. And nothing short of this is meant when it is said that marriages, valid where made, will be upheld in other states"—citing *Story's Conflict of L. c. 5*; *Wheaton's L. of N. 137*; *Reynolds v. Reynolds*, 3 Allen (Mass.) 605. In *Estate of Hazzard*, 13 Phila. (Pa.) 335, it was held, where a marriage had taken place between testator and wife, who were slaves in Virginia, at a time when such marriages were permitted, but not recognized as a valid contract by that state, that the children of testator born in slavery were illegitimate, and must be so considered in Pennsylvania; that they could not have inherited from each other. The court said that, the marriage not being recognized by the law of Virginia, "we are bound to respect that law, however repugnant to the present condition of society or the law, either of Virginia or our own state."

In volume 1, c. 21 (section 646 et seq.) Mr. Bishop considers: (1) Slave marriages; (2) the effect of emancipation on these marriages; (3) the status and rights of the children. He points out that there were two, if not three, reasons for the legal doctrine which denies validity to slave marriages: First, that slaves had in law no such freedom of will as is required to pass the matrimonial consent; secondly, that the duties of the husband and wife are incompatible with the duty which the slave owes to his master; third, sometimes urged, that the slave's acquisitions accrued to the latter. The author expresses some doubt as to the sufficiency of the first and third reasons, although the cases seem to be against him; but, as to the second, he says: "That the duties of husband and wife are incompatible with those of a slave is a proposition evidently sound in law, and upon it the doctrine which denies to slaves the power of matrimony may well rest." He then deduces the doctrine that since for reasons stated these customary slave marriages were valid as far as in the nature of the case they could be, "they are deemed to have been, not null in the widest sense of the word, but only null as compared with ordinary marriages, and were good in law for any purpose for

which they could so be held, not inconsistent with the master's superior claims or the general policy of slavery. This rule would seldom permit validity to be assigned them in everyday litigation of the courts; hence judges would naturally speak of them as void." It is difficult to perceive any purpose for which the marriage was held good, except to distinguish the relation from that of fornication. When we consider the incompatibility of the duties of common marriage with those due from the slave to the master and the inconsistency of a true marriage relation with the master's superior claims, as well as the general policy of slavery, there remains no essential element that could give any sort of validity to such a union. It was tolerated concubinage, but not matrimonial cohabitation. What are some of the duties and reciprocal rights arising out of the sacred relation of husband and wife? Marriage necessarily supposes a home and mutual cohabitation; each has the right to the society of the other; and obligation rests upon both to live together—to adhere to each other so long as they shall live—the husband has the right to fix the domicile, and the wife's domicile merges in that of the husband, and wherever he goes she is bound to go; each spouse is entitled to the society and affection of the other, and the husband may recover damages from any person who would withhold her from him, and may sue for damages all persons who seek to entice her away; the husband is bound to support his wife, and she may not leave him so long as she is comfortably provided for. Then there are the wife's obligation to render family services; the right of the father to the custody of the children. Schouler's Dom. Rel. § 34 et seq. These and others that might be mentioned are recognized rights, duties, and responsibilities attending marriages among all civilized people, and yet not one of them attaches, as of right, to these so-called slave marriages.

Mr. Story, in his work upon the Conflict of Laws (8th Ed.) § 113, says: "The general principle certainly is, as we have seen, that between persons *sui juris*, marriage is to be decided by the law of the place where it is celebrated. Note, sections 80, 81. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is invalid everywhere." This rule was quoted approvingly in *Pearson v. Pearson*, 51 Cal. 120; *State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 683; *Estate of Hazzard*, supra. Mr. Bishop says: "It is necessary that there should be one universal rule whereby to determine whether parties are to be regarded as married or not, and that the only practicable rule is to refer this question to the law of the country wherein they exchange the mutual consent to be husband and wife." Our Civil Code (section 1646) lays down the rule: "A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indi-

cate a place of performance, according to the law or usage of the place where it is made."

Without prolonging a discussion, the present length of which is justified only by the importance of the questions and the apparent sincerity, zeal, and earnestness of appellants' counsel in urging their contentions, we find no great difficulty in reaching the conclusion that no marriage was proven ever to have taken place between Basil Campbell and Mary Stephens. When Basil and Mary "took up with each other," having their mistress' consent, they knew that the relation was but temporary; that they had no power to perpetuate it; that they could be permanently separated any moment, either by their own act or that of their mistress; that Mary had a slave husband then living, two or three of whose children were in the family. Basil left Missouri, not to return, in 1854, and though he may have then had in mind the thought of bringing Mary and the children to him some day, he took no steps to that end—he married in this state in 1866, while Mary was living; ceased all communication with Mary in 1854, who not long thereafter went to Texas and there died; he never communicated with her in any way after leaving Missouri, and indicated by his marriage here a renunciation of any relation with her—in short, the entire conduct of both parties is consistent with their acceptance of the fact that their former relation was not that of husband and wife. If it be insisted that a presumption of marriage arose from cohabitation and repute, this presumption is removed by proof of Basil's formal and lawful marriage in this state. *Case v. Case*, 17 Cal. 598. It was held in *Jones v. Jones*, 48 Md. 391, 30 Am. Rep. 466: The presumption of a marriage between A. and B., founded simply upon habit and repute, is overcome by proof of a subsequent actual marriage between A. and C. during the lifetime of B.

We do not find it necessary to dwell upon the effect which emancipation had upon these so-called slave marriages. Mr. Bishop states the doctrine as now settled: "That though during slavery the slave marriage is substantially void in law, if after emancipation the parties continue to cohabit matrimonially, it is thereby made good." And so, it was held in *Johnson v. Johnson*, supra, where a slave had two wives, and after emancipation he continued to live with the second one, and acknowledged her as his lawful wife, he not only ratified the second slave marriage, but disaffirmed the first.

It is said that a statute passed by the Missouri Legislature in 1865 validated the marriage and legitimized the children. But no such statute is in evidence. The laws of another state must be proved like any other fact. *Estate of Harrington*, 140 Cal. 244, 73 Pac. 1000, 98 Am. St. Rep. 51; *Estate of Richards*, 133 Cal. 524, 65 Pac. 1034.

As already pointed out in the earlier part

of this opinion, the legitimacy and right of appellants to inherit depend upon a marriage being proven; and, as we conclude that there was no marriage shown, the finding of the court is sustained.

The finding that neither of the petitioners is a son of deceased is immaterial for, in view of the other findings, neither of them is entitled to inherit, although both may be sons of deceased.

The order is affirmed.

We concur: BURNETT, J.; HART, J.

(12 Cal. A. 707)

In re CAMPBELL'S ESTATE. (Sac. 1,776.)
(Supreme Court of California. May 7, 1910.)

In Bank. On rehearing. Denied.

For opinion of the District Court of Appeal, see 108 Pac. 669.

PER CURIAM. Rehearing denied, no formal action having been taken thereon.

SHAW, J. I dissent from the denial of the application to vacate the judgment of the District Court of Appeal in this cause. I do not think that the decisions holding that a marriage contracted in good faith between slaves is not a marriage at all should be followed. And if it were conceded that such a marriage is technically null on the ground that the parties were slaves without capacity to contract, under the decisions of the courts of the slave states made during the existence of that condition, nevertheless the children born of such a marriage should be considered as legitimate under our statute. Section 1887 of the Civil Code declares that "The issue of all marriages null in law, or dissolved by divorce, are legitimate." There being no evidence in the record as to the law of Missouri where the marriage of the deceased with the mother of the petitioners took place, and where they were born of that marriage, it is to be assumed that the law of that state is the same as our own. If ever there was a law which should be broadly and liberally construed, it must be admitted that this law is of that class, when applied to a marriage which, in all respects except the capacity to enter into it, was as formally solemnized and as faithfully observed as that of free persons. I can conceive of no sound reason for refusing to apply this statute to the children of a marriage which is null only because the man and woman who entered into the relation were slaves. The question is of little future importance, but I cannot allow a doctrine which I deem so repugnant to humanity to receive even the silent sanction of acquiescence without a protest. I think it proper to add that the denial of a rehearing in this court does not necessarily mean an approval of the opinion of the district court. People v. Davis, 147 Cal. 350, 81 Pac. 718.

(157 Cal. 573)

NATIONAL BANK OF THE PACIFIC v. WESTERN PAC. RY. CO. (S. F. 5,323.)

(Supreme Court of California. April 7, 1910.
Rehearing Denied May 7, 1910.)

1. ATTACHMENT (§ 178*)—LIEN ACQUIRED.

The general rule is that a creditor who attaches property for his debt obtains a lien only on the title or interest the debtor has in the property at the time of the levy, and, if at that time all title and interest has passed from the debtor to a third person, the attaching creditor gets nothing by the levy.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 528-534; Dec. Dig. § 178.*]

2. ATTACHMENT (§ 180*)—CORPORATE STOCK—LIEN—PRIOR UNREGISTERED TRANSFER.

A holder for value of corporate stock by a previous unregistered transfer in good faith prevails against an attaching creditor or execution purchaser with notice of the transfer.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 571; Dec. Dig. § 180.*]

3. ATTACHMENT (§ 180*)—TRANSFER OF SHARES—"PERSONAL PROPERTY"—CORPORATE STOCK—LIEN.

Under Civ. Code, § 324, declaring that shares of stock in a corporation are "personal property" and may be transferred by indorsement and delivery of the certificate, and providing that such transfer is not valid, except as to the parties thereto, until the same is entered on the books of the corporation, etc., a bona fide transfer of corporate shares, though unregistered, takes precedence over a subsequent attachment or execution levied on the stock for the debt of the vendor, in whose name the shares stand on the corporation books.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 571; Dec. Dig. § 180.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5346-5358; vol. 8, p. 7753.]

4. CORPORATIONS (§ 129*) — TRANSFER OF SHARES—REGISTRATION—RECITALS IN CERTIFICATE.

The right to sell, transfer, or pledge corporate stock, being given by statute, cannot be curtailed by a recital in the certificate that it is transferable only on the books of the company and on surrender of the certificate; such recital, while serving to give notice of the rights of the corporation under the statute, not changing the relative rights of the stockholder and third persons with respect to each other, nor making an unregistered transfer subject to an attachment lien.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 479; Dec. Dig. § 129.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the National Bank of the Pacific against the Western Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles S. Wheeler, Warren Olney, Jr., and F. W. M. McOutcheon, for appellant. Gavin McNab, R. P. Henshall, and Chauncey S. Goodrich, for respondent.

SHAW, J. A general demurrer to the complaint was overruled. The defendant refused to answer, and judgment was given for plain-

tiff upon the facts stated in the complaint. The defendant appeals.

On June 15, 1908, the plaintiff became the owner of 1,000 shares of the capital stock of the defendant corporation, previously belonging to J. Dalzell Brown. The certificate for these shares was duly indorsed by Brown and delivered to the plaintiff. The consideration paid for the stock by the plaintiff was \$25,000. Brown was indebted to the defendant in a sum exceeding \$50,000. On July 28, 1908, the defendant began an action against Brown to recover said debt, and caused a writ of attachment to be issued therein, which on July 29, 1908, was levied on Brown's interest in said stock. The action is still pending. At the time the attachment was levied, the transfer of the stock from Brown to the plaintiff had not been entered on the books of the defendant corporation, as required by section 324, Civ. Code, and the defendant had no notice or knowledge of said transfer. This condition continued until March 11, 1909, when the plaintiff presented its certificate of stock to the defendant, and demanded that the transfer from Brown to plaintiff be duly entered upon the defendant's books. Defendant refused to comply with the demand, basing its refusal on the claim that, by virtue of the levy of said attachment, it had a lien upon said stock prior and paramount to the right and title of plaintiff thereto. This action was thereupon begun to compel the defendant to enter the transfer on its books and issue to the plaintiff a new certificate for the stock, free from the lien of the attachment. The judgment directed that this be done.

Section 324, Civ. Code, declares that shares of stock in a corporation are personal property, and that they may be transferred by indorsement and delivery of the certificate. It further provides that "such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by whom and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of the transfer."

"The rights or shares which a defendant may have in the stock of any corporation" may be attached by leaving with the proper officer of the corporation a copy of the writ and a notice that the stock or interest of the defendant is attached in pursuance of the writ. Code Civ. Proc. §§ 541, 542, subd. 4. When such stock is sold on execution, the sheriff must give the purchaser a certificate of the sale. "Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied." Code Civ. Proc. § 699.

The general rule is that a creditor who attaches property for his debt obtains a lien only upon the title or interest which the debtor has in the property at the time of

the levy, and that, if at that time all title and interest therein has passed from the debtor to a third person, the attaching creditor gets nothing by the levy. *Tuohy v. Wingfield*, 52 Cal. 319; *Howell v. Foster*, 65 Cal. 173, 3 Pac. 647; *Ward v. Waterman*, 85 Cal. 508, 24 Pac. 930. Where a statute declares a previous transfer of title void as to creditors of the transferrer, there is an exception to this rule. The exception is, of course, founded upon the theory that as the law makes the transfer void as to the creditor, there is, as to him, no transfer at all, and the title to the property, for his benefit, remains in the debtor, notwithstanding a previous legal transfer good as against all other parties. Examples of this are found in the case of transfers tainted with actual fraud and transfers of personal property in good faith not followed by immediate delivery and actual and continued change of possession. The latter are conclusively presumed to be fraudulent. All such transfers are expressly declared to be void as to the creditors of the person making the transfer. Civ. Code, §§ 3439, 3440. Another example is that of a chattel mortgage not executed and recorded in the prescribed mode, which the statute declares to be absolutely void as against other creditors of the mortgagor, regardless of the good faith of the transaction. Civ. Code, § 2957. The contention of the defendant is that the provisions in section 324, declaring that a transfer of corporate stock is not valid, except as to the parties, until it is duly entered on the corporation books, is intended for the benefit of the creditors of stockholders, and, therefore, that its effect is to make an unregistered transfer absolutely void, and subject to any attachment or execution against the previous owner.

If this doctrine is correct, the logical result would be that knowledge of the attaching creditor or execution purchaser, at the time of the levy or execution sale, that there had been a prior unregistered transfer for value, would be an immaterial circumstance which would neither protect the holder of the stock, nor vitiate or affect the lien of the attachment, or the title conveyed by the execution sale. If the attempted transfer by indorsement and delivery of the certificate, without entry thereof on the books of the company, is wholly void as to the attaching creditor, the levy would create a lien superior to the title of the indorsee. It would operate as if there had been no previous transfer of the certificate by the record holder, and a registration after the levy, or a subsequent notice, would be of no avail to the indorsee. This rule prevails in the case of a levy on goods, after a sale which is void as against creditors, under section 3440, Civ. Code. Notice to the creditor, or to an intending purchaser, in such a case, that the third person holds the title, whether given before or after the levy, does not affect the attachment, nor invalidate the title of the execution purchas-

er. The defendant does not contend that this strict rule applies to corporate stock, but is willing to concede that a holder thereof for value, by a previous unregistered transfer in good faith, would prevail against an attaching creditor or execution purchaser with notice of the transfer. The decisions in this state on this point uniformly hold that the law is in accordance with this concession. *Weston v. Bear River, etc., Co.*, 6 Cal. 425; *People ex rel. Mead v. Elmore*, 35 Cal. 653; *Farmers' National Gold Bank v. Wilson*, 58 Cal. 600; *Blakeman v. Puget S. I. Co.*, 72 Cal. 321, 13 Pac. 872; *Spreckels v. Nevada Bank*, 113 Cal. 272, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348.

The defendant relies mainly on a prior decision in *Weston v. Bear River, etc., Co.*, reported at 5 Cal. 186, 63 Am. Dec. 117, and on the decisions in *Strout v. Natoma W. Co.*, 9 Cal. 78, and *Naglee v. Pacific Wharf Co.*, 20 Cal. 529.

The *Weston* Case was an action by *Weston* to compel the defendant corporation to transfer certain shares of its stock to him on its books. On the first trial of the case the lower court held the unregistered transfers good, and gave judgment against the plaintiff. On appeal the Supreme Court reversed this judgment. 5 Cal. 186, 63 Am. Dec. 117. Afterwards the case was again tried, and judgment in the lower court was given for the plaintiff. Upon a second appeal this judgment was reversed. 6 Cal. 425. In the report of the first case the facts are not stated, and the plaintiff is described merely as an attaching creditor. It is not stated whether he was or was not a purchaser on execution sale, or whether he had or had not notice of the prior assignment of the certificates. It was apparently regarded as immaterial, and, as above stated, the logic of the decision would make it so. But there is no discussion or mention of the point. The court considered the effect of sections 12 and 144 of the act of April 22, 1850, upon stock transfers. St. 1850, p. 347. Section 12 is identical with section 324, Civ. Code. Section 144 declared that until there was a proper entry thereof on the corporation books, "no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the company." Holding these provisions imperative and prohibitory, and not intended as a protection to the company alone, the court states the reason for giving the statute effect as a declaration that an unregistered transfer is void as to the creditors of the transferor, as follows: "The Legislature intended to protect the public from the frauds which might be perpetrated by a sale or hypothecation of the certificates passing the legal or equitable title, while the books of the company induced credit to the vendor, by holding him out to the world as the owner of such stock." (The italics are ours.)

In *Strout v. Natoma Co.*, supra, the question was not involved, but the court quotes the above extract from the first *Weston* decision, saying: "The principle clearly established by this decision is, that the books of the corporation must constitute the test of the rights of third parties. They can look only to the books as their criterion." The citation in the opinion to "6 Cal. 425," as the place where the first *Weston* Case is reported seems to be a clerical error. The court does not mention the second decision, and was apparently unaware of the fact that it had declared a contrary doctrine. In *Naglee v. Pacific Wharf Co.*, supra, the stock was attached after the transfer from *Stebbins* to *Naglee*. Before the execution sale in the attachment suit against *Stebbins*, *Naglee* applied to the company to have his transfer entered on its books. The company refused to do so, assigning the attachment as the cause. Shortly afterwards the stock was sold for its market value, on the execution, to a purchaser without notice of the transfer. *Naglee* sued to compel a transfer to him. The judgment denying this relief was affirmed on the authority of the *Weston* Cases. As the stock had been sold to an innocent purchaser, it is plain that the soundness of the decision in the first case, to the effect that a mere levy created a lien superior to an unregistered transfer, was not essential to the decision. The court says, however, that the second decision in the *Weston* Case was not intended to overrule or qualify the first. From this it will be seen that the doctrine of the first *Weston* decision was not involved in either the *Strout* Case or the *Naglee* Case, and hence the expressions in the opinions in these two cases to the effect that that doctrine is settled in this state, are not entitled to great weight, especially in the face of prior and subsequent decisions declaring the contrary rule to be settled.

Upon the second appeal in the *Weston* Case (6 Cal. 425) it was shown that before the action was begun, *Weston*, the attaching creditor, had purchased the stock at the sheriff's sale in his attachment suit against *Lovell*, and that before purchasing it he had notice of the prior unregistered transfers and pledges thereof. Upon this the court says: "A party who purchases at sheriff's sale, stocks of an incorporation, knowing that the certificates of such stock have been previously hypothecated, is chargeable with notice of such fact, and takes subject to the claim of the pledgee. Neither the incorporation law of 1850, or of 1853 (St. 1853, c. 65), was intended to cover a case of this kind, but applied only to transfers and purchases in good faith without notice. In the case of *Weston v. Bear River Water & Mining Company*, 5 Cal. 186, 63 Am. Dec. 117, this point was not presented to the consideration of the court, and the case went off on a construction of the statute only." The question whether the lien of the levy was, of itself,

superior to the right of a holder of the certificate, whose transfer was not entered on the books, was necessary to this decision, for if such lien was superior it would have inured to the benefit of a purchaser even if he had notice, if the case is to be treated as a fraudulent transfer. The ruling that it was so far inferior that a subsequent notice before execution sale would destroy the lien, is directly contrary to the principle upon which the first Weston decision was based, and practically overrules it.

The other decisions heretofore cited contain repeated declarations in approval of the doctrine of the second Weston Case. In *People v. Elmore*, supra, after referring to the Weston and Naglee decisions, the court says that it was held in those cases that unregistered transfers of stock "are nevertheless valid as against all the world, except subsequent purchasers in good faith, without notice." This was said to be binding under the rule of stare decisis, if for no other reason. *Parrott v. Byers*, 40 Cal. 614, at page 625, quotes this passage from the Elmore Case, designating it as the principle established in this state. This was reiterated in *Winter v. Belmont Co.*, 53 Cal. 431, *Farmers', etc., Bank v. Wilson*, supra, *Blakeman v. Puget S. I. Co.*, supra, *Spreckels v. Nevada Bank*, supra, and in *West Coast, etc., Co. v. Wulff*, 133 Cal. 315, 65 Pac. 622, 85 Am. St. Rep. 171. In view of these repeated affirmations of the doctrine, we again declare, what has been said so often, that the principle of stare decisis applies, and that it is now too late to change the rule, even if we were not satisfied with it. For many years it has been generally understood that in this state shares of stock in a domestic corporation, thus transferred or pledged, were safe as against a mere levy of an attachment or execution against the person in whose name they stand on the corporation books, and the commercial business of the people has been carried on upon that basis. A rule thus settled and relied on should not be disturbed.

Counsel for defendant contend that the precise question here presented was not involved in any of the cases, except the first Weston Case, and that the declarations in the subsequent decisions, contrary to that case, should be disregarded as obiter dicta. Even if this were so, since the dicta have been accepted and acted upon for so many years as the established law, they should be adhered to, if possible. But, as we have shown, this rule cannot be sustained without overthrowing the principle upon which the first Weston Case rests, and every decision holding that a purchaser for value at an execution sale, with notice of a prior unrecorded transfer, obtains no title against the indorsee and holder of the certificate, in effect, overrules that case. In *Farmers', etc., Bank v. Wilson*, the effect of a mere levy was involved, and the court very properly stated the rule, so that the parties would un-

derstand that a future execution purchaser with notice would take only the pledgee's right of redemption. That case is direct authority for the proposition.

It may be remarked further that the reason given, as above stated, in the first Weston Case, for the rule there adopted had no foundation in the law then in force, and has none under the present law. It was founded on the notion that "the stock and transfer book" of a corporation is made a public record, accessible to all persons, intended to give notice to everybody of the status and ownership of the title to the stock, and that it is therefore available to the creditors of the stockholders and to persons dealing with them with respect to the stock. This is the law of some of the states where the rule contended for by the defendant prevails, but it is not the law of this state. Civ. Code, § 378. It was not the law with respect to mining corporations at the time the Weston Cases were decided. St. 1850, p. 368, § 144; St. 1853, p. 90, § 18. The creditors of the individual stockholders have no such right of access, and the books could not constitute notice to them. Nor could these books hold any person out to the world as the owner of any stock, since the world could not have access thereto. Stockholders and creditors of the corporation are the only persons who have the right to inspect the books. Civ. Code, § 378.

The authorities of other states having similar statutes differ somewhat in their interpretation thereof. The following cases hold that the levy of an attachment or execution is not, of itself, paramount to the right of a holder of the certificate under a prior unregistered transfer from the attachment or execution debtor: *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; *Lund v. Wheaton*, 50 Minn. 38, 52 N. W. 268, 36 Am. St. Rep. 623; *Thurber v. Crump*, 86 Ky. 408, 418, 6 S. W. 145; *Mapleton Bank v. Standrod*, 8 Idaho, 740, 71 Pac. 119, 67 L. R. A. 656; *Port Townsend N. B. v. Port Townsend, etc., Co.*, 6 Wash. 597, 34 Pac. 155; *Van Cise v. Merchants' N. B.*, 4 Dak. 485, 33 N. W. 897; *Newberry v. Detroit, etc., Co.* 17 Mich. 157 (per Cooley, J.); *Batesville T. Co. v. Meyer-Schmidt, etc., Co.*, 68 Ark. 115, 56 S. W. 784; *Masury v. Farmers' N. B.*, 93 Fed. 603, 35 C. C. A. 476 (construing statute of Arkansas). The contrary construction is adopted in *Lyndonville N. B. v. Folsom*, 7 N. M. 611, 38 Pac. 253; *Sabin v. Bank*, 21 Vt. 353, and *Application of Murphy*, 51 Wis. 519, 8 N. W. 419; also in Iowa, where the statute is the same as our section 234, but the stock book is open to the public (*Ft. Madison Co. v. Bank*, 71 Iowa, 270, 32 N. W. 336, 60 Am. Rep. 789; *Ottumwa S. Co. v. Stodghill*, 103 Iowa, 437, 72 N. W. 669), and in Colorado, where the statute declares that the transfer "shall not be valid for any purpose whatever," until it

is entered on the books (*First Nat. Bank v. Hastings*, 7 Colo. App. 129, 42 Pac. 691).

In several of the states, under statutes which do not declare such transfers invalid between the parties, but merely declare that it is transferable only on the books of the corporation, it is held that the mode must be followed in order to pass the title, and that a levy will prevail over a transfer not properly made. In other states the opposite rule is followed. We do not consider it necessary to discuss these cases. The condition of the law is well stated in 2 Cook on Corporations, at the end of section 490, as follows: "It may be added, in regard to this whole subject, that the decisions and statutes of the various states show clearly that public policy and the legitimate demands of trade have gradually caused the courts and Legislatures of the various states to establish a rule that a sale or pledge of certificates of stock has precedence over a subsequent attachment levied on that stock for the debt of the vendor or pledgor, and that the failure of the pledgee or purchaser to obtain a registry on the corporation books is not fatal to his interest in the stock." See note 1 to section 488 of Cook for list of states which have changed their statutes to conform to this rule, where the courts had previously adopted the opposite doctrine.

The certificate here in question recited that it was transferable only on the books of the company and on surrender of the certificate. This did not affect the transfer. The right to sell, transfer, or pledge corporation stock is given by statute and it cannot be curtailed by a recital in the certificate. The recital served to give notice of the rights of the corporation under the statute, with respect to transfers, but it did not change the relative rights of the stockholder and third persons, with respect to each other, nor make the unregistered transfer subject to the attachment lien.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(157 Cal. 605)

FOX v. CAMPBELL. (L. A. 2,436.)

(Supreme Court of California. April 13, 1910.)

1. BOUNDARIES (§ 37*)—EVIDENCE—WIDTH OF STREET.

Evidence, in an action to determine boundary between two lots, depending on the width of a street held to show it to be of the width shown by the plat, by reference to which the lots were conveyed.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 37.*]

2. COSTS (§ 260*)—FRIVOLOUS APPEAL.

Damages will be awarded for the taking of a frivolous appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 983; Dec. Dig. § 260.*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Edwin R. Fox against R. M. Campbell. Judgment for defendant. Plaintiff appeals. Affirmed.

Lucius M. Fall and Webster Davis, for appellant. H. H. Appel, for respondent.

HENSHAW, J. This action was brought to determine conflicting claims to a strip of land 10 feet wide and 165 feet long, alleged by plaintiff to be a portion of his lot 10, and by defendant to be a portion of his lot 9, in block V of the Mott tract, city of Los Angeles.

Plaintiff and defendant both derive title from a common source, and their deeds convey to them their respective lots according to the map of the Mott tract found in Book 14, p. 7, of the Miscellaneous Records of the county. This map was introduced in evidence, from which it appears that lot 9 is situated at the southwesterly corner of block V, and is bounded upon the west by Grasshopper street, now Figueroa street, and on the south by First street; that the lot has a depth of 165 feet on First street, and a frontage of 60 feet on Grasshopper street. Adjacent to this lot 9 and to the north thereof is lot 10, with the same depth and the same frontage upon Grasshopper street. Admittedly plaintiff owns lot 10. Admittedly defendant owns lot 9. The south line of First street and the intersecting corner of this south line of First street with Figueroa street are established upon the ground, and undisputed. Measuring from this corner northerly along the easterly line of Figueroa street plaintiff contends that the southerly boundary line of his lot is 120 feet from that point, while defendant contends that this boundary line between lots 9 and 10 is 128 feet from the southern corner of First and Grasshopper streets. Herein lies the sole contention between the parties. The map of the Mott tract, as has been said, is the recorded plat to which the deeds of both of these parties make reference. That map shows First street to be 68 feet wide running from Grasshopper street easterly to Hope street. Moreover, by the deeds of the predecessors in interest of both these parties, First street is described as being 68 feet wide, and the witness Ward, a clerk in the city engineer's office, testifies that the city found that First street as far as Hope was 60 feet wide and "from Hope street to Figueroa it was 68 feet wide according to the map recorded in Book 14, at page 7, of Miscellaneous Records, and west of Figueroa it was 68 feet wide." Here is abundant evidence that First street is 68 feet wide. Moreover, it is evidence of the strongest character against appellant's contention, since it is evidence of the very map by reference to which his deed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to lot 9 is described. The southerly corner of First and Figueroa streets being established on the ground, and it being further established that First street is 68 feet wide, it follows of necessity that the southerly line of plaintiff's lot 10 begins 128 feet from the southerly line of First street. So the court found and decreed, upon evidence so complete and so satisfactory that the shufflings and evasions found in plaintiff's testimony cannot be said to raise even a conflict against it.

The judgment and order appealed from are therefore affirmed, with damages awarded to respondent against appellant in the sum of \$100 for the taking of a frivolous appeal.

We concur: MELVIN, J.; LORIGAN, J.

(157 Cal. 596)

In re COLLEGE HILL LAND ASS'N OF CITY OF SAN DIEGO. (L. A. 2,891.) (Supreme Court of California. April 9, 1910.)

1. APPEAL AND ERROR (§ 356*)—TIME—SCOPE OF REVIEW.

Where an appeal is not perfected until more than 60 days after entry of judgment, Code Civ. Proc. § 939, prohibits a review of the evidence, or a consideration of the findings of fact objected to.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 356.*]

2. CORPORATIONS (§ 610*) — DISSOLUTION — STATUTES—AMENDMENT.

Under Const. art. 12, § 1, providing that all laws concerning corporations may be altered from time to time or repealed, stockholders of a corporation who became such prior to the amendment in 1907 of Code Civ. Proc. § 1228 (St. 1907, c. 254), providing for a dissolution on a two-thirds vote of all stockholders, so as only to require a two-thirds vote of the subscribed capital stock, were not entitled to a dissolution vote in accordance with the law as it existed before amendment.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 610.*]

3. CONSTITUTIONAL LAW (§ 126*)—CHARTER—REPEAL—RESERVE POWER—STOCKHOLDERS' CONTRACT.

The reserved power of the state to alter or repeal the charter of a corporation is a part of the contract of every stockholder of a corporation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 325, 366-369; Dec. Dig. § 126.*]

4. CORPORATIONS (§ 610*)—DISSOLUTION—APPLICATION.

Where the stock of objectors to the dissolution of a corporation had been long since sold for delinquent and unpaid assessments, an affidavit for a continuance of the dissolution proceedings to afford time to take objectors' depositions, to prove that they were the parties to whom stock certificates alleged in their objections were issued, charging that they had paid all assessments on the stock on which they ever had or received any notice or knowledge, and that their post office address had been at all times known to the secretary, but without any allegation that they had paid all the assessments levied, or that the assessments under

which the stock was sold were illegal and void, was insufficient, and the denial of the continuance was not an abuse of discretion.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 610.*]

Department 2. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

In the matter of the dissolution of the College Hill Land Association of the City of San Diego. From a judgment of dissolution, Catherine B. Chase and another appeal. Affirmed.

J. H. McCulloch and C. N. Andrews, for appellants. Sam Ferry Smith, for respondent.

HENSHAW, J. The College Hill Land Association of the City of San Diego was a private corporation, organized for profit. It had a capital stock of \$2,000,000, divided into 20,000 shares of the par value of \$100 each. Eleven thousand and seven hundred and seventy of these shares were issued and outstanding. At a special meeting of the stockholders called for that purpose on February 1, 1908, at which there were present and represented 10,667 shares of the capital stock, it was unanimously decided to dissolve the corporation and distribute its assets. In conformity with this resolution the directors of the corporation, on the 24th day of February, 1908, filed a petition in due form in the superior court of the county of San Diego, seeking a decree of dissolution. The court set the hearing for Monday, the 6th day of April, and due notice thereof was given, as required by law. On the 7th day of April, Catherine B. Chase and C. W. Chase, appellants herein, claiming to be stockholders of the corporation and owners of about 340 shares of the stock, filed objections to the dissolution, and alleged grave corporate mismanagement on the part of the directors and others connected with the corporation. The hearing of the petition and the objections thereto were set for the 20th day of April, 1908. Upon that day the objectors asked for a continuance of 30 days in which to take their own depositions in New York. This request was denied by the court. The matter proceeded to a hearing, and, after evidence taken, a judgment of dissolution was rendered on that date. The court found that the objectors, Catherine B. Chase and C. W. Chase, were not stockholders of the corporation, and also found against them upon all other material allegations. The court further found that all and singular the allegations and statements in the application for dissolution were true. The judgment was rendered upon April 20, 1908, and entered April 22, 1908. The appeal was taken October 10, 1908, more than 60 days after entry of judgment. It does not permit a review of the evidence. Code Civ. Proc. § 939; Ryland v. Heney, 130 Cal. 426, 62 Pac. 616; Sather Banking Co. v. Briggs

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Co., 138 Cal. 724, 72 Pac. 352; Thomas v. N. W. Mutual Life Ins. Co., 142 Cal. 79, 75 Pac. 865. The same reason forbids the consideration of other findings of fact objected to by appellants.

The objection to want of jurisdiction appearing upon the face of the petition is based upon appellants' contention that, at the time when they became stockholders, the law required a two-thirds vote of all the stockholders (Code Civ. Proc. § 1228), although in 1907 the law was amended to read that dissolution might be had upon a vote "of the holders of two-thirds of the subscribed capital stock." St. 1907, c. 254. The contention of appellants is that the law as it stood at the time when they purchased their stock conferred upon them a legal right of which they could not be deprived by any subsequent legislative enactment. There is no force in this contention. Admittedly the petition for dissolution was in the form prescribed by section 1228 as amended in 1907. Section 1, art. 12, of our Constitution provides that "all laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section may be altered from time to time or repealed." And, indeed, it is well settled that this reserve power to alter or repeal the charter of a corporation becomes a part of the contract of every stockholder of the corporation organized thereunder. *Venner Co. v. U. S. Steel Corp.* (C. C.) 116 Fed. 1012; *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149; *Thompson on Corporations* (2d Ed.) §§ 402, 408.

The court did not abuse its discretion in refusing the motion for continuance. The application for a continuance was made upon the ground that it was necessary to take the depositions of the objectors to prove that they were the parties to whom certificates of stock set forth in the objections filed were issued by the company; that they had paid all the assessments upon the stock upon which they ever had or received any notice, or of which they had any knowledge, and that their post office address and their whereabouts have been at all times well known to the secretary and other officers of the corporation. It was shown at the hearing that these objectors were the persons to whom the certificates of stock had been issued. It was also shown that the stock had long since been sold for delinquent and unpaid assessments. The affidavit in support of the motion for a continuance does not state facts which would be a defense upon the merits. It asserts merely that the objectors paid all the assessments of which they had any knowledge, but it is nowhere asserted that they had paid all the assessments levied, or that the assessment under which their stock was sold was illegal or void. It was further made

to appear that the sale of their stock had been made many years ago, with ample time accorded to these appellants to have instituted a proper proceeding to set aside the sale upon the ground of its invalidity, if any such invalidity existed. Their failure so to have done exhibits a lack of diligence in itself, justifying the court in refusing the continuance.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(157 Cal. 599)

CARY et al. v. LOS ANGELES RY. CO.
(L. A. 2417.)

(Supreme Court of California. April 13, 1910.)

1. CARRIERS (§ 303*)—INJURY TO PASSENGER
—STARTING CAR—SIGNAL BY ANOTHER PASSENGER.

There was no negligence of a street car company in the starting of a car, throwing a passenger who was alighting, the starting signal, two bells, having been given, without authority, by another passenger, neither the motorman nor conductor having any reason to believe it would be so given, the motorman believing it was given by the conductor, the conductor instantly on hearing the signal calling to the motorman not to start, and the motorman then endeavoring to prevent the starting; the company, through its motorman and conductor, not being required to anticipate and take precautions against such an unauthorized signal.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 303.*]

2. CARRIERS (§ 315*)—INJURY TO PASSENGER
—NEGLIGENCE—PLEADING AND PROOF.

The only allegation of negligence in an action for injury to a passenger on a street car being that, while he was alighting, the car was negligently started with a jerk, the fact that the car was crowded, and passengers were standing in the aisle, cannot be considered as a matter of negligence, but only as a part of the conditions existing at the time.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 315.*]

3. NEGLIGENCE (§ 111*)—PLEADING.

While negligence may be charged in general terms, the particular act relied on as negligence must be specified.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 182-184; Dec. Dig. § 111.*]

4. CARRIERS (§ 305*)—INJURY TO PASSENGER
—ACTIONABLE NEGLIGENCE.

While violation of Civ. Code, §§ 2102, 2184, 2185, providing that a carrier of passengers must not overcrowd or overload his vehicle, must provide a sufficient number of vehicles to accommodate all passengers who can be reasonably expected to require carriage at the time, and must provide every passenger with a seat, will establish negligence, it will not authorize recovery for injury to a passenger, while alighting, from being thrown by the starting of the car, on the unauthorized signal of another passenger; it not being shown to have any direct and causal connection with the injury.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 305.*]

5. CARRIERS (§ 321*)—DUTY OF CONDUCTOR—INSTRUCTIONS.

The collection of fares being part of the duty of the conductor of a street car, though

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

it is equally his duty to look after the safety of his passengers, it is not error to instruct that he was in the performance of his duty while collecting fares; it appearing that he was collecting fares when the car stopped, that before giving his starting signal he would have gone to the platform to see whether all passengers so desiring had alighted, and that before he had done so a starting signal was given by a passenger, resulting in injury to another passenger, who was alighting.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 321.*]

6. TRIAL (§ 141*)—DIRECTING ANSWERS BY JURY.

It is not an invasion of the province of the jury to direct answers to questions not in dispute and established without contradiction.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 336; Dec. Dig. § 141.*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Sarah P. Cary and another against the Los Angeles Railway Company. Judgment for defendant. Plaintiffs appeal. Affirmed.

Hannon & McCormick, for appellants. Gibson, Trask, Dunn & Crutcher, for respondent.

HENSHAW, J. This action was instituted by plaintiffs to recover damages alleged to have been sustained by plaintiff Sarah P. Cary while debarking from one of defendant's cars. The negligence, and the only negligence charged against defendant is found in the following allegation: "And as said Sarah P. Cary was in the act of leaving said electric car, while the same remained stopped, and while in the act of stepping off of said car, the said defendant, through its agents and servants, negligently and carelessly and wantonly caused the said car to start forward with a sudden jerk, and with great force, thereby throwing said Sarah P. Cary violently from said electric car and onto the ground, whereby the said plaintiff sustained serious bodily injuries." The answer denied negligence. The case was tried upon the issue of defendant's negligence, and on that issue the jury returned a general verdict in favor of the defendant, together with a special verdict, by which latter they found that two bells were a signal used by the conductor to the motorman to start the car, and that it was not the duty of the motorman, under the rules of the company, nor was it a custom of the motormen, upon receiving the signal of two bells, to ascertain whether passengers were alighting from the rear steps. That the car stopped at a street for the purpose of allowing plaintiff to alight therefrom. That the conductor was at that time at the front of the car collecting fares. That the signal of two bells was given by some passenger standing at the rear of the

car. That the motorman supposed it was given by the conductor, and at once started the car. That instantly upon hearing the two bells the conductor cried out, warning the motorman not to start, but to stop his car. The motorman thereupon endeavored to prevent the starting of the car. That the car moved only from two to six feet. That neither the conductor nor the motorman had any reason to believe that any signal, by bell or otherwise, would be given by any other person than the conductor. That the proximate cause of the injury to plaintiff arose from the unauthorized act of the passenger in giving the signal to the motorman to start the car.

The evidence abundantly supported the special verdict and findings of fact above set forth. The only question upon the verdict is whether or not the facts themselves constitute a defense. Appellants present no authorities against the proposition that the facts found by the jury show an absence of negligence on the part of the defendant, and establish that the accident occurred by the unwarranted intervention of an unauthorized stranger, against whose unexpected act the company was not bound to take precautions. That such is the law governing the conduct of defendants in such cases is abundantly settled. Thus in *Krone v. Southwest Mo. E. R. Co.*, 97 Mo. App. 609, 71 S. W. 712, the trial court refused to give an instruction which declared: "The court instructs the jury that, if they believe from the evidence that the conductor stopped the car at Elizabeth street to let Mrs. Kirksey and plaintiff get off said car, and that Mrs. Kirksey got off, and, before plaintiff could get off, some one, not an employe of the defendant, without the knowledge or authority of the conductor, rang the bell, and gave the motorman the signal to start, and in pursuance of said signal the motorman started the car, and plaintiff fell off, then there was no negligence on the part of defendant, and plaintiff cannot recover in this case, and their finding will be for defendant." The Supreme Court said: "We cannot see upon what theory the court refused said instruction, for if it was true that some person other than the conductor, and not in defendant's employ, gave the signal which started the car while plaintiff was attempting to get off, causing her fall and injury, it was not the result of any negligence on the part of defendant, but that of a careless or mischievous stranger, over whom the defendant had no control." To the same effect are *McDonough v. Third Ave. R. Co.*, 95 App. Div. 311, 83 N. Y. Supp. 609; *Fanshaw v. Norfolk & Portsmouth Tr. Co. (Va.)* 61 S. E. 790; *O'Neil v. Lynn & B. R. Co.*, 180 Mass. 576, 62 N. E. 983; *Ellinger v. Philadelphia R. Co.*, 153 Pa. 213, 25 Atl. 1132, 34 Am. St. Rep. 697; *Gulf,*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

C. & S. R. Co. v. Phillips, 32 Tex. Civ. App. 238, 74 S. W. 793.

It was admitted that at the time of the accident the car was crowded, and that passengers were standing in the aisle. Appellants make complaint of the court's rulings and instructions upon this point, which were to the effect that the fact that the car was crowded with passengers would not entitle the plaintiffs to recover, and could not be considered by the jury, except as a part of the conditions existing at the time. The court's rulings and instructions in this regard were correct. The crowded state of the car was permitted to be shown as one of the conditions at the time of the accident. No negligence was alleged by plaintiffs because of the crowded condition of the car, and no causal connection between the crowded condition of the car and the accident was in any way shown. While it is permissible to charge negligence in general terms, it is nevertheless necessary to specify the particular act or acts alleged to have been negligently done. *Stevenson v. S. P. Co.*, 102 Cal. 144, 34 Pac. 618, 36 Pac. 407; *Smith v. Buttner*, 90 Cal. 95, 27 Pac. 29. If appellants had desired to predicate negligence upon the crowded condition of the car they should have done so by appropriate allegation. But in this case, if they had done so, it is apparent that no different result would have been reached, since the overcrowded condition of the car was in no way the proximate cause of the accident, and it is but a matter of speculation as to whether or not the conductor, at the time actually engaged in taking up fares, would have seen the unauthorized act of the passenger who rang the starting bell if the car had not been crowded. A violation of the provisions of the Civil Code (Civ. Code, §§ 2102, 2184, 2185) will establish negligence, and where injury results from such negligence a recovery may be had. But in every case the particular negligence to avail plaintiff must have some direct and causal connection with the injury complained of. For example, it is negligence if the whistle of a locomotive engine is not sounded and its bell rung at crossings, but if the train were derailed by a misplaced switch, an injured passenger could not base his recovery upon the showing that somewhere along the journey the whistle had not been blown or the bell sounded when these things should have been done. In such a case the employer will not be liable merely because his act constituted a violation of law, but only if it proximately caused the injury complained of. So, although the violation of such a statute is negligence per se, there must be a causal connection between the unlawful act and the injury, which must be shown in the pleading and by the proof, or the action fails. *Nickey v. Steuder*, 164 Ind. 189, 73 N. E. 117; *Hendricks v. Coole-*

mees Cotton Mills, 138 N. C. 169, 50 S. E. 561; *McVay v. Brooklyn, etc., R. Co.*, 113 App. Div. 724, 99 N. Y. Supp. 266; *Snyder v. Colorado Springs R. Co.*, 36 Colo. 288, 85 Pac. 686.

It was not error for the court to state, as it did, that the conductor was doing his duty, or was in the performance of his duty, while collecting fares. Unquestionably, and as matter of law, the collection of fares and the issuance of transfers is a part of the duty of the conductor of a street car. It is, of course, equally his duty to look after the safety of his passengers while on the car and embarking and debarking therefrom. In this case it appears that the conductor was actually engaged in taking fares at the time the car stopped, and before giving his starting signal would have proceeded to the platform to see whether all intending passengers had left the car. But before he had done so the starting signal was given.

Answers to certain special questions which the court itself directed were upon matters not in dispute and established without contradiction. In this there was no invasion of the province of the jury. *Baumann v. C. Reiss Coal Co.*, 118 Wis. 330, 95 N. W. 139.

The court did not err in giving its instruction 4. The instruction, in hypothetical form, stated the uncontradicted facts of the accident, saying that: "If some passenger upon the rear of defendant's car, over whom the defendant had no control, gave the signal to start said car, and that the motorman in charge thereof responded to said signal and started his car," etc. It is argued against the instruction that it eliminates from the consideration of the jury the question as to whether the defendant, through its motorman and conductor, should have anticipated the unauthorized giving of the signal. But there is no word of testimony in support of this. The law is to the contrary of appellants' contention. "A carrier of passengers is not obliged to proceed to provide against casualties which have not been known to occur before, and which may not reasonably be anticipated. * * * That which never happened before, and which in its character is such as not naturally to occur to prudent men to guard against its happening at all, cannot, when in the course of years it does happen, furnish good ground for a charge of negligence in not foreseeing its happening and guarding against that remote contingency." *Holt v. S. W. Mo. E. R. Co.*, 84 Mo. App. 443. Moreover, the jury specifically found that the motorman believed that the starting signal was given by the conductor.

No other points call for special attention. For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(157 Cal. 613)

FRANKISH v. GOODRICH et al. (L. A. 2,308.)

(Supreme Court of California. April 15, 1910.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 32*)—BOUNDARIES—INCLUSION IN CITY.

Under Pol. Code, § 1576, providing that each city or incorporated town, unless subdivided by the legislative authority thereof, shall constitute a separate school district, outside territory belonging to a school district becomes, on inclusion within the boundaries of a city, part of the latter's school district.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 52; Dec. Dig. § 82.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 42*)—HIGH SCHOOL DISTRICT—BOUNDARIES—INCLUSION WITHIN CORPORATE LIMITS.

Under Pol. Code, § 1670 (prior to its repeal in 1909), and other related sections, a high school district, so far as its territorial limits are concerned, is not a distinct entity from the school district, and, when the school district loses part of its territory by the inclusion thereof within the corporate limits of a city, the high school district also loses the same part of its territory.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 85; Dec. Dig. § 42.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 102*)—HIGH SCHOOL DISTRICTS—TAXATION.

Territory of a school district, which, by inclusion within city limits, becomes part of a new high school district, is taxable in the latter district only.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 237; Dec. Dig. § 102.*]

Department 2. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by Charles Frankish against J. B. Goodrich and others. From the judgment, defendants appeal. Affirmed.

Byron Waters, for appellants. Goodcell & Goodcell, for respondent.

HENSHAW, J. This is in form an action by a resident taxpayer of the Ontario high school district, on behalf of himself and all other residents and taxpayers of the district, to restrain the school trustees of the Ontario school district and the trustees of the Upland school district, and the county superintendent of schools of the county, from acting as a union high school board of trustees, and from exercising or attempting to exercise any authority or control over the high school or property or the funds of the Ontario high school district; in effect, the action seeks to have defined the boundaries and status of the Ontario high school district, concerning which matters doubt has arisen, growing out of the following state of facts: The Ontario school district came into existence in 1901, and its territory comprised all of the lands of the city of Ontario, a municipal corporation of the sixth class, and certain additional outside territory adjacent

to the city. The inhabitants of the Ontario school district, as thus constituted, voted to establish, and in due course did establish and maintain, a high school therein, and thus the Ontario high school district, embracing the same territory as the Ontario school district, came into and continued in existence. In 1906 the city of Upland was incorporated as a city of the sixth class. Its boundaries included a portion of the territory adjacent to the city of Ontario, which territory had formerly been a part of the Ontario school district. They likewise embraced territory which had belonged to still a third school district and which had never been a part of the Ontario district. By virtue of the incorporation of the city of Upland, all of the territory within its corporate boundaries became, by operation of law, a school district known to the law as the "Upland school district." The position of appellants is that, by the annexation to the Upland school district of the outlying territory formerly a part of the territory of the Ontario school district and Ontario high school district, the territory so annexed did not cease to be a part of the territory of the Ontario high school district, but did at once become also a part of the Upland school district; that thus, by operation of law, there was created a union high school district, composed of the Upland School district and the Ontario school district, and the defendants were therefore justified in undertaking, as they did, to control the funds and property of the Ontario high school district while acting as the trustees of the Ontario-Upland Union high school district.

It is unquestioned that the outside territory formerly belonging to the Ontario school district, upon its inclusion within the boundaries of the city of Upland, became a part of the Upland school district. Pol. Code, § 1576; *Hughes v. Ewing*, 93 Cal. 414, 28 Pac. 1067; *Bay View School District v. Linscott*, 99 Cal. 26, 33 Pac. 781; *Kramm v. Bogue*, 127 Cal. 122, 59 Pac. 394. But while it is admitted that the outside territory formerly belonging to the Ontario school district ceased to be a part of that school district by its inclusion within the boundaries of the Upland school district and became a part of the Upland school district, nevertheless it is insisted that this territory is not severed from the Ontario high school district, as distinguished from the Ontario school district; that it still remains a part of the Ontario high school district, subject to its burdens and entitled to its rights; and that by virtue of this, through some method not defined in appellants' brief, it is declared that "by operation of law there was thus created the Union high school district composed of Upland school district and Ontario school district."

But a reading of section 1670 of the Po-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

litical Code and of the other sections bearing upon the question makes it manifest that a high school district, so far as its territorial limits are concerned, is not a distinct entity from the school district. When a school district has resolved to erect and maintain a high school, and has taken proper steps to that end, a so-called "high school district" is created. But it comprises the territory of the school district, its boundaries are the boundaries of the school district, and those boundaries are enlarged or contracted, increased or diminished, as are the boundaries of the school district. As, admittedly, the Ontario school district lost a part of its territory by the inclusion of that territory within the corporate limits of the city of Upland, so, necessarily, the Ontario high school district also lost the same part of its territory. But by that loss neither the existence nor the identity of the Ontario school district nor of the Ontario high school district was affected. It should be here said that we are not unmindful of the fact that section 1670 of the Political Code has been repealed. It is discussed as being in force, because it was in force at the time of these proceedings, and was repealed in 1909 (St. 1909, c. 311, § 3); its place being taken by the similar provisions of section 1720 et seq. of the Political Code. For obvious reasons, a high school district has its own distinct funds, property and government. *Chico High School Board v. Board of Supervisors*, 118 Cal. 116, 50 Pac. 275; *Brown v. City of Visalia*, 141 Cal. 372, 74 Pac. 1042. The high school is to be maintained at the expense of the school district, and, if the high school is discontinued, the high school property is to be sold and the proceeds, together with the high school funds on hand, go to the school district. Section 1670, subdivision 21, of the Political Code, declares that a school district cannot lie partly within a high school district of a joint union high school district and partly without; while section 1783 of the Political Code, as it now reads (Code 1910), makes the declaration the more explicit, and in terms provides that "in all cases where the boundaries of a school district comprised within any high school district shall be changed so as to exclude territory therefrom, such excluded territory shall, except as hereinafter provided, be excluded from the high school district." This is not a new declaration of law, but a declaration of the law as it has stood, put in precise words, so as to remove all doubt.

The contention that the portion of the Ontario school district now belonging to the Upland school district is still subject to taxation for the support of the Ontario high school district, and that therefore it must continue to be a part of the Ontario high school district, is without foundation in law. The territory is no longer subject to tax-

ation in the Ontario high school district, but in the Upland school district alone. *Hughes v. Ewing*, supra; *Bates v. Gregory*, 89 Cal. 387, 26 Pac. 891.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(157 Cal. 607)

BACKMAN et al. v. PARK et al.
(L. A. 2,399.)

(Supreme Court of California. April 14, 1910.
Rehearing Denied May 13, 1910.)

1. VENDOR AND PURCHASER (§ 144*)—TITLE OF VENDOR—AFTER-ACQUIRED TITLE.

Though plaintiff did not have title to property when she agreed to convey it, if she procured the execution of a valid deed from the then owner and tendered it as vendor to the purchaser within the required time, she could sue for damages for breach of agreement to purchase on the latter's refusal to accept the deed and recover damages as vendor under Civ. Code, § 3307, making the detriment caused by breach of agreement to purchase realty any excess of the amount which would have been due the seller under the contract over the value of the property to him.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 271-275; Dec. Dig. § 144.*]

2. VENDOR AND PURCHASER (§ 143*)—PERFORMANCE OF CONTRACT—TENDER—WAIVER OF IRREGULARITIES.

While the purchaser could have insisted on title deraigned through plaintiff, instead of through the owner of the record title, who executed the deed, failure to object to the deed tendered on that ground waived such irregularity.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 261-270, 311; Dec. Dig. § 143.*]

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Mary Backman and others against William Park and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

F. A. Stephenson, for appellants. W. R. Hervey, Newman Jones, and W. W. Butler, for respondents.

HENSHAW, J. This action is by the vendor to recover damages for defendant's breach of agreement to purchase certain real property situate in the city of Redondo Beach. By stipulation, many of the important facts were agreed upon. At the time of the execution of the contract the title to the property stood in the name of Kate Minerva Backman Palmer, a daughter of Mary Backman, plaintiff, and there was nothing of record to disclose that plaintiff had any title to or interest in the property. But, as provided by, and in accordance with, the terms of the agreement, plaintiff immediately procured the execution of a grant, bargain, and sale deed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

executed by Kate Minerva Backman Palmer and her husband, and procured from the Title Insurance & Trust Company of Los Angeles an unlimited certificate of title. On the 7th day of August, within the time limited by the contract, plaintiff tendered to the defendants the deed to the property so executed by Kate Minerva Backman Palmer and her husband, and again, on the 16th day of August, made a like tender, offering also the sum of \$20 to cover taxes for the fiscal years of 1905 and 1906, the amount of which taxes had not then been determined. The defendants refused to accept the conveyance or to execute any note or mortgage as contemplated by their agreement. It is not questioned here by defendants that the agreement to purchase was in form and substance sufficient to charge them. No objection was made by them to the certificate of title or to the deed.

The court gave judgment for defendants upon the contention, on which they here rest, that as it appears that plaintiff Mary Backman, at the time of entering into the contract with defendants, did not have any title or interest in or to the property which she agreed to convey, she was not a vendor under section 3307 of the Civil Code. They further insist that their position finds abundant support in *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123, and *Gray v. Smith*, 83 Fed. 828, 28 C. O. A. 168. As to the cases which appellants cite in support of their contention that the contract was valid, and that plaintiff Mary Backman, under that contract, stood in law as a vendor, they answer that the cases are to be read in the light of their facts, and that, so read, it appears that in each instance the purported vendor had some interest or title which he could perfect.

The question is thus presented whether one who, at the time of entering into the contract, has no right or title to the land in question, may make a valid contract for the sale of that land to a vendee. In this state the question has long been settled in favor of the validity of such contracts. In *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320, the first installment had been paid under an executory contract for the purchase of land. No other installments had been paid, and after the time for the payment of the last installment the vendor had conveyed the land for a valuable consideration to a third party; whereupon the vendee brought action to recover the first installment. This court, by Temple, J., first discussed the doctrine of rescission whereby, upon mutual abandonment, either party may recover the consideration paid, but declared that this was not a case for rescission, but was an effort by the purchaser, after his own default, to recover money paid by him when the vendor has not refused to complete the sale. Says the court: "The conveyance by the vendor was not a breach of the contract. One may sell land which he

does not own, and yet be able, when the time of performance arrives, to furnish a good title. In the meantime the purchaser would not be at liberty to disaffirm the contract on the ground that then the vendor was unable to make a good title. It would be incumbent on him to offer to perform, or to show that at the time of performance the vendor could not furnish the title." It will be noticed that herein the rule is fairly and squarely declared, not as respondents would have it, that one may sell land to which he has an imperfect or inchoate title, but that one may sell land to which he has no title, and the contract will be valid and enforceable if at the time of performance by him he is able to furnish good title. *Joyce v. Shafer* is approved in *Shively v. Semi-Tropic, etc., Co.*, 99 Cal. 261, 33 Pac. 848, in *Garberino v. Roberts*, 109 Cal. 125, 41 Pac. 857, and finally in *Hanson v. Fox*, 155 Cal. 106, 99 Pac. 499, where the previous cases are reviewed, and it is said: "Nor does the fact which the court found, namely, that defendant had no title to the lots, afford any reason for the interposition of equity. In a case such as this it is permissible for one to contract to convey title to land which he does not own, and he is in default under such contract only when the vendee has performed his part of the contract and made demand for a title which the vendor is unable to furnish. Such is and always has been the settled rule in this state." *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123, contains no declarations of law at variance with this, and indeed if it did, of necessity it would follow that those declarations were overruled by the above-quoted utterances of this court in later cases. *Easton v. Montgomery* declares: "We cannot lose sight of the proposition that in this country, where values of land fluctuate rapidly, and where transfers are so frequent, it is very common for the purchaser of land to make a transfer of land before he has acquired the title. It would work great injustice to hold that no one could make a valid contract for the sale of land until he had himself become clothed with the absolute title. * * * It is not necessary, however, that the vendor should be the absolute owner of the property at the time he enters into the agreement of sale." In *Easton v. Montgomery* the vendee sought to justify his refusal to proceed upon the ground of a defect in the vendor's title. The court was not considering the case of a vendor without title at the time of making the contract, and its language is addressed to the situation actually before it. The court lays down the well-established rule that in every executory contract for the sale of land there is an implied condition that the title of the vendor is good, and that he will transfer to the purchaser by his deed of conveyance a title unincumbered and without defect; but the vendor sufficiently complies with this obligation if he is able to give a good title at the time when, by the terms of his contract of sale, he is required to

make the conveyance. Says the court: "It is not necessary that the vendor should be the absolute owner of the property at the time he enters into the agreement of sale. An equitable estate in land, or a right to become the owner of the land, is as much the subject of sale as is the land itself, and whenever one is so situated with reference to a tract of land that he can acquire the title thereto, either by the voluntary act of the parties holding the title, or by proceedings at law or in equity, he is in a position to make a valid agreement for the sale thereof." Measured by the rule and language of *Easton v. Montgomery*, the plaintiffs by the tender of a good and sufficient deed to the property, within the time and under the terms limited by their contract, demonstrated their ability to acquire and transfer the title by the voluntary act of the parties who had formerly held it. Upon this subject, and in support of the doctrine of our court, reference may be made to *Dresel v. Jordan*, 104 Mass. 407, *Dally v. Minnick*, 117 Iowa, 563, 91 N. W. 913, 60 L. R. A. 840, and *Logan v. Bull*, 78 Ky. 607.

Gray v. Smith, 83 Fed. 828, 28 O. C. A. 168, does not express views at variance with those adopted by this court, and, if it did, it would be sufficient to say that those views, not being upon a federal question, would have no weight in overthrowing the deliberate judgments of this court. *Gray v. Smith* was an effort by a vendor to recover damages for the vendee's withdrawal from an executory contract of sale. But the vendor in that instance had neither title nor means of procuring title, and did not and was not able to tender title, but rested his right of action solely upon the default and refusal of the vendee to proceed. It is in view of these facts that the circuit court used the following language: "The case presented for our consideration therefore was one in which the plaintiff made a contract to sell real estate of which he was not the owner and in which he had no right, title, nor interest, nor the ability to compel, by the law or otherwise, a conveyance from the owner. * * * One who makes a contract to sell property of which he has no title, nor the certain means of procuring title, presents no facts upon which damage to him may be predicated if the purchaser withdraws from

the contract." This last declaration is in strict accord with the views of this court, with the proviso added that the time limited by the contract in which the vendor is to procure title has at the time of the vendee's withdrawal expired. Otherwise, and by the very terms of the contract, the vendor who has stipulated to make title by a certain date cannot be in default. Such in effect was the case of *Burks v. Davies*, 85 Cal. 110, 24 Pac. 613, 20 Am. St. Rep. 213, where the contract was a mere option, exercisable by the vendee at any time within its life, to purchase lands agreed to be conveyed by the vendor. As to some of these lands the vendor had no title, discovering which the vendee gave notice of rescission. The vendor at the time of the notice had not procured or taken steps to procure title to the lands which he did not own. As the vendee's option could be exercised at any time, it was held by this court that it became the vendee's duty to be ready, at all times within the period of the option during which a conveyance might be demanded by the purchaser, to convey good title to him of all the lands which he had agreed to sell, and his inability and unreadiness so to do justified a rescission of the option.

But the case at bar is radically and essentially different from the two which have last been considered. Here the vendor entered into a contract to make a conveyance within a given time. She made tender of full and complete title, and the tender was refused. True, the title tendered was not her own, and it is recognized that the vendee might have insisted upon title deraigned through the vendor. But their failure to object upon this ground was a waiver of the irregularity. *Royal v. Dennison*, 109 Cal. 558, 42 Pac. 39. The case then presented, in brief, is one where the vendor within the time limited by the contract has made good and sufficient tender of full and complete title to the land agreed to be sold. No reason in law or in equity exists for defendants' refusal to accept the tender, and for their breach of contract they are responsible in damages.

The judgment appealed from is therefore reversed, and the cause remanded.

We concur: LORIGAN, J.; MELVIN, J.

(37 Utah, 359)

HILTON v. SLOAN et al.

(Supreme Court of Utah. April 19, 1910.)

1. COURTS (§ 90*)—STARE DECISIS—OPERATION OF DOCTRINE.

Where the specific ground of estoppel is alleged in an action and passed upon, the decision is not a ruling on all other grounds of estoppel, so as to be stare decisis as to such grounds.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313-321; Dec. Dig. § 90.*]

2. DOWER (§ 50*)—ESTOPPEL TO CLAIM.

Complainant was married, and afterwards, in 1873, she and her husband obtained a purported divorce from the church, which was in fact invalid. Complainant and her husband lived apart thereafter until 1900, when the latter died, and during that time complainant never asked for or received aid from her husband, and they both lived as unmarried persons, and complainant went by her maiden name until 1875, when she married another in the same city in which she and her first husband lived, and complainant was thereafter known by the name of her second husband, and in 1887-89 she joined her second husband in conveyances which were recorded, and complainant raised a large family by her second husband. After their alleged divorce, her first husband conveyed the property in controversy as an unmarried man; he then living near such property. At least six months before his death complainant was informed of a decision of the court holding church divorces invalid, but continued to live with her second husband as husband and wife. *Held*, that complainant was estopped, as against bona fide grantees of her husband after their alleged divorce or purchasers therefrom, from claiming dower in the land sold by him.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 99; Dec. Dig. § 50.*]

3. ESTOPPEL (§ 54*)—ESTOPPEL IN PAIS—KNOWLEDGE OF FACTS—NECESSITY.

In order to be estopped, one need not in every case know the truth concerning material facts or intend to deceive the person injured, if, under the circumstances, he had a reasonable means of ascertaining such facts.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 128-135; Dec. Dig. § 54.*]

4. ESTOPPEL (§ 95*)—EQUITABLE ESTOPPEL—SILENCE.

Inaction or silence may under some circumstances amount to a misrepresentation and concealment of the true facts, so as to raise an equitable estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 285-287; Dec. Dig. § 95.*]

5. ESTOPPEL (§ 52*)—EQUITABLE ESTOPPEL—NATURE OF DOCTRINE—"ESTOPPEL IN PAIS."

The doctrine of "estoppel in pais" is an equitable doctrine originally applied to prevent an advantage to be taken of strict legal rights, and the equities of the particular facts must control in applying it.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121-127; Dec. Dig. § 52.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2497-2508; vol. 8, p. 7656.]

6. ACTION (§ 24*)—EQUITABLE DEFENSE—ESTOPPEL—DOWER.

In view of Const. art. 8, § 19, providing that there shall be but one form of action for the administration of both law and equity, an equitable estoppel may be pleaded as a defense in a legal action for dower.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 153-155; Dec. Dig. § 24.*]

7. DOWER (§ 44*)—CONVEYANCE BY HUSBAND—BONA FIDE PURCHASERS.

Ordinarily a claim of dower cannot be defeated by a claim of a bona fide purchaser of the land from the husband.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 130-143; Dec. Dig. § 44.*]

8. ESTOPPEL (§ 72*)—EQUITABLE ESTOPPEL.

When one of two innocent purchasers must suffer by the acts of a third person, he who has enabled the latter to cause the loss must sustain it.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 188; Dec. Dig. § 72.*]

9. DOWER (§ 29*)—NATURE OF RIGHT.

Dower is merely an inchoate right which may never become a vested interest.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 81; Dec. Dig. § 29.*]

10. DOWER (§ 50*)—DEFENSES—ESTOPPEL.

The wife's right to dower is not affected by the husband's representations upon selling the land that he is unmarried unless she permits innocent persons to deal with him in good faith as an unmarried man with actual or constructive knowledge of his representations.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 99; Dec. Dig. § 50.*]

11. ESTOPPEL (§ 97*)—EQUITABLE ESTOPPEL—PERSONS ENTITLED—GRANTEES.

One purchasing land from another who was entitled to invoke an estoppel as against claimants thereto may himself rely on the estoppel, though he had knowledge of facts when purchasing which would have prevented his grantor from invoking the estoppel had the latter known them.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 289; Dec. Dig. § 97.*]

Appeal from District Court, Third District; C. W. Morse, Judge.

Separate actions by Annie F. A. Hilton against Robert W. Sloan and others; against Adolph M. Anderson and others; against Fred Stauffer and others; against Eberard Blerer, Jr., and others; against Nellie M. Blair and others; against Salt Lake City; against Mae C. Beamer and others; and against Elizabeth Goeghegan and others. From a judgment for plaintiff in each case, defendants appeal. Judgments reversed, with direction to enter judgments quieting title in defendants.

See, also, 108 Pac. 698.

Barnard J. Stewart, for appellants. N. V. Jones (Ogden Hiles, of counsel), for respondent.

FRICK, J. The foregoing eight cases were tried together in the district court, are presented to this court in one record, and, as the decision in each one of them substantially depends upon the same state of facts and must be based upon the same legal and equitable principles, we shall, for the purposes of this opinion, treat them all as one case.

The actions were instituted by respondent to recover dower in certain real estate as the surviving widow of one Dr. John R. Park, deceased. The appellants dispute respondent's right to dower on two grounds: (1)

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

That she is not the widow of said Dr. Park for the reason that respondent and said Park had never been married; and (2) that, even though they had at one time been married, respondent, by reason of her conduct, was estopped from successfully maintaining the actions to recover dower in the lands described in her complaints and of which appellants were in possession either as the purchasers or as grantees from the purchasers of said Dr. Park, deceased. The pleas of estoppel are quite lengthy. It must suffice to say that the facts set forth in each of the pleas are sufficient in form and substance to entitle the appellants to prove equitable estoppels, or, as they are sometimes called, estoppels in pais, against respondent, if such estoppels are available in these actions as a defense. Upon a hearing of the cases, the trial court found the issue of marriage in favor of respondent; while upon the issue of estoppel the parties had stipulated the facts to be substantially as they were set forth in the several pleas, and the court found as a conclusion of law from the conceded facts that they did not constitute an estoppel, and thus both issues were resolved against appellants, and they now present the record to this court for review.

The principal errors assigned are: (1) That the court erred in its finding that the respondent and said Dr. Park were in fact married, and that they sustained the relation of husband and wife at his death; and (2) that, conceding that the respondent and said Dr. Park were in fact married, the court nevertheless erred in its conclusion of law that respondent was not estopped from successfully asserting her right to dower in the lands in question by reason of her conduct. The facts upon which this estoppel is claimed we shall refer to more fully hereinafter.

So far as the error relating to the finding of the marriage is concerned, we remark that the same grounds against such a finding are now urged that were insisted on in the cases of *Hilton v. Roylance*, 25 Utah, 129, 69 Pac. 660, 58 L. R. A. 723, 95 Am. St. Rep. 821, and *Hilton v. Stewart*, 25 Utah, 161, 69 Pac. 671. Moreover, the evidence and all the facts and circumstances disclosed by the record before us are substantially the same as they were made to appear to this court by the records of the two cases referred to. While it is urged that there is some new evidence of an expert character relative to the difference between a so-called "sealing" and a marriage ceremony, we are of the opinion that this difference cannot affect the result as reached in *Hilton v. Roylance*, supra. We shall therefore not enter upon a discussion upon the question of marriage, but, for the purposes of this decision, we shall consider that question as settled by the case last referred to. The only question we shall discuss, therefore, is the question of estoppel.

Respondent asserts that this question has

been settled by this court in the case of *Norton v. Tufts*, 19 Utah, 470, 57 Pac. 409, and in *Hilton v. Roylance*, supra. In the latter case respondent herein was appellant, and the question, she now insists, was there determined in her favor, and is therefore *stare decisis* at least. If the precise question now raised by appellant was in fact presented in the two cases referred to, or in either one of them, and was there considered and decided as respondent claims, then we ought not, except for the most cogent reasons, disturb the ruling there made. In order to determine whether respondent's conclusions are correct with respect to the scope and effect of those two decisions, we have not only had recourse to the text of the decisions, but have carefully examined the pleadings, the findings of fact, and the conclusions of law, the assignments of error, and the arguments of counsel as found in their briefs in those cases, and from all the matters above referred to have been forced to the conclusion that the precise question now presented for decision was not attempted to be, nor was it, decided in either of those cases. Mrs. Wickel, the dower claimant in the case of *Norton v. Tufts*, claimed to be the surviving widow of one Elbridge Tufts under circumstances somewhat similar to those under which respondent claims to be the surviving widow of Dr. Park. The attorneys for Mr. Norton claimed that she was equitably estopped from claiming dower in the mortgaged premises as against Norton, the mortgagee, because she had permitted Mr. Tufts and the so-called Mrs. Tufts to live and cohabit together as husband and wife for a long period of time without any protest or objection, and, further, that she, under her "church divorce," had herself married Mr. Wickel, and by so doing had recognized the validity of the church divorce, and that by such conduct she had misled the public, and hence ought to be estopped from claiming any interest in Tufts' property as his surviving widow. The attorneys for Mrs. Wickel answered this contention by insisting that, while Mrs. Wickel did obtain a church divorce and in reliance upon its validity did intermarry with one John Wickel, she nevertheless, as soon as she learned that the church divorce was void and of no effect, ceased to live and cohabit with the man whom she had married, and thereafter began an action against Elbridge Tufts, her husband, for a legal divorce, which action was pending when Mr. Norton obtained his interest in the premises in which Mrs. Wickel claimed her dower right, and that, in view of these facts, Mr. Norton knew of Mrs. Wickel's claim when he obtained the mortgage, and hence she was not equitably estopped as against Mr. Norton. From what this court in speaking through District Judge Rolapp said, it would seem that the decision in *Norton v. Tufts* was in part at least based upon the ground contended for by Mrs. Wickel's attorneys. At page 477 of 19 Utah, at

page 411 of 57 Pac., in discussing the grounds of estoppel, Judge Rolapp said: "In this case it appears that, prior to the time the plaintiff took this mortgage Eleanor B. Wickel had commenced divorce proceedings against her husband in the proper court in this state; and it is not claimed that she had any knowledge either of the plaintiff's purpose to loan her husband money, or of the fact that the latter executed the mortgage sought to be foreclosed; so that she was never able to advise plaintiff of her claim during any time that such information would have been of benefit to her. We do not understand that mere silence, under such circumstances, would amount to an estoppel; because, while probably it would have been her duty to speak, and make known her claim, had she been advised that her husband was about to make the mortgage in question, yet prior to such proposed action she could not reasonably apprehend that her husband, after being made acquainted through the divorce proceedings with the fact that she claimed to be his wife, would execute a mortgage to the plaintiff, or any other person, and permit a woman having no interest in the property to assume to sign such document for the apparent purpose of releasing dower. If the plaintiff in this case was misled, it was through the wrongs of Elbridge Tufts, and not through any negligence or fault of the defendant Eleanor B. Wickel." From the foregoing it seems that the court assumed that the commencement and pendency of the action for a divorce by Mrs. Wickel "prior to the time plaintiff [Norton] took his mortgage" was in itself sufficient to apprise Mr. Norton of Mrs. Wickel's claim that she was the lawful wife of Mr. Tufts. The court thus, in effect at least, held that if Mrs. Wickel, by her former conduct, had held out to the world that Mr. Wickel, and not Mr. Tufts, was her husband, she immediately, upon learning her true status, had likewise openly by a proper action in court disavowed her relation with Mr. Wickel, and had announced that, notwithstanding her apparent former relation with Mr. Wickel, she nevertheless was the lawful wife of Mr. Tufts. The controlling elements upon which the court seemingly based the decision therefore were: (1) That Mrs. Wickel, upon learning of the invalidity of the church divorce, at once ceased to live and cohabit with Mr. Wickel, and by commencing an action for divorce against Mr. Tufts had effectually repudiated that which, by her former conduct, the public generally had a right to assume as true, namely, that she was not the wife of Mr. Tufts because she was the wife of John Wickel; and (2) that Mr. Norton at the time he obtained the mortgage, if he did not actually know of Mrs. Wickel's claim that she was the wife of Mr. Tufts, at least had the means at hand to ascertain that fact, and that Mrs. Wickel in no way misled nor attempted to mislead him. As is clear from the

opinion, therefore, the court found that Mrs. Wickel, neither in law nor in fact, had misled Mr. Norton, and hence was not estopped from asserting her claim as against him. The contention of appellants in these cases is to the effect that respondent by her acts and conduct misled them into dealing with Dr. Park as an unmarried man, and, if she is now permitted to enforce her claims against them, it can only be done by gainsaying the effect of her conduct to their detriment. This, the appellants claim, equity and good conscience forbid.

From the foregoing we think it is quite clear that the real ground of estoppel now urged was not decided to be an element in the case of Norton v. Tufts, and hence was not passed on in that case. While it is true that there was at least an attempt to set up an estoppel in the answer in Hilton v. Roylance, it is equally true that the trial court made no rulings or in any way alluded to this issue, either in the findings of fact or conclusions of law in that case. The findings of fact and conclusions of law in that case were limited to the one issue, namely, the issue of marriage, and the trial court found that the respondent in these cases and Dr. Park were not married, and that she was not Dr. Park's widow, and hence had no right of dower in his estate. If the question of estoppel was thus an issue in Hilton v. Roylance, the parties, as well as the trial court, had ignored and abandoned it; and, if this be so, it is not easy to see how this court could have reviewed an issue which was not considered or passed upon in some form by the trial court. It is true that the respondent, who was the appellant in that case, insisted in her brief and argument that she was not estopped, and it is equally true that Mrs. Roylance, the respondent in that case, urged in her brief and argument that Mrs. Hilton, the respondent here, was estopped, but such estoppel was asserted upon the following grounds: "On the ground of public policy, public morality, and public decency, appellant is estopped from obtaining any relief whatever in this case, or from claiming, asserting, or establishing that she is, or ever was, the wife of Dr. John R. Park." See page 48, respondent's brief in the case of Hilton v. Roylance. This claim of estoppel was, therefore, a mere general claim that respondent was estopped from claiming to be the wife of Dr. Park. This court in the opinion in Hilton v. Roylance treated the matter even more generally. All that is said upon this question is found on page 159 of 25 Utah, on page 671 of 69 Pac., where Mr. Justice Barch, speaking for the court, said: "Nor, under the circumstances disclosed in evidence, is she now estopped from asserting her marriage with Dr. John R. Park, or from denying the legality of her subsequent marriage." Not a word is there said, nor intimation made that she is estopped, for special reasons as against a particu-

lar grantee of Dr. Park, her alleged husband, but the statement of the court is confined to two matters, namely, her marriage with Dr. Park and her subsequent marriage with Mr. Hilton. The court simply held that she was not estopped from claiming the former nor denying the legality of the latter. All this may be conceded as a general proposition, and yet, when we come to apply her conduct concretely to particular individuals who had dealings with Dr. John R. Park, her husband, during his lifetime, it may be that upon the principles of common justice and in good conscience she should be estopped as against such individuals who claim as the innocent purchasers and grantees of Dr. Park. This latter is the claim that is now presented, and as a basis for which the parties to the present actions made an agreed statement of facts upon which, as we have already stated, the trial court based its conclusion that respondent was not estopped. That the former members of this court recognized a distinction between the general claim of estoppel as passed on in *Hilton v. Roylance* and the claim of estoppel as now made is clearly shown from what is said in a case decided nearly three years after the decision in the Roylance Case, namely, the case of *In re Park Estate*, 29 Utah, 257, 81 Pac. 83. In the latter case Mr. Chief Justice Bartch, who was the writer of the opinion in the Roylance Case, at page 264 of 29 Utah, at page 84 of 81 Pac., in referring to the plea of estoppel, says: "Whether she can now maintain such suits against innocent third parties who made such purchases ignorant of the status existing between her and the vendor, or whether her conduct during the lifetime of the vendor was such as to estop her from maintaining them, are questions which we do not decide; the same not being material to this decision. Such questions can only be determined upon proper pleadings and proof. There is nothing in this case showing an estoppel." The "suits" referred to by the Chief Justice are the very suits that are now being prosecuted by respondent on the one hand and defended by appellants upon the other. From the foregoing it seems clear to us that the issue of estoppel as now presented for decision was neither presented nor decided in either of the cases to which reference has been made.

Neither can it be said that the question was necessarily involved, and hence decided, although not discussed, by the court. This contention might be sound if the parties to the actions, as well as the court, had not specifically stated what the character of the estoppel was that was claimed on the one hand and defended on the other and finally decided by the court. When a specific ground for an estoppel is alleged and the court passes upon such ground only, it cannot with any show of reason be said that such ground includes all other grounds of estoppel, and, because the court considered and passed upon

that ground, therefore every possible ground which may be urged in a subsequent case has been included in the former decision, and has thus become *stare decisis*. We do not understand this to be the law.

The question, therefore, is: Do the conceded facts constitute an estoppel in pais in favor of appellants, who are all grantees or purchasers from the grantees of Dr. Park, the former husband of respondent? The material facts upon the issue of estoppel, as either agreed to or not disputed, in substance, are: That on the 5th day of December, 1872, at Salt Lake City, Utah, the respondent and Dr. Park, by a certain ceremony which this court has held constituted a valid marriage contract, became husband and wife; that on the 19th day of March, 1873, the respondent and said Dr. Park obtained what was by them supposed to be a divorce from their church, which is in words and figures as follows: "Know all persons by these presents: That we the undersigned John R. Park and Annie, his wife, before her marriage to him Annie Armitage do hereby mutually covenant, promise and agree to dissolve all the relations which have hitherto existed between us as husband and wife, and to keep ourselves separate and apart from each other, from this time forth. In witness whereof, we have hereunto set our hands at Salt Lake City, U. T., this 19th day of March, A. D. 1873. Signed in the presence of D. McKenzie, James Mack, John R. Park, Annie Flora Park." That said Dr. Park died testate on the 30th day of September, 1900, at Salt Lake City, Utah. That said Dr. Park lived continuously in Salt Lake City from December, 1872, to the time of his death, and respondent continuously lived therein from 1872 to the time of trial. That respondent and said Dr. Park never applied for nor obtained a divorce from any court of this or any other state. That they never lived nor cohabited together as husband and wife, and respondent never demanded support from said Dr. Park during his lifetime, nor received any aid from him. That said Dr. Park, in 1872, and for many years thereafter, was president of the University of Deseret, subsequently and now the University of Utah. That for many years before and up to within a short time of his death he was state superintendent of public instruction. That during the whole period of time from 1872 up to the time of his death he lived as and represented himself to be an unmarried man, and that in making the several conveyances set forth in the pleadings in the foregoing actions he represented himself to be and did convey the lands in question as a single man. That each purchaser before he obtained his conveyance caused the title to the land to be examined by a competent lawyer who approved the title as free from all incumbrances and claims. That said Dr. Park lived near the real estate in question when the conveyances were made, and that respondent never was in possession or occu-

pancy thereof, either with said Dr. Park or otherwise. That after obtaining the so-called church divorce the respondent went by her maiden name of Annie Armitage, and by that name, in 1875, married one William Hilton, an unmarried man, in Salt Lake City. That said respondent and said Hilton from thence forward continuously lived and cohabited together in Salt Lake City as husband and wife, said respondent being thenceforth known as the wife of said Hilton, and went by the name of Mrs. Hilton. That said respondent and said Hilton, while sustaining the relations aforesaid, reared a family of 10 children, who were born to them from the time of their said reputed marriage up to the time of the death of said Dr. Park. That during the years 1887-89 said respondent joined in conveyances of real estate by said Hilton as his wife, all of which conveyances were recorded in the public records of Salt Lake county. That said respondent, at least six months prior to the death of said Dr. Park, was informed and knew that by the decision of this court the so-called church divorces were declared absolutely void and of no force or effect, and that the marriage relation which was attempted to be dissolved by such a divorce still continued in full force and effect. That, notwithstanding such knowledge on her part, she continued to live and cohabit with said William Hilton as his wife, and said nothing about her marriage with Dr. Park, or as to being his wife until after his death, after which she and said Hilton entered into a legal marriage, after which they continued to live and cohabit together as husband and wife the same as they had theretofore done. While the time when the original conveyances of the lands in question were made by Dr. Park is stated to have been during the years 1888 and 1889, the time when the present holders obtained their conveyances from the prior grantees of Dr. Park does not appear, except in the Geoghegan Case. This we do not deem as material, for the reason that it is made to appear that all of the present claimants, as well as their grantors, for many years lived in Salt Lake City, and at least some of them personally knew Dr. Park. Further, the facts clearly disclose that all knew him by reputation as a public educator and as a single man, and that, when they obtained the property in question, each purchaser had the title examined as aforesaid, and the inference is certainly strong, if not conclusive, that the original purchasers from Dr. Park and of whom the present claimants are grantees relied upon Dr. Park's conduct, habits, and mode of life as well as upon his declarations and representations that he was an unmarried man, and as such conveyed the property in question. Out of all the claimants there is but one, namely Elizabeth Goeghegan, who it appears knew when she purchased the premises that respondent claimed a dower right therein, but the original grantee of Dr. Park

obtained the property now owned by Mrs. Goeghegan under the circumstances above detailed. We shall have occasion to refer to this phase of the case again. Finally, it is conceded that each one of the original grantees from Dr. Park purchased the property conveyed to him in good faith for value, and that each one of the claimants purchased in the belief that he was acquiring an absolute and unincumbered title, and that none of them, except Elizabeth Goeghegan, had knowledge, either directly or indirectly, of respondent's claim or of her relation to Dr. Park at the time of acquiring the property. The total value of the real estate of which Dr. Park became seised after 1872, and which was alienated by him before his death, is stipulated to be about \$70,000.

Appellants contend that the foregoing facts, including the inferences that may be deduced therefrom, together with the circumstances disclosed, constitute an equitable estoppel in their favor as against the dower claim of respondent. Upon the other hand, respondent, in effect, insists that whatever might be the rule as applied to other claims, as to the claim for dower, the facts are entirely insufficient to constitute equitable estoppel. Without here repeating what she claims in this regard, and without formulating a statement of the necessary elements constituting estoppel, it must suffice to say that she relies on the usual elements which the courts under a large variety of circumstances have declared to be necessary in order to successfully invoke an equitable estoppel or estoppel in pais. The usual formula is perhaps as clearly stated as it can be by Mr. Pomeroy in section 805, vol. 2 (2d Ed.) of his excellent work on Equity Jurisprudence, to which we refer the reader. Mr. Pomeroy, with his usual caution and loyalty to fundamental principles, prefaces the formula adopted by him by the following suggestion: "One caution, however, is necessary, and very important. It would be unsafe and misleading to rely on these general requisites as applicable to every case without examining the instances in which they have been modified or limited." In section 808 et seq., in discussing the formula aforesaid, the author more specifically refers to conduct which may give rise to an estoppel, and we think that the author clearly shows that it is not a rule of universal application that a party, in order to be estopped, must have known the real truth concerning the material facts, but that, under peculiar circumstances, it may be quite sufficient to create an equitable estoppel if "the party, although ignorant or mistaken as to the real facts, was in such a position that he ought to have known them, so that knowledge will be imputed to him. In such case ignorance or mistake will not prevent an estoppel." It follows as a matter of course that, in order to make the foregoing rule applicable, the party invoking the estoppel must show that at the time he acted up-

on what appeared to him to be the real facts he lacked both the knowledge and the reasonable means of ascertaining the real facts, and that he relied upon the facts and circumstances as they then appeared to him in view of the conduct of the party against whom the estoppel is invoked.

Respondent contends, also, that the claim of an equitable estoppel must fail if for no other reason than that there is no evidence, either direct or inferential, that she intended to deceive any one by her conduct, and that the inference is strong, if not conclusive, that she was ignorant of her own rights, was ignorant of the legal effect of the church divorce, and that she in good faith believed that her marriage with Dr. Park was legally annulled, and that the one with Mr. Hilton was legal, and that she in good faith acted accordingly. This claim of respondent in our judgment is too broad. It is not necessary that in all cases and under all circumstances there must be shown an actual intention to deceive in order to estop a person. In 2 Herman on Estoppel, etc., § 773, in referring to the usual claim that, in order to prevent one from asserting his title upon the ground of an estoppel, an actual intention to deceive must be shown, the author says: "The doctrine (equitable estoppel) has not in equity been limited to cases where there was an actual intention to deceive. The cases are numerous where the party who was estopped by his declarations or his conduct to set up his title was ignorant of it at the time, and, of course, could have had no actual intention to deceive by concealing his title; yet, if the circumstances were such that he ought to have informed himself, it has been held to be contrary to equity and good conscience to set up his title, though he was in fact ignorant of it when he made the representations." It is almost unnecessary to add that mere inaction or silence may, under peculiar circumstances, amount to both misrepresentation and concealment of the true status of things which are important for others to know in order to protect their full interests. But it is further contended that the right of dower is favored by the law, and that the widow is not to be deprived of this right except where she has been guilty of some actual or intended fraud. Referring to section 755 of the volume last above quoted from, the author, in answer to the claim that to constitute an estoppel in pais the party to be estopped must have been guilty of intentional fraud, says: "All that is essential is that there should be such conduct on the part of the person against whom the estoppel is alleged as would make it a fraud for him to gainsay what he had expressly admitted by his words or tacitly confessed by his silence, but there need not be in the precedent acts actual fraud or evil design. All that is meant in the expression that an estoppel must possess an element of fraud is that the case must be one in which the circumstances and conduct would render

it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon. The door is shut against asserting a right then (when) that would result in doing an injury by the party asserting it to some other person, or when in good conscience and honest dealing he ought not to be permitted to gainsay his previous conduct." The right to assert an estoppel by appellants against respondent, in view of the facts and circumstances of the cases at bar, rests upon purely equitable grounds. An estoppel in pais is entirely a creature of courts of equity, and the equities of the particular case must control the result of that case. The reasons why such estoppels were called into existence, and when and to what extent they should be enforced, are well stated by the author in section 739 of 2 Herman on Estoppel and Res Judicata, in the following language: "This doctrine is properly and peculiarly a doctrine of equity, originally introduced there to prevent a party from taking a dishonest and unconscientious advantage of his strict legal rights, * * * though, like many other equitable doctrines, constantly administered at law. The ancient practice differed from the modern, and in actions at law, the courts, being unable of giving effect to this equity, were often enjoined where the party insisted on his rights at law contrary to the equitable doctrine. The office of equitable estoppels at law is therefore like that of injunctions in equity, to preclude rights that cannot be asserted consistently with good faith and practice, to prevent wrongs for which there might be no adequate remedy. And they should consequently, when the circumstances will permit, be so construed and moulded as not to deviate from their object; and those cases where estoppels are said to be odious or not favored should be only where the technicality of the estoppel cannot be subservient to its equity."

We have thus shown the general principles that govern courts in applying the doctrine of estoppels in pais. Some courts have mooted, while others have asserted, the proposition that an equitable estoppel cannot be invoked in an action to recover dower, unless the claim for dower is made in a proceeding in equity, for the reason that the right of dower is purely legal and is enforceable in a law action. Whatever anciently may have been the practice, or whatever it may be in some of our sister jurisdictions, our Constitution admits of no doubt upon the subject, since, by section 19 of article 8, there may be but one form of action in which both law and equity may be administered. Such, we think, is also the great weight of authority as appears from the following cases in which dower claims or similar rights were involved and litigated, and in all of which the courts recognized the right to interpose equitable estoppels as defenses: *Prater v. Prater*, 87 Tenn. 78, 9 S. W. 361, 10 Am. St. Rep. 623; *Yorston v. Yorston*, 32 N. J. Eq. 495; *Sedlak*

v. Sedlak, 14 Or. 540, 13 Pac. 452; Richeson v. Simmons, 47 Mo. 20; De France v. Johnson (C. C.) 28 Fed. 891; Dunlap v. Thomas, 69 Iowa, 358, 28 N. W. 637. In a number of the foregoing cases the doctrine is also illustrated and applied that, while particular facts may not be sufficient to estop the widow as against the estate of the deceased husband, they may nevertheless be sufficient to estop her as against the innocent grantees of her husband or as against such as claim through such grantees. We remark that the foregoing cases, with possibly one or two exceptions, are not claimed by us as cases in point upon the facts and circumstances disclosed by the record before us, but what we claim for them is that they fully sustain the principles for which we contend. The case of Richeson v. Simmons, supra, is in our judgment upon principle a case directly in point. The equitable estoppel in that case was based upon a marriage relation which legally continued to exist as in the cases at bar after it was assumed by the parties to the original marriage contract to have been ended, and the estoppel was based entirely upon the conduct of the parties to the original marriage, although they were in fact ignorant of their real legal status. Notwithstanding this ignorance, however, the court enforced the doctrine of protecting the innocent by invoking, if necessary, an equitable estoppel against one who by his conduct had induced another to act although likewise innocent of any intentional deceit, fraud, or wrongdoing. The language of Mr. Justice Wagner, who wrote the opinion in Richeson v. Simmons, supra, is so apropos to some of the facts and circumstances in the cases at bar that we take the liberty to quote from the opinion somewhat at length. At page 27 of the volume aforesaid (47 Mo.), Mr. Justice Wagner, in referring to the estoppel, said: "From all the investigation that I have given to the case it is of first impression, so far as the question presented is concerned. Now, the record shows that since 1849, a period of 20 years, Mr. Hill and Mrs. Barclay have not only lived separate and apart, but they have ceased to intermeddle with the affairs of each other. With mutual concurrence they have both changed their situation in life. Each has married and brought up children, built up separate and distinct property, and transacted their business without regard to any previous connection between them. It may be reasonably inferred that there is not any very amicable feeling of relationship existing between them. Under such circumstances does the law demand or require the absurdity of Mrs. Barclay, when she wishes to dispose of her private property, going to Mr. Hill and asking him to join in the conveyance, when at the same time he professes to be the husband of another woman? The length of time that has elapsed, the manner in which each party has regarded and treated the other ought to operate as an effectual

estoppel, and preclude either party from an attempt to intermeddle in the affairs of the other. For upward of 20 years Mr. Hill, as far as his relationship toward Mrs. Barclay extends, has treated her as a feme sole; and upon no principle of justice has he any interest in, or can he interfere or exert any control over, her property. Mr. Hill is not here claiming any right, but it is set up in defense that the deed is not valid unless he joins and concurs. But I am of this opinion: I think that as Mr. Hill has voluntarily renounced his marital rights, and, by a course of policy persisted in for more than 20 years, has led Mrs. Barclay and the whole world to believe that all control or interest on his part had ceased and been surrendered, he can no longer be a party, nor need he be consulted in any disposition she may see proper to make of her property. Any other conclusion would be promotive of injustice and lead to the greatest hardship." But we need not go to the extent in applying the estoppel in the cases at bar that the Supreme Court of Missouri went in Richeson v. Simmons. True, in that case the husband's rights to the wife's property were involved, while here it is the wife's rights. In the Richeson Case it was held, however, that by reason of the conduct of the husband and wife, who separated and lived apart from each other, and, in the belief that they were legally divorced, each in good faith intermarried with another, and continued this relation until the action was commenced in which the question was raised, that this constituted an abandonment of all marital rights as well as an estoppel against enforcing such rights as against any one who claimed as grantee of either husband or wife, or against the estate of either. We are not asked to, nor is it necessary for us to go to this extent in these cases. To hold that a wife by her conduct has either abandoned or forfeited all of her marital rights as against her husband and as against his estate is one thing, while to hold that by her conduct she has led those who lived in the same community with her and her alleged husband to believe that he was a single man—that all may deal with him as such—that she is the wife of another man, and that by reason of such conduct she is estopped as against those who actually dealt with the man whom she now says was her lawful husband in the belief that he was a single man, is quite a different thing. To hold that by respondent's conduct in marrying Mr. Hilton and in continuously for many years living and cohabiting with him as her husband, in joining with him as his wife in making conveyances of his real estate, in bearing his name, and rearing his and her family of 10 children, she did not hold out to the world that her relations with him were precisely what they seemed to be, and that she had absolutely no claim whatever upon Dr. Park, would be to ignore the universal experience of mankind. The respondent

ent went even farther than to permit others to deal with Dr. Park from the standpoint of mere appearances. The so-called church divorce, while impotent to dissolve the existing marriage, nevertheless, in effect, said to Dr. Park: "You may deal with your property as an unmarried man. You may represent yourself as such, and make conveyances of your property in your name as a single man." In view of this, the doctrine that a husband may not, by his representations, bind the wife with respect to her dower right in his property, does not apply. She not only in effect agreed with Dr. Park forever to abandon him, but she acted upon such agreement herself by entering into permanent conjugal relations with another, and thus, by such conduct, openly proclaimed to the world that, not only had she abandoned all personal claims upon Dr. Park, but that all the world might deal with him upon that basis. If she had proclaimed this fact from the housetops, it would have been no more effective than was her conduct, continued, as it was, from day to day, from month to month, and from year to year until the years had covered almost an entire generation. Under such circumstances, it is idle to assert that the law favors dower, and that nothing short of a legal relinquishment or the strongest grounds for an estoppel will ordinarily deprive the wife of her dower right. We concede that the law favors the dower right, and is tenacious in protecting the wife's right in her husband's estate. We also concede that the doctrine seems established, in the United States at least, that the mere claim of bona fide or innocent purchasers for value is not ordinarily available as against a widow's claim of dower. 2 Scribner on Dower (2d Ed.) 168; *Gano v. Gilruth*, 4 G. Greene (Iowa) 453; *Felch v. Finch*, 52 Iowa, 563, 3 N. W. 570; *Cruise v. Billmire*, 69 Iowa, 397, 28 N. W. 657.

The appellants' rights are not based upon the naked claims of innocent purchasers. While, in order to prevail, they, or their grantors, must have purchased the property from Dr. Park without notice of respondent's right, yet this without the elements of an estoppel would not be sufficient to protect them. When, however, such a purchaser obtains property under the facts and circumstances of these cases, he is protected upon broader grounds than the mere claim of innocent purchaser. In these cases, if appellants are not protected against the claims of respondent, it will result in permitting her to contradict and gainsay, to appellants' detriment, all that she by her solemn acts and daily conduct during a long period of years avowed as true, and will further permit her to now assert that she did not authorize Dr. Park to deal with all the world as a single man. This, in justice and good conscience, she ought not be permitted to do. It is still true, and as applicable as ever, that "in a moral sense that is called equity which is

found 'ex æquo et bono' in natural justice, in honesty, and in right." Moreover, if we permit respondent to assert her claims against these appellants, we must ignore the fundamental principle that, "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." 16 Cyc. 773.

In saying what we have we are not unmindful of the fact that dower is merely an inchoate right which may or may not ripen into a vested interest, and that a wife is not required to stand guard over her husband, and apprise those who are about to deal with him of her rights. Neither is she bound, or even affected, by his representations that he is unmarried, unless she knowingly, or under peculiar circumstances amounting to knowledge, permits innocent persons to deal with him while in good faith believing that he is what he represents himself to be. The law will ordinarily even protect wives who are the unwilling dupes of designing men as against the claims of those who have dealt with such men when they are in fact husbands, regardless of whether persons dealing with such husbands knew the actual relation or not. But this is protecting the wife in her marital rights, and not permitting her to assert those rights against those whom, by her own acts and conduct, she has led to believe that she had no rights. Under such circumstances, a court of equity and good conscience may not arbitrarily disregard her own acts and conduct, or condone them, to the injury of others. The claim that she too was innocent and was ignorant with respect to both her real status and her rights cannot prevail as against those who, in view of all the circumstances may be characterized as more innocent. Indeed, as against that class, respondent cannot claim to be innocent. She must be assumed to have known what all others knew—that she could not legally be the wife of two men at the same time. When, therefore, she by her acts and conduct said, "I am the wife of Mr. Hilton," she, by the same acts, declared to all the world that she was not, and legally could not be, the wife of Dr. Park. Third persons therefore had a right to rely on her acts and conduct in dealing with Dr. Park. If during all the years from 1875, when respondent married Mr. Hilton, up to about six months before the death of Dr. Park, when she says she first learned of the invalidity of church divorces, any one had asked her the direct question, "Are you the wife of Mr. Hilton, or are you the wife of Dr. Park, and in the property of which do you claim rights?" she, in view of the circumstances would, she must, have regarded the question as an insult, and without any hesitation would have announced that Mr. Hilton and no one else was her husband, and in corroboration of the announcement would have pointed to her children and

her past acts and conduct. If, therefore, there was a purchaser from Dr. Park here who had taken the precaution to ask the foregoing question, and he had received the assumed answer, would any one contend, or could a court of equity be found anywhere that would hold, that as against such a purchaser respondent would not be estopped? We think not. Is there any real difference in so far as a purchaser from Dr. Park is concerned between the case of appellants and the assumed case? Again we say we can perceive none.

Counsel for respondent, however, most earnestly insist that all of the foregoing facts may be true, and yet there is nothing which will prevent respondent from enforcing her dower right. In this connection it is again asserted that the authorities are to the effect that while a widow may, by her declarations, acts, and conduct, under certain circumstances, estop herself from successfully claiming her right of dower, yet this is not the case with a wife before the death of the husband. It is therefore contended by counsel that a wife cannot be barred from claiming her dower, except by a formal relinquishment of it as provided by the statute. The case of *Martin v. Martin*, 22 Ala. 86, is cited in support of this contention, and much reliance is apparently placed upon what is said in that case. It must suffice to say with respect to that case that the proceeding there was a direct one by the widow to recover dower in her alleged husband's estate. What was said by the court, therefore, in that case with respect to an estoppel, was intended to apply to the peculiar facts and circumstances present in that case, and not to a case where the widow is proceeding against the innocent grantees of her alleged husband. If it be conceded that as against the estate of Dr. Park respondent would not be estopped, yet as against the claims of third persons she may be, and ought to be. It may also be conceded, as is held in another case cited by counsel, namely, *Towles v. Fisher*, 77 N. C. 437, that the husband cannot represent the wife with respect to her dower right, and thus bind her by his representations, yet, under the facts and circumstances of the cases at bar, as we have already attempted to show, if respondent did not in express terms do so, she nevertheless, by unavoidable implication, authorized Dr. Park to represent himself as a single man, and to deal with his property as such. Moreover, by the same acts, and in the same manner, she announced to all the world that she not only had abandoned Dr. Park for all time, but had also abandoned all claims upon him as a wife, and she proceeded to and did act upon these declarations by entering into relations which spoke louder than mere words. What is said in the foregoing cases, therefore, can have no application to the facts and circumstances in the cases at bar. The same may be said with respect to the case of *Martien*

v. Norris, 91 Mo. 465, 8 S. W. 849. The only other case upon which counsel specially rely is *Wright v. De Groff*, 14 Mich. 163. In that case the widow was held not estopped from insisting upon her dower right for two reasons: (1) Because the agreement set up against her, and upon which the estoppel was claimed, was held void under the statute of frauds and hence of no force either offensively or defensively; and (2) because the acts of the widow, the second ground of estoppel, were all performed while she was acting in a representative capacity, and the court held that they did not constitute an estoppel against her personal rights. Giving the foregoing, as well as all other similar, cases, their full force and effect, what relevancy have they to the cases at bar? Clearly none whatever.

In view of all the circumstances, upon what reasonable ground can respondent base her claim that her rights in equity and good conscience are superior to the rights of appellants? Without ignoring the fundamental principles upon which equitable estoppels are based, we confess that we are unable to see wherein respondent can now be permitted to entirely ignore her past acts and conduct as against appellants and compel them to surrender to her as Dr. Park's widow a portion of the property that they purchased from Dr. Park in good faith while she claimed to be the wife of Mr. Hilton. In order to recover in these actions, she must be permitted to say, to the detriment of appellants, that her past acts and conduct by which she led the whole community, including appellants, to believe that she was the wife of Mr. Hilton, was a mere sham and falsehood. This equity and good conscience forbids us to permit.

In what we have said we disclaim any intention to in any way reflect upon the motives or the intentions of respondent. She, to a certain extent, was the dupe of circumstances, and, we have no doubt, acted in good faith. By reason of her relations with Mr. Hilton, we do not wish to be understood as imputing to her any impure motives, any moral wrong, nor that she consciously (except in the manner we have stated) desired to deceive any one. If we permitted her to prevail in these actions, however, she would perpetrate a wrong upon innocent persons. Our system of jurisprudence would fall far short of accomplishing what is claimed for it if it were impotent to afford relief under circumstances like those in the cases at bar, and a court of conscience that would fail to protect the purchasers in their rights as against the claims of respondent would, in our judgment, entirely ignore the fundamental principles upon which that system of jurisprudence is founded.

In conclusion we remark that it is claimed that the judgment against Elizabeth Goeghegan should be affirmed if for no other reason than that she purchased the property claimed by her after being made cognizant of re-

spondent's claim of dower. It is, however, conceded that Mrs. Goeghegan purchased from a grantee of Dr. Park, and that this grantee obtained the property under the facts and circumstances herein stated. The grantor of Mrs. Goeghegan could thus have invoked the estoppel against respondent, and, if this be so, Mrs. Goeghegan may do so as a subsequent purchaser. Ewart on Estoppel, 220-221. If this be not so, an estoppel would be of but little benefit to a purchaser of property, since he could not transfer it to another with the same rights that it is held by the purchaser. If, therefore, the original purchaser may successfully ward off an attack on his property upon the ground of an equitable estoppel against a claimant, why may not the grantee of such owner defeat the claim upon the original estoppel the same as the original owner could have done? We confess that we can see no reasons why such a grantee does not stand in the shoes of his grantor, and counsel for respondent have advanced none. What we have said with regard to the judgment against Mrs. Goeghegan applies also to the judgments against Sloan and Nellie M. Blair.

The judgment in each case is therefore reversed, with directions to the district court to set aside its conclusions of law that respondent is not estopped from claiming a dower interest in the several parcels of land described in her complaint in each case, and to substitute a conclusion of law that, by reason of the conceded and undisputed facts as they are made to appear from the stipulation of the parties and otherwise, respondent is so estopped; and to enter judgment or decree in each case quieting the title to the real estate described in the several complaints to the several appellants in accordance with the prayers contained in their answers. It is further ordered that the several parties to the foregoing actions pay his own costs on appeal.

MCCARTY, J., and LEWIS, District Judge, concur.

(37 Utah, 384)

HILTON v. SNYDER et ux.

(Supreme Court of Utah. April 19, 1910.)

1. JUDGMENT (§ 708*) — CONCLUSIVENESS — THIRD PERSONS.

Where the law provides a proceeding to establish an individual's status upon giving notice prescribed by law, a judgment in a proceeding solely for that purpose, declaring the status of the individual, is admissible in evidence against a stranger in any subsequent suit to prove such status, being evidence of that fact against all the world; but where the action is between individuals, and the status of an individual is merely incidentally in issue, the judgment therein is not admissible against strangers to that judgment, so that a judgment in an action to recover dower in land conveyed by the husband in which the widow's marriage was in issue and

established is not admissible in a subsequent action against strangers to that judgment to prove the marriage; the establishment of the widow's status as a married woman being merely incidental to the main purpose of the suit.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 708.*]

2. JUDGMENT (§ 708*)—CONCLUSIVENESS.

In an action against an estate to have plaintiff declared the widow of decedent under a valid marriage and to have dower awarded her, grantees of decedent were not bound by the judgment therein, establishing the marriage, the adjudication of plaintiff's status being merely incidental to the action to establish dower, so that, in an action against such grantees by the widow to establish dower in the land conveyed to them, the judgment was not admissible to prove her marriage.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 708.*]

3. DOWER (§ 79*)—ACTIONS TO ESTABLISH—BURDEN OF PROOF—MARRIAGE.

In an action for dower, the burden is upon the widow to establish a valid marriage; the validity of her marriage being put in issue.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 295; Dec. Dig. § 79.*]

4. DOWER (§ 80*) — FINDINGS — NEGATIVE FINDINGS.

In an action for dower, a finding that plaintiff must fail because she failed to establish the existence of a lawful marriage between herself and decedent is in effect a negative finding, and is sufficient to support a judgment for defendant on that ground.

[Ed. Note.—For other cases, see Dower, Dec. Dig. § 80.*]

Appeal from District Court, Third District; C. W. Morse, Judge.

Action by Annie F. A. Hilton against Gideon Snyder and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

N. V. Jones (Ogden Hiles, of counsel), for appellant. Snyder & Snyder, for respondents.

FRICK, J. This is an action to recover dower. The case may be said to be a companion to the case of Hilton v. Sloan, 108 Pac. 639, and the seven other cases tried with that case, all of which have just been decided by this court. The controlling issues presented for trial to the district court, affirmatively stated, are: (1) The marriage of appellant to Dr. Park; and (2) that appellant was estopped from claiming her dower interest in the land in question as against respondent. The parties to the action at the trial stipulated with regard to all the issues except that of marriage, which was left to be established by such competent evidence as appellant might produce. The only evidence that she produced in support of her claim that she was married to Dr. Park, and that she was his legal wife, and hence his widow, were the pleadings, findings of fact, conclusions of law, and judgments in the cases of Hilton v. Roylance, 25 Utah, 129, 69 Pac. 660, 58 L. R. A. 723, 95 Am. St. Rep. 821, and Hilton v. Stewart, 25 Utah, 161, 69 Pac. 671.

It is deemed material to state the issues that were involved in those two cases. Hil-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ton v. Roylance was an action by the appellant here to recover dower in land conveyed by Dr. Park during his lifetime, and during the time it is alleged appellant was his wife. In that case Mrs. Roylance denied that appellant and Dr. Park ever had been married. The trial court found that issue in favor of Mrs. Roylance and entered judgment accordingly, but this court, on appeal, reversed the judgment, and ordered findings and judgment in favor of appellant here, who was also the appellant in that case. By the findings and judgment in that case it was adjudicated that appellant and Dr. Park were married as claimed by appellant, and that at the time of the conveyance of the property involved in that case, and at the time of his death, she was his legal wife. In the action or proceeding of *Hilton v. Stewart*, supra, appellant petitioned the court (1) that it be adjudged that she is the widow of Dr. Park; (2) that she be awarded a certain sum per month out of Dr. Park's estate as his widow for maintenance and support pending the administration of the estate; and (3) that she be awarded a widow's share in the estate of Dr. Park. It may be said that in effect the latter proceeding was either directly against the estate, or indirectly so by proceeding against Mr. Stewart as the executor of the last will and testament of Dr. Park, which will had, in a proper proceeding, been duly probated when *Hilton v. Stewart* was commenced and determined. The district court in *Hilton v. Stewart* also found against appellant upon all three claims aforesaid. On appeal to this court, however, the findings and judgment of the district court were reversed as to the first and third claims. As to the second claim the lower court was sustained by this court, but for reasons other than those given by the district court.

From the foregoing it will thus be seen that in two actions or proceedings in which appellant was plaintiff it had been adjudicated by this court that she at a certain time and place was legally married to Dr. Park, and that at the time of his death was his lawful widow, and as such was entitled to a widow's share in his estate. At the trial of the case at bar in the district court that court pro forma admitted the findings and judgments aforesaid in evidence over respondent's objection, with the understanding, however, that their effect as evidence would be determined later. Upon further consideration, the court ruled that the findings and judgment in neither of the cases mentioned were admissible as evidence of the marriage in the case at bar. Appellant having produced no other or further evidence of her marriage with Dr. Park, the court found that issue in favor of respondent, and entered judgment against appellant upon the sole ground that she had failed to prove her marriage to Dr. Park, and hence had not established her right to dower in the lands in question. Appellant assigns the ruling of

the court excluding the judgments as error, and insists that the findings and judgment in both cases were competent and conclusive evidence of the marriage claimed by her.

As we understand appellant's contention, it is, in effect, this: That proceedings to establish a status, such as marriage, divorce, pedigree, citizenship, inquisitions of lunacy, etc., are in their nature proceedings in rem, and hence the judgment by which the status of any individual is adjudged is competent evidence as against all the world to prove the status as it is declared to be by such a judgment. 2 Black on Judgments, §§ 802-806, inclusive. Appellant therefore insists that in both cases referred to her status, namely, that she was the legal wife of Dr. Park, was solemnly adjudicated, and that hence the judgments in those cases were at least evidence of her marriage with Dr. Park. It may be conceded that, where there is some law by which a proceeding to establish a status of any individual may be instituted upon such notice as may be prescribed by law, in such a proceeding the judgment declaring the status of the individual in whose interest or against whom the proceeding is had may ordinarily be used as evidence against all the world for the purpose of proving that the status is what it is declared to be in the judgment. Generally it may be conceded that in nearly all, if not all, jurisdictions special proceedings are provided for by which the status of certain individuals may be determined and established when for special reasons it becomes necessary to do so. Those most generally provided for are inquisitions of lunacy, naturalization proceedings by which certain individuals are adjudged citizens, and matters of that character. We know of no special law or procedure in this state, however, whereby every possible status may be established as is done in some countries, notably in England. *Shores v. Hooper*, 153 Mass. 231, 26 N. E. 846, 11 L. R. A. 308. But, even where status may be determined by some special proceeding, notice thereof is usually provided for which must be given to some designated public official, or to the public generally, by publication, or the like. In this way the public generally may be said to have been brought into court, and for that reason may be bound by the judgment, for certain purposes at least. In cases between individuals, however, where the status is merely incidentally in issue, a judgment, which, among other things, also fixes the status of one or both parties, is not admissible as evidence of that fact as against strangers to that judgment. So far as we are aware, the reasons for the rule itself governing the admission and exclusion of judgments obtained between private parties in proceedings where the status of an individual is incidentally involved are the same as in other cases. As we understand the rule which distinguishes a status from any other element in a case, it is this: If an action,

although prosecuted by one individual against another, is instituted for the sole purpose of changing or declaring the status of either one or both of the parties to the action, then, in the absence of fraud or collusion in obtaining the judgment, it is binding upon all the world as well as the parties and their privies. But, if the status is merely incidentally involved, the judgment, although fixing the status of either or both parties, is not admissible as against strangers as evidence of the status. It certainly cannot be seriously contended that the case of *Hilton v. Roylance* was instituted and prosecuted for the purpose of establishing appellant's status. The purpose of that action was to recover dower, and the relation of appellant to Dr. Park, while a material issue, was nevertheless only an incidental issue. That is, the principal thing sought to be obtained by that action was to obtain dower in particular land once owned by Dr. Park, and by him conveyed to Mrs. Roylance, and, in order to obtain the principal thing, the marriage between appellant and Dr. Park had to be proved. This was, therefore, a mere element to be established. Dr. Park's ownership of the property during the marriage relation, his conveyance thereof, and its value were elements which had to be established, all of them essential, but only incidental. It might as well be contended that the judgment in the *Roylance Case* was evidence upon any other issue in any other case commenced by appellant to recover dower in so far as the issues in the two cases were the same. It is manifest the court committed no error in excluding the judgment in the *Hilton v. Roylance Case*.

Did the court err in excluding the judgment in the case of *Hilton v. Stewart*, which we have assumed in effect was a proceeding against Dr. Park's estate? We think not. Assuming, but not deciding, that all those who claimed any interest in Dr. Park's estate were in legal effect parties to the proceeding instituted by appellant to obtain a dower interest therein, it does not follow that all those who simply claim as grantees of Dr. Park, and who claim no interest in his estate as such, were also parties to the proceeding. While any person who claimed a direct interest in Dr. Park's estate could no doubt have resisted appellant's claim for dower, and if she was successful might have prosecuted an appeal from any judgment so obtained, such clearly was not the case with respondents. They had no interest in Dr. Park's estate as such, and claimed none, and hence could not have tested appellant's right to dower in it. They had to postpone their defense, if any they had, to her claim for dower, until she sought to enforce it against property in which they were interested. Respondents, therefore, were in no sense parties to or interested in the action or proceeding of *Hilton v. Stewart*, and hence cannot be affected by any judgment that was rendered

therein, or be concluded by any fact or facts that may have been judicially determined and established in that proceeding. The end in view in instituting those proceedings was not merely to establish the status of appellant, but it was to have her rights in Dr. Park's estate as his widow determined and adjudicated. Her status, in so far as strangers to the estate were concerned, was thus again determined and declared for the purpose of a particular proceeding only. Under such circumstances, the judgment entered in a proceeding in which the status is in fact declared is not evidence of the fact in another proceeding, unless such judgment would be admissible as evidence upon grounds upon which judgments are generally admissible. That such is the law is well and clearly stated in *Shores v. Hooper*, 153 Mass., at page 235, 26 N. E., at page 848 (11 L. R. A. 308), where, in speaking for the court, Mr. Justice Devans said: "The only relation which the former proceeding in the probate court had to the present suit is that the defendant, in order to succeed there, was obliged, as against other parties, to prove, as she is here, that she is the daughter of Dr. Ellis. If that had been, as this is, a writ of entry against another party for a piece of land, it certainly cannot be maintained that a recovery of a judgment there by a decision in her favor would enable her, so far as this proof is concerned, to recover a judgment against the tenant for a different piece of land, even if the title to both pieces had descended to her from the same ancestor. In the proceeding in the probate court, as a preliminary fact to be decided before the administrator could be held liable, it was found that the defendant was the daughter of Dr. Ellis. Even if the subsequent determination of the responsibility of the administrator and settlement of his accounts would be conclusive under our statutes, proper notice having been given, and to that extent would possess many of the characteristics of a judgment in rem, the finding which preceded should have no effect in other proceedings against another party, a stranger, not affected by any notice thereof, nor entitled to be then heard therein, if he had actually appeared." The only difference between that case and the case at bar is that, in order to entitle the claimant in that case to recover, she had to judicially establish the fact that she was a child of the deceased, while in this case appellant is required to establish the fact that she is the wife of Dr. Park, deceased. In that case the relation of the claimant to the deceased person had been judicially determined in another proceeding just as it has been in this case. In the proceedings reported in the case referred to it was necessary to again establish the relation as a necessary element in the case precisely as in the case at bar. The claimant in that case attempted to establish the relation by using the judgment in the former proceeding as evidence wherein her

relationship was determined and adjudged, and the court held that the judgment was inadmissible as evidence to establish that fact as against a stranger to the judgment. This is the precise question involved in the ruling complained of, and if the decision in *Shores v. Hooper*, supra, is sound, and we think it is, then the ruling complained of in this case is right. The following are among the best-considered cases in which the question of when and to what extent judgments are evidence of the facts adjudicated therein, in other proceedings, is discussed and decided: *Shores v. Hooper*, 153 Mass. 228, 26 N. E. 846, 11 L. R. A. 308; *Brigham v. Fayerweather*, 140 Mass. 411, 5 N. E. 265; *Sorensen v. Sorensen*, 68 Neb. 483, 98 N. W. 837; *State v. McDonald*, 108 Wis. 8, 84 N. W. 171, 81 Am. St. Rep. 878; *Farrell v. St. Paul*, 62 Minn. 271, 64 N. W. 809, 29 L. R. A. 778, 54 Am. St. Rep. 641. We have carefully examined the authorities cited upon the foregoing propositions by counsel for appellant, and while in some of them general expressions are used which, if standing alone, might lead one to the conclusion that there are authorities to the effect that, when a status is once determined and adjudicated in any case, the judgment in that case may be used as evidence of the status in other cases, yet, when the cases upon the subject are carefully read, the conviction is forced upon one that little, if any, room for doubt is left that the law upon the question is as we have attempted to outline it herein.

From what has been said it follows that the court committed no error in excluding the judgments. It also follows that, if this ruling is correct, then the court had no alternative save to find the issue of marriage against appellant, for the reason that the burden of establishing the marriage was upon her, and, as she adduced no evidence in support of the issue, the court was bound to find in the negative. We remark that the finding of the court is to the effect that appellant must fail for the reason that she failed to establish the existence of a lawful marriage between her and Dr. Park. Since there is no objection to the form of the finding, and as it is in effect a finding in the negative, and is sufficient to support the judgment, we also have no alternative save to affirm the judgment, with costs to respondent. It is so ordered.

MCCARTY, J., and LEWIS, District Judge, concur.

(13 Ariz. 176)

HARPER v. INDEPENDENCE DEVELOPMENT CO. et al.

(Supreme Court of Arizona. April 2, 1910.)

1. CORPORATIONS (§ 407*)—CONTRACTS—LIABILITY OF OFFICERS.

Where a stockholder and officer of a corporation dealt with laborers in his capacity as

agent of the corporation, the corporation was alone liable for the work performed.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 407.*]

2. GUARANTY (§ 6*)—OFFER AND ACCEPTANCE.

The owner of mining claims gave an option to purchase the same, which was transferred by the holder to a corporation, which took possession, located adjoining claims, and employed men to develop the claims. The owner knew that the men did work on claims included in the option, and assured the laborers that in his opinion the mines were good for the money, and stated that if the corporation did not pay, the men should not lose their money, even if he had to sell or work the mine or have some one else work it, but he did not promise expressly to pay the wages of any of the men to whom he talked, and no one of the men testified that the work was continued in reliance on the statement made by the owner. The continuance of the work was a benefit to the owner and his property. *Held*, that the owner was not personally liable to the men for the work performed.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 6.*]

3. MINES AND MINERALS (§ 53*)—MINING CLAIMS—OPTIONS.

A contract to convey mining claims for a specified sum in cash and specified payments in one and two years, stipulating that the purchaser or his assigns may take possession of the claims and develop them during the life of the agreement, and that the purchaser agrees to abide by the terms of the agreement, and in default of any of the payments to surrender the property to the owner and forfeit all moneys paid and expended, is a mere option to purchase, for the purchaser is left to his election within the life of the agreement to purchase or to forfeit his rights.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 147, 148; Dec. Dig. § 53.*]

4. MINES AND MINERALS (§ 112*)—CLAIMS OF LABORERS—LIENS.

Where an owner of mining property gives an option to another, who enters and works it, employing laborers to perform the work, no indebtedness is established in favor of the miners against the owner, and no lien is fastened on his interest in the property, because the work is not performed by virtue of any employment from the owner, and the holder of the option is neither a vendee nor an agent of the owner.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 112.*]

5. MINES AND MINERALS (§ 54*)—SALE OF MINING PROPERTY—CONTRACTS—CONSTRUCTION.

In agreements for the sale of mining property, time is of the essence.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 54.*]

6. MINES AND MINERALS (§ 54*)—SALE OF MINING PROPERTY—CONTRACTS—CONSTRUCTION.

A contract to convey mining claims on the payment of part of the price in cash and the balance in two installments on specified dates makes time of the essence, and a failure of the assignee of the purchaser to pay the balance due on the dates fixed relieves the owner of any obligation to convey, and the right of the assignee is terminated.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 54.*]

7. MINES AND MINERALS (§ 112*)—LIENS OF LABORERS.

Where the assignee of an option to purchase mining claims entered on the claims and employed miners to work them, and his option expired on the failure to pay the purchase price on the dates stipulated in the contract, the laborers could not thereafter acquire any lien against the property for the labor performed.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 112.*]

8. APPEAL AND ERROR (§ 854*)—QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.

Where the trial court arrived at the correct result, that it gave a wrong reason therefor was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403-3430; Dec. Dig. § 854.*]

Appeal from District Court, Gila County; before Justice Frederick S. Nave.

Action by John Harper against the Independence Development Company and others. From a judgment granting insufficient relief, plaintiff appeals. Affirmed.

Allred & Whitcher, for appellant. George R. Hill, for appellees.

DOAN, J. This action was brought by appellant in the district court of Gila county, on March 26, 1908, against the appellees above named, for the sum of \$9,519.28, and the foreclosure of a laborer's lien upon a group of mining claims securing that amount. The trial court gave judgment against the Independence Development Company, and decreed a foreclosure of the lien against the six mining claims found to be owned by it, but denied any relief as against the appellees Thomas E. Farrish, G. J. Ridenour, and J. C. and R. G. Goodwin and seven mining claims found to be owned by the Goodwins. From the judgment of the trial court, denying relief as against the last-named appellees and their property, the appellant has taken this appeal.

The facts in this case are quite complex, but, appear from the record to be about as follows:

J. C. and R. G. Goodwin, on April 1, 1906, were the owners of a group of seven claims, adjoining each other, to wit, the Imperial No. 1, Imperial No. 2, Imperial No. 3, Oro Cobre No. 1, Oro Cobre No. 2, Oro Cobre No. 3, and Oro Cobre No. 4. On April 1, 1906, J. C. Goodwin, on behalf of himself and R. G. Goodwin, entered into an agreement with Thomas E. Farrish for the sale of the said seven claims, which agreement was as follows:

Agreement.

"This agreement, made the first day of April, A. D. 1906, by and between J. C. Goodwin of Tempe, A. T. and R. G. Goodwin of Globe, A. T. parties of the first part, and T. E. Farrish of Phoenix, A. T., party of the second part; witnesseth: That the parties of the first part, being the owners of seven

mining claims in Globe mining district, Gila county, A. T. about two and one half (2½) miles northeast from the 66 ranch and adjoining the Goodwin and Cole group of claims on the south, two of the claims being formerly owned by Kinney and McCarty, and then known as the Irene No. 1 and Irene No. 2, and the said claims are now known as the Superior No. 1, No. 2 and No. 3 and the Oro Cobre No. 1, No. 2, No. 3 and No. 4. Now therefore the parties of the first part agree to sell and convey the above described property, under a good and sufficient title to the party of the second part, upon the following terms and conditions: One thousand (\$1,000.00) dollars in cash, the receipt of which is hereby acknowledged; twelve thousand (\$12,000.00) dollars to be paid by the party of the second part or his assigns to the parties of the first part on or before twelve (12) months from the date hereof, and the further sum of twelve thousand (\$12,000.00) dollars to be paid as aforesaid on or before two (2) years from the date hereof. It is further understood and agreed by and between the parties hereto that the party of the second part or his assigns may take possession of the said mining claims and develop the same during the life of this agreement; and ship ore therefrom at his discretion, provided, that from the proceeds of such shipments of ore, the party of the second part shall pay to the party of the first part one half (½) of the amount received from such sales of ore to be applied upon the payments as aforesaid. The party of the second part hereby agrees to abide by the terms of this agreement, and in default of any of the payments as above, to surrender the property to the parties of the first part, and forfeit all moneys paid and expended thereon. Signed and sealed the day and date above written. J. C. Goodwin, Party of the First Part. T. E. Farrish, Party of the Second Part."

Thereupon Farrish went into the possession of the property embraced in the above agreement, and located four claims adjoining, as follows: Parthian, Lulla B., Nelly Bly, and Ore Here. Thereafter Farrish and others organized the Independence Development Company, deeded to this company the four claims located by Farrish already named, and assigned to it the agreement between Farrish and the Goodwins set out above. The Independence Development Company then located two additional claims adjoining the original seven Goodwin claims and the four Farrish claims. These two claims were the Parthian No. 2 and the Last Parthian, making in all 13 claims held by the company by virtue of the assignment of the Goodwin-Farrish agreement, the deed from Farrish, and the locations of the company. The company then undertook to mine, work, and develop this group of 13 claims, which development work extended from about October 17, 1906, to May

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1, 1908, and the work was done almost entirely upon one of the claims, named the Imperial No. 2, embraced in the agreement between the Goodwins and Farrish, and assigned by Farrish to the company. In the performance of the mining and development work the company employed the appellant, Harper, and some 60 other miners and laborers, and finally became indebted to Harper and the others in varying amounts. Harper acquired assignments from the other miners for the respective amounts due them from the company. The amount owing to Harper individually and by virtue of the assignment of claims aggregated the sum of \$9,519.28. For this amount Harper made out, verified, and recorded a lien and bill of particulars, duly served all parties with copies in duplicate of the same, and instituted suit against the Independence Development Company, J. C. and R. G. Goodwin, Thomas E. Farrish, and G. J. Ridenour, for the amount claimed and the foreclosure of the lien therefor upon the entire group of 13 claims. The trial court gave judgment against the Independence Development Company for the amount claimed, and decreed a foreclosure of the lien upon the six claims owned by it, but denied any relief as against the Goodwins, Farrish, and Ridenour and the seven claims embraced in the Goodwin-Farrish agreement, which was assigned to the company. From this portion of the judgment this appeal was taken.

It appears from the record that the labor performed by plaintiff and his assignors was such work as would, under chapter 2, tit. 40, Rev. St. Ariz. 1901, entitle them to a lien. Plaintiff clearly had the right to bring suit thereon for his individual claim and as assignee of the claims of his fellow workmen. The record shows that the lien for the aggregate amount, \$9,519.28, was duly perfected under the statute, and suit properly brought within the statutory period thereafter. The judgment of the trial court against the Independence Development Company for \$9,519.28 was perfectly proper, as was the foreclosure of the lien against the six claims owned by it. It remains to determine whether the trial court erred: In denying judgment against J. C. and R. G. Goodwin, Thomas E. Farrish, and G. J. Ridenour, and denying foreclosure of the lien against the property owned by them, in whole or in part, to wit, the seven claims named in the above agreement; in denying foreclosure of the lien against the interest of the Independence Development Company and that of Thomas E. Farrish in the same last-named claims; in holding, that no lien existed against the seven Goodwin claims, for the reason that no personal liability attached to J. C. and R. G. Goodwin. These are the questions as raised by the appellant's assignments of error.

It seems clear that no personal liability attached to J. C. and R. G. Goodwin, Thomas E. Farrish, or G. J. Ridenour in favor of appellant or his fellow workmen and miners

for labor performed by them. Appellant and others were under contract to, and employed by, the Independence Development Company, and by no other person or persons. Ridenour's relation to the company does not appear, and the record discloses no dealings or negotiations with the appellant. As to Farrish, he was evidently a stockholder and officer of the company, and his dealing and negotiations with the appellant and others, if there were any, were clearly in the capacity of agent; for such the company alone was liable. As to J. C. and R. G. Goodwin, appellant bases their personal liability upon the fact that the work done and labor performed was so done and performed upon the property owned by them, to wit, the Imperial No 2 claim, with their knowledge and consent, and, further, upon the fact that R. G. Goodwin was frequently upon the ground during the performance of the said labor. Considerable evidence has been presented in the record to show that R. G. Goodwin frequently encouraged the work, advised appellant and others to continue working on the property after their wages were long in arrears, stating that he thought everything would come out all right; that in case the company did not pay, he would see that the boys would get their money; that he would see that the mine was either worked by himself or by somebody for the men, and, even if necessary, he would sell the mine, and the men would not lose their money. This evidence is voluminous, and all to the same effect. Admitting it all, however strong the assurances were, they created no personal liability on the part of Goodwin. The statements in the record consist of expressions of confidence in the success of the undertaking; assurances that the company would pay; opinions that the mines should be good for the money; general statements that if the company did not pay, the men should not lose their money, even if he had to sell or work the mine, or have some one else work it. These were made generally to some person in regard to what would happen to or be done for, others. He did not promise expressly to pay the wages of any man to whom he talked, nor did any one testify that he or any one continued working or performed labor in consideration of or reliance on any statement or promise made by Goodwin. That the continuance of this work may have been of great benefit to the Goodwins and their property is immaterial. All these statements and promises, if any of them could be called promises, were admittedly verbal, made to various men at different times. The appellant and others were not employed by the owners of the property, upon which the work was done, nor by any agent of such owners. They were employed by the Independence Development Company, which company held the property upon which the work was actually done under an option that had been assigned to the company by

Thomas E. Farrish, who procured the same from the owners of the property, J. C. and R. G. Goodwin. It appears in the record that this condition of affairs was generally known to the men. In view of the foregoing, there appears no ground for any personal liability on the part of J. C. Goodwin, R. G. Goodwin, Thomas E. Farrish, or G. J. Ridenour in favor of appellant.

The next question presented is: Was the property owned by J. C. and R. G. Goodwin and embraced in the Goodwin-Farrish agreement subject to appellant's lien for work done under employment by the company, but, with the knowledge of the Goodwins? Appellant contends that the relation of vendor and vendee existed between the Goodwins and Farrish, and has cited authorities holding that a lien exists in favor of a miner or laborer who performs work at the instance of the vendee. These authorities are of no weight in the determination of this case, for the reason that the relation of vendor and vendee contended for does not here exist. The Goodwin-Farrish agreement must be construed to be an option, and nothing more. This agreement has heretofore been set out, and did not create the relation of vendor and vendee between the Goodwins and Farrish. By its terms there was no sale, Farrish did not agree, nor was he bound to do anything except "abide by the terms of this agreement, and in default of any payment to surrender the property and forfeit all moneys paid and expended thereon." The Goodwins agreed to sell to Farrish upon certain conditions, namely, the payment of certain sums, at one and two years' time, and it was agreed that "Farrish or his assigns may take possession of said mining claims and develop the same during the life of this agreement."

Farrish did not bind himself to buy or pay for the property, nor did he bind himself to take possession of and develop it. He merely agreed to abide by the terms of the agreement, which were, among other things, that "Farrish or his assigns may take possession," etc. The entire matter was left to his election within the life of the agreement. This agreement was then nothing more than an option, and appellant's right to a lien in this case against the owners of the property is settled and determined by the rule laid down in *Gates v. Fredericks*, 5 Ariz. 343, 52 Pac. 1118, *Hadley v. Cummings*, 7 Ariz. 258, 64 Pac. 443, *Griffin v. Hurley*, 7 Ariz. 399, 65 Pac. 147, and *Bogan v. Roy & Titcomb*, 10 Ariz. 237, 86 Pac. 13, which is, in substance, that where an owner of mining property gives an option to another, who enters and works such property, employing laborers and miners to perform such work, no indebtedness is established in favor of the miners and laborers against the owner of the property, and no lien is fastened upon his interest therein. For it is held that such work is not performed by virtue of any employment from the owner, and the holder of such option is

neither the vendee nor the agent of the owner. Under the rules laid down by this court in these cases, and since adhered to, the Imperial No. 2 claim and the other six Goodwin claims stand upon the same ground, and are not subject to appellant's lien.

We next consider the interest of Thomas E. Farrish and the interest of the Independence Development Company in the seven Goodwin claims. No interest of Thomas E. Farrish appears in the record in or to any of these seven Goodwin claims, he having assigned his entire interest to the Independence Development Company; so this point may be dismissed.

The interest of the Independence Development Company in these claims was merely the right to exercise the option obtained by Farrish from the Goodwins and assigned to the company—the right to take possession and work the property, and, upon making the payments on April 1, 1907, and 1908, to receive conveyance of title to the seven claims. This interest, unless such payments were thus made, would cease and expire on April 1, 1908, and after this date the company would have no interest of any kind in or to these claims. It is elementary that in all such agreements, looking to the sale of mining property, time is of the essence. *Durant v. Comegys*, 3 Idaho (Hast.) 204, 28 Pac. 425. Goodwin's agreement to sell and convey was predicated upon the payment of \$12,000 one year from the date of agreement, and the further payment of \$12,000 two years from the said date, as express conditions precedent to said sale and conveyance, and only on compliance with them would Farrish or his assigns, or any one of them, be entitled to the conveyance under the agreement. It required the payment of the stipulated sums on those dates to impose any obligation under the agreement on J. C. and R. G. Goodwin to sell or convey the property mentioned therein. The time specified in the agreement expired April 1, 1908; neither the company nor any one for it having complied with the conditions prescribed in the agreement, there existed after that date no obligation on the part of J. C. or R. G. Goodwin to sell or convey the property embraced therein. This cause was tried October 28, 1908, some six months after the option had expired. Therefore the Independence Development Company had no interest in the seven Goodwin claims at either the time of the trial or at the time the judgment was rendered. Clearly no decree of foreclosure against an interest which had ceased to exist could have been rendered.

Had any interest in or right or title to the seven Goodwin claims existed in the Independence Development Company, it would have been subject to appellant's lien, and no doubt the trial court would have granted a decree in favor of appellant foreclosing it.

It is urged by the appellant that the trial court held that appellant's lien was not op-

erative against the seven Goodwin claims for the reason that no personal liability attached to J. C. or R. G. Goodwin, and this is assigned as error. The contention is not material, for the reason that upon the record, the court correctly held, not only that the appellant had failed to establish any personal liability on the part of J. C. or R. G. Goodwin, or either of them, but that neither the seven Goodwin claims nor the interest of J. C. and R. G. Goodwin, or either of them in said claims, or any of them, could be subject to any lien for labor performed for the Independence Development Company.

The questions above determined dispose of all of appellant's assignments of error. The record disclosing no reversible error, the judgment of the lower court is affirmed.

KENT, C. J., and CAMPBELL, DOE, and LEWIS, JJ., concur.

(157 Cal. 617)

CANFIELD v. LOS ANGELES COUNTY.
(L. A. 2,432.)

(Supreme Court of California. April 15, 1910.)

1. TAXATION (§ 398*)—CORPORATIONS—STOCK—TAXABLE IN STATE.

Corporate stock of domestic corporations owned by citizens is taxable at full value, less the value of the corporation's property taxed in the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 673; Dec. Dig. § 398.*]

2. TAXATION (§ 169*)—FOREIGN CORPORATIONS—STOCK—TAXABLE IN STATE.

Assessments levied upon stock of foreign corporations and similar credits owned by residents are valid, even when the evidences of ownership are out of the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 292; Dec. Dig. § 169.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by C. A. Canfield against the County of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

Ward Chapman, for appellant. J. D. Frederick, Dist. Atty., and Hartley Shaw, Chief Deputy Dist. Atty., for respondent.

MELVIN, J. Appeals are taken from a judgment and from an order denying plaintiff's motion for a new trial in this case and similar appeals are pending in two other cases which are practically identical with this one. They are Los Angeles Nos. 2,433 and 2,434, and are entitled Doheny v. County of Los Angeles, 108 Pac. 707. The briefs filed are pertinent to the appeals in all three of these cases, and it is agreed that the decision in this one shall apply to the other two. Plaintiffs seek to recover taxes paid under protest upon the ground that an assessment of stock in a domestic corporation to the individual stockholders is unauthorized and prohibited by the laws of the state of California.

The superior court found that the Mexican Petroleum Company was on the first Monday in March, 1906, and thereafter, a corporation organized under the laws of this state and having its principal place of business in Los Angeles; that said corporation at that date and ever since has owned a large tract of land in Mexico, upon which many valuable wells producing petroleum are situated; that the corporation carries on its business of marketing and selling petroleum outside of the state of California; that the Mexican Petroleum Company has ever since its incorporation maintained offices in Los Angeles and governed its entire business from that city; that on the first Monday in March, 1906, there were 5,411,000 shares of the capital stock of the corporation outstanding and owned by individuals; that the value of this stock was 75 cents per share; and that the property of the corporation in California did not exceed \$10,000 in value. The court concluded that plaintiff Canfield's shares (808,211 in number assessed for the sum of \$323,285) had been correctly subjected to valuation by the assessor and to payment of the tax (amounting to \$3,572.89). A similar conclusion of law was reached in the two cases in which the respondent Doheny sought return of the taxes paid on his stock for the years 1905 and 1906. In the former year he owned 5,400,000 shares of the stock, found by the court to be worth 15 cents a share, and this was assessed for \$50,000; the amount of the tax being \$550. In the latter year his holding of stock amounted to 1,729,000 shares, assessed for \$691,600; the tax thereon amounting to \$7,192.64.

Appellant's counsel seeks to establish the doctrine that the tax here considered is in substance a levy upon property lying outside of California and beyond the jurisdiction of this state, and that, having such extraterritorial application, it deprives the taxpayer of his property without due process of law and is therefore void, being in conflict with the fourteenth amendment of the Constitution of the United States.

These cases are practically identical in principle with Chesebrough v. City and County of San Francisco, 153 Cal. 559, 98 Pac. 288. In that case the assessor deducted the value of the corporation's property in California from the value of that of the stockholder who was assessed for almost the entire amount of the stock of the company. While here there was no such formal deduction, it will be seen that in each case now before us the difference between the actual value of the stock as found by the court and the amount for which it was assessed far exceeded the value as established by the court, of the corporation's property located within the territorial limits of the state of California. Therefore the law announced in the Chesebrough Case applies fully here. In that case this

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

court quoted with approval from *Commercial National Bank v. Chambers*, 21 Utah, 324, 61 Pac. 560, 50 L. R. A. 346, as follows: "In the case at bar deductions were made from the value of the stock of the value of all real estate owned by the bank which is situate within the limits of the state, but deductions for its real estate without the state were refused by the assessor and board of equalization, but the court below ordered that the value of the real estate situate in other states should also be deducted from the value of the stock. In this we think the court erred.

* * * The state has a right to fix its particular situs as to such stock (corporate stock) for the purposes of taxation, and its value for such purposes cannot be diminished by deducting therefrom the value of property not situated or taxable within the state, and over which the state can exercise no control. The bank, therefore, had no right to have the value of its real estate situate without the state deducted from the value of the stock. 'The true criterion, as fixed by the statute, is the true value of the stock, without reference to the question where, or in what manner or nature of property or security, the capital stock may be invested. Whether that be invested in real estate or other property beyond the jurisdiction of this state, the latter having control over the shares and their value, the peculiar nature and value of the investment of the capital stock of the corporations beyond the limits of the state can form no proper subject for specific deduction or abatement from the true value of the shares of stock when presented to be assessed for purposes of taxation. It is exclusively with the shares of stock, and their true value, as representing the entire corporate assets, that the tax commissioner has to deal, and not with the nature and locality of the investment of the capital stock of the corporation, except as to real estate of the company situate within this state.' *American Coal Co. v. Allegany County*, 59 Md. 185; *Dwight v. Boston*, 12 Allen [Mass.] 316, 90 Am. Dec. 149; *Nevada Bank v. Sedgwick*, 104 U. S. 111, 26 L. Ed. 703; *Kelley v. Rhoades*, 7 Wyo. 237, 51 Pac. 592 [39 L. R. A. 594] 75 Am. St. Rep. 904, affirmed in 9 Wyo. 352, 63 Pac. 935, 87 Am. St. Rep. 659. See same cases, 188 U. S. 1, 23 Sup. Ct. 259 [47 L. Ed. 359]; *Commercial Nat. Bank v. Chambers*, 182 U. S. 556, 21 Sup. Ct. 863 [45 L. Ed. 1227]."

After some further analysis of the provisions of the Constitution and the Code applicable to the discussion, this court, in *Chesebrough v. City and County*, used the following language, which, unless we make a radically different rule, is decisive of the point here considered: "Applying this principle to the section in question in connection with the constitutional provisions requiring the taxation of all property, including shares of stock, at its full value, and it must be taken to mean that, when the property of the corpora-

tion in the state is taxed directly to the corporation, the shares of stock held here and subject to taxation shall not, to the extent that the property represented by it is taxed, be thus taxed. This exemption can only be extended, however, to deductions from the value of the shares of stock, the corporate property of which is situated in this state, and directly taxed to the corporation. It is the purpose of all revenue laws, as nearly as possible, to impose upon all property its just proportion of taxation, and the construction of the statute should not be had which will permit shares of stock held here, of vast value in domestic corporations whose properties are located beyond the state, to escape their just proportion of such taxation. Under these views the shares of stock of the Tacoma Mill Company held by the estate of Hanson, except to the extent that the property of the corporation in this state was actually assessed and taxed to the company, were taxable to their full value."

But in spite of the opinion just quoted and the provisions of section 1 of article 13 of the Constitution of California, the attorney for appellants quotes the applicable portion of that constitutional provision and comments upon it in part as follows: "Section 1 of article 13 provides that: 'All property in the state shall be taxed in proportion to its value to be ascertained as provided by law. The word "property" as used in this article and section is hereby declared to include stocks,' etc. Here, then, is an express declaration that it is only property in the state that is subject to taxation, and the word 'property' is construed to include stocks only as that word is used in this article and section. It seems to us that this is almost an express declaration that the word 'property' shall not be construed to include any of the things mentioned unless they are within the state. The words 'in this state' certainly do not necessarily mean property which is in fact out of the state and only in this state theoretically by virtue of some legal fiction, and so we say that, accepting the construction most consonant with the justice of the case, we should not extend it to include stocks representing properties which are physically beyond the state's jurisdiction."

When we consider the purpose of taxation, it must be apparent that there should not be a construction at variance with the ordinary meaning of the words of the above-quoted section of the Constitution. Citizens are taxed for the support of the government that protects them and their property. It would be manifestly unfair to tax one citizen for personal property of a tangible, salable kind located in California and omit the imposition of a similar burden on the possessors of equally valuable and vendible personalty, just as difficult to protect, just as much subject to the law of supply and demand in this state, because the value of that property de-

pende in whole or in part upon the holdings of a corporation in a country where they may or may not be taxed. In *Bank of Commerce v. Tennessee*, 161 U. S. 146, 16 Sup. Ct. 456, 40 L. Ed. 645, it was held that "the capital stock of a corporation and the shares into which such stock may be divided and held by individual stockholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of the shareholders may both be taxed and it is not double taxation."

The doctrine for which appellants contend would in many cases prevent the assessment in California to residents of this state of valuable stock in foreign corporations. This would be true, at least, in respect to the stock of those corporations having their entire property in other countries. Assessments levied upon such stock and similar credits, however, have been held to be valid even when the evidences of ownership were out of the state. *Stanford v. San Francisco*, 131 Cal. 34, 63 Pac. 145; *Estate of Fair*, 128 Cal. 613, 61 Pac. 184.

In Ohio this question has come up in practically the same manner in which it is presented here, in a case in which the assessment of stock in a foreign corporation was involved. In that case (*Bradley v. Bauder*, 36 Ohio St. 34 [38 Am. Rep. 547]) the court said: "But it is said that because the capital of the company is invested in real and fixed property in the state where the corporation is located, and in which state taxes upon the same are regularly levied and paid, a tax here upon the shares of stock of those residing here is a tax upon the same property, and therefore results in double taxation. The argument is: That the capital of the corporation is invested in property which is taxed in the name of the corporation, and that the shares of the capital stock, when owned by individuals, only represent proportions in the ownership of such property, and hence to tax the shares is another mode of taxing the property of the corporation, and that a tax upon both, although the tax upon one is imposed in another state, violates the rule or principle of equality established by the Constitution. This argument, however plausible it seems, has never met with favor from the courts. Double taxation, in a legal sense, does not exist, unless the double tax is levied upon the same property within the same jurisdiction. Here the property owned by the plaintiffs is not only not the same as that owned by the corporation, but its situs, so far as shares of stock are capable of one, is in a different state. * * * The constitutional power to tax shares of stock, owned by our citizens in corporations located without the state, does not depend on whether the capital of the corporation is or is not taxed in the state where the corporation is created. The power is the same, whether the

capital of the corporation is there taxed or not; otherwise, the power of taxation conferred by the Constitution would be made to depend upon the operation of laws of a foreign jurisdiction—a proposition so obviously ill founded that the moment it is stated its falsity becomes apparent."

In the matter of taxing the shares of stock in a domestic corporation owning property without the state, that court has gone even beyond the doctrine in the *Chesebrough Case*, because it sanctions assessment of the stock without deduction for the value of the corporation's property in the state. *Lander v. Burke*, 65 Ohio St. 532, 63 N. E. 69.

After a careful examination of all the authorities presented, we see no reason to change the rule expressed in *Chesebrough v. City and County of San Francisco*, *supra*, and the other cases to which reference has been made herein.

The judgment and orders from which appeals are taken are therefore affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J. SHAW, J., did not sit in the foregoing cause.

(157 Cal. 624)

DOHENY v. LOS ANGELES COUNTY
(two cases). (L. A. 2433, 2434.)

(Supreme Court of California. April 15, 1910.)

In Bank. Appeals from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Two actions by E. L. Doheny against the County of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

Ward Chapman, for appellant. J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy Dist. Atty., for respondent.

PER CURIAM. For the reasons expressed in the opinion of this court in *Canfield v. County of Los Angeles*, (L. A. 2432) 108 Pac. 705, the judgments and orders from which appeals are taken are affirmed.

(157 Cal. 634)

LOUSTALOT v. McKEEL (L. A. 2460.)

(Supreme Court of California. April 19, 1910.)

1. APPEAL AND ERROR (§ 843*)—REVIEW—MATTERS NOT NECESSARY TO DECISION.

Where, in ejectment for a strip of land along the boundary line between plaintiff and defendant, the court found that defendant was the owner in fee of the strip, and that plaintiff was estopped to assert any claim thereto, and the finding of estoppel is supported by the evidence, and is sufficient to sustain the judgment for defendant, it is immaterial on appeal whether the additional finding of title in fee is supported, and that question will not be considered. [Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

2. BOUNDARIES (§ 37*)—SUFFICIENCY OF EVIDENCE.

Evidence held to support a finding that an agreement between plaintiff's predecessor in title and defendant recognized the line claimed by defendant as the true line, and that plaintiff, by

acquiescence in it as the established line for almost seven years, was estopped from asserting title to the strip of land in controversy.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 189-193; Dec. Dig. § 37.*]

3. BOUNDARIES (§ 46*)—ESTABLISHMENT BY AGREEMENT.

Where a boundary line is uncertain, and the contiguous owners, with equal knowledge of the facts, by parol agreement fixed a dividing line, and such line is marked by the erection or maintenance of a fence or other equivalent structure along it, and thereafter they occupied their respective lands to the boundary as agreed on, the accuracy of such line cannot be subsequently questioned by the parties establishing it or those claiming under them; no deception being practiced in locating it.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 212-226, 249-251; Dec. Dig. § 46.*]

4. BOUNDARIES (§ 37*)—EVIDENCE AS TO LOCATION.

Evidence in ejectment held to show that the location of a boundary line was uncertain prior to an agreement between defendant and plaintiff's predecessor fixing the location of the line.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 184-194; Dec. Dig. § 37.*]

5. BOUNDARIES (§ 46*)—ESTOPPEL TO QUESTION LOCATION.

Where persons owning contiguous tracts of land establish a common boundary line, which may not be in fact the true line according to the call of their deeds, in which they acquiesce, and according to which they occupy their respective lands for a time equal to that prescribed by the statute of limitations, they and their successors in interest are conclusively estopped from questioning it as the true line.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 212-226, 249-251; Dec. Dig. § 46.*]

6. FRAUDS, STATUTE OF (§ 70*)—REAL PROPERTY—AGREEMENTS FIXING BOUNDARY.

An agreement by the owner of contiguous tracts of land fixing the boundary line between them is not a contract for the sale or conveyance of land, and is not within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 112; Dec. Dig. § 70.*]

In Bank. Appeal from Superior Court, Santa Barbara County; Felix W. Ewing, Judge.

Action by Frank Loustalet against J. J. McKeel. Judgment for defendant, and plaintiff appeals. Affirmed.

William G. Griffith, for appellant. O. A. Storke, for respondent.

LORIGAN, J. Plaintiff, alleging ownership in fee thereto, brought this action in ejectment to recover of defendant a strip of land 86 feet long and 9.8 feet wide at one end, and 4.6 feet wide at the other, lying along the common boundary line of the lands of the parties located in the city of Santa Barbara. The complaint was filed September 17, 1907. In his answer defendant denied title in plaintiff, asserted title in himself, and set up an affirmative defense of estoppel, based upon the claim that in 1897 the common boundary line being in dispute between him-

self and the predecessor in title of plaintiff—one Mary A. Ashley—they agreed upon a boundary line which fixed the strip of land in dispute to be on the defendant's side of the line, and that the line so agreed on was acquiesced in by the predecessor of plaintiff thereafter and up to 1906 when plaintiff succeeded to her interest in part of the adjacent property. The court found that the defendant was the owner in fee of the strip in dispute, and also that plaintiff was estopped from asserting any claim to the property against defendant by virtue of the agreement between his predecessor in title and defendant establishing a common boundary line between their lands. Plaintiff appeals from the judgment accompanied by a bill of exceptions under which he attacks the sufficiency of the findings of title in defendant and the claim of estoppel.

We shall not discuss the finding as to title because we are satisfied that the finding of estoppel was supported by the evidence, and, being sufficient of itself to sustain the judgment, it is immaterial whether the additional finding of title in fee is supported or not.

Addressing ourselves to the evidence on the finding of estoppel, it appears that in 1869 one George Hartley purchased a lot fronting on State street, being a part of block 229, in the city of Santa Barbara. The lot was rather indefinitely described in the deed, but along its southeasterly line ran a board fence, referred to in the deed as the southeasterly boundary thereof, and which divided the property he took possession of from an adjacent lot to the southeast then owned by one Mary B. Lake. The lots in the block, including those immediately referred to, were fenced off from each other. Hartley, on going into possession of the lot purchased by him, immediately built a stable upon it known as the "Dexter Stables," the building fronting on State street and running back nearly 186 feet to the rear line of the lot. The southeasterly side of the stable, and subsequently a barn, were built along and upon the board dividing fence referred to in his deed as the southeasterly boundary line of his lot, and, as constructed, embraced within their inclosure, as part of the land described in his deed, the strip in dispute except a few feet at the rear. In 1879 one Mary A. Ashley purchased from Mary B. Lake, above referred to, the lot to the southeast and adjacent to the Hartley stables. The deed to Mary A. Ashley, as did all of the deeds from her predecessors in title, called for a frontage on State street of 195 feet running northwesterly along that street from its intersection with Haley street (being the south corner of block 229) with a uniform depth northerly through the block of 450 feet. The northwesterly line of the lot (the boundary line between it and the lot of Hartley) ran at

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

right angles to State street. We mention this particular call for the frontage on State street to refer to it again presently. In 1893 one McPhail, successor in interest of Hartley, conveyed the lot on which the Dexter stables were located to defendant. Now, while the description in the deed to Hartley included the strip in question by reference to the board fence on the southeasterly line of the lot, and the deed from him to McPhail described the land conveyed explicitly by courses and distances, and generally as the "premises known as the Hartley stable and corral," the deed to the defendant did not in terms include this strip. The deed to him was for 90 feet frontage on State street running northerly along that street from a point 137 feet northerly from the intersection of State and Haley streets (being the southern corner of block 229), with the southeasterly line running in depth 186 feet at right angles with State street. As the board fence referred to in the Hartley deed, and along and upon which the southeast wall of the stable and barn was built, did not run at right angles with State street, the strip was not included in the deed to defendant calling for the southeasterly line of his lot as being one run at right angles to State street. However, the defendant went into possession of the premises under his deed assuming that it embraced the strip in controversy upon which the stables partially stood.

In the early part of the year 1897, while Mary A. Ashley and the defendant were so in possession of their adjacent lots, physically divided by the southeast wall of the stable and barn, the former had a survey made of the land called for in her deed, and thereafter wrote to the defendant stating that his barn was on part of her property, and that, while she did not wish to sell the land, she was willing to rent it to him. Defendant called to see her about the matter, taking with him his abstract of title, and she and her attorney and defendant went over it together and discussed the matter of the accuracy of the line. At first, she claimed all that her deed called for. In this connection it will be observed that, eliminating for the moment this strip in question, there was a marked and decided conflict between the calls in the deeds of Mrs. Ashley and the defendant as to the dividing line between their lots. It is not pretended that Mrs. Ashley, or her predecessors in interest, ever had any valid claim of title to any portion of the lot actually described in the deed to defendant, or to any part of the land enclosed by the southeast wall of the stable and barn, except a narrow piece of which the strip in controversy is a part, extending from State street northeasterly to the rear of defendant's lot. Yet it will be observed from the calls in the respective deeds of Mrs. Ashley and the defendant that the deeds largely overlapped each other. The deed to Mrs. Ashley called for a frontage of 195 feet run-

ning along State street from the south corner of block 229. The deed to defendant called for a frontage of 90 feet running along State street from a point on that street 137 feet distant from the same south corner of the block. The deeds overlapped each other in frontage on State street and in depth the difference between 137 and 195 feet, or 58 feet. Mrs. Ashley under her deed could claim 195 feet along State street, while the deed of defendant called for 58 feet of this same frontage. The strip ran all through the land of the defendant and the calls of the respective deeds clearly left the true dividing line between their lands in uncertainty and doubt. But, while at first Mrs. Ashley claimed all that her deed called for, the dispute between herself and the defendant settled down to the narrow strip along their line and upon which the stables and barn were built. Mrs. Ashley insisted that under the deed to her the dividing line should run at right angles to State street, which would entitle her to the strip. The position of defendant was that the barn "had to follow the board fence" (referred to in the deed to Hartley) and had in fact followed it. After examining the abstract and discussing the matter between them, Mrs. Ashley conceded that the claim of defendant was correct, and that the line upon which the barn was built was the true line between their respective properties. At the time of this conference and adjustment as to the boundary line, there was a small piece of the strip extending from the barn to the rear of the lot which had not been built on or inclosed by defendant or his predecessors. A few days afterwards Mrs. Ashley of her own volition, and at her own expense, had a fence built extending from the barn to the end of defendant's lot along the same line of the strip on which the stable and barn were built prolonged northeasterly so as to make an actual southeasterly line between the properties of both parties. After this agreement as to the true boundary line and the building of the fence, the line of the stable and fence as built by Mrs. Ashley were recognized by both parties as the true line dividing their property. Neither Mrs. Ashley nor any of her predecessors in title were ever in possession of the strip of land in dispute. No question was ever subsequently made between Mrs. Ashley and the defendant about the dividing line. As agreed to it was acquiesced in as the true dividing line between their properties for some seven years thereafter and up to the time of the death of Mrs. Ashley in 1904 and until plaintiff purchased a portion of the adjacent lot from her estate. This was some two years subsequent to her death, and the deed from her executors included the portion of the strip for which this action was brought. Upon this evidence the court was warranted in finding that by the agreement between Mrs. Ashley and the defendant, recognizing and establishing the line along which the

stable, and thereafter the fence, was built, as the true dividing line, and also by acquiescence in it as so established for almost seven years, the plaintiff as the successor in interest of Mrs. Ashley was estopped from asserting title to the strip in controversy.

The rule universally sustained by the authorities is that where the boundary line between the lands of contiguous owners is doubtful or uncertain, and they by parol agreement fix and determine a dividing line between their respective tracts, said line being marked by the erection or maintenance of a fence or other equivalent structure along it, and thereafter the parties hold and occupy their respective lands to the boundary as so agreed on, the accuracy of such boundary line cannot be subsequently questioned by the parties establishing it, or by those claiming under either of them. *Cavanaugh v. Jackson*, 91 Cal. 580, 588, 27 Pac. 931; *Dierssen v. Nelson*, 138 Cal. 394, 398, 71 Pac. 456; *Young v. Blake-man*, 153 Cal. 481, 95 Pac. 888, and other authorities cited in those cases.

That there was an uncertainty as to the line between their lots according to the calls of their deeds when Mrs. Ashley and the defendant agreed upon and established a dividing line is hardly open to serious question. The calls of their deeds were widely divergent as to it. The deeds overlapped each other to an extent of 58 feet, and, while no claim was insisted upon by Mrs. Ashley that the northwesterly line of her lot extended into the land of defendant as far as her deed called for it, still if it did not extend there it was uncertain where it was to be located, and while in the end the dispute between them was brought down to whether the true line should run along the old board fence, which physically divided for many years the lands of which she and defendant were actually in possession, or at right angles to State street, there was nothing in her deed which specifically called for its location along the line which she claimed controlled. The northwesterly line of her lot was 58 feet beyond the line which she was contending for, according to the call of her deed, and embraced to that extent land of the defendant to which she did not insist that she had any claim, and to which it must be conceded she had none. It is true that the deed to the defendant did not fix his line along the board fence, upon which the stables and barn were built, which was the actually disputed line, but he was in possession of it and of the strip in controversy as included within that line, as his predecessors had also been for a great many years. Had a controversy arisen between Hartley and Mrs. Ashley there can be no question but that under the calls of their respective deeds the boundary line was uncertain, and we do not perceive how it could be considered the less uncertain, as far as the calls of the deed of Mrs. Ashley are concerned, when the dis-

pute as to it arose between her and the defendant.

But if it be conceded that according to the calls of Mrs. Ashley's deed there could be no question of the true location of the dividing line; that, as claimed by counsel for appellant, it was and is capable of ready ascertainment and location as running at right angles to State street, so as to include the strip in question; and that the parties were mistaken in believing what they established to be the true line—still the rule of law is that where parties in good faith establish a boundary line which may not be in fact the true line according to the calls of their deeds, in which they acquiesce and according to which they occupy their respective lands for a period of time equal to that prescribed by the statute of limitations, both parties and their successors in interest are conclusively estopped from questioning it as the true line.

As said in the early case of *Sneed v. Osborn*, 25 Cal. 619, 626: "The authorities are abundant to the point that when the owners of adjoining lands have acquiesced for a considerable time in the location of the division line between their lands, although it may not be the true line according to the calls of their deeds they are thereafter precluded from saying it is not the true line. The better opinion is that the considerable time mentioned in the cases must at least equal the length of time prescribed by the statute of limitations to bar a right of entry." *Columbet v. Pacheco*, 48 Cal. 395; *Cooper v. Vierra*, 59 Cal. 282; *Johnson v. Brown*, 63 Cal. 391; *White v. Spreckels*, 75 Cal. 610, 17 Pac. 715; *Helm v. Wilson*, 76 Cal. 476, 18 Pac. 604; *Cavanaugh v. Jackson*, 91 Cal. 580, 27 Pac. 931; *Dierssen v. Nelson*, 138 Cal. 394, 71 Pac. 456; *Lewis v. Ogram*, 149 Cal. 505, 87 Pac. 60, 10 L. R. A. (N. S.) 610, 117 Am. St. Rep. 151.

There can be no question under the evidence but that Mrs. Ashley and the defendant deemed the matter of the location of the true line uncertain. It may be that they were in error in this respect and that a careful examination of their respective titles by an attorney, and accurate surveys of their lots according to the calls of their several deeds, would have fixed an absolutely correct boundary line between them. But, whatever might have been possible in this respect, the fact is that the true location of the line was considered uncertain and was definitely fixed between them, acquiesced in without question for years, and each occupied their lands thereafter according to the agreed line. When they entered into the agreement, both had equal knowledge of the facts, and no deception or fraud was practiced. Under these circumstances, it is entirely immaterial whether the parties were right or wrong in believing that the true line was exactly where it should be as they established it. They were certainly in doubt as to where it should run,

and adjusted the matter by making a practical location of the line where they thought it ought to be, and having acquiesced in it as so established, and having occupied their lands under the location for almost seven years—a longer period than prescribed by the statute of limitations to bar a right of entry—the line they established is conclusively determined to be the true divisional line. Courts have always looked with favor on the settlement of questions of this character by the parties in interest themselves, and when it appears that an agreement adjusting a disputed boundary line has been fairly and definitely made between them, and they have occupied their lands accordingly for a period longer than the statutory period of limitation, such agreement is conclusive, no matter whether they were mistaken or not in their belief that they were locating it along the true line. It is quite obvious that, if the fact merely that the parties were mistaken as to where the true line lay could invalidate their agreement, there never could be any stability attached to such an agreement unless the line agreed on was in truth the exact line. The policy of the law, however, is to give stability to such an agreement as a method adopted in good faith by the parties themselves to settle the controversy, and because it is the most satisfactory way whereby a true boundary line may be determined, and tends to prevent litigation. *Cavanaugh v. Jackson*, supra, 91 Cal. 583, 27 Pac. 931.

There is nothing in appellant's point that the agreement being in parol was within the statute of frauds. The agreement was not a contract for the sale or conveyance of land. Its only object was to settle a disputed question of boundary, and, as said in *White v. Spreckels*, supra, 75 Cal. 616, 17 Pac. 717: "Agreements of this character are not subject to the objection that they are within the statute of frauds, because they are not considered as extending to the title. They do not operate as a conveyance so as to pass title from one to another, but they proceed upon the theory that the true line of separation is in dispute and to some extent unknown, and in such cases the agreement serves to fix the line to which the title of each extends."

The judgment appealed from is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.

(157 Cal. 625)

PERKINS v. COWLES et al. (L. A. 2,427.)
Supreme Court of California. April 18, 1910.
Rehearing Denied May 18, 1910.)

1. CORPORATIONS (§ 145*)—STOCK—TRANSFER—EFFECT—LIABILITY ON UNPAID SUBSCRIPTIONS.

Upon the transfer of stock by the original subscribers and entry thereof by the transferees

upon the corporate books, the original subscribers were released from payment of the unpaid subscription, and the transferees became liable to the corporation or its receiver in bankruptcy for payment of calls on the original subscription without an expressed promise to do so, though they believed in good faith when purchasing that the subscriptions were fully paid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 530, 531; Dec. Dig. § 145.*]

2. CORPORATIONS (§ 144*)—STOCK—TRANSFER—LIABILITY OF UNPAID SUBSCRIPTIONS.

That the president of the corporation, who was also an original subscriber, represented in good faith to the transferees of his own and other stock that the subscriptions were fully paid in order to induce the latter to purchase, would not estop the corporation nor its receiver in bankruptcy from collecting the unpaid subscriptions from the transferees, he not acting for the corporation in making such representation, nor would representations to the same effect by original stockholders prevent the collection of unpaid subscriptions from the transferees.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 144.*]

3. CORPORATIONS (§ 112*)—STOCK—EFFECT OF TRANSFER—BONA FIDE PURCHASERS.

Stock certificates are not negotiable instruments, and the purchaser thereof stands on the same basis as the purchaser of any other non-negotiable instrument.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 464, 465; Dec. Dig. § 112.*]

4. CORPORATIONS (§ 144*)—STOCK—ISSUES—ESTOPPEL.

The issuance of stock certificates to a transferee without a statement that it is not fully paid is not equivalent to a representation that it is fully paid so as to prevent the corporation from collecting the remainder of unpaid subscriptions.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 144.*]

5. BANKRUPTCY (§ 145*)—COLLECTION OF UNPAID SUBSCRIPTIONS—RIGHT TO ENFORCE LIABILITY.

The amount due on subscriptions to corporate stock is a trust fund for corporate creditors, and unpaid subscriptions are a part of its assets in bankruptcy, and may be collected by the receiver in bankruptcy for creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 145.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Gregory Perkins, Jr., trustee in bankruptcy of the Golden Gate Laundry, Incorporated, against J. E. Cowles and others. From a judgment for defendants, plaintiff appeals. Reversed, with directions to enter judgment for plaintiff.

Lawler, Allen, Van Dyke & Jutten, for appellant. Lloyd W. Moultrie, for respondents.

LORIGAN, J. This case was submitted to the trial court on an agreed statement of facts. It appears therefrom that the Golden Gate Laundry, Incorporated, was organized under the laws of this state in January, 1902, with a capital stock of \$33,000, represented by 330 shares of the par value of \$100 each. All the stock was subscribed for by the six original incorporators. Certain of these, be-

ing the owners of a business plant known as the Golden Gate Laundry, transferred it to the Golden Gate Laundry, Incorporated, at a valuation of \$5,500. It was accepted by the latter corporation at that figure, and 165 shares of the capital stock of the corporation subscribed for by said parties was credited thereby with a payment of 33½ cents on each dollar per share of the capital stock subscribed for by them. Subsequently the subscribers to the remaining 165 shares of the capital stock paid into the treasury of the corporation 33½ cents on the dollar per share of the stock subscribed for by them. Thereupon all the stock of the corporation was issued to the original subscribers, the certificates being in the usual and ordinary form, reciting that the person named therein was the owner of a given number of shares of \$100 each of the capital stock of the corporation, transferable on its books on surrender of the certificate. Some months thereafter these defendants purchased certain shares under the following circumstances: Three of the original subscribers—Rogers, McCoy, and Hedderly—being desirous of securing patronage for the business of the corporation and extending its influence, arranged with the defendants and others to purchase part of the shares held by them for 40 cents on the dollar per share. Hedderly was one of the original subscribers and president of the corporation. He and the others stated to the defendants, when soliciting a purchase of the stock by them, that the stock was fully paid up at its face or par value, and that there were no unpaid subscriptions thereon. In making this statement Hedderly acted in good faith, believing that the stock was fully paid up by the transfer of the property to the corporation from the Golden Gate Laundry. The defendants had no notice to the contrary, believed the representations as made, and stated to Hedderly and those from whom they purchased that they would not buy the stock unless it was fully paid up. Under the assurances given, the defendants then purchased a large number of the shares of the stock, which were transferred to them by the original subscribers, and such transfers entered upon the books of the corporation. The defendants ever since said transfers have been, and now are, the owners and holders of said stock. In 1904, on an involuntary petition in bankruptcy filed in the United States District Court for the Southern District of California, the corporation was adjudged a bankrupt and plaintiff was elected and duly qualified as its trustee. The bankrupt corporation, being without sufficient property to pay the debts of the corporation in full, on petition of plaintiff, as such trustee, the said United States District Court in September, 1904, ordered that a call be made of 50 per cent. of all unpaid subscriptions or balance due on the capital stock. In January, 1906, a second call for a like amount of the balance of unpaid subscriptions was made, and, the de-

fendants having failed to make payment to the trustee of either of said calls, the plaintiff brought this action against them. The corporation itself never made any calls on account of any unpaid subscription to its capital stock. The trial court rendered judgment in favor of defendants, adopting the agreed statement of facts as the findings of the court, and this appeal is taken by plaintiff from the judgment.

It will be readily observed under the agreed statement of facts that the main question presented on this appeal is whether a stockholder who has purchased the stock of a corporation in good faith and for a valuable consideration from an original subscriber, who has not paid the full subscription price thereof, can be held liable for the unpaid subscription of which nonpayment he has no actual notice or knowledge; it in fact being represented to him by the president of the corporation, as well as the other sellers of the stock, at the time of his purchase, that the stock was fully paid for, although from the books of the corporation it appears that the stock had not been fully paid. The trial court held that under these circumstances the defendants, as transferees of the stock were not liable. But we cannot agree with that conclusion. As far as the question is affected by the representations of the president of the corporation that the stock was fully paid, that is a false quantity. We are not referred to any authority where it has been held that even a corporation itself, let alone its creditors, would be bound by any such statement of the president of the corporation. As a matter of fact the stock had not been fully paid, and, when the president stated that it was, he was not representing the corporation, and did not pretend to. Himself a stockholder by virtue of his original subscription, he was simply acting with Rogers and McCoy in an endeavor to make a sale of a portion of their stock to the defendants, in order to extend the influence and increase the patronage of the corporation by having the stock of the company distributed among a large number of stockholders. He was acting in his own behalf in an effort, with the others, to dispose of a portion of his and their stock. While it is true that he made the representations in good faith, and doubtless the others did also, it is equally true that he had no authority from the corporation to do so. At least it does not appear that he had any. He was not acting in behalf of the corporation in the sale of any stock belonging to it, but simply in the personal interest of himself and the others. His conduct could not have estopped the corporation in its right to require, if necessary and while a going concern, the full payment of the subscription price, and certainly could not estop the receiver in bankruptcy, acting in behalf of the creditors, after the corporation had become insolvent, from making a call for such payment of it, if otherwise the transferees of the original

subscribers were liable therefor. Neither is it of any moment that representations that the stock was fully paid (independent of those made by the president) were made by the other original subscribers when selling the stock to defendants. There can be no question but that the original subscribers were liable to the corporation for the full subscription price, and, under the law of this state, when they transferred their stock to the defendants, and the latter caused the transfer to be entered on the books of the corporation, the former were released from liability for such payment, and the defendants in law as transferees assumed it, as far as any action by the corporation to compel its payment is concerned. No express promise on their part to assume or pay the balance of the subscription price was necessary. The corporation could, after the transfer of the stock to defendants and entry thereof on its books, look only to the defendants as its recorded stockholders to compel payment of either calls for the original subscription to its stock or for assessments thereon. *Visalia, etc., Ry. Co. v. Hyde*, 110 Cal. 632, 43 Pac. 10, 52 Am. St. Rep. 136; *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858; *People's Home Sav. Bank v. Stadtmuller*, 150 Cal. 106, 88 Pac. 280; *O'Dea v. Hollywood Cemetery Ass'n*, 154 Cal. 53, 97 Pac. 1. In view of this exclusive legal liability to the corporation for the payment of the subscription price which the transferees of stock assume by having themselves entered on the corporate books as stockholders, it would seem to be but a waste of time to give serious consideration to the proposition that a representation by a stockholder, who is an original subscriber of corporate stock, when selling his stock, that it is fully paid, would absolve both of them—the original subscriber by transfer and the transferee by the representation—from all liability to the corporation or its creditors for payment of such subscription price. A mere statement of the proposition negatives its soundness. The only right which the defendants had arising from the misrepresentation of the fact of payment was a right of action against the parties making it personally for damages and for rescission of the sale of the stock.

So that the matter of representation, either by the president of the corporation, or by him and the other stockholders, being eliminated as obviously unimportant factors in the present controversy, we are brought to the broad proposition, and the one for which in the end respondents really contend, namely, that a purchaser of certificates of stock in the open market in good faith and for value, without anything on the face of the certificates indicating that the stock has not been fully paid, takes them free from any liability for calls for unpaid subscription, either at the instance of the corporation or its creditors, although the shares are in fact not fully paid for. Whatever may be

the rule in sister jurisdictions, and we are referred to cases therefrom so holding, this is not the rule obtaining in this state. In *O'Dea v. Hollywood, etc.*, 154 Cal. 71, 97 Pac. 8, this same proposition was urged, and in answer to it this court said: "But independent of this claim of representation, the broad proposition of appellants is that, because they purchased their certificates of stock in good faith and without notice in the open market, such stock is to be deemed fully paid up, and they are protected as bona fide purchasers, even though upon the face of the certificates there was nothing to indicate that the stock had been fully paid. In effect, their claim is that certificates of stock are negotiable securities and subject to the same rules governing the transfer of such instruments. But this position under the law of this state is untenable. Whatever the rule may be in other jurisdictions (and some authorities therefrom are cited by appellants in support of their claim), it is well established in this state that certificates of stock are not negotiable instruments, either in the commercial sense or within the definition of the Civil Code, and that the stock represented by them is subject to assessment for subscription calls, no matter to whom it may be transferred. The rule in this state is that certificates of stock in a corporation are but mere evidences of the holder's right to a given share in the franchises and property of the corporation, and are not negotiable instruments. *Barstow v. Savage M. Co.*, 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705; *Graves v. Mono Lake Min. Co.*, 81 Cal. 304, 22 Pac. 665; *Craig v. Hesperia L. & W. Co.*, 113 Cal. 7, 45 Pac. 10, 35 L. R. A. 306, 54 Am. St. Rep. 316. Such certificates of shares not being negotiable instruments, the rule analogous to other nonnegotiable instruments applies, and a purchaser takes them subject to all equities in favor of the corporation. The transfer relieves him from no liability to the corporation which his transferor was under, so that, when one purchases stock and causes the transfer to be entered upon the books of the corporation, he thereafter holds his shares on the same conditions as did the stockholder from whom he purchased, he acquires under them all his rights, and is subject to all his liabilities and obligations respecting them. *Visalia, etc., R. Co. v. Hyde*, 110 Cal. 632, 43 Pac. 10, 52 Am. St. Rep. 136; *Craig v. Hesperia L. & W. Co.*, 113 Cal. 7, 45 Pac. 10, 35 L. R. A. 306, 54 Am. St. Rep. 316; *People's Home Savings Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858. Many authorities from other states might be cited to the same effect, but these from our own state declare the rule here." In that case we had occasion to examine the authorities relied on as establishing the rule for which respondents contend. 1 Cook on Corp. § 50; *Clark & Marshall*, p. 1741; *Helliwell on Stock and Stockholders*, p. 911. It will be noted, however, when these authorities are looked to and the cases they

cite examined, that (with a few exceptions in the latter) the rule promulgated or declared proceeded upon the theory that certificates of stock are negotiable or quasi negotiable instruments, or at least should be so treated. In this state, however, as certificates of stock are not negotiable instruments and the purchaser of stock is no more protected than the purchaser of any other nonnegotiable instrument, the rule of the authorities cited, based on the negotiability or quasi negotiability of stock is the same as in this state. In fact, in those jurisdictions, where the rule of nonnegotiability of certificates of stock obtains, the rule as to the liability of transferees of stock is the same as in this state. *Upton v. Tribblecock*, 91 U. S. 45, 23 L. Ed. 208; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Merrimac Mining Co. v. Levy*, 54 Pa. 227, 93 Am. Dec. 697. See notes to *Thompson v. Reno Bank*, 3 Am. St. Rep. 829.

As far as it is insisted that the issuance of the certificates of stock without any statement that the stock had not been fully paid for, was equivalent to a representation that it had been so paid, this point is fully discussed and decided adversely to the respondent in *O'Day v. Hollywood*, heretofore quoted from. The certificates here involved, like the certificates involved in that case, were issued long before section 323 of the Civil Code was amended so as to require certificates issued prior to the payment of the full amount due to state the amount actually paid.

Some question is raised by respondents as to whether the unpaid subscription of the stock owned by defendants constitutes assets in bankruptcy. We think there can be no doubt about it. In *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438, 440, the rule is correctly laid down as to the liability of the original subscribers. It is there said: "The amount due from the stockholders for the subscribed stock of the corporation is a trust fund for the creditors of the corporation, and such unpaid subscriptions to its stock are a part of its assets and may be collected for its creditors. *Vermont, etc., Co. v. Declez, etc., Co.*, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; *Walter v. Mercad Academy Ass'n*, 126 Cal. 583, 59 Pac. 136; *Visalia, etc., R. R. Co. v. Hyde*, 110 Cal. 632, 43 Pac. 10, 52 Am. St. Rep. 136. Such liability arises by virtue of the stockholders' contract of membership in the corporation, evidenced by the certificates of shares. *Morawetz on Private Corporations* (2d Ed.) § 128; *Union Sav. Bank v. Willard*, 4 Cal. App. 690, 88 Pac. 1098." But the same liability attaches to transferees on becoming stockholders of record on the books of the corporation as bound the transferrors as original subscribers. By purchasing from the original subscribers the transferees assumed, as a matter of law, all the liabilities that the transferrors of the stock to them were under,

and took it subject to all their obligations. *Visalia, etc., R. R. Co. v. Hyde*, supra, 110 Cal. 630, 43 Pac. 10, 52 Am. St. Rep. 136; *O'Day v. Hollywood*, supra. Hence the defendants were liable to a call for payment of the unpaid subscriptions in the bankruptcy proceedings, and the trustee had the right to maintain this action to recover on the calls.

The judgment appealed from is reversed, with directions to the trial court to enter judgment in favor of plaintiff against each of the defendants for the amount due on the unpaid subscriptions to the capital stock of the corporation held by him when this action was commenced. The agreed statement of facts which has been adopted by the court as its finding in the case furnishes the data upon which the computation may be made and the judgment rendered.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.

SHAW, J. I concur because the previous decisions of this court settle the question that in this state the issuance of a certificate of corporate stock, which upon its face does not show that it is not full-paid stock, is not a representation by the corporation that it has received the par value of the stock. If it were a new proposition, I would hold the contrary.

(157 Cal. 643)

BALDWIN et al. v. FOSTER et al.
(L. A. 2,401.)

(Supreme Court of California. April 21, 1910.)

1. JUDGMENT (§§ 470, 501*)—COLLATERAL ATTACK.

On collateral attack, every intendment is in favor of the judgment, and mere errors and irregularities will not be considered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 907, 941; Dec. Dig. §§ 470, 501.*]

2. JUDGMENT (§ 486*)—COLLATERAL ATTACK—GROUNDS.

On collateral attack, a judgment will be set aside, generally speaking, for but one of three reasons: Lack of jurisdiction of the person; lack of jurisdiction of the subject-matter; or an absolute lack of jurisdiction to render such a judgment as the one given.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 920; Dec. Dig. § 486.*]

3. JUDGMENT (§ 503*)—COLLATERAL ATTACK—SUFFICIENCY OF COMPLAINT.

In a collateral attack on a judgment, the sufficiency of the complaint on which the judgment was based may not be attacked.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 943; Dec. Dig. § 503.*]

4. PROCESS (§ 163*)—AMENDMENT—ISSUANCE—DISCRETION OF COURT.

Under the express provisions of Code Civ. Proc. § 128, subd. 8, the court has full power to amend its process pending its service.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 163.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. JUDGMENT (§ 495*)—COLLATERAL ATTACK—PRESUMPTIONS.

Where nothing to the contrary appears, the existence of an order for the issuance of an amended summons will be presumed in support of a judgment on collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 933, 934; Dec. Dig. § 495.*]

6. PROCESS (§ 21*)—SUMMONS—ISSUANCE—DISCRETION OF COURT.

Under the statute, the court may in its discretion direct issuance of summons after the expiration of the prescribed period.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 16; Dec. Dig. § 21.*]

7. PARTITION (§ 91*)—APPOINTMENT OF REFEREES—COLLATERAL ATTACK.

Error in appointing in partition proceedings one referee instead of three, as required by Code Civ. Proc. § 797, cannot be taken advantage of or inquired into collaterally.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 91.*]

8. PARTITION (§ 95*)—ALLOTMENT IN SEVERALTY.

A party in partition suit has the right, on demand, to secure from the court a segregated allotment to him in severalty of the land which may be found to be his.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 95.*]

9. PARTITION (§ 95*)—JUDGMENT—ALLOTMENT IN SEVERALTY—COLLATERAL ATTACK.

Under Code Civ. Proc. § 760, making provision for cases in partition, where, because of the impracticability or inconvenience of doing otherwise, the court may set apart portions or parcels to co-tenants, subsequently segregating the interests of such co-tenants, where this was done, while certain co-tenants might have insisted on further proceedings to have their several interests delimited, the judgment was not void, and could not be attacked collaterally.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 307-309; Dec. Dig. § 95.*]

10. JUDGMENT (§ 501*)—COLLATERAL ATTACK—GROUNDS—ERROR IN AWARD OF COSTS.

An error of the court within its jurisdiction in awarding costs in a partition suit does not render the judgment void, and the same may not be collaterally attacked.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 501.*]

Department 2. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by C. H. Baldwin, as administrator with the will annexed of Anderson W. Todd, deceased, and others against Joseph Foster and others. From the judgment, and from an order denying a new trial, defendants appeal. Reversed and remanded.

Luce, Sloane & Luce, for appellants. C. N. Andrews, for respondents.

HENSHAW, J. This appeal is from the judgment and order denying defendants' motion for a new trial. The action was to quiet title to certain real estate in the city of San Diego. The real estate consists of certain town lots in the subdivision of a 5-acre tract in the west half of Pueblo lot 1128. Pueblo lot 1128 was a large tract of land containing more than 160 acres, the title to which

was originally in the city of San Diego. The city made deeds to certain portions of this lot, one to Wallace of the west half; one to Porter, conveying 80 acres of the easterly portion, and one to Norton of "80 acres in lot 1128." The area of the Pueblo lot was uncertain, owing to the indeterminate easterly boundary line, according to the map. The 80 acres conveyed to Norton was unlocated, wherefore an action in partition was brought for the determination and allotment of the interests of those holding under the city's deeds. In this action in partition, entitled Norton v. Mayhew et al., interlocutory and final decrees were entered. By them a certain 5-acre tract described as lot 14, containing the lots in controversy, was set apart in common to Anderson W. Todd and eight other co-tenants. It is sufficient for the purposes of this consideration to say that plaintiffs derived title by mesne conveyances through Anderson W. Todd. Defendants claim title by virtue of sheriff's sale and deed of Todd's interest, growing out of the decree of distribution in the partition suit. The facts in this connection are, as has been said, that a five-acre tract containing the lots in controversy was set apart to Anderson W. Todd and eight others as tenants in common. The court in awarding costs decreed that the nine tenants in common to whom the five-acre tract had been awarded in severalty should "pay the sum of \$21.85, the portion for which each party is liable being hereby decreed to be a first lien upon the tract of land so allotted to each of said defendants respectively." Upon failure of payment of these costs the land was sold, and it is conceded that whatever title passed by that sale vested in these defendants, and it is not disputed that if the effect of the sale was to deprive Anderson W. Todd of his interest in the land, defendants should prevail in this action.

Manifestly, then, the question of the validity or invalidity of the judgment in Norton v. Mayhew et al. is the all-important one in this case. It is made to appear that the trial court took the view that the judgment was void as to the nine tenants in common to whom this five-acre tract was partitioned, first, because it did not award them their interests in severalty; and, second, because it did not apportion the costs in severalty, but in effect made the total costs of \$21.85 awarded against the five acres a lien upon the interest of each of the co-tenants, and that the sale under such judgment was therefore void. But respondent urges other objections against the validity of the judgment which demand notice. Throughout this consideration the fact is to be borne in mind that we are not reviewing this judgment under attack made on direct appeal where errors prejudicial to those appealing would call for a reversal, but we are considering it upon collateral attack, where every intendment is in favor of the

judgment, and where mere errors and irregularities will not be considered. Upon collateral attack the judgment will be set aside, generally speaking, for but one of three reasons: Lack of jurisdiction of the person; lack of jurisdiction of the subject-matter of the action; or an absolute lack of jurisdiction to render such a judgment as the one given. *Moore v. Martin*, 38 Cal. 428; *Mayo v. Foley*, 40 Cal. 281; *In re James*, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60; *Wood v. Jordan*, 125 Cal. 261, 57 Pac. 997.

1. The complaint stated a cause of action. The objection to it is that plaintiff Norton is not shown to be a tenant in common with the various defendants in the Pueblo lot, for the assigned reason that the complaint shows that plaintiff Norton's deed to a floating 80 acres was void for uncertainty. Such, however, is not the law. *Cullen v. Sprigg*, 83 Cal. 56, 23 Pac. 222. The complaint expressly alleged that Norton was the owner of an undivided 80 acres in said Pueblo lot, and that the defendants claim an interest in the same premises. The court in its interlocutory decree found that the defendants were tenants in common. Moreover, the sufficiency of the complaint may not thus be called in question upon such collateral attack. *In re James*, 99 Cal. 376, 33 Pac. 1122, 37 Am. St. Rep. 60.

2. Summons in the action was not issued until after the expiration of a year. It appears that summons was issued within a year after the filing of the complaint; that subsequently after the expiration of a year, but while the summons was in full force and effect, an amended complaint was filed, bringing in new parties and process, designated "Summons as Amended," was issued, and thereafter served upon the defendants. Return of service was made within the statutory three years after the filing of the original complaint. The only change in the complaint or summons was the bringing in of new parties. The defendant Todd was a party to the original complaint and summons, and the summons as amended and served upon him was identical with the original. The court has full power to amend its process pending its service. Code Civ. Proc. § 128, subd. 8. It is contended that an order of court was necessary for the issuance of such an amended summons, and that no such order is shown. But nothing to the contrary is shown; and, where nothing to the contrary is shown, the existence of such order will be presumed in support of the judgment upon collateral attack. *Dowling v. Comerford*, 99 Cal. 204, 33 Pac. 853. Moreover, no authority is cited to show that summons issued after one year would be held void upon collateral attack, while in *Steves v. Carson*, 21 Colo. 280, 40 Pac. 569, the superior court of Colorado, under a statute similar to ours, holds it to be within the discretion of the court to direct issuance of summons after the expiration of the prescribed period.

3. Objection is made that but one referee was appointed instead of three. Section 797, Code Civ. Proc. provides that with the consent of the parties one referee may be appointed instead of three. The interlocutory decree recites that the appointment of one referee was made on consent of all parties, but the effect of the appointment of but one referee, even if it were irregular, would not be to avoid the judgment. It is an error that could not be taken advantage of or inquired into collaterally. *Jack v. Cassin*, 9 Tex. Civ. App. 228, 28 S. W. 832; *Morrill v. Morrill*, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95.

4. Coming thus to the principal objection urged against the validity of this judgment, it is unquestionably true that a party in a partition suit has the right, upon demand, to secure from the court a segregated allotment to him in severalty of the land which may be found to be his. Such was the holding of the court in *Emeric v. Alvarado*, 64 Cal. 529, 2 Pac. 418, where the question arose upon direct appeal. Nevertheless section 760, Code Civ. Proc., makes provision for cases where, by reason of the impracticability or inconvenience of doing otherwise, the court may set apart portions or parcels to co-tenants, subsequently segregating the interests of such co-tenants. Such was the method adopted here; and, while the nine co-tenants of the five-acre tract would have had the unquestioned right, upon demand to the trial court, or upon direct appeal to this court, to have insisted on further proceedings whereby their several interests should be delimited and set over to them, the judgment in this case is in no sense void because it has assigned to them a designated tract as tenants in common. This was precisely what was done in *Grant v. Murphy*, 116 Cal. 427, 48 Pac. 481, 58 Am. St. Rep. 188, and the decree in partition was upheld as being proper upon direct attack, while in *Linehan v. Hathaway*, 54 Cal. 251, where a similar decree awarding lands to tenants in common was under review upon collateral attack, and where the contention was that the judgment was void, this court said: "We cannot so regard it. The court had jurisdiction of the parties and of the subject-matter of the action, and the judgment, if erroneous, cannot be attacked in a collateral proceeding."

5. As to the award of costs covered by sections 768 and 796 of the Code of Civil Procedure, it would seem to be proper, where a share has been set off to co-tenants, that the proportion of the costs should be made a lien upon the share without attempted segregation as to the portion of the costs which each of the co-tenants within that share should be called upon to bear. But however this may be, the award of costs as made certainly has not rendered the judgment void. The most for which respondents here could successfully contend is that the court erred in the exercise of the jurisdiction to award costs, which

unquestionably it possessed, but this error within its jurisdiction cannot avail defendants upon this attack, and would not render the judgment void.

No serious question is made as to the validity of the proceedings concerning the sheriff's sale and deed. Such objections as are made are fully covered by what has been said concerning the judgment. Freeman on Execution, §§ 43, 334, 339; Boles v. Johnson, 23 Cal. 226, 83 Am. Dec. 111; Newmark v. Chapman, 53 Cal. 558; Granger v. Sheriff, 140 Cal. 190, 73 Pac. 816.

It follows herefrom that the court erred in holding the judgment in Norton v. Mayhew et al. to be invalid and void, for which reason the judgment and order here appealed from are reversed, and the cause remanded.

We concur: LORIGAN, J.; MELVIN, J.

(12 Cal. A. 749)

VAN LUE v. WAHRLICH-CORNETT CO.
(Civ. 737.)

(Court of Appeal, First District, California.
March 9, 1910.)

1. EXEMPTIONS (§ 36*)—EXTENT—DOUBLE EXEMPTIONS.

A debtor may not claim the exemption given by Code Civ. Proc. § 690, subd. 3, to farmers, and also the exemption given by subdivision 6 to teamsters.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 36.*]

2. EXEMPTIONS (§ 126*)—EXTENT OF EXEMPTIONS—ELECTION.

Where a debtor suing for the conversion of property claimed as exempt set forth his exemptions as a farmer and as a teamster, and he entertained a reasonable doubt as to which of the two exemptions he was entitled, the court at the close of plaintiff's case erred in requiring him to elect on which exemption he would stand; he being entitled under the circumstances to plead both exemptions, though he could only have one.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 126.*]

3. TRIAL (§ 165*)—NONSUIT—EVIDENCE.

A motion for a nonsuit admits the truth of plaintiff's evidence and of every favorable construction, inference, or presumption fairly deducible therefrom.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

4. EXEMPTIONS (§ 150*)—EXTENT OF RIGHT—EVIDENCE—QUESTIONS FOR JURY.

A debtor suing for the conversion of exempt property seized under an execution on a judgment obtained in October, 1908, claimed exemptions as a farmer and also as a teamster, and showed that for about 10 years he farmed until the spring of 1907, when his crop was destroyed by floods. He retained his horses and some of his implements, intending to resume farming and he made reasonable but unsuccessful efforts to do so. During the interval he earned his living by teaming. On the day of the seizure of the property under execution he had all but concluded arrangements to lease a small farm. *Held*, that the question whether his former occupation as a farmer had been

abandoned, so that his right to exemptions as a farmer had been forfeited, was for the jury.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 150.*]

5. EXEMPTIONS (§ 13*)—ABANDONMENT—CHANGE OF CALLING.

A person does not forfeit his right of exemptions as a member of a given calling because, while seeking in good faith an opportunity to engage therein, he accepts some other employment to earn a living for himself and family.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 13.*]

6. EXEMPTIONS (§ 13*)—FORFEITURE—CHANGE OF CALLING.

The length of time which has elapsed since a person actively pursued a given calling is an element to be considered in ascertaining whether he has abandoned the calling, and has thereby forfeited his exemptions as a member thereof.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 13.*]

7. EXEMPTIONS (§ 4*)—STATUTES—CONSTRUCTION.

Statutes exempting property from execution should be fairly and liberally construed, and, as far as practicable, beneficially to the debtor.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 4; Dec. Dig. § 4.*]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by D. T. Van Lue against the Wahrlich-Cornett Company. From a judgment for defendant, plaintiff appeals. Reversed.

Daugherty & Lacey, for appellant. Sargent & Bardin and P. E. Zabala, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the defendant taken within 60 days after the entry thereof, in an action to recover damages for the conversion of property claimed by plaintiff as exempt from execution.

Plaintiff had been engaged as a farmer for about 10 years, when in March, 1907, a farm comprising 80 acres, which he held under a lease, and upon which he had been raising beets for about two years, was flooded and his crop of beets destroyed. From that time until October, 1908, when the personal property in question was attached, plaintiff engaged in the business of a teamster. During this time, however, he had retained his horses and some farming implements, intending to return to the farming business, and made various efforts to do so, but without success. In October, 1908, the defendant obtained a judgment against plaintiff in the superior court, upon which an execution was issued, and the personal property in question sold. After the property had been seized plaintiff demanded its return from the sheriff, upon the ground that he was a farmer and teamster, and that, therefore, the property was exempt from execution. Its return being refused, he commenced the present action.

The plaintiff in his complaint claims exemptions both as a farmer and a teamster. The case went to trial, and at the conclusion

of plaintiff's case the court, upon motion of defendant, required plaintiff to elect whether he would claim exemption as a teamster or as a farmer. After excepting to the order, he elected to rely on his claim as a farmer, whereupon the defendant moved for a nonsuit on the ground that there was no evidence showing that at the time of the taking of the property plaintiff was a farmer. This motion was granted by the court, to which ruling the plaintiff also duly excepted. The result is that, while it is admitted in the brief of defendant that plaintiff was entitled to a teamster's exemption, he stands deprived of all exemption.

Plaintiff was not entitled to both exemptions. Subdivision, 3, § 690, Code Civ. Proc., relates exclusively to exemptions in favor of judgment debtors who are farmers (Robert v. Adams, 38 Cal. 384, 99 Am. Dec. 413; Murphy v. Harris, 77 Cal. 195, 19 Pac. 377); and subdivision 6 of the same section exempts two horses and their harness, and one cart or wagon, dray, or truck by which a teamster or other laborer habitually earns his living (Dove v. Nunan, 62 Cal. 400). While subdivisions 1, 2, and 10 of section 690 of said Code exempt certain furniture, etc., and earnings of judgment debtors, and probably apply to all vocations mentioned in the section (Robert v. Adams, supra), still we think that a comparison of subdivisions 3 and 6, and a consideration of the scope and spirit of the whole section, force the conclusion that a person cannot claim both the farmer's and the teamster's exemption. Brusie v. Griffith, 34 Cal. 302, 91 Am. Dec. 695; Harlow on Sheriffs and Constables (3d Ed.) p. 463; Morrill v. Seymour, 3 Mich. 65. But we think it was competent for the plaintiff, being in doubt as to which exemption he was entitled to, to set forth both in his complaint, as was done in this case.

In the case of Willson v. Smith, 61 Cal. 209, the plaintiff in an action for work and labor set forth his cause of action in two counts, one upon an agreement to pay a stipulated price, and the other upon a quantum meruit; and the court held that plaintiff might state his cause of action in two forms where there was a fair and reasonable doubt of his ability to plead them in one mode only. In Remy v. Olds, 90 Cal. xix, 34 Pac. 216, 21 L. R. A. 645, the complaint contained two counts, one for damages on a contract, and the other to recover for materials furnished, etc. The defendant requested the court to require the plaintiff to elect upon which count he would rely. This the court refused to do, and the ruling was assigned as error. The court said: "Conceding that this is an action in which the same cause of action is differently stated in two separate counts, still I think the ruling correct. The right to so plead is well established here [citing cases]. Since it is allowable to state the cause of action in the alternative, using different counts in order to meet any possible phase of the evidence, a party

cannot be deprived of the privilege by being compelled to strike out all causes of action save one before the trial commences. It would render the privilege a barren one." See, also, Pomeroy's Code Remedies, § 467; Rucker v. Hall, 105 Cal. 425, 428, 38 Pac. 962; Cowan v. Abbott, 92 Cal. 100, 28 Pac. 213; Stockton, etc., v. Glens Falls Ins. Co., 121 Cal. 167, 53 Pac. 585; Willard v. Carrigan, 8 Ariz. 70, 68 Pac. 538; Woodman v. Davis, 32 Kan. 844, 4 Pac. 262; Pittsburg v. Hedges, 41 Ohio St. 233; 81 Cyc. 117, 121. We think it was error for the trial court, after the plaintiff's case was all in, to require him to elect on which exemption he would stand, as the effect of the court's order was merely to require him to hazard a guess as to the case he had made out. The plaintiff was entitled to one exemption, and from the record it is plain that he entertained a fair and reasonable doubt as to which of the two exemptions he was entitled, and, in order to protect his rights he was warranted in setting forth both exemptions.

We are also of opinion that the action of the court in granting defendant's motion for a nonsuit was erroneous. A motion for a nonsuit admits the truth of plaintiff's evidence, and of every fair construction, inference, or presumption favorable to him deducible therefrom. Archibald Estate v. Matteson, 5 Cal. App. 441, 90 Pac. 723; Estate of Arnold, 147 Cal. 583, 82 Pac. 252; Estate of Welch, 6 Cal. App. 44, 91 Pac. 336. The evidence introduced by plaintiff tended to prove all the material allegations of the complaint, including the allegation that he was a farmer; and the question of whether or not he was entitled to a farmer's or a teamster's exemption should, with proper instructions, have been left to the jury. There was evidence that up to the time his crop was destroyed in the spring of 1907 he had farmed for 10 years; that after he was flooded out he retained his horses and some of his agricultural implements intending to resume the business of a farmer; and that he made every reasonable effort to do so. Indeed, upon the very day of the attachment he had all but concluded arrangements to lease a small farm. The only feature of his case which supports the theory of defendant that he was not a farmer is that he was not thus occupied for a period of about 18 months prior to the levy of the attachment, and that during this period he had earned his living by teaming. Giving the plaintiff, however, the benefit of every reasonable inference and construction deducible from the evidence, we are bound to conclude that he not only in good faith intended to resume farming, but that during the entire 18 months he made every reasonable effort to accomplish this end. We assume that farms cannot be readily rented at all seasons of the year. There can be no doubt that a person does not forfeit his right of exemption as a member of a given calling, because, while seeking in good faith an opportunity

to engage therein, he accepts some other employment in order to earn a living for himself and family. No doubt the length of time elapsed since actively pursuing that calling is an element to be considered in ascertaining whether or not it has been abandoned; and while, if the question of whether the plaintiff's former occupation had been abandoned were submitted to us as a question of fact, we might hold that it had, still we think that the lapse of 18 months under the circumstances of this case did not authorize the trial court to take the question from the jury. Before citing cases to support this view, it may not be amiss to call to mind that statutes exempting property from execution should be fairly and liberally construed and, as far as practicable, beneficially to the debtor. *Matter of McManus*, 87 Cal. 292, 25 Pac. 413, 10 L. R. A. 567, 22 Am. St. Rep. 250; 12 Am. & Eng. Ency. of Law (2d Ed.) p. 75.

In *Caswell v. Keith*, 12 Gray (Mass.) 351, it is said: "The distinction between withdrawing from the pursuit of a particular trade or occupation, with a determination never to resume it, and a temporary diversion from its prosecution while engaged in conducting some other business or enterprise not intended to be of permanent or durable continuance, is clear and definite. * * * To secure to himself the privileges and benefits intended to be conferred by the provisions of the statute, an artisan is not required to ply his trade without any possible intermission or the occurrence of any interruption in its pursuit. If, for instance, owing to the general stagnation of business, he cannot for a season find remunerative employment in carrying it on, or if, from personal infirmity or other intervening impediment, it becomes necessary or expedient that he should resort temporarily to some other department of industry to obtain means of supporting himself and his family, he cannot, so long as he entertains an intention to return, as soon as circumstances will permit, to occupation and employment in his trade, be said to have given up or abandoned it."

Another case holding that one does not lose his right of exemption by reason of having temporarily suspended his occupation, if he intends to return to it when he has an opportunity, is *Harris v. Haynes*, 30 Mich. 140. See, also, generally, 18 Cyc. 1416 et seq.

The judgment is reversed.

We concur: COOPER, P. J.; HALL, J.

(12 Cal. A. 697)

REED & CO. v. HARSHALL. (Civ. 668.)

(Court of Appeal, Third District, California.
March 5, 1910.)

1. APPEAL AND ERROR (§§ 694, 704*)—QUESTIONS REVIEWABLE—RECORD.

The assignments that the evidence does not sustain the findings, and that the court erred

in failing to find on a material issue, are not reviewable where neither the evidence nor the substance thereof is brought up.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2910-2915, 2939-2941; Dec. Dig. §§ 694, 704.*]

2. APPEAL AND ERROR (§ 925*)—REVIEW—PRESUMPTIONS—ABANDONMENT OF COUNTERCLAIM.

Where the record on appeal does not disclose any evidence in support of the counterclaim interposed, and the trial court failed to make a finding on the counterclaim, the court on appeal will presume that there was no evidence on that issue, and that defendant abandoned the counterclaim at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 925.*]

3. APPEAL AND ERROR (§§ 713, 714*)—RECORD—BRIEFS—SPECIFICATIONS IN TRANSCRIPT—EFFECT.

A statement by counsel for appellant in his brief, and specifications in the transcript, unsupported by either a bill of exceptions or statement of the case, are mere extrajudicial declarations, of which the court on appeal cannot take notice.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. §§ 713, 714.*]

4. NEW TRIAL (§ 131*)—RECORD—STATEMENT OF FACTS—AMENDMENTS.

The rule that, where the defeated party's proposed statement on motion for a new trial is incorrect, the attorney of the successful party must propose amendments to correct it does not apply where no such statement was proposed by the defeated party in the first instance.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 131.*]

5. PLEADING (§ 236*)—AMENDMENT OF COMPLAINT—DISCRETION OF TRIAL COURT.

Where an action by a foreign corporation, which had not designated, as required by Civ. Code, § 405, a resident on whom process might be served, and hence was not entitled under section 406 to sue, was tried on the merits and submitted for decision, the refusal to permit an amendment and supplemental answer alleging the failure of the corporation to comply with the statute was a proper exercise of the court's discretion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*]

6. CORPORATIONS (§ 672*)—FOREIGN CORPORATIONS—RIGHT TO SUE—WAIVER.

The fact that the disability of a foreign corporation to sue because of its failure to designate a resident, as required by Civ. Code, § 405, on whom process might be served was not pleaded before the cause came to issue and trial might be taken as a waiver on the part of defendant of such disability.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 672.*]

7. PLEADING (§ 261*)—AMENDMENTS—ALLOWANCES.

It is not sufficient that a new defense proposed by an amended answer is a legal defense, but it should also be an equitable defense, before it is error to refuse to allow it.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 261.*]

8. PLEADING (§ 106*)—DILATORY PLEAS—CONSTRUCTION.

A plea in abatement, or a dilatory plea, is not favored, and must be strictly construed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 219; Dec. Dig. § 106.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

9. CORPORATIONS (§ 667½*)—FOREIGN CORPORATIONS—ACTIONS—PARTIES.

Where an action by a foreign corporation had been tried on the merits, before the question of whether the corporation had paid the license tax imposed by St. 1905, c. 386, as amended by St. 1907, c. 403, requiring payment by corporations of an annual license tax, and providing that the directors in office of a foreign corporation, whose right to do business is forfeited because of failure to pay the tax, shall be the trustees of the corporation, the court, on the testimony of the directors that they were directors, was authorized to substitute the directors of the corporation as plaintiffs in lieu of the corporation, though, strictly speaking, the books of the corporation furnished the best evidence.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 667½.*]

10. APPEAL AND ERROR (§ 882*)—INVITED ERROR—RIGHT TO COMPLAIN.

A defendant, in an action by a foreign corporation, who introduced the depositions of directors of the corporation on the motion for leave to file a supplemental answer, alleging that the corporation had not paid the statutory license tax, may not complain because the court considered the same depositions on a motion to substitute the directors as plaintiffs, over the objection that the fact that the deponents were directors should be proved by the corporate books.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8591-3610; Dec. Dig. § 882.*]

Appeal from Superior Court, City and County of San Francisco; James M. Trout, Judge.

Action by Reed & Co., by trustees, against Abraham Harshall. From a judgment for plaintiff, defendant appeals. Affirmed.

Joseph Hutchinson, for appellant. Gavin McNab, F. H. Gould, and R. V. Whiting, for respondent.

HART, J. This action was instituted for the purpose of recovering judgment for the sum of \$403, alleged to be due for personal services rendered by plaintiff for defendant. The answer, in addition to denying the validity of the claim set out in the complaint, pleads a counterclaim, alleging that the plaintiff is indebted to defendant in the sum of \$427.65 for services alleged to have been performed by defendant for plaintiff at the latter's "special instance and request." The cause was tried by the court, and the plaintiff given judgment, from which and the order denying defendant a new trial this appeal is brought to this court.

From the court's findings it is learned that the sum sued for is an alleged balance remaining unpaid for certain work done under a written contract by the plaintiff for defendant, and for which the plaintiff was to receive the sum of \$4,403, payable as follows: Two thousand dollars when "one-half the work herein agreed to be done by said contractor shall have been fully completed," \$2,000 when all of said work shall have been fully completed, and \$403 "35 days after the final completion and acceptance of said work

and the filing, in the office of the recorder of said city and county of San Francisco, state of California, of the notice of completion of said work." The court found that the services had been performed as alleged in the complaint, and that there was due plaintiff the sum of \$403, for which it was entitled to judgment. The court further found that, about the 1st day of November, 1906, the contract was so modified by agreement of the parties that certain of the excavations provided for by said contract might be left unperformed by the plaintiff, and that "certain other excavations on the lot described in the said contract should be made to a greater depth than those provided for in the said contract, which said modifications of contract were subsequently performed in accordance therewith by the said plaintiff;" that on the 9th day of November, 1906, the performance of the said contract was accepted by the said defendant, with the proviso that a certain small amount of work remaining undone should be completed by said plaintiff; "that thereafter, and prior to the commencement of this action, the said work so provided in said modification of said contract was completed in accordance with the terms of said modification of said contract; and that all the terms and provisions of the original contract as modified by said subsequent agreement have been performed by plaintiff." The propositions presented in appellant's briefs, and upon which a reversal of the judgment and order is urged, are: (1) That the findings are not supported by the evidence; (2) that the action was prematurely brought; (3) that the court omitted to make a finding on the counterclaim pleaded in the answer; (4) that the court erred in making several orders granting and refusing to grant certain motions made after the case had been tried, and while it was yet under submission.

With the exception of a bill embodying exceptions to the orders referred to as having been made by the court after the trial and submission of the issues involved, the record does not present any bill of exceptions or statement on motion for a new trial. In other words, neither the evidence nor the substance thereof, as taken at the trial on the merits, is brought up either through a bill of exceptions or a statement, and the appeal here, so far as the proceedings had at the actual trial of the cause are concerned, in effect amounts to nothing more than an appeal from the judgment on the judgment roll alone. Therefore there is nothing before us upon which we can review the assignment that the evidence does not sustain the findings and the alleged error of the court in failing to find upon a material issue. As to the last-mentioned point—the failure of the court to make a finding on defendant's counterclaim—no evidence being disclosed by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the record, the presumption is that no evidence upon that issue was presented by the defendant, and that he abandoned the counterclaim at the trial. *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. 1098; *Winslow v. Gohransen*, 88 Cal. 450, 26 Pac. 504; *Dolliver v. Dolliver*, 94 Cal. 646, 30 Pac. 4; *Roebbling's Sons Co. v. Gray*, 139 Cal. 608, 73 Pac. 422; *Cutting Packing Co. v. Canty*, 141 Cal. 692, 75 Pac. 564.

The appellant, in his brief, refers for verification of his declaration that a large amount of evidence was received in support of his counterclaim to folios 168, 169 of the transcript, but we find upon an examination of those folios that the reference is to the recitals involved in one of his specifications of particulars, in which it is alleged that the evidence does not justify the decision. Both the statement of counsel for appellant in his briefs and the specifications in the transcript, being unsupported by either a bill of exceptions or statement of the case, are mere extrajudicial declarations, of which we are not, of course, authorized to take notice.

What is said in the foregoing applies with equal force to the contention that the action was prematurely instituted. This claim is based upon the provision of the contract that the payment of the sum alleged in the complaint to be due plaintiff was to be postponed until after 35 days after the final completion and acceptance of the work and the filing of the notice of completion in the office of the county recorder. Counsel declares that the evidence discloses that "no such notice was ever filed," referring for support of the declaration to the folios of the transcript, at which are found specifications of the insufficiency of the evidence to justify the findings, apart from which the transcript is silent as to any evidence having been introduced upon the subject.

The authorities cited by counsel for appellant to the effect that, "if defendant's proposed statement on motion for a new trial was incorrect, the respondent's attorney should have proposed amendments to it, so as to have it correct," can, of course, have no application where, as here, no such statement was proposed by the losing party in the first instance.

The defendant excepted to the orders made on the following motions, all said motions having been made, as stated, after the case had been tried and submitted: (1) Defendant's motion for an order directing commission to issue to take the deposition of Charles H. Ingraham, at Santa Fé, N. M.; (2) defendant's motion for an order permitting him to file a supplemental answer; (3) plaintiff's motion to substitute as plaintiffs certain parties as trustees for the stockholders of said plaintiff corporation; (4) plaintiff's motion for settlement of findings; (5) defendant's motion for an order permitting him to file amended and supplemental answer.

The first and fifth of the motions in the

order in which they are above presented were denied and the others granted by the court.

The order refusing to grant defendant's motion for permission to file an amended and supplemental answer, alleging plaintiff's failure to file in the office of the Secretary of State a designation of some person residing within the state upon whom process issued by authority of or under any law of this state may be served, constituted the exercise of a judicial discretion with which, under the circumstances of this case, we are not justified in interfering. The plaintiff is a foreign corporation organized and existing under the laws of Arizona. Section 405 of the Civil Code provides that the above-mentioned designation shall be filed with the Secretary of State, and section 406 of the same Code provides, as a penalty for noncompliance with the requirement of the preceding section, that "no corporation not created by or under the laws of this state is entitled to the benefit thereof, nor can any such corporation maintain or defend any action or proceeding in any court of this state until the corporation has complied with the provisions of the preceding section." It was, as stated, entirely within the discretion of the trial court to allow or disallow the proposed amended answer; but, as the defense sought to be interposed by the proposed supplemental answer involved a mere dilatory plea—a plea in abatement of the action and not to the merits—we doubt not that had the motion been granted, the court would thereby have been guilty of a clear abuse of its discretion. The motion was made *after* the case had been tried upon its merits and submitted for decision, and the fact that the disability of plaintiff to maintain the action was not pleaded before the cause had come to issue and trial may be taken as a waiver on the part of the defendant of such disability. *Cal. Sav. & L. Soc. v. Harris*, 111 Cal. 136, 43 Pac. 525; *Bernheim Distilling Co. v. Elmore* (Cal. App.) 106 Pac. 720; *Parmelee Co. v. Haas*, 171 N. Y. 583, 64 N. E. 440.

Referring to the law of the state of New York similar in effect to the provisions of our law requiring all corporations to pay an annual license tax to the state, and prescribing as a penalty for failure so to do the forfeiture of the right of such corporations to do business in this state, the court in its opinion in the last-mentioned case, at page 583 of 171 N. Y., at page 440 of 64 N. E., says: "The statutes in themselves give no right of action, and are not essential elements of the cause of action stated in the complaint. They are mere revenue regulations, compliance with which is made necessary in order to acquire the right to do business here and to enforce causes of action in our courts. * * * In this case the defendant may waive the provisions of this statute and defend the action brought against him upon the merits, and unless he elects to de-

fend or raise some question under this statute by some affirmative act or pleading, the court will simply look at the cause of action as stated—citing *Crane v. Powell*, 139 N. Y. 379 [34 N. E. 911]; *Rowell v. Janvrin*, 151 N. Y. 60 [45 N. E. 398]; *Rima v. Rossie Iron Works*, 120 N. Y. 483 [24 N. E. 940]. * * *

In this case it appears that the defendant has answered, and the answer contains merely a general denial. It would seem to be clear, therefore, that he has waived the right to raise any question based upon the statutes referred to." Besides, "It is not sufficient," says the Supreme Court, in *Bank of Woodland v. Heron*, 122 Cal. 109, 54 Pac. 538, "that the new defense proposed be a legal defense; it should also be an equitable defense." See, also, *Greenwood v. Adams*, 80 Cal. 74, 21 Pac. 1134; *Harding v. Minear*, 54 Cal. 502, 506. Moreover, "pleas in abatement, or dilatory pleas, have never been favored, and are to be strictly construed." *Cal. Sav. & L. Soc. v. Harris*, supra; *Tooms v. Randall*, 3 Cal. 438; *Larco v. Clements*, 36 Cal. 132. In *Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348, the Supreme Court, upholding the court below in its disallowance of an amendment setting up the statute of limitations, uniquely and forcefully said: "It was claimed solely as a legal advantage, to which at one time he would have been entitled; but it is a wise conservation that it should have but its day in pleading, and no grace of right after, beyond the extent of justice."

Nor did the court abuse its discretion in allowing the substitution of the directors of the plaintiff corporation, as trustees thereof, as plaintiffs in lieu of the corporation itself. By section 10a of an act of the Legislature of 1907 (St. 1907, pp. 746, 747) amendatory of the act of 1905 (St. 1905, pp. 493, 494), requiring the payment by corporations of an annual license tax to the state, it is provided that the directors or managers in office of a domestic corporation, whose charter is forfeited, or of a foreign corporation whose right to do business in this state is forfeited, because of failure to pay such tax, are deemed to be the trustees of such corporation and the stockholders and members of such corporation, and have full power, as such trustees, to settle the affairs of the corporation, and to maintain or defend any action or proceeding then pending in behalf of or against any of said corporations, etc. The court, upon motion of counsel for plaintiff, allowed the substitution mentioned in obedience to the provisions of the act of 1907 above referred to, it appearing from a supplemental answer which defendant, by leave of the court, had previously filed that the plaintiff corporation had not paid to the Secretary of State the required license tax.

It is not pretended by counsel for appellant that, if the corporation had not paid the license tax prescribed by the law, it was not necessary to substitute as plaintiffs the directors of said corporation as the trustees

thereof and of the stockholders and members of said corporation. It is the contention, however, that there was not adduced before the court competent evidence from which it could be determined who were the directors of said corporation, and therefore the proper parties to be substituted for the corporation as plaintiffs. The record contains a stipulation entered into on June 12, 1908, by the attorneys for the plaintiff and the attorney for the defendant, by which it was mutually agreed that the depositions of Walter G. Hopkins, Charles H. Ingraham, and Howard S. Reed (the substituted plaintiffs) might be taken in the city of Los Angeles, and, in pursuance of said stipulation, the depositions of Reed and Hopkins were taken before a notary public in said city, and returned to the court. Later, by agreement of the parties, another and further deposition by Reed was taken in the city of San Francisco. These depositions were introduced into the record here on motion of counsel for the defendant himself. The depositions of Reed and Hopkins, in substance, show that the corporation was created and organized under the laws of Arizona, but that its principal office is at Santa Fé, N. M.; that they and said Charles H. Ingraham are the directors of said corporation, the latter being secretary thereof and a resident of Santa Fé. It also appears from these depositions that Hopkins had, on the 30th day of December, 1906, tendered his resignation as a director and manager of the corporation, and that his resignation as manager, but not his resignation as a director, had been accepted. The deposition of Ingraham was not taken, as he was not in Los Angeles when the other depositions were taken, being then, as seen, a resident of New Mexico. The claim of counsel for appellant is that parol testimony is incompetent to prove who the directors or officers of a corporation are; that the books of such corporation constitute the best evidence of the fact. In connection with the point now under consideration, it is further argued that the court erred in its refusal to cause a commission to be issued to take the deposition of Ingraham at Santa Fé, N. M.; the contention being that, as secretary of the corporation, he had in his custody and under his control the corporation's books, from which the only competent proof of the directorate could have been obtained.

As stated in the outset, these motions were initiated and pressed to the attention of the court after the cause had been tried upon the merits of the issue, and while, strictly speaking, the books of the corporation would have furnished the highest and best evidence, in law, upon the question of who were the de jure directors of said corporation, the testimony of Reed and Hopkins was sufficient to establish at least their de facto capacity as directors, and, we think, was sufficient for the purposes of the motion to substitute them as plaintiffs and to justify the court in grant-

ing said motion. These witnesses knew whether they were acting as directors, and even if, in truth, they were only de facto directors, they were, according to their testimony, "the directors in office of the affairs of the corporation" at the time of the substitution, and, under the provisions of section 10a of the act of 1907, were to be deemed to be the trustees of the corporation for the purpose of maintaining this action. Furthermore, the depositions were introduced into the record here on the motion of counsel for the appellant himself; and, if the court erred in considering them for the purpose of the motion to substitute the directors as plaintiffs, the error is one of which obviously appellant cannot claim any advantage. Necessarily the foregoing disposes of the point against the contention of appellant that the court erred in refusing to issue a commission for the taking of the deposition of Ingraham at Santa Fé, N. M., and of necessity it follows, from the views we have expressed upon the rulings of the court with regard to the depositions that the court did only what it had to do in settling the findings.

No error appearing in the record, the judgment and order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(12 Cal. A. 733)

TOGNI et al. v. SLOCOMB. (Civ. 680.)

(Court of Appeal, Third District, California.
March 8, 1910.)

1. BOUNDARIES (§ 37*)—EVIDENCE.

Evidence in an action to determine the boundary between two city lots, depending on the location of the southern line of the block containing the lots, held to show such southern line was marked by a fence.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 191; Dec. Dig. § 37.*]

2. BOUNDARIES (§ 48*)—MISTAKE—ACQUIESCENCE.

The question of boundary between two city lots, depending on the location of the southern line of the block containing them, such boundary being fixed by the deeds conveying them as a certain distance above such southern line, is not affected by the fact that the location of the southern line, which at the time of the survey was marked on the ground and remained identified and unquestioned for 50 years, was induced by a mistake as to the northern and southern limits of the land of the one platting the block, and that the northern boundary as so located was without his lands.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 241; Dec. Dig. § 48.*]

3. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Admission of a declaration of a decedent as to a mistake in locating a line, even if not admissible as against interest, as apparently considered when made, was harmless, the mistake otherwise clearly appearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

4. EVIDENCE (§ 201*)—ADMISSION AGAINST INTEREST.

As an admission against interest, and as indicating a purchaser understood what property he was buying, the statement in his bid therefor that he was aware the northern line of the property might be in dispute, but that he would be satisfied if he got a certain amount, is admissible in an action to determine boundary.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 201.*]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Chas. Togni and another against Henry Slocomb. Judgment for plaintiffs. Defendant appeals. Affirmed.

Larkins & Peemster, for appellant. Edwards & Smith, for respondents.

BURNETT, J. The controversy is over a small strip of land in the city of Visalia, county of Tulare. At the trial it was stipulated "that the title to the property involved was formerly in A. B. Atwell, a common grantor; that he owned the property at the time of his death; and that both parties got deeds from the administrator of his estate, and that said administrator had a right to make those deeds."

The deed to plaintiffs calls for the following tract of land: "Beginning at the southwest corner of block No. 1 of Matthew's First addition to the town of Visalia, county of Tulare, state of California, as per the official map now on file in the office of the county recorder of the county of Tulare, state of California, thence running east 264 feet to the east line of said block; thence north 120 feet; thence west 264 feet to the west line of said block; thence south 120 feet to the place of beginning." The conveyance to defendant contained the following description: "Beginning at a point 120 feet north of the southwest corner of block No. 1 of Matthew's First addition to the town of Visalia, as per official map thereof on file in the office of the county recorder of said county; thence running east 264 feet, to east line of said block; thence north 74 feet more or less; thence west 264 feet to the west line of said block; thence south 74 feet more or less to the place of beginning." As seen, defendant's land lies north of that belonging to plaintiffs, and the strip in question extends across the block from east to west and is 35 feet in width from north to south.

The settlement of the controversy depends upon the location of the southern boundary line of said block No. 1, it being the contention of respondents that said line is marked by a fence, which, renewed from time to time, has been on the ground for nearly 50 years. On the other hand, it is insisted by appellant that the true line is some 35 feet further south, and hence the northern line of respondents' property must be located the same distance south from what they claim,

leaving the disputed strip covered by appellant's deed. The court found "that along the southerly boundary line as described in plaintiff's complaint, thereinbefore mentioned and forming the actual boundary line of said lot No. 1, is a fence which bounds said block on the south, and which said fence is at the point of beginning as aforesaid and the commencement of plaintiffs' lands hereinbefore mentioned, and said fence extends along the south boundary line of said block No. 1 the entire length of said block from west to east and forms the actual boundary line of said block on the south." It is conceded that if this finding is supported by the evidence then the judgment must be sustained, since the northern line of plaintiffs' land as claimed by them is only 120 feet from this fence.

That this finding is abundantly supported does not admit of any kind of doubt. Certainly, the grantors, if owning the land, had a right to fix the boundaries of the land which they conveyed. It is quite natural that they should mark those boundaries upon the ground. This we find was done at an early date. The northern and southern boundary lines of said block No. 1 were definitely fixed, and thereon fences were erected. It may be that the northern line as thus established was without the exterior limits of the property of the original owner of said lot but, as we shall see, this cannot affect the location of the line in question here. When these lines were first located it was undoubtedly believed that the northern line of said block corresponded with the section line. In this a mistake was made, but this mistake does not render uncertain the identity of said block. The northern fence was originally placed on this supposed line, and afterwards, when the street adjacent thereto, called "South Street," was widened and extended further south a distance of about 35 feet, the fence was moved south also correspondingly, reducing thereby to the same extent the depth of the northern segment of the block. The southern boundary line, however, as we have stated, has been identified and unquestioned for nearly 50 years. It was marked on the ground at the time of the original survey, it has ever since been recognized and acquiesced in by all parties, and it has been attested by the fence put there by the owners of the property with the intention of having said fence constitute a visible and substantial memorial of the southern extremity of the block. The finding of the court in this regard is "that said fence was built in 1860 on the south line of said block No. 1 of Matthews First addition; that prior to the building of said fence surveyors were on the ground and marked it off; that said fence was placed on the south boundary line of said block No. 1 after said surveyors had surveyed the ground as aforesaid; that said fence has been main-

tained at the same place ever since its erection in 1860 as aforesaid."

Turning to the evidence, we find that one Mary Young testified: "I have resided in Visalia 51 years, and am acquainted with block No. 1, Matthews First addition to the city of Visalia, and have been acquainted with said property ever since I can remember. I know something about a fence, on or about the south line of said block No. 1. I know only where the south line of said block No. 1 is by the fence that is there. I think said fence has been there, as well as I can remember, since 1859 or 1860. I saw the surveyors surveying there, or surveying the line of course. The fence was built shortly afterwards; could not tell who built it, but I think it was built by Joshua Lewis. * * * During all these years I never heard any of the Atwells claim any of the property south of the said fence. I have always lived down near that community; so far as my knowledge the property of the Atwells as possessed by them has always been north of said fence. All the property south of that fence was in the possession of Mr. Creighton and Mr. Griffin. * * * When that road (South street) was extended, they threw out somewhere in the neighborhood of 30 or 35 feet, because there were five or six rows of grape vines thrown out on the road; a strip of land about 30 or 35 feet wide was taken off along the north side of the piece of land the Atwells claimed inside of their fence, and they moved their fence back about 30 or 35 feet and that strip of land went into the street. The fence they moved back had been there about 20 years, as near as I can get at it."

A. T. Griffin also testified that no one to his knowledge, whoever owned any part of block No. 1, claimed any property south of that fence, and that "no other boundary line was ever put there between blocks 1 and 2."

Seth Smith, the county surveyor, testified to the establishment of the northeast corner of said block and the opening of South street, which necessitated the change of the northern boundary of the block, and that the fence was moved back accordingly.

What purported to be an official map of Matthews addition, over the objection of appellant, was received in evidence. But whether properly admitted or not is of no importance, as it is too meager to throw any light upon the disputed tract. The identification of block No. 1, at least as far as the southern boundary is concerned, is made complete by the testimony to which we have already referred, and the reference to the map may be disregarded. There can be no doubt that when a conveyance was made of a strip of land beginning at the southwest corner of said lot it was the intention of the parties and so understood that the western termination of said fence should be the

Initial point, as this fence was the established southern boundary of said lot.

In *Banks v. Moreno*, 39 Cal. 239, it is said: "In grants of real estate it is not always necessary to describe it by metes and bounds, or by a reference to actual or artificial monuments, nor by courses and distances. If the tract granted have a well-known name, and the boundaries of the tract known by that name are notorious and well defined, a grant of the tract by its name would doubtless convey the title to the whole. In like manner, a grant describing the tract by reference to the known occupation of the grantor or another—or to another instrument containing a sufficient description of the premises—would be sufficient. In short, any description will suffice which identifies the land granted with such certainty that the specific parcel intended to be granted can be ascertained either by the calls of the instrument, as applied to the land, or by aid of the descriptive features of the grant. These are familiar propositions, too well known to the profession to need the citation of authorities."

Appellant objected to the question asked of the county surveyor, "What did Mr. Atwell say about that lost corner?" The objection was overruled, and the witness answered: "If I recollect the exact words he said, it was about 33 feet north of where the true line would come." The evidence seems to have been brought within the rule permitting the declaration of a deceased person "made against his interest in respect to his real property." It is probably true, as pointed out by appellant, that the said Atwell owned at the time a strip of land on the south side of the lot, but upon appellant's theory of this case the mistake in the location of the said section line would affect Atwell's property in the same manner as if it had been adjacent to said South street. Atwell appeared to think so, as he said "the line should be straight, and the government survey should be straight and we can straighten it now better than any other time; and it hurts me worse than anybody else." But the testimony could not have affected the result, as it otherwise appears clear that the mistake was made in the original survey, and, as we have seen, this circumstance has really no bearing upon the conclusion of the trial court as to the identity of the southern boundary line of said lot No. 1.

The bid of appellant for the purchase of the property now owned by him, addressed to the administrator of the estate of the said A. B. Atwell, deceased, was admitted over objection. It was therein stated that "I am aware of the fact that the north line of said property may be in dispute, but will feel myself satisfied should I get 39 feet south of that certain fence which extends along the north side of what is known as the A.

B. Atwell tract on which the brick building above referred to is situated." This was clearly admissible as an admission against interest, and as indicative of appellant's understanding of what property he was purchasing and paying for. At the time of his bid, and also, we must assume, at the time of the sale, he was satisfied with 39 feet. The only surprising thing is that he was dissatisfied with the ruling of the court confining him to that tract which he purchased and paid for.

All the points made by appellant have received careful attention, but we are convinced that the decision of the lower court is correct, and the judgment and order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(12 Cal. A. 730)

PEOPLE v. WARREN. (Cr. 144.)

(Court of Appeal, Second District, California.
March 8, 1910.)

1. CRIMINAL LAW (§ 1153*)—APPEAL—QUESTIONS OF FACT—VOLUNTARY NATURE OF CONFESSION.

Where there is a sharp conflict in the testimony whether a confession was voluntary, the finding of the trial court must, like its finding on any other disputed fact, be deemed conclusive on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3066; Dec. Dig. § 1158.*]

2. CRIMINAL LAW (§ 531*)—CONFESSIONS—ADMISSIBILITY.

The owner of stolen property applied to the police for assistance in its recovery. During the investigation of the circumstances and before the arrest of accused, a police officer believed that accused was cognizant of the theft, and requested that he tell of the whereabouts of the property. Several days later, after the property had been recovered and further evidence of the guilt of accused obtained, accused made a confession. The police denied the testimony of accused that the confession was not made voluntarily. *Held* to justify the court in holding that the confession was made voluntarily.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1212-1217; Dec. Dig. § 531.*]

3. CRIMINAL LAW (§ 394*) — EVIDENCE WRONGFULLY OBTAINED—ADMISSIBILITY.

A letter written by accused while in jail, and strongly tending to prove his guilt, is admissible in evidence, though the letter was procured by strategy and fraud.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 876; Dec. Dig. § 394.*]

Appeal from Superior Court, Los Angeles County; S. B. Crow, Judge.

Lee B. Warren was convicted of grand larceny, and he appeals. Affirmed.

George M. Harker and Ezra Williams, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant prosecutes this appeal from an order denying his motion for a

new trial and from a judgment pronounced against him upon conviction of the crime of grand larceny.

The chief ground, and indeed the only one worthy of consideration, upon which appellant bases his contention for a reversal is that the admission in evidence of defendant's confession over his objection constituted prejudicial error. Appellant claims that the confession was not made voluntarily, but that he was induced to make it by reason of the chief of police and another officer assuring him (together with other promises which, if made, were sufficient to render the confession inadmissible) that if the valuables stolen were returned and he would "tell the whole business," the prosecution would be dropped and the case dismissed. Not only did these officers deny making the several statements and representations attributed to them by defendant, and upon the strength of which he claims to have made the confession, but they denied using any language of like import. It thus appears there is a sharp conflict in the testimony of the witnesses upon a question of fact, as to which, like any other disputed fact, the finding of the trial court must be deemed conclusive.

Upon discovering that her diamonds had been stolen from the box wherein they were placed, which box was deposited in the custody of the cashier of the bathhouse where she went in bathing, the owner applied to the chief of police to assist her in their recovery. During his investigation of the circumstances connected with the commission of the crime, and before defendant was arrested, the chief of police said to him: "I am satisfied that you know exactly where the diamonds are, and come through and tell me where they are; the game is young." We are unable to perceive how this language could be construed as a promise of immunity. The words "the game is young" have no secret or hidden meaning. The police officer was engaged in an effort to recover the stolen goods, and being satisfied that defendant was cognizant of the theft, requested that he tell of their whereabouts, thus relieving the officer from the duty of a further search. The cases of *People v. Williams*, 133 Cal. 165, 65 Pac. 323, and *People v. Thompson*, 84 Cal. 598, 24 Pac. 384, have no bearing upon the question. In the former case, the defendant's admission was excluded from evidence because it was obtained by duress, while in the latter the defendant was induced to confess by reason of the sheriff telling him, in response to an inquiry, it would be better for him to make a full disclosure. In the case at bar it is significant that the confession was not made until several days after the alleged promise of immunity, and after the officer had recovered possession of

the stolen property, and obtained further evidence of defendant's guilt. The direct evidence of the officers contradicting the testimony of defendant, as well as the inferences fairly deducible from circumstances, the existence of which was conclusively shown by the evidence, or admitted by defendant, fully justified the court in holding the confession to have been made voluntarily and without promise of any kind whatsoever.

While in jail defendant wrote a letter to one who had been his accomplice in the commission of the crime. The contents of this letter strongly tended to prove defendant's guilt. It was received in evidence over defendant's objection that it was procured by strategy and fraud. In the recent case of *People v. Swaile* (Cal. App.) 107 Pac. 134, this court, in discussing an objection of like character, said: "Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. 1 Greenleaf on Evidence (16th Ed.) § 254a." Moreover, there was evidence tending to prove that defendant's surrender of the letter was voluntary.

Other points urged by appellant are deserving of no consideration, other than to say that they are wholly without merit.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

(13 Cal. A. 44)

SANTA BARBARA COUNTY v. YATES
et al. (Civ. 760.)

(Court of Appeal, Second District, California. March 15, 1910. Rehearing Denied April 13, 1910; Denied by Supreme Court May 12, 1910.)

EMINENT DOMAIN (§ 188*)—PROCEEDINGS TO CONDEMN RIGHT OF WAY—BOND OF PETITIONERS—COLLATERAL ATTACK.

Pol. Code, § 2683, requires that the petitioners for the condemnation of a right of way for a road must accompany the petition with a sufficient bond, to be approved by the board of supervisors, in double the probable cost of the viewing and laying out or altering of any road, conditioned that the bondsmen will pay all the cost of viewing and surveying in case the prayer is not granted. Section 2690 provides that "no informality in the proceedings of the board shall vitiate said suit, but the said order of the board directing the district attorney to bring suit shall be conclusive proof of the regularity thereof." The bond presented by petitioners provided that the bondsmen "will pay all the costs of viewing and surveying in case the prayer of said petition is not granted and the said road finally not opened." *Held*, that the insertion in the bond of the provision "and the said road finally not opened" does not render the bond defective; and, if it did, the defect could not be attacked collaterally in the condemnation proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 506; Dec. Dig. § 188.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

Appeal from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Proceeding by the County of Santa Barbara against Mary M. Yates and others to condemn a right of way for a public road. From the judgment of condemnation, Mary M. Yates appeals. Affirmed.

H. P. Starbuck and Canfield & Starbuck, for appellant. Wm. S. Day and Wm. G. Griffith, for respondent.

SHAW, J. This is a proceeding instituted by the county of Santa Barbara to condemn a right of way for a public road. Mary M. Yates, one of the defendants in the proceeding, appeals upon the judgment roll accompanied by a bill of exceptions from the judgment of condemnation.

The sole question presented for consideration is the alleged insufficiency of the bond, which, under the provisions of section 2683, Political Code, is required to accompany the petition for the opening of the road. This section provides that: "The petitioners must accompany the petition with a good and sufficient bond, to be approved by the board of supervisors, in double the amount of the probable cost of the viewing and laying out or altering of any road, conditioned that the bondsmen will pay all the costs of viewing and surveying in case the prayer is not granted." The bond presented with the petition was conditioned that the bondsmen "will pay all the costs of viewing and surveying in case the prayer of said petition is not granted, *and the said road finally not opened.*" It is contended that the insertion in the bond of the words italicized renders the bond void, and that the defect appearing in the bond itself objection thereto may be taken collaterally in the proceeding to condemn the property. Conceding the bond to be defective as claimed, we are nevertheless of the opinion that objection thereto upon such ground cannot be raised collaterally.

While the law requires certain preliminary steps to be taken before the board of supervisors prior to the maintenance of an action to condemn the property of nonconsenting landowners, jurisdiction to determine the sufficiency of such steps, or whether they have been properly taken, is vested solely in the board of supervisors. Its determination therein must be deemed the final judgment of a competent tribunal having jurisdiction in a proceeding entirely distinct and separate from the action to condemn. The order directing the district attorney to institute the action is in the nature of a judgment adjudicating upon the sufficiency of all prior proceedings requisite to the making of the order. If the proceedings be irregular, or any essential step therein wanting, objection thereto should be taken by obtaining a review upon certiorari of such proceedings in the proper court. Not only is this rule pre-

scribed by section 2690 of the Political Code, which provides that "no informality in the proceedings of the board shall vitiate said suit, but the said order of the board directing the district attorney to bring suit shall be conclusive proof of the regularity thereof," but it finds ample support in the authorities. Humboldt County v. Dinamore, 75 Cal. 604, 17 Pac. 710; County of Siskiyou v. Gamlich, 110 Cal. 94, 42 Pac. 468; County of San Luis Obispo v. Simas, 1 Cal. App. 175, 81 Pac. 972; County of Sutter v. Tisdale, 136 Cal. 474, 69 Pac. 141. In the case last cited it is said: " * * * The form of the bond which was presented with the petition * * * became immaterial, and evidence in reference thereto * * * was properly excluded by the court." In San Luis Obispo v. Simas, supra, it is said that "none of the intermediate orders or proceedings are reviewable in this action," which "shall be determined by the court or jury in accordance with the rights of the respective parties as shown in court, independent of said proceedings before the board." While the taking of the preliminary steps required should be alleged in the complaint, it seems that the order directing the bringing of the action is in itself proof of the regularity of such proceedings.

Moreover, we are of the opinion that the bond in form is in substantial compliance with the requirements of the statute. There is no merit in appellant's contention that adding the words "and the said road finally not opened" renders the bond void, for the reason that it lessens the liability of the bondsmen. The added condition is mere surplusage. The words neither add to nor detract from the liability of the bondsmen. Their obligation is to pay the costs of viewing and surveying if, after such examination and survey, the board shall deem it inadvisable to grant their petition, the granting of which would be equivalent to the opening of the road. If the petition be denied, such denial constitutes a final disposition of the proceedings thereunder for the opening of the road and their liability would attach at once. The proceedings being at an end, the road could not be finally or otherwise opened thereunder. It is idle to claim that the bondsmen would be released from liability because, after their petition was denied, a road covering the same territory might be opened under a dedication or purchase. The bond could have reference to no road other than that opened in the proceeding initiated by the petition with which the bond was filed, and to which it referred. At most, the alleged defect constitutes a mere irregularity, which did not affect the private rights of appellant. Hill v. Board of Supervisors, 95 Cal. 239, 30 Pac. 385.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

(13 Cal. A. 1)

SAN PEDRO SALT CO. v. HAUSER PACKING CO. (Civ. 710.)

(Court of Appeal, Second District, California. March 10, 1910.)

1. SALES (§ 84*)—CONTRACTS—RENEWAL AT ELECTION—TIME TO EXERCISE ELECTION.

A contract for the sale and delivery during a year of a specified quantity of salt at a fixed price, which gives the buyer the option to renew the agreement for a second year, without specifying the time within which the election must be made, binds the buyer to exercise his option before the expiration of the contract, and an election made within 30 days after the expiration of the contract is ineffectual.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 84.*]

2. SALES (§ 84*)—CONTRACTS—LIABILITY OF BUYER.

A contract for the sale and delivery during a year of 200 tons of salt at \$5 per ton gave the buyer the option to renew the agreement for a second year, without specifying the time within which he should elect to renew. He did not elect to renew until after the expiration of the year. During the following year he ordered salt from the seller as he had previously done under the contract, and in conversations with representatives of the seller he insisted that the purchases were made at the price stipulated in the contract. The seller never consented to the sale at such price, but he disclaimed any renewal by the buyer of the contract, and the invoices accompanying the shipments gave the price which was in excess of the price fixed in the contract. *Held*, that the seller could recover the value of the salt delivered after the expiration of the contract.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 84.*]

3. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR — ERRONEOUS EXCLUSION OF EVIDENCE.

The error in sustaining objections to questions to witnesses on cross-examination was not prejudicial, where the most favorable answers could not have benefited the cross-examining party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the San Pedro Salt Company against the Hauser Packing Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Isidore B. Dockweiler, for appellant. B. W. Hahn and Hahn & Hahn, for respondent.

SHAW, J. On August 26, 1905, plaintiff contracted in writing to deliver to defendant during the ensuing year 200 tons of salt at the price of \$5 per ton as therein stipulated. The contract contained a provision to the effect that the defendant should have the option to renew the agreement for a second year, but failed to specify the time within which defendant should elect to renew the agreement. By its terms the contract expired on August 27, 1906. Within the year following such expiration plaintiff delivered to defendant a certain amount of salt alleged

to be of the reasonable market value of \$2,525.50, and for the recovery of which, less payments made, this suit was instituted. Defendant claims that, pursuant to the provisions of the agreement according such right, it renewed the contract under which it was entitled to the salt so delivered at the price specified therein. The court found there was no renewal of the contract and gave judgment against defendant for the value of the salt. Defendant's motion for a new trial was denied, and it appeals from the order denying the same.

The evidence clearly tends to prove that defendant did not elect to renew the contract prior to its expiration on August 27, 1906. Appellant contends, however, that, as the contract fixed no time when it should exercise its option to renew, it had a reasonable time after the expiration thereof within which to act, and that it did, by letter, within 30 days after its expiration, notify plaintiff of its election to renew the contract. Where a contract provides for its renewal at the election of one party thereto without fixing the time when such option shall be exercised, the time for giving notice of such renewal cannot be extended beyond the date of the expiration of the contract. The right to renew, like other rights, must necessarily cease when there is no longer a contract under and by virtue of which to claim the privilege. *Shamp v. White*, 108 Cal. 220, 39 Pac. 537; *Renoud v. Daskam*, 34 Conn. 512; *Thiebaud et al. v. First Nat. Bank*, 42 Ind. 212. Under the contract defendant was required to take the salt so purchased thereunder within one year after the date of the contract. It might with equal propriety insist that it had a right to delivery of the salt within a reasonable time after the expiration of the year as to insist upon the right of renewal of the contract after it had expired.

Appellant claims that during the year following the expiration of the contract it ordered salt from respondent as it had previously done under the contract, and that in conversation with representatives of the salt company it insisted that such purchases were made at the price stipulated in the contract. Conceding this to be true, it is clear that plaintiff never assented to the sale at such price of the salt so ordered by defendant. On the contrary, the evidence clearly tends to show that plaintiff at all times disclaimed any renewal by defendant of the contract. The invoices, copies of which are brought up in the record, included a large number of shipments of salt. Copies of these invoices accompanied each shipment, and the price of \$8.50 per ton inserted in such invoices afforded ample evidence to defendant that the price at which plaintiff was supplying the salt was greater than that of \$5 per ton stipulated in the contract.

The alleged errors of law are all based up-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on rulings of the court in excluding certain questions asked by defendant on cross-examination of plaintiff's witnesses. We perceive no error in any of these rulings. None of the questions constituted proper cross-examination. Moreover, the most favorable answers to these questions could not have benefited defendant, and hence, if the rulings were improper, were not prejudicial to the defendant.

The order denying defendant's motion for a new trial is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

12 Cal. A. 725)
CONTINENTAL BUILDING & LOAN ASS'N
v. WOOLF et al. (Civ. 670.)
(Court of Appeal, Third District, California.
March 7, 1910.)

1. JUDGMENT (§ 87*)—ON STIPULATION—VALIDITY.

A judgment, which recites that it was made pursuant to stipulation entered into in open court in the presence of the attorneys for both parties, "and of such defendants, * * * it appearing to the satisfaction of the court that the said stipulation was duly entered into in open court," is a valid judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 143-145; Dec. Dig. § 87.*]

2. APPEAL AND ERROR (§ 907*) — REVIEW — PRESUMPTIONS.

Where there is no bill of exceptions, all intendment in support of the judgment appealed from must be indulged, and all proceedings necessary to its validity will be presumed to have been regularly taken, and any matters which might have been presented to the court below which would have authorized a judgment will be presumed to have been presented.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

3. APPEAL AND ERROR (§ 931*) — REVIEW — PRESUMPTIONS.

It will be presumed on appeal that findings were waived, where there is nothing to show that they were not waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3771; Dec. Dig. § 931.*]

4. TRIAL (§ 388*)—APPEAL AND ERROR (§ 934*) — NECESSITY OF FINDINGS.

Where a judgment is entered upon an agreed statement of facts, no findings are necessary, and the same rule applies where the judgment is entered upon stipulation; for it will be presumed, if necessary to support such judgment, that the stipulation was made a matter of entry, and was sufficiently specific to authorize the entry of the judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 908-911, 915; Dec. Dig. § 388.* Appeal and Error, Cent. Dig. §§ 3777-3781; Dec. Dig. § 934.*]

5. JUDGMENT (§ 73*)—RESCISSION.

Where judgment is entered in accordance with a verbal stipulation in open court that, on failure to make certain payments at specified times, judgment against defendants might be entered, defendants, having obtained an extension of time to make the payments, are not at liberty to repudiate the other provisions of the stipulation.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 73.*]

6. ATTORNEY AND CLIENT (§ 85*)—ORAL STIPULATIONS.

Where an attorney in open court verbally stipulates that an order or judgment may be entered, and agreeably thereto the order or judgment is entered, it then becomes an executed stipulation, and Code Civ. Proc. § 283, providing that an attorney shall have authority to bind his client in any of the steps of an action by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise, cannot be invoked to the prejudice of the opposing party, as such section refers to executory agreements only.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 1137; Dec. Dig. § 85.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Continental Building & Loan Association against Louis Woolf and Mary L. Woolf. Judgment for plaintiff, and defendants appeal from an order refusing to set aside the judgment. Judgment and order affirmed.

See, also, 106 Pac. 107.

Wm. Hoff Cook, for appellants. Gavin McNab, for respondent.

CHIPMAN, P. J. Action for the recovery of possession of real property. Plaintiff had judgment. Subsequently defendants moved to set aside and annul the judgment, which was denied. Defendants appeal from the judgment, and from the order denying their motion to vacate the judgment.

The judgment was as follows:

"This matter coming on regularly for trial in open court, by the court, both parties having waived a jury, the 24th day of September, 1908, in the presence of Gavin McNab, Esq., counsel for plaintiff, and of Joseph Siye, Esq., of counsel for the defendants, Louis Woolf and Mary L. Woolf, and of said defendants, and the parties hereto having entered into a stipulation in open court and duly reported by the official reporter of this court, whereby the amount payable by the defendants to plaintiff was fixed at \$1,300, together with subsequent costs, including the calendar fee and reporter's fee, \$500 of said sum to be paid by the 28th of September, 1908, and the remainder within 30 days from said 24th day of September, 1908, and whereby it was agreed that in the event the said money should not be paid in accordance with said stipulation at that time, then judgment should go against said defendants as asked in the complaint, without further trial; and the cause having been regularly continued from time to time, and finally until this 18th day of November, 1908, and counsel for plaintiff having, on this said 18th day of November, 1908, in the presence of counsel for defendants, moved for judgment, pursuant to said stipulation, and Joseph Siye, Esq., of counsel for defendants, having moved for a further continuance to permit of compliance by defendants with the requirements

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of said stipulation; and it appearing to the satisfaction of the court that the said stipulation was duly entered into in open court, and that defendants, and each of them, had failed to comply with same, and that plaintiff is entitled to judgment in accordance with the terms of said stipulation, in all respects as asked in the complaint; and the law and the premises being by the court here understood and fully considered—it is hereby ordered, adjudged, and decreed, and this court does hereby order, adjudge, and decree, that plaintiff above named do have and recover possession of the real property, the subject of this action, which said real property is particularly described as follows, to wit: [Description of property.]

"J. M. Seawell, Judge.

"Dated November 18, 1908. Recorded Dec. 2/08. Book 22, Page 128."

Indorsed: "Filed Dec. 2, 1908. H. I. Mulcrevy, Clerk, by Milton M. Davis, Deputy Clerk."

It appears from what purports to be a bill of exceptions, in support of the motion to annul the judgment, that on January 12, 1909, defendants filed with the clerk a notice of motion to set aside and annul the judgment, on the grounds: (1) That the court had no jurisdiction to enter the judgment, and it is void; (2) that it was made without the consent of defendants, and without a trial of the facts in issue; (3) that it was made through mistake, inadvertence, and excusable neglect upon the part of defendants. The motion came on to be heard on January 29, 1909, upon the pleadings in the case, and upon certain affidavits filed by defendants and upon certain counter affidavits submitted by plaintiff. On February 11, 1909, the court made the following order: "Ordered that if within 15 days defendants pay to plaintiff the sum of \$1,062, said motion be granted, and if not so paid, motion to be denied." The bill of exceptions purports to be "upon said motion and order of this court, made in relation thereto."

Respondent makes the point that the order refusing to set aside a judgment or order is not appealable. It was held in *Goyhinech v. Goyhinech*, 80 Cal. 409, 22 Pac. 175: "The motion was not for a new trial, but was merely to set aside the judgment, and the judgment was itself appealable. It is settled that when a judgment or order is itself appealable the appeal must be taken from such judgment or order, and not from a subsequent order refusing to set aside—citing cases. There are some exceptions to this rule, but the case does not fall within any of them. The plaintiff should have appealed from the judgment, with a bill of exceptions upon that appeal." See *Kent v. Williams*, 146 Cal. 3, 11, 79 Pac. 527. Nevertheless, we have examined the bill of exceptions, and, upon a careful reading of the affidavits before the trial court at the hearing of the motion, we think its order finds ample justifica-

tion. We see no infirmity in the judgment. It is there recited that it was made pursuant to stipulation entered into in open court, in the presence of the attorneys for both parties, "and of said defendants; * * * it appearing to the satisfaction of the court that the said stipulation was duly entered into in open court," etc. There being no bill of exceptions upon the appeal from the judgment, all intendments in support of the judgment must be indulged (*Von Schmidt v. Von Schmidt*, 104 Cal. 547, 38 Pac. 361), and all proceedings necessary to its validity will be presumed to have been regularly taken; and any matters which might have been presented to the court below, which would have authorized the judgment, will be presumed to have been thus presented (*Id.*). Appellants now urge nothing against the validity of the judgment which might not have been presented to the court below, and passed upon by that court favorably to respondent.

It will be presumed that findings were waived where there is nothing to show that findings were not waived. *Goyhinech v. Goyhinech*, 80 Cal. 410, 22 Pac. 175. Where judgment is entered upon an agreed statement of all the facts in the case no findings are necessary (*Gregory v. Gregory*, 102 Cal. 50, 36 Pac. 364); and we see no reason why the same rule should not apply where the judgment is entered upon stipulation, for it will be presumed, if necessary to support the judgment, that the stipulation was made a matter of minute entry, and was sufficiently full and specific to authorize the entry of the judgment. It appears from the recitals in the judgment that the matter came on to be heard September 24, 1908, and pursuant to the stipulation then made in open court the amount payable to plaintiff by defendants was fixed at \$1,300, of which \$500 was to be paid September 28, 1908, and the remainder within 30 days from September 24, 1908, and if not so paid, judgment should go against defendants as asked in the complaint. Judgment was not finally entered until November 28, 1908. The judgment shows on its face that defendants obtained an extension of time in which to make payments, and thus secured some favor by it. Having agreed to the judgment, in open court, though by verbal stipulation, defendants are not at liberty to repudiate the other provisions of the stipulation. *Himmelmänn v. Sullivan*, 40 Cal. 125; *Hawes v. Clark*, 84 Cal. 275, 24 Pac. 116; *Smith v. Whittier*, 95 Cal. 279, 287, 30 Pac. 529. In *Reclamation District v. Hamilton*, 112 Cal. 603, 609, 44 Pac. 1074, approving *Himmelmänn v. Sullivan*, supra, it was held that section 283, Code Civ. Proc., prescribing the manner in which the attorney may bind his client by stipulation, is executory, and does not refer to executed agreements. It seems to us that when an attorney in open court verbally consents or stipulates that an order or judgment may be entered, and agreeably thereto the order or

judgment is entered, it then becomes an executed agreement or stipulation, and the rule last above stated applies. In *Coonan v. Lowenthal*, 129 Cal. 197, 61 Pac. 940, it was held that, where an attorney consents orally in open court to the amendment of a pleading, section 283, Code Civ. Proc., cannot be invoked to the prejudice of the opposing party. To give section 283 a literal construction would greatly retard the business of the court, and lead to absurd consequences. Every admission, consent, or agreement made in the course of the trial would either have to be reduced to writing or filed with the clerk or by the clerk entered in his minutes. It was never intended that the section should receive such a construction.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

(12 Cal. A. 760)

PEOPLE v. PHILLIPS. (Cr. 152.)

(Court of Appeal, Second District, California. March 9, 1910.)

1. HOMICIDE (§§ 228, 234*)—SUFFICIENCY OF EVIDENCE.

Evidence, in a prosecution for homicide, held sufficient, if believed, to show that the crime was committed, and that accused was guilty of committing it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 471-476, 482-493; Dec. Dig. §§ 228, 234.*]

2. CRIMINAL LAW (§ 213*)—PRELIMINARY EXAMINATION—WAIVER OF OBJECTIONS.

After the jury was sworn, and the district attorney had made his opening statement, and the complaining witness was about to be sworn, defendant objected to the taking of any testimony on the ground that he had not been properly committed by the examining magistrate because in the body of the complaint the given name of the complaining witness was different from the given name signed to the complaint. Held that, if this variance was a material one, it should have been presented on motion to set aside the information, and it came too late at the time it was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 431-433; Dec. Dig. § 213.*]

3. CRIMINAL LAW (§ 660*)—RECEPTION OF EVIDENCE—OBJECTION TO INTERPRETER.

Where, in a prosecution for homicide, a number of the witnesses were Indians, who were unable to testify in English, and it was recognized by all that the interpretation was likely to prove inexact in the hands of any one within reach of the court, the proper time to question the qualification of an interpreter was before he was permitted to act, and, where the best is made of the situation by consenting to a person acting as interpreter who was known not to be able to interpret exactly either the oath or the evidence, the accused was not entitled to have the testimony given through such an interpreter stricken out without some showing that in a particular instance complained of the oath was not correctly interpreted.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 660.*]

4. CRIMINAL LAW (§ 707*)—RECEPTION OF EVIDENCE—HARMLESS ERROR.

In a prosecution for murder, many of the witnesses were Indians, who could not testify

in English, and the court allowed accused to introduce the testimony of his witnesses with the aid of his stepfather as an interpreter, and allowed the district attorney to have an Indian boy as a check interpreter to prompt him when it appeared to the boy that the interpretation had not been correctly made. Much of the defense was introduced in a leading form. The district attorney objected to one answer given by the interpreter, and said, "Is this interpreter giving the answers to the witness, or is she testifying?" Held that, there being enough in the record to justify the remark, the suggestion that the interpreter might be giving his own version of the matter was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 707.*]

5. CRIMINAL LAW (§ 782*)—INSTRUCTIONS—JUSTIFICATION.

A requested instruction, in a prosecution for homicide, that no justification or excuse of the act by defendant is required to be proven "by a preponderance of evidence," is properly modified by striking out the words in quotation marks.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 782.*]

6. CRIMINAL LAW (§ 829*)—INSTRUCTIONS ALREADY GIVEN.

Striking out from an instruction on reasonable doubt the clause, "which never shifts, but remains throughout the whole case upon the prosecution," is not prejudicial to defendant, where it is in effect covered by other instructions.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 829.*]

7. CRIMINAL LAW (§ 1104*)—APPEAL AND ERROR—PREPARATION OF TRANSCRIPTS.

The statute making a typewritten transcription of the evidence the record on appeal does not change the rule of the Supreme Court requiring the transcripts in all cases to conform to certain dimensions.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1104.*]

Appeal from Superior Court, Kings County; John G. Covert, Judge.

Lee Phillips was convicted of murder, and appeals. Affirmed.

J. C. C. Russell, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Information for murder. Verdict of guilty of murder in the second degree, and judgment ordering imprisonment in state's prison for term of 50 years.

The defendant, the man whom he killed, Jim Alonzo, and all the witnesses who testified, except the officers and the complaining witness, were California Indians. The complaining witness, who is a Mexican and the son-in-law of the deceased, was the only witness, other than the officers, who could make himself fully understood in English; the others being assisted more or less by an interpreter who was sworn to interpret from English into Indian and from Indian into English. These Indians and the complaining witness were all staying at a sheep-shearing camp at the time of the killing of Jim Alonzo. The day of the occurrence, August 22,

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1909, was Sunday, and some or all of these Indians had been to one of the neighboring towns and returned to camp toward night. The defendant and his wife were the last to reach camp, arriving about dusk or a little after dark; the former bringing with him some whisky. The deceased immediately upon defendant's arrival asked him for a drink, which was freely given; the complaining witness and another Indian, Andrew Tip or Tepe, also taking a drink. Upon Jim Alonzo asking for another drink a little later, some altercation took place between him and defendant which ended in the defendant pulling a pistol and firing three shots, one of which hit Jim Alonzo and caused his death. The conversation between the two men while quarrelling was carried on principally in the Indian language, and the complaining witness was unable to understand the purport of it; but the testimony of the other witnesses for the prosecution, who testified, in part at least, through an interpreter, tends to show that defendant was at all times the aggressor, and that the deceased was acting in a conciliatory manner. So far as the complaining witness could understand what was said, or see what was done, his testimony supported the same view. The testimony of the witnesses for the defense (who were relatives and friends of the defendant, as the witnesses for the prosecution were relatives and friends of the deceased) tended to show that the deceased was the aggressor, and at least one of them testified that the first two of the three shots fired by the defendant were fired in the air to deter the deceased from advancing upon defendant, and that the third and fatal shot was only fired after these had failed, and when deceased was making a demonstration which might have indicated an intention upon the part of Jim Alonzo to pull a weapon. There can be no question that, if the evidence of the prosecution be believed, it was shown by the testimony of eyewitnesses that the crime was committed, and that defendant was guilty of committing it. This was supplemented by evidence that the defendant ran away immediately after the killing.

After the jury was sworn to try the cause, the district attorney had made his opening statement, and the complaining witness called and about to be sworn, defendant objected to the taking of any testimony on the ground that he had not been properly committed by the examining magistrate, because in the body of the complaint the name of the complaining witness was given as "Marcello" Baker, while the name signed to the complaint was "Undo" Baker. This is assigned as error. If this variance was a material one, it should have been presented on motion to set aside the information, and came too late at the time it was made. *People v. Morley*, 8 Cal. App. 372, 374, 97 Pac. 84.

The witness Belle Jim, the daughter of

the deceased, and wife of the complaining witness, was examined through an interpreter named Willie Atwell, to whose acting in this capacity defendant consented before the witness was sworn; it being at that time recognized by all persons interested that the interpretation was a difficult matter and likely to prove inexact in the hands of any one within reach of the court, but the interpreter was permitted to proceed without objection. After the testimony of this witness was closed, and the next witness, Josie Alonzo, the wife of the deceased, was being interrogated with respect to her knowledge of English and of the significance of an oath, it was disclosed that the interpreter, Willie Atwell, was not able to clearly convey to the mind of the Indian witness the full purport of the oath administered by the clerk. Thereupon defendant moved that all the evidence of the witness Belle Jim be stricken out on the ground that she was not properly sworn. The court then interrogated the interpreter as to his qualifications and ability to interpret in the English and Indian languages and proceeded with the examination of the witness then on the stand, Josie Alonzo, without objection; and later, when the motion to strike out the testimony of Belle Jim was renewed, the court said: "The presumption is that the witness was properly sworn, and the motion to strike out is denied. If there is a showing made in this court that will overcome that presumption, in the opinion of the court, and tend to show the fact that the witness wasn't sworn, or didn't understand the oath when administered, the court will hear such offered proof or testimony if it be offered; but the motion is at this time denied." No further showing was made by the defendant as to the improper interpretation of the oath to the witness Belle Jim.

The trial court did not abuse its discretion in denying this motion. The proper time to question the qualification of an interpreter is before he is permitted to act, and where, as in this case, the best is made of an unsatisfactory situation, by consenting to a person acting in this capacity who is known not to be able to interpret or translate exactly either the oath or the evidence, it cannot be said the defendant is entitled to have the testimony given through such an interpreter stricken out, without making some showing that in the particular instance complained of the oath was not correctly interpreted. There was no showing whatever that the oath as administered to Belle Jim in English was not properly interpreted into the Indian language. Neither was there any attempt to negative the presumption that might have arisen, from the knowledge of English which she displayed, that she understood the oath when spoken by the clerk in that language. In other words, as the trial court said, the record is regular on its

face, and no showing inconsistent with it was made.

When the defendant was permitted to introduce the testimony of his witnesses with the aid of his stepfather as an interpreter, the court allowed the district attorney to have an Indian boy as a check interpreter to prompt him when it appeared to the boy that the interpretation was not correctly made. The calling of the court's attention to the discrepancies reported by the boy on four or five occasions is assigned as misconduct on the part of the district attorney. On the first occasion the district attorney stated the answer of the question as interpreted by the boy, and, on being admonished that he must not state what the boy said, confined himself to objecting on the ground that the interpreter was not asking the question propounded by counsel, and in the last instance inquiring: "Is this interpreter giving the answers to the witness, or is she testifying?" Much of the defense was introduced in a leading and suggestive form, and there is enough in the record to justify the remark last made, and we do not see how the defendant could have been prejudiced by it. The trial court strained its discretion in respect to the admission of leading and suggestive questions on behalf of the defense in order that the defendant might have the full benefit of all the justification for his act that could be presented. This is not said in criticism of the court's action in this respect, but in support of the view that, under the conditions of this trial, the statement of the district attorney containing the suggestion that the interpreter might be giving his own version of the matter could not have been prejudicial to the defendant.

The language in the argument of the district attorney, the use of which is assigned as misconduct, is found in the evidence in the case. One witness at least testified that the defendant jumped over a fence and ran, after the shooting occurred.

It was not error for the trial court to make the modifications of the two instructions complained of. An instruction that no justification or excuse of an act by a defendant is required to be proven is only weakened by being stated in the form that he is not required to establish his justification or excuse, "by a preponderance of evidence." The insertion of the words quoted only tends to mislead the jury and detract from such an instruction given at the request of the defendant. The court properly eliminated these words from the instruction before giving it. The clause stricken out of the instruction on reasonable doubt, "which never shifts, but remains throughout the whole case upon the prosecution," is covered in effect by the instructions given by the court, and no prejudice could have resulted from

the failure to give it where requested. We find no prejudicial error in the record.

We have considered this appeal upon the record presented without passing upon the Attorney General's objections urged in his brief. We have also done this, notwithstanding the record is not prepared in accordance with the rules of the Supreme Court. The statute making a typewritten transcription of the evidence the record on appeal does not change the rule of the Supreme Court requiring the transcripts in all cases to conform to certain dimensions. Whether typewritten or printed, there must be some uniformity of size in the files of the court that they may be preserved in satisfactory form, and for this reason the rules as to dimensions are applicable to written and typewritten, as well as printed, transcripts and briefs.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(13 Cal. A. 18)

SCHINDLER v. YOUNG et al. (Civ. 755.)
(Court of Appeal, Second District, California.
March 10, 1910.)

MUNICIPAL CORPORATIONS (§ 339*)—STREET IMPROVEMENTS—CONTRACTS—VALIDITY.

A clause in specifications for street work requiring the contractor to observe all the ordinances as to the obstruction of streets, keeping open passageways and protecting the same where they would be dangerous to public travel, and making him responsible for all damages the city may have to pay on his failure to protect the public, does not increase the obligation of the contractor and one subject to an assessment for the work may not complain on the ground that the cost of the work is thereby increased.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 868, 871; Dec. Dig. § 339.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Charles Schindler against C. O. Young and others. From a judgment for defendant C. O. Young, rendered on sustaining a demurrer to the amended complaint, plaintiff appeals. Reversed and remanded.

F. C. Spencer, for appellant. F. O. Daniel, for respondent C. C. Young.

SHAW, J. Action to recover the amount of an assessment levied for street improvement against a lot owned by defendant C. C. Young.

Defendant interposed a demurrer upon the ground that the second amended complaint failed to state facts sufficient to constitute a cause of action. The court sustained the demurrer and denied plaintiff's right to further amend, stating as a reason for such denial that it satisfactorily appeared to the court that plaintiff could not amend his complaint so as to state a cause of action. Judgment

was thereupon rendered for defendant, from which plaintiff prosecutes this appeal.

We regret that respondent has not deemed the case of sufficient importance to justify him in filing points and authorities, or otherwise attempting to aid the court in arriving at a decision upon the appeal. In the absence of any suggestion on his part directing our attention to other alleged defects in the voluminous complaint, which, with exhibits, covers some 35 pages of the transcript, we shall assume, as stated by appellant, that the chief ground upon which the ruling of the court was based was a clause in the specifications under and in accordance with which the proceedings were had and taken and the work required to be done. This clause is as follows: "The contractor will be required to observe all the ordinances of the board of trustees in relation to the obstruction of streets, keeping open passageways and protecting the same where they are exposed and would be dangerous to public travel, and he will be held responsible for all damages the city may have to pay in consequence of his failure to protect the public from injury."

The court no doubt had in view the principle applied in *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701, *Blochman v. Spreckels*, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213, and like cases. In the former case the specifications required the contractor to give a bond with sureties conditioned for the keeping of the street so improved in thorough repair for a period of five years from the completion of the contract. It was not only held that requiring the bond was unauthorized, but that such requirement changes and may increase the burdens of the property owner in that the contractor must charge a higher price for the work by reason of having to keep the street in repair. Clearly, its effect was to impose a duty upon the contractor other than that which the law imposed and as to which there was no authority in law for the creation of contractual relations.

The specifications in *Blochman v. Spreckels* contained the following provisions: "The contractor shall keep good and sufficient guards around said improvements, by fence or otherwise, to prevent accident, and shall hang thereon lights, to burn from dusk until daylight; and the contractor shall hold the city harmless for any and all suits for damages arising out of the construction of said improvements. The contractor shall, when required to do so by the superintendent of streets, remove from the work any overseer, laborer, or other person, who shall refuse or neglect to obey the said superintendent in anything relating to the work, or who shall perform his work in a manner contrary to these specifications or be found incompetent or unfaithful. All loss or damage arising from the nature of the work to be done under these specifications shall be sustained by the contractor." The court in denying a recovery based its conclusions solely upon the provi-

sion requiring the contractor to sustain all loss or damage, which it is held contemplated any damage which might subsequently result from the nature of the improvement. It was further held that the contractual assumption of such liability was unauthorized and its effect was to increase the burdens imposed upon the property owner. As to the other provisions contained in the specifications, it was intimated a fair interpretation would warrant holding them all to relate to damage during the progress of the work and before the city had accepted it.

In the case at bar the provision, while it had no proper place in the specifications, is clearly distinguishable from those discussed in the above and like cases. It does not contemplate any obligation devolving upon the contractor after the completion and acceptance of the work. Under the contract, he assumes no duty other than that which is imposed by law or the city ordinances. His obligations were not increased by the contract requiring him to take measures prescribed by ordinance applicable to all persons for the protection of the public from dangers incident to exposed and unprotected obstructions in the public highways. The specifications imposed no additional burdens in this respect. So, too, the contractor in prosecuting the work was liable for damages to persons who might receive personal injuries by reason of his negligence in failing to observe proper precautions to protect the public, but we know of no provision of law in this state under which the city could be required to pay damages to one injured in consequence of a defective street (*Arnold v. City of San Jose*, 81 Cal. 619, 22 Pac. 877; *Chope v. City of Eureka*, 78 Cal. 588, 21 Pac. 364, 4 L. R. A. 325, 12 Am. St. Rep. 113), or the fact of the contractor neglecting a duty thus enjoined upon him. As the city could in no event be required to pay damages on account of the contractor's negligence in failing to observe the ordinances, the requirement imposed no new or additional obligation upon him. It is therefore apparent that the agreement on the part of the contractor to do that which the law, in the absence of a contract, required him to do, though not under the law a subject of contract, and hence unauthorized, added nothing to his duties, obligations, or liabilities. This being true, it would seem clear that no ground exists for presuming that, by reason of such specification, the cost of the work was increased to the detriment of the property owner. And, since his burdens were not increased, the case is not brought within the principle announced in the cases hereinbefore cited. The court erred in sustaining the general demurrer.

The court also sustained the demurrer interposed upon the ground that the complaint was ambiguous. An examination of the complaint discloses that, whatever uncertainty may exist therein, it is not obnoxious to demurrer on the ground of ambiguity.

The judgment is reversed, with instructions to the trial court to overrule the general demurrer and permit plaintiff to make such amendment to his complaint as he may be advised.

We concur: ALLEN, P. J.; TAGGART, J.

(13 Cal. A. 33)

BELLS v. GRAY BROS. CRUSHED ROCK CO. (Civ. 772.)

(Court of Appeal, Second District, California. March 10, 1910.)

1. CORPORATIONS (§ 397*)—ACTS OF AGENTS—APPARENT AUTHORITY—LIABILITY OF CORPORATION.

Where the secretary of a corporation had apparent authority to act for the corporation, the fact that the board of directors had adopted no formal resolution conferring such authority was immaterial.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1598; Dec. Dig. § 397.*]

2. CORPORATIONS (§ 425*)—ACTS OF AGENTS—APPARENT AUTHORITY—LIABILITY OF CORPORATION—ESTOPPEL.

If a corporation clothes an officer or agent with apparent authority to act for it in a particular matter, it will be estopped to deny such authority as against persons dealing with him in good faith and in ignorance of limitations upon his authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697-1701; Dec. Dig. § 425.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by George I. Bells against the Gray Brothers Crushed Rock Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Ames & Manning, for appellant. R. Y. Williams and Williams & Rutan, for respondent.

SHAW, J. Action to recover the value of certain nursery stock, consisting of budded walnut trees, alleged to have been sold and delivered to defendant at its special instance and request. Judgment was rendered for plaintiff. The appeal is from the judgment and an order denying defendant's motion for a new trial. Defendant offered no evidence, and the only point which it urges as ground for reversal is that the court erred in denying defendant's motion for a nonsuit.

Defendant is a corporation, and, as shown by the evidence, the owner of a 24-acre orchard in Orange county, which for 10 or 12 years prior to the commencement of this suit had been in the care and under the management of one William E. Case. The trees were delivered to defendant at the request of Case, who, pursuant to oral instructions given him by the secretary of the corporation, and acting on its behalf, ordered them delivered at defendant's orchard, and the fair inference from the evidence is that upon their delivery he planted them upon defendant's land, as he was instructed to do by defendant's secreta-

ry. Subsequently, the bill for the trees was sent to defendant, who, on November 27, 1908, returned it to plaintiff with the request that it be submitted to "Mr. W. E. Case, who has charge of our place, for his approval." On January 6, 1909, defendant, in reply to plaintiff's demand for payment, wrote: "In reference to the payment of the same (the bill for the trees), we would ask if it would not be satisfactory if we would send you a sixty and a ninety day note covering the amount as you want to close up the estate." It further appears from the evidence that it was and had been the custom of defendant to transmit directions to Case, its manager, regarding the care of the orchard, through its secretary. Case testifies that "sometimes it was one (the secretary) and sometimes the other, whichever one happens to be there, and sometimes they write about it." It thus clearly appears that the secretary, who directed the purchase, was clothed with apparent authority to act in the matter. The fact that the board of directors adopted no formal resolution conferring such authority upon him is immaterial; it was not necessary. "If a corporation clothes an officer or agent with apparent authority to act for it in a particular matter, it will be estopped to deny such authority as against persons dealing with him in good faith, and in ignorance of limitations upon his authority." Section 707, Clark and Marshall on Private Corporations. It is unnecessary to cite authorities in support of this proposition. Suffice it to say that we cannot perceive how the court, under the facts here presented, could have reached any conclusion other than that which resulted in the judgment rendered for the value of the trees so delivered to defendant and by its agent planted upon its land.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

(13 Cal. A. 12)

MORGAN v. LOS ANGELES PAC. CO. (Civ. 752.)

(Court of Appeal, Second District, California. March 10, 1910.)

1. NEW TRIAL (§ 72*)—GROUNDS—WEIGHT OF EVIDENCE—DUTY OF TRIAL COURT.

On motion for a new trial for insufficiency of the evidence to sustain the verdict, the trial court cannot merely determine whether there is a conflict in the evidence, but must weigh it for both parties, and, if the verdict in his judgment is against the weight of the evidence, must grant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. § 72.*]

2. APPEAL AND ERROR (§ 979*)—DISCRETION OF TRIAL COURT—GRANTING NEW TRIAL.

An order granting a new trial for insufficiency of the evidence to sustain the verdict will

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not be reversed, unless there was a manifest abuse of discretion in granting it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3871; Dec. Dig. § 979.*]

3. APPEAL AND ERROR (§ 933*)—PRESUMPTIONS—PRESUMPTIONS IN FAVOR OF JUDGMENT.

The language of an order granting a new trial, as to the grounds of granting it, must be interpreted by the appellate court so as to support the order if possible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3772; Dec. Dig. § 933.*]

4. NEW TRIAL (§ 163*)—ORDER—FINDINGS—CONSTRUCTIONS.

A statement, in the order granting a new trial after verdict for plaintiff, in an action for injuries by being thrown from a street car, that the new trial was granted because plaintiff assumed the risk of riding on the steps where he did was at most a mixed inference of fact and law, and meant only that plaintiff assumed all risks of riding where he did which the evidence showed were incurred by him.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 163.*]

5. CARRIERS (§ 346*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action against a street car company for injuries to plaintiff by being knocked off a street car by being struck by the handlebar on another car while he was riding on the steps, evidence held to support a finding that there was no risk to plaintiff due to a defective rail, or the swaying of the car from such cause.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 346.*]

6. NEW TRIAL (§ 157*)—GROUNDS—INSUFFICIENCY OF EVIDENCE.

In ruling upon a motion for new trial for insufficiency of the evidence to sustain the verdict, the trial court must assume that the instructions given by it correctly stated the law.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 317, 318; Dec. Dig. § 157.*]

7. NEW TRIAL (§ 157*)—GROUNDS—SUFFICIENCY OF EVIDENCE.

In passing upon a motion for a new trial on the ground that the evidence was insufficient to sustain the verdict, the trial court was bound to consider all testimony introduced without objection, whether competent or not.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 318; Dec. Dig. § 157.*]

8. CARRIERS (§ 292*)—EQUIPMENT—SAFETY BAR.

A street car company is not required, as a matter of law, either by a statute or rule of law, to keep a safety bar before the entrance of open street cars.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 292.*]

9. CARRIERS (§ 321*)—TRIAL (§ 256*)—INJURIES—ACTIONS—INSTRUCTIONS—REQUESTS.

In an action against a street car company for injuries by being knocked off the step of a car by the projecting handlebar of a car going in the opposite direction, an instruction that there was no law requiring the company to place a safety bar on the side of the car on which plaintiff was riding was correct so far as it went, and did not preclude plaintiff from showing negligence in not providing a safety bar under the circumstances, and plaintiff cannot complain thereof, not having requested an appropriate instruction on the subject.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321; Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

10. CARRIERS (§ 320*)—PASSENGERS—INJURIES—JURY QUESTION—NEGLIGENCE.

The distance between the projecting steps of passing street cars on defendant's double tracks was only three inches, and the distance between the bodies of the cars was 18 inches, but the handlebars of cars on either track would extend 2½ inches beyond that distance. There was no safety bar across the entrance of the car on which plaintiff was riding and injured by being struck by a handlebar on another car, and plaintiff was riding on the step of the entrance because of the crowded condition of the car. Held, that it could not be said as a matter of law that it was negligence not to provide a safety bar on the car.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Harry H. Morgan against the Los Angeles Pacific Company. From an order granting defendant a new trial after verdict for plaintiff, plaintiff appeals. Affirmed.

E. B. Drake and Jones & Drake, for appellant. Gurney E. Newlin, John D. Pope, and J. W. McKinley, for respondent.

TAGGART, J. Action to recover damages for personal injuries sustained by plaintiff while a passenger upon an electric car of the defendant which was being operated in the city of Los Angeles. The verdict of the jury was for plaintiff for \$5,000, and the superior court granted a motion by defendant for a new trial upon the ground of insufficiency of the evidence to sustain the verdict. This appeal is from that order.

Several other grounds of motion are stated in the notice of intention, and it appears to be conceded by appellant that, if the ruling of the trial court can be sustained upon any of the grounds stated in the notice, its order must be affirmed. We think, however, that under the rules applicable to the action of the trial court upon all matters relating to the weight of evidence and credibility of witnesses, the order of the superior court must be sustained on the ground therein stated. There is a clear and obvious distinction between the duty of a trial court and the duty of an appellate court with respect to the decision of such questions on a motion for a new trial. The trial court cannot rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it. Where the decision is against the weight of the evidence it is the duty of that court to grant a new trial. In considering the question upon the motion, the trial judge must act upon his own judgment as to the effect of the evidence. In an action tried by a jury, the parties are entitled to the judgment of the jury in rendering a verdict in the first instance; but, upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence. *Green v. Soule*, 145 Cal. 96, 78 Pac.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

337. The trial court having discharged this duty (which duty, says the Supreme Court, judges of the superior court are generally only too reluctant to perform), and made its order granting a new trial on this ground, that order will not be reversed by an appellate court, unless it appears that there has been a manifest abuse of the sound, legal discretion which the trial court is presumed to exercise in passing upon such a motion. *Pico v. Cohn*, 87 Cal. 253, 7 Pac. 690. "It is only in rare instances and upon very strong grounds that the Supreme Court will set aside an order granting a new trial." *Quinn v. Kenyon*, 22 Cal. 82.

Plaintiff left the business part of the city of Los Angeles on one of defendant's regularly operated street cars to go to his home in the residence district of the city, about the hour of 5 o'clock in the afternoon. When he attempted to board it he found the car was "jammed," and he could not get in the car on the right-hand side, the proper side to enter. The conductor said: "Some of you fellows will have to get off of those steps; people cannot get on and off"—so he walked around to the steps at the rear of the car on the inside or left-hand side. According to his own testimony, he stood on the top step, holding himself on by the emergency brake wheel, while others testified that he was on the bottom step, and there was some testimony tending to show that he could not reach the brake wheel from the position in which he stood; one witness stating that he was holding on by hooking his arm around the post. The car upon which he was riding was a wide one, being 8 feet 6 inches across, while from tip to tip of the projecting steps it was nine feet and nine inches. The double tracks upon which the cars on this line were operated were of 3 feet 6 inch gauge and 10 feet from center to center, thus leaving but 3 inches clear between the steps of passing cars. The distance of 18 inches between the bodies of passing cars was also further reduced by the projection of the handlebars from each of them a distance of 2½ inches. There was no safety bar across the entrance to the car upon the steps of which plaintiff stood, and this is also alleged to be an act of negligence upon defendant's part which contributed to plaintiff's injury. The trial court instructed the jury that there was no law requiring the defendant to have a safety bar at such a place, and one of the witnesses who stood upon the steps with the plaintiff, testified, in effect, that if there had been one, it would only have rendered the position of a person standing on the top step the more dangerous, as it would have prevented him from getting his body inside the line of the car.

In the position described the plaintiff rode quite a distance without mishap, quite a number of cars being passed on the other track during this time, but when about a mile and a half from where he boarded the car he was struck by the projecting handle-

bar of another car of defendant going in the opposite direction, and thrown from his place on the step to the ground, the force of the collision wrenching loose the handlebar which struck him and precipitating that to the ground also. Plaintiff was badly injured, was in the hospital for nine weeks, and from the character of his injuries the verdict could not well be attacked on the ground that it was excessive. The negligence mainly relied upon by plaintiff is alleged to be the unsafe and defective condition of the defendant's roadbed at this point, which caused the car on which plaintiff was riding to give a sudden lurch or jerk to the side, thus throwing plaintiff's body out, and causing his head to project beyond the side of the car at the moment the other car was passing.

Plaintiff's own testimony located him as standing upon the top step, with his head inside the line of the body of the car, until the lurch or jerk threw him against the projecting bar. There was other evidence to sustain this view, as there was to support the theory of plaintiff that there was a lurch or sudden jerk of the car such as might have been caused by a defect in the rail. There was, however, no direct evidence of any particular defect or loose rail at the place of the accident at the time of the accident; there being, however, evidence as to the crooked condition of the track at other times when excavations were made to repair or relay the rails. Some of the other passengers who were on the car did not notice any such motion, and still others stated that there was no such swaying or rocking motion as would have been produced by a defect in the track, but merely the jerk caused by plaintiff coming in contact with the other car.

Appellant, however, quotes the language of the trial court in granting the motion to show that the order was made "because the plaintiff assumed all the risk in riding where he did," and contends that it was the evidence upon the issue of contributory negligence which the learned judge who tried the cause construed to support the order made. If it were necessary for us in considering the order before us to read this language of the trial judge into it, we would still be bound to interpret the language in support of the court's action. It could not be said that the evidence in the record would justify this court in saying as a matter of law, that the plaintiff did *not* assume all the risks in riding where he did, and it is not necessary that we should assume for the purpose of this appeal that the declaration of the trial court that he *did* was a conclusion of law alone. At most, it was a mixed inference of fact and law, and in considering the court's language we must so regard it. So considered, it would mean only that the plaintiff assumed all the risks of riding where he did which the facts of the case disclosed were incurred by him. Thus the question of reconciling the conflicting testimony above men-

tioned would be before us, and, taking the most favorable view of the evidence in support of the order, there was no risk due to a defective rail or swaying or lurch of the car from such a cause, referred to by the trial court when it said the plaintiff assumed all the risks in riding where he did.

For the purpose of passing upon the motion for a new trial the trial court was bound to assume the instructions given by it to correctly declare the law, as well as to consider all testimony introduced without objection, whether competent or not. *Williams v. Hawley*, 144 Cal. 102, 77 Pac. 762. In other words, the law given to the jury by the court, and the evidence which the court permitted the jury to hear, constitute the law and evidence which must be considered by the court upon a motion for a new trial. The trial judge must determine the sufficiency of the evidence to sustain the verdict in the light of the same facts and law that were before the jury. The instruction of the trial court that "there is no law requiring the defendant to place and keep in place a safety bar on the side of the car on which plaintiff was riding at the time of the accident which resulted in his injuries" is therefore not before us on this appeal except for the purpose indicated. Treating this question as one of those which we are called upon to determine for the purposes of a new trial (section 53, Code Civ. Proc.), we are of opinion that the instruction, as far as it went, correctly stated the law. There is neither statute nor ordinance, nor as we are advised, legal precedent, requiring the defendant to place and keep in place a safety bar, either in the entrance where plaintiff was riding, or in entrances of this class generally. The instruction did not preclude the plaintiff from showing, or the jury from considering, whether or not it was negligence upon the part of defendant not to provide a safety bar under such circumstances as existed here. An appropriate instruction in this regard would no doubt have been given by the court had it been requested, but the trial court would not have been justified in saying as a matter of law that the absence of the safety bar in this case was negligence per se.

The order granting the new trial is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(13 Cal. A. 48)

PEOPLE v. LEE. (Cr. 205.)

(Court of Appeal, First District, California. March 18, 1910. Rehearing Denied April 13, 1910; Denied by Supreme Court May 13, 1910.)

1. CRIMINAL LAW (§ 1159*)—APPEAL—QUESTIONS OF FACT.

The question whether the testimony of a witness is improbable and in contradiction of the

other testimony in the record is solely for the jury below, and the appellate court will not pass on their finding, where it is substantially supported.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

2. HOMICIDE (§ 228*)—SUFFICIENCY OF EVIDENCE—VENUE.

Evidence in a prosecution for homicide to prove venue held to show that the crime was committed in the county where the venue was laid.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 228.*]

3. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.

In a prosecution for homicide, a witness called by the prosecution testified that he was a police officer, that on the evening of the difficulty, and after he had heard of it, he saw accused. Held, that a question on cross-examination whether the deceased made any statement about not wanting to prosecute anybody, and that it was his own fault, was not proper cross-examination.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 268.*]

4. WITNESSES (§ 236*)—EXAMINATION—QUESTIONS.

In a prosecution for homicide, a witness for defendant testified that he was a police officer, that he was present shortly after deceased had been arrested, and was then asked if he heard deceased make any statement at the time about the encounter. Held, that the question as asked was too indefinite, and an objection to it was properly sustained.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 236.*]

5. CRIMINAL LAW (§ 823*)—INSTRUCTIONS—"MANSLAUGHTER"—"INVOLUNTARY MANSLAUGHTER"—"VOLUNTARY MANSLAUGHTER"—ERROR CURED BY OTHER INSTRUCTION.

In a prosecution for manslaughter, the court instructed that manslaughter is the unlawful killing of a human being without malice, and that it is of two kinds—voluntary (that is, upon a sudden quarrel or heat of passion); involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act, which might produce death, in an unlawful manner, or without due caution and circumspection. The instruction was in the language of Pen. Code, § 192. Held, that the portion of the section defining involuntary manslaughter might well have been omitted, but could not have misled the jury, as they were fully instructed elsewhere as to the rights of self-defense and of defendant to act upon appearances.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 823.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4338-4342; vol. 8, p. 7715; vol. 4, p. 3762; vol. 8, p. 7692; vol. 8, p. 7350.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Benjamin B. Lee was convicted of manslaughter, and appeals. Affirmed.

See, also, 99 Pac. 1110.

Wm. H. H. Hart (Joseph A. Brown, of counsel), for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, P. J. The defendant was charged by the information with the crime of murder, and a verdict returned finding him guilty of manslaughter. He was thereupon sentenced to a term of five years in the state prison. He prosecutes this appeal from the judgment, and from the order denying his motion for a new trial. It is claimed that the evidence is insufficient to support the verdict, and we have carefully examined the same, and in our opinion find it sufficient.

The evidence of the witness Lloyd is to the effect that the defendant upon meeting deceased, with whom he was not on good terms, called him a vile name, and about the same instant aimed his umbrella at him, hitting him in the eye with it, thus inflicting the wound that caused his death; that at the time of the assault the deceased had not made any hostile demonstration or any attempt to injure defendant. Defendant's counsel in his brief claims that the version of the matter as given by Lloyd was improbable and in contradiction of the other testimony in the record. This was a question solely for the jury, and it is not our province to pass upon the evidence where it is conflicting, and where it is sufficient in substance to support the verdict.

The evidence as to the venue is sufficient. The witnesses referred to the restaurant near which the difficulty occurred as being next to Laib's saloon on the west side of Fillmore street in the city and county of San Francisco. The deceased was taken to the Scoble Hospital in the city and county of San Francisco, where he died. It is sufficient if it is shown by the evidence taken all together that the crime was committed in the county where the venue is laid.

One Bell was called as a witness for the prosecution, and testified that he was a police officer, and that on the evening of the difficulty and after he had heard of it he saw the defendant. He was then cross-examined, and at near the conclusion of the cross-examination he was asked by defendant's counsel: "Q. Did McCarthy make any statement about he did not want to prosecute anybody—about it being his own fault?" The question was objected to as being irrelevant and incompetent and not proper cross-examination, and the court sustained the objection. The ruling was correct. The question was not proper cross-examination as the witness had not even mentioned the name of McCarthy in his direct examination. If the deceased had made a dying statement, or a statement which was part of the *res gestæ*, the defendant no doubt would have been allowed to prove it, but he could not prove such a statement by a cross-examination entirely outside of any statement made by the witness in direct examination. The witness was not called by the defendant as his own witness, nor questioned in any way or manner in regard to the matter.

One Mitchell was called by the defendant

as his own witness, and testified that he was a police officer; that he was present shortly after McCarthy, the deceased, had been placed under arrest by Officer Bell. He was then asked if he heard deceased make any statement at the time about the encounter. The witness answered: "Yes, sir." The district attorney then, after the answer had been given and was of record, objected to the question upon the ground that it was immaterial and irrelevant, and the court sustained the objection. No motion was made to strike out the answer, and it was not stricken out. No further question was asked as to the particular time of the statement, or whether it was a dying statement, or was so closely connected in time with the difficulty as to be part of the *res gestæ*. The question as asked was too indefinite, and was not pointed to any fact which would show that the ruling was prejudicial. It should have been asked with sufficient statement of particulars to show that defendant was entitled to the statement. The mere fact that the witness heard deceased make a statement after the trouble is too indefinite to show that the statement was admissible, or that it would throw any light upon the case. It is perfectly consistent with the question asked to conclude that the statement was a mere narrative of a past transaction. It was not shown by the question that the statement desired was contemporaneous with the transaction or within so short a time afterwards as to preclude the idea of deliberate design.

It is argued that the court erred in instructing the jury as follows: "Manslaughter is not murder. It is the unlawful killing of a human being without malice. It is of two kinds—voluntary (that is, upon a sudden quarrel or heat of passion); involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." The instruction is a literal copy of section 192 of the Penal Code. The portion of the section defining involuntary manslaughter might well have been omitted, but it could not have misled the jury as they were fully instructed in other portions of the charge as to the right of self-defense, and the right of a defendant to act upon appearances.

The case of *People v. Thomson*, 145 Cal. 717, 79 Pac. 435, is not in point. In that case the defendant's requested instruction related to the right of defendant to defend himself when in apparent danger of death or great bodily harm, and that, "If defendant acted in self-defense from real and honest convictions as to the character of the danger induced by the existence of reasonable circumstances, he should be acquitted, even though he was mistaken as to the extent of the danger." The trial court refused to give the requested instruction, but after

giving it in substance added to it: "But the killing must be done with due caution and circumspection, and not in a sudden quarrel or heat of passion. For, if the killing, under such circumstances, was done with due caution and circumspection, or was done in a sudden quarrel or heat of passion, then the defendant is guilty of manslaughter." The court very properly held that the effect of the instruction was to tell the jury that a defendant could not kill his adversary in self-defense unless the killing was done with due caution and circumspection, and that the giving of such instruction under the facts of that case was prejudicial error. Further, it clearly appears that the instruction was erroneous in that case, where the jury was told that if the killing was done with due caution and circumspection, or was done in a sudden quarrel or heat of passion, "then the defendant is guilty of manslaughter." In the case at bar, the definition of involuntary manslaughter was not given in connection with any particular instruction or with the right of self-defense. The jury were not told that the defendant in the killing must have acted with due caution and circumspection even if acting in self-defense.

Other instructions are criticized, but the objections to them are not sufficiently plausible to merit further discussion. The court fully and fairly instructed the jury upon every phase of the case. Their verdict was for the least offense included within the information, and recommended the defendant to the mercy of the court. The court accordingly sentenced defendant to one-half the term to which he might have been sentenced under the verdict.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

(18 Idaho, 158)

CRAESAFULLI v. WINSTON BROS. CO.
(Supreme Court of Idaho. April 29, 1910.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENCE OF MASTER—EVIDENCE.

Held, under the facts of this case, that it was the duty of the master to see that the scaffold from which the defendant fell and was injured was safely erected.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

2. MASTER AND SERVANT (§§ 189, 226, 231*)—INJURY TO SERVANT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

Held, that the fellow-servant doctrine, assumption of risk, and contributory negligence rules are not applicable to the facts of this case.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 189, 226, 231.*]

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by Joe Craesafulli against the Wins-

ton Bros. Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Kerns & Ryan, for appellant. Gray & Knight and Featherstone & Fox, for respondent.

SULLIVAN, C. J. This action was brought to recover damages in the sum of \$1,975 for injuries alleged to have been sustained by the plaintiff on or about the 2d day of December, 1908, while in the employ of the appellant corporation, by reason of his having fallen from a scaffolding when engaged in holding a plumb line for the purpose of plumbing a post used in timbering a tunnel. The appellant at the time of the injury was engaged in driving what is known as the St. Paul Pass Tunnel on the Chicago, Milwaukee & St. Paul Railway through the Bitter Root Mountains, which mountains form the dividing line between the states of Montana and Idaho. The accident occurred on the Montana side of the dividing line.

It appears from the record that said tunnel was driven in substantially the following manner: There was what is known as the heading, which was the upper or forward section. Below this and several hundred feet behind the face of the heading was the bench or lower portion. This tunnel was permanently timbered as near up to the face of the bench or lower portion of the tunnel as practicable, sometimes within a few feet of the breast of the bench. The permanent timbers were set from two to four feet apart as the exigencies of the case demanded and were erected as follows: First, a permanent foot block or mud sill was placed on the floor of the tunnel. Upon this was set what is known as the "plumb post" or permanent timber 12 by 12 inches square. The post was raised and driven in at the top under the wall plate by the use of hammers. In order then to plumb the post, a scaffold or staging was erected along the sides of the tunnel as follows: A piece of lagging was nailed between two plumb posts on each side of the tunnel, and on this was placed what is known as a "spreader" or crosspiece (a piece of timber four by six inches) crosswise of the tunnel. Against the face or breast of the bench a ladder was placed, and from this spreader a plank (4 by 6) was placed, resting one end upon the spreader and the other on a rung of the ladder. Upon the staging a man was sent with a plumb line which he would hold up against the wall plate while the other men would hammer the post into line. Supervising the entire construction of the tunnel was a shift boss, who had authority to hire and discharge men working in said tunnel. The men were classified as machine men, helpers, muckers, steam shovel engineers, cranemen, skimmers, switchmen, motormen, breakmen, nippers, and ditchmen. The respondent was

*For other cases see same topic and section NUMBER in Dec. & Am. D gs. 1907 to date, & Reporter Indexes

a mucker. The evidence shows that the shift boss was intrusted with the duty of supervising the men, directing the work, pointing the holes for the air drills, and had general supervision of the work. It appears that under this shift boss there were from 35 to 45 men. The staging used for the purpose of plumbing the plumb posts was constructed by the men at work under direction of said boss. The shift boss directed the respondent to take the plumb line and go upon the scaffolding and assist in plumbing the posts, and, while engaged in that work, the testimony shows that he felt the plank on which he was standing move, and he called to the shift boss, informing him of that fact, and the shift boss told him to climb on one of the crosspieces. The scaffolding fell immediately, and before he had time to do as directed by the boss. The result to the respondent was what the physicians call a Pott's fracture, being a small fracture of the lower end of the fibula; that is, the external bone of the leg. About two inches of it was broken from the shaft of the bone. The bone was properly set, the case properly cared for, and the respondent suffered no permanent injury. The case was tried before a jury and a verdict was rendered in his favor in the sum of \$800, and judgment was entered accordingly. A motion for a new trial was overruled by the court, and this appeal is from the judgment and order denying the new trial.

Eleven errors are assigned which go to the admission and rejection of certain testimony, denying the motion for a nonsuit, the giving and refusing to give certain instructions, and the sufficiency of the evidence to sustain the verdict. It is alleged in the complaint that the scaffold from which the respondent fell was erected by the appellant, that it was unsafe and insecure, and that the ladder upon which one end of the plank from which the respondent fell was improperly and insecurely set or fastened thereto, and that said scaffold was improper and insufficient for the purpose for which it was constructed. It is contended that respondent failed to prove said allegations. As to who actually erected the scaffold, there is some conflict in the evidence. The plaintiff testified that he assisted in erecting the scaffold on the left-hand side of the tunnel, and that he did not assist in erecting the one on the right-hand side from which he fell. The shift boss, Newhouse, was present, and, when the muck had been cleared away, he directed the men to erect the scaffolds and to plumb the posts. There is some evidence tending to show that the shift boss assisted in putting up the scaffold that fell, but we think the evidence all taken together shows that the muckers and other workmen there erected that scaffold under the direction of the shift boss, and that the plaintiff did not assist in erecting it. The question is then presented whether it was the duty of the shift boss as a representative of the appellant

to see that said scaffold was safe, and whether that was a part of the duty devolving upon the master.

Newhouse testified that he had 35 to 45 men under him, and that his duties were to supervise the work in connection with everything that the men he had under him were required to do. His testimony is a little indefinite as to just what his duties were, but witness Phelan, who testified on the part of the plaintiff and had acted as shift boss, testified that the duty of the shift boss was to show the men what to do, and that the duty of the muckers was to do what the shift boss told them; that the shift boss had charge of the setting of the ladder and the plank, and is supposed to look out for them and see that they are safe, and testified as follows: "As to what must be done in order to make that plank safe for a man to go up and stand on it and hold the plumb bob, will say you are supposed to make the ladder safe in the first place, see that the two legs are set down on good, solid ground, and then put the plank across and block it so that it can't move. If that ladder is properly placed, as I have stated, and the plank is properly fixed, the plank cannot slip off the ladder or the ladder fall down." It will be observed that this shift boss testified that it was the duty of the shift boss to see that the ladder and planks composing the scaffold were put up in a safe condition. He also testified that the ladders never looked safe to him. The witness Newhouse gave his opinion as to what caused the board to fall as follows: "What caused the board to fall was that the plank rested about 8 or 10 inches on the top of the spreader, and this here ladder evidently was not placed solid on the top against the rocks, and it was caught somewhere above the center, and the ladder leaned against the rock and pressed over the top, and therefore pulled the plank along with it, and the end of the plank dropped off that spreader and dropped four or five steps down the ladder. At the same time the ladder still remained standing up." The evidence also shows that the respondent had been at work in that tunnel as a mucker, and had assisted very often in erecting the scaffolds and in plumbing the posts for about four months. It also shows that on the day the accident occurred all except two or three of the men who were working there with him had only been at work there for two or three shifts. This would indicate that they were not very familiar with the method of erecting the scaffolds for plumbing the posts. It also may be inferred from the evidence that the scaffold from which the plaintiff fell was erected by those inexperienced men; this shift boss Newhouse being present and directing the work. From the testimony of Phelan it appears that with the exercise of ordinary care the shift boss could have made the staging safe, and that it was the duty of the shift boss to do so.

We conclude from all of the evidence, there being a conflict upon some of the material points, that it was the duty of the appellant to see that said scaffold was safe. If the ladder had been properly set and the plank that formed the floor of the scaffold had been properly blocked, the evidence shows that the accident would not have occurred, and we think from the facts as shown by the record that it was the duty of the appellant to see that the scaffold was properly erected. Had the respondent fallen from the platform that he had erected himself, a different question would be presented. The evidence shows that the platform from which respondent did fall was erected by inexperienced men, and under the facts it was the duty of the shift boss, for his principal, to see that the same was safely erected. The allegations of the complaint were established by the evidence, and the verdict was fully supported by it.

It is contended that the fellow servant doctrine, assumption of risk, and contributory negligence rules apply to the facts of this case. We cannot agree with counsel in that contention, as it is clear to us that the rules applicable to the doctrines mentioned are not applicable to the facts of this case. Under those facts, it was the duty of the master to see that said staging was made safe for the purposes for which it was erected.

Having arrived at that conclusion, it will be unnecessary for us in this opinion to take up each specific error assigned and pass upon it. However, we have examined all of the errors assigned, and fail to find reversible error in the record. The judgment is therefore affirmed, with costs in favor of respondent.

STEWART and AILSHIE, JJ., concur.

(18 Idaho, 238)

BALDERSTON v. BRADY et al.
(Supreme Court of Idaho. May 16, 1910.)

Motion to modify opinion. Denied.

Former opinion (107 Pac. 498) affirmed.

B. S. Crow and Wyman & Wyman, for plaintiff. D. O. McDougall, Atty. Gen., and O. M. Van Duyen and J. H. Peterson, Assts. Atty. Gen., for defendants.

AILSHIE, J. A motion has been made in this case by the Attorney General for a modification of that portion of the opinion which deals with the state's rights in sections 16 and 36, and of the powers of the land board with reference to such lands. It is said in support of this motion that the opinion of the court is cited in other litigations as authority for the contention that the state board of land commissioners has no power to apply for or take title to any lands in lieu of sections 16 and 36. In that

respect the opinion certainly needs no modification, for the simple and conclusive reason that the court has never so held.

The question the court was dealing with was not the power of the board to *acquire* title to lands for the use of the state, but rather the board's power of *disposition* of state lands. The state land board has undoubted power under the Constitution and statute (Const. § 8, art. 9, and section 1564, Rev. Codes) to acquire title to any and all lands which the general government may at any time give or grant to the state, and this is true whether the grant be general or special, or in lieu of lands "lost" or "otherwise disposed of." And so the power and authority of the board, acting as the agent of the state, to acquire and take title to grants or gifts of land for the use of any of the institutions or instrumentalities of the state is beyond question or doubt. It is the power of the board to dispose of and convey away the lands of the state that has been guarded and hedged about by the people in the Constitution itself.

It was said in the original opinion that the question of the state's title to sections 16 and 36 did not directly arise in the consideration of the demurrer, and that it was only treated in view of the fact that it would arise later in the consideration of another phase of the case. This question was raised and presented in the oral argument on the original hearing by counsel who appeared for the land board, and was in this manner urged upon the attention of the court. It now appears, however, that the case is to terminate, so far as this court is concerned, with our disposition of the present motion to modify the opinion. Counsel on both sides of the case now take the same position with reference to the state's title to these school sections. It follows, therefore, that what was said on the subject of the state's title to sections 16 and 36 would in the present status of the case amount to nothing more than dictum, and would determine or adjudicate nothing. Indeed it was expressly recognized and stated in the original opinion that the construction of the grant of those lands is purely a federal question, to be determined by the Interior Department, subject to review by the federal courts.

In view of what we previously said it is, perhaps, proper to add here that it is clear to us, and has been admitted by the learned counsel on both sides, that in order to reach the conclusion that the state took no title under the admission bill (section 5) to sections 16 and 36, as construed by Secretary Hitchcock in *South Dakota v. Delicate*, 34 Land Dec. Dep. Int. 717, and *South Dakota v. Riley*, 34 Land Dec. Dep. Int. 657, it is necessary to eliminate the word "unsurveyed," and give to it absolutely no meaning or significance whatever. Whether the state

has title or not, and whatever the character of that title may be, still it is apparently within the power of the government to prevent the state taking possession or acquiring any substantial benefits therefrom, by withholding the public survey and thereby depriving the state of the evidence and means of proof of the identity of those sections. *U. S. v. Montana Lumber & Mfg. Co.*, 196 U. S. 573, 25 Sup. Ct. 367, 49 L. Ed. 604; *U. S. v. Birdseye*, 137 Fed. 516, 70 O. C. A. 100. The government seems to have reserved the implied power to control the public surveys, and consequently the means of identification of the thing granted.

No case has been brought to our attention wherein the federal Supreme Court has passed on the identical provisions of a grant by Congress such as are contained in our admission bill as they refer to sections 16 and 36, "whether surveyed or unsurveyed." The tendency of the Supreme Court, as disclosed by its decisions, has been to hold, whenever possible, that the grants by Congress of the public domain are still subject to the control of the government until after the survey has been made and approved. Counsel have furnished us a list of the authorities they claim tend to support their contention, most of which deal with floating grants to railroad companies. Some of these cases, however, deal with grants to states in some form or other. The following are the cases cited: *Leavenworth L. N. & G. Co. v. U. S.*, 92 U. S. 738, 23 L. Ed. 634; *Denver & R. G. R. Co. v. Alling*, 99 U. S. 463, 25 L. Ed. 438; *Mo. K. & T. R. Co. v. Kan. Pac. R. Co.*, 97 U. S. 491, 24 L. Ed. 1095; *St. Paul & P. R. Co. v. N. P. Co.*, 139 U. S. 1, 11 Sup. Ct. 389, 35 L. Ed. 77; *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 12 Sup. Ct. 158, 35 L. Ed. 999; *Beecher v. Wetherby*, 95 U. S. 517, 24 L. Ed. 440; *Minnesota v. Hitchcock*, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. Ed. 954; *Wisconsin v. Hitchcock*, 201 U. S. 202, 26 Sup. Ct. 498, 50 L. Ed. 727; *Kissell v. St. Louis Public Schools*, 18 How. 19, 15 L. Ed. 324; *West v. Cochran*, 17 How. 403, 15 L. Ed. 110; *Cooper v. Roberts*, 18 How. 173, 15 L. Ed. 338; *Rogers Locomotive M. Works v. American Emigrant Co.*, 164 U. S. 559, 17 Sup. Ct. 188, 41 L. Ed. 552; *Michigan L. & L. Co. v. Rust*, 168 U. S. 589, 18 Sup. Ct. 208, 42 L. Ed. 591; *Clemmons v. Gillette*, 33 Mont. 321, 83 Pac. 379, 114 Am. St. Rep. 814; *Hibberd v. Slack C. O.*, 84 Fed. 571; *State of South Dakota v. Riley*, 34 Land Dec. Dep. Int. 657.

The question as to when a school section has been "lost," so far as the state is concerned, is one to be determined by the government in every case where the state makes application for lieu lands to reimburse such loss." If the government therefore holds that an unsurveyed school section, included in a forest reserve, or one which has been

settled upon prior to survey, is thereby "lost" to the state, it is then the unmistakable duty of the department to grant the state "lieu" land for such "loss" (*U. S. Comp. St. 1901*, p. 1483; *Idaho Admission Bill*, § 4), and the power of the board to take title to lands in "lieu" of such loss as a base is beyond doubt.

The Attorney General has stated in open court that the board, acting under authority of the opinion as previously announced, has refused to release the lands in question, and is proceeding to perfect the state's title thereto, and that the board does not wish to file an answer to the complaint. A formal writ will therefore not issue. It is the judgment and decree of the court, however, that the state board of land commissioners has no power or authority to relinquish the lands described in the complaint.

SULLIVAN, O. J., and STEWART, J., concur.

(18 Idaho, 104)

BARNETT v. HAGAN et al.

(Supreme Court of Idaho. April 21, 1910.)

(Syllabus by the Court.)

1. EVIDENCE (§ 461*)—PAROL EVIDENCE—EXPLAINING TERM IN CONTRACT.

Where a contract is made for the sale of a safe described in the contract as a "No. 8 F. & B. Victor safe," in an action founded upon such contract for the recovery of the purchase price, where a defense is made upon the ground of breach of warranty, parol evidence may be received showing the statements and representations of the seller to the purchaser at the time and prior to the execution of said contract as to what a "No. 8 F. & B. Victor safe," as designated in said contract, meant, and its character and description.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.*]

2. SALES (§ 440*)—WARRANTIES—ACTION FOR BREACH—ADMISSIBILITY OF EVIDENCE.

Where a safe is purchased, and an implied warranty arises out of the transaction to the effect that such safe is fireproof, and is a new safe, and in good condition, in an action based upon the contract of purchase, where breach of warranty is pleaded as a defense, it is error to admit evidence tending to show that the safe was not made in the same way or upon the same plan or theory as other standard fireproof safes.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 440.*]

3. SALES (§ 440*)—WARRANTIES—ACTION FOR BREACH—ADMISSIBILITY OF EVIDENCE.

In determining whether a safe warranted to be fireproof is in fact fireproof, evidence may be received showing that safes made by the same company, of like kind and material and method of construction, had passed through fires and withstood the effects of heat without any material injury to the contents of such safes, but comparison cannot be made with safes made by other manufacturers of different kind and materials and constructed upon different plans and theories.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1261-1276; Dec. Dig. § 440.*]

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. SALES (§ 440*)—WARRANTIES—ACTION FOR BREACH—ADMISSIBILITY OF EVIDENCE.

Where breach of warranty is pleaded as a defense, evidence should not be admitted which goes outside and beyond the terms of the warranty, and which tends to show that the article warranted does not possess certain other characteristics or qualities which were not covered by the warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1261-1276; Dec. Dig. § 440.*]

(Additional Syllabus by Editorial Staff.)

5. SALES (§ 273*)—WARRANTIES.

Where buyers agree to purchase a "No. 8 F. & B. Victor safe," and the seller, in describing the safe, told the buyers that it was burglar and fire proof, there was an implied warranty that the safe purchased was burglar and fire proof, as the term is usually applied, and that the safe was suitable for the purpose for which it was purchased.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 772-776; Dec. Dig. § 273.*]

Appeal from District Court, Latah County; Edgar C. Steele, Judge.

Action by R. I. Barnett against Chris Hagan and another. Judgment for defendants, and plaintiff appeals. Reversed.

O. J. Orland, for appellant. George G. Pickett, for respondents.

STEWART, J. This is an action to recover the contract price of a Victor safe sold by the Victor Safe & Lock Company to the defendants upon a written contract assigned to this plaintiff. The order for the safe was as follows: "The Victor Safe & Lock Co., Cincinnati, Ohio. Moscow, Idaho, January 19, 1907. Ship to Cold Storage Market, town Moscow, county Latah, state Idaho, our No. 8 F. & B. Victor safe, for which I agree to pay to your order the sum of three hundred dollars (\$300.00) as follows: One hundred and twenty (\$120.00) net cash on arrival and \$25.00 each 30 days until fully paid less \$60.00 for 2nd hand safe in exchange in our office, balance due, \$240.00, to be delivered on board cars at Cincinnati. Paint on safe the following name: Cold Storage Market. It is agreed no money shall be paid for, or on account of this order except as above stated, and that the title to said property shall not pass until it is paid for in full, but shall remain the property of the Victor Safe & Lock Co. until such payment is made, and in default thereof said company, its agent or attorney, may take possession and remove said property without legal process and for which purpose may enter in or upon the premises without prejudice. It is also agreed that nothing but shipment shall constitute an acceptance of this order, and that this paper contains all the agreement and understanding between the parties hereto and that upon default in any of the payments herein stipulated for, all of the remaining payments shall thereupon become immediately due and payable. Hagan & Cushing, By G. H. Cushing. Spokane Safe

& Lock Co., No. 3 Bernard St., Spokane, Wash. By Barnett."

The defendants interposed two defenses: First. That at the time the order for the safe sued upon was given the Victor Safe & Lock Company was a foreign corporation doing business within the state, and had failed and refused and neglected to comply with the Constitution and laws of this state regulating and governing foreign corporations. Second. Breach of warranty; that the safe received was not the safe ordered; that the safe received was defective, and was not a No. 8 F. & B. Victor safe under the general terms in the guaranty of said number, and the safe to be supplied thereunder; that, upon the arrival of said safe and before the defendants were allowed to inspect the same, they were compelled to pay \$68.44 freight, express, and moving charges; that they notified plaintiff of the condition the safe was in, and that they would not accept the same, and that it was subject to the order of the defendants, and that defendants have been damaged in the sum of \$45 in caring for said safe subject to the plaintiff's order. Upon the issues thus joined a trial was had to a jury, and a verdict rendered for the defendants in the sum of \$68. A motion for a new trial was made and overruled. This appeal is from the judgment and the order overruling the motion for a new trial.

The first defense, that the Victor Safe & Lock Company was a foreign corporation doing business within the state, and had failed and refused to comply with the Constitution and laws of the state, seems to have been abandoned by the defendants. There is no evidence in the record or any question argued upon this appeal involving the issue presented by this part of the answer. The entire defense made and the questions raised upon this appeal grow out of the defense of breach of warranty. When the safe arrived, two of the wheels or casters were broken, and the defendants notified the plaintiff, as the agent of the Victor Safe & Lock Company, of such fact, and the company advised the defendants to accept such safe and file a claim for damages against the railroad company for the damages, and that the safe company would assist the defendants in collecting the same, and that the fireproof qualities of the safe were in no way impaired by such damage. This defendants refused to do. After these wheels had been received, they were placed on the safe, and it was removed into the defendants' place of business for inspection, when an examination of the same was made; and the defendant Hagan testified as to its condition as follows: "In taking hold of the door of the safe, it being locked, I shook it, and it shook like a barn door, and I went to work and took the combination and opened it, and examined, and found that the door in being made has five off-sets or

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

what you would call steps, and that the door fits against similar off-sets in the frame, and on the inner off-set, the off-set No. 1, as I would call it, I could place eight pennies. * * * I could place these on the inner off-set and shut the door and turn the combination. On off-set No. 2 I can place four pennies on and shut the door. On off-set No. 3 at one place I could place five pennies, in one place a little farther back only three. In off-set No. 4 I can place at one place five pennies and shut the door, and in another place on the same off-set I can put four pennies, and close the door. Off-set No. 3, or the outer one, I can put at one place five pennies, and at another six pennies, and shut the door. I find that the safe is bulged, what I would call warped on top, and on the right-hand side I should judge the safe is bulged or warped to the extent of perhaps five-eighths of an inch, and on the left-hand side it is warped to the extent of about three-sixteenths. * * * Around the inside, in the main frames, the packing or filling has penetrated, and it has penetrated more especially from the top coming down, and there is some on the left-hand side, not as much as on the right-hand side and at the top, but it is coming down through. It shows that the filling was green. The mold on the casing itself is a kind of a gray. The filling that comes through has an iron color I should say it was, or rather dark. * * * I find this coming through the walls of the safe, the opening between the last step or off-set and the inner door, off-set No. 5. The outside door is very loose. I can place on the side of the door that has the lock on 14 thicknesses of butcher's paper, butcher manilla, between the door and the flanges, shut the door, turn the combination, and pull it out. I did the same thing on the top. At the bottom of the door I placed 10 thicknesses of this butcher paper, shut the door, and the combination and pulled it out. On the back side, the side the hinges are on, I placed three thicknesses, and shut the door and pulled it out. * * * The filling in that door is cracked. I think it has three cracks leading from the combination up."

The defendants wrote the plaintiff about the condition of this safe, and the plaintiff advised them as follows: "We fully understand your idea about the safe door being loose. However, this is perfectly proper, as when attacked by heat at, say 12-1500 Fahrenheit, there is a chemical action takes place in the safe, that is, in the fireproof filling, and it throws off a steam vapor, and if the door fits tight the safe would blow up; the door expands and takes up some of the slack, and yet there must be sufficient opening for the steam to escape. You need have no fear but that your safe is in fact a fireproof safe, and high grade. * * * I again affirm that your Victor safe is all right and fireproof. * * * Burglar proof is one thing; fireproof is another. Your burglar-proof door fits tight; your fireproof door loosely. In the

very nature of the construction, if it fits tight, it would prove of no value." The evidence of this witness as to the condition of the safe is corroborated by other testimony, and there is no substantial conflict in the evidence as to the condition of the safe. This witness was asked this question: "I will ask you what Mr. Barnett represented to you a No. 8 F. & B. safe was?" Objection was made to this question and overruled, and the witness answered: "Just before the signing of the contract, Barnett and I discussed the quality of the safe, and he told me just what it was and what I would get. A No. 8 F. & B. Victor safe was a fire, water, and burglar proof safe."

Counsel for appellant contends that this evidence was clearly inadmissible and prejudicial to the appellant; that it related to conversations and negotiations had between the respondents and the appellant before the written contract sued upon was entered into; and that all such conversations and negotiations between the parties were merged in the written contract. Referring to the contract, it will be observed that the safe purchased is described in such contract as "one No. 8 F. & B. Victor safe." This description standing alone gives no information as to the character or description of the safe purchased, and to give a meaning to such description requires some explanation which may be found in the representations made by the seller as to what was meant by the use of such words, or by reference to some catalogue or printed matter wherein such safe was fully described. In this case the question objected to called for a statement by the witness of what the seller said such words meant or a description of the kind of safe the defendants were to receive under a No. 8 F. & B. Victor safe. This evidence in no way contradicted, varied, or extended the terms of the contract. It merely described and explained what was meant by the language used in the contract as No. 8 F. & B. Victor safe, and the kind and quality of a No. 8 F. & B. safe. This evidence was clearly admissible. Jones on Evidence, §§ 455-456.

One R. H. Chick, a salesman for the Norris Safe & Lock Company, was called as a witness for the defendants, and among other things testified that he had examined the safe in controversy, found it in a poor condition, and not up to grade. He was then asked to describe the safe, and did so, showing its condition to be substantially as testified to by the witness Hagan. During the course of the examination of this witness he defined the term "fireproof," and said it was a relative term, and that a safe might be fireproof under certain conditions, and it might not; that he could not tell whether the safe was fireproof or not; that the words "F. & B." was a common term used by all manufacturers to mean a fireproof body containing within it a burglar-proof chest, the burglar-proof chest to be built exactly ac-

cording to specifications that become standard. In other words, the outside of the chest should be two and a half thick and the body shall be an inch and a half thick. That form has been adopted by various companies in different ways. The witness then testified as to methods adopted by different factories to make their safes fireproof and burglar-proof, and testified that "all doors in standard safes are either tongued and grooved or tight fitting." Objection was made to the questions asked this witness and the evidence given by him in response thereto, which described how other manufacturers make their safes and compared the safe in controversy with safes of other manufacturers, and that the safe involved was not a standard safe because not made in accordance with rules and regulations adopted by standard manufacturers of safes. This objection was based upon the fact that this evidence did not fall within the warranty as claimed by the defendants, and that there was no pretense that a warranty had been given to the effect that the safe sold the respondents was made like other safes, or that the safe was made under any rule adopted by safe manufacturers generally or any claim made that this particular safe bore any similarity of theory of construction for the protection of its contents with other safes. We think this objection is well founded. By the contract the defendants agreed to purchase a No. 8 F. & B. Victor safe, and the plaintiff in describing such safe told the defendants that it was a burglar and fire proof safe. This amounted to an implied warranty that the safe purchased was a fire and burglar proof safe as such term is usually applied, and that the safe was suitable for the purpose for which it was purchased. *Hunter v. Porter*, 10 Idaho, 72, 77 Pac. 434; *Huntington v. Lombard*, 22 Wash. 202, 60 Pac. 414; *Lander v. Sheehan*, 32 Mont. 25, 79 Pac. 406; 13 Am. & Eng. Ency. of Law, 135; *Benjamin on Sales*, § 661; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup. Ct. 537, 28 L. Ed. 86.

The evidence of this witness to which particular objection was made went very much beyond the warranty. The warranty was that the safe was to be a fire and burglar proof safe and suitable as a safe, and the safe might have been in accord with such warranty, although not manufactured like other standard safes or upon the same theory and method adopted by other manufacturers in order to make safes fireproof. If the safe in fact was a fire and burglar proof safe as such term is usually considered and was suitable to be used as a safe, the fact that it was not made upon the same principle as other safes or in the same manner or upon the same theory or of like material would be wholly immaterial, and not a breach of the warranty. This evidence of this witness could have but one tendency, and that was to lead the jury to believe that there had been a breach of warranty by reason of the fact that the safe in controversy

was not constructed upon the same plan as other standard safes or resembled in construction other standard burglar and fire proof safes. This evidence was prejudicial to the plaintiff, and clearly outside and beyond the warranty given at the time the safe was sold. 30 Am. & Eng. Ency. of Law, 226. Any evidence which tended to show that the safe received was not a fire and burglar proof safe under ordinary conditions or was not according to the warranty, because of its plan or method of construction or because of its disabled condition or the manner in which it bulged on the top or bottom or side, or the doors closed or fitted, was proper and admissible. But the fact that the safe was made differently from other fireproof safes or not in accordance with the rules or regulations adopted by other manufacturers, or evidence that fireproof safes of other makes and name were not made upon the same plan and theory as the safe in controversy or of like material, was not admissible, and was clearly outside of the terms of the implied warranty. There were two methods open to the defendant either of which could be pursued in showing the breach of warranty: First, that the safe received was in a disabled condition and because of such condition was not a fire and burglar proof safe and fit or suitable to be used as a safe; second, that the particular method or theory upon which said safe was constructed, and the material which was used in its construction, were such as to render such safe unfit to be used as a safe and not fireproof as such term is generally recognized, and, if the preponderance of the evidence was with the defendants upon either one of these propositions, then the duty of the jury was to find a verdict for the defendants. This same course of reasoning also applied to evidence offered by the plaintiff on rebuttal.

In rebuttal the plaintiff offered evidence to show that other safes manufactured by the Victor Safe & Lock Company upon the same plan and theory of construction as the safe under consideration had passed through fires, and that the contents had been properly and adequately protected. This the trial court refused to admit. This was clearly error. The very best evidence that could possibly be received in support of the warranty claimed was made by the Victor Safe & Lock Company that safes of similar kind, constructed upon the same plan and theory, and out of like material, had passed through fires, and the contents were not materially injured. The fact that the safes to which such evidence was directed were a different size or different number than the particular safe under consideration would not render such evidence inadmissible, provided such safes were constructed upon the same general plan and theory and of the same material. The term "fireproof" as shown by the expert witnesses, familiar with safes, was a relative term, and a safe might be fireproof under some con-

ditions and not under other conditions; and in this case, the implied warranty being that the safe was fireproof, it was for the jury to determine whether or not the safe received was fireproof in the ordinary sense of the term and under ordinary and reasonable conditions.

The evidence received on behalf of defendants, over the objection of the plaintiff to which we have referred, and the evidence offered by the plaintiff in rebuttal and refused upon the objection of the defendants, went to the very vitals of this case. We are unable from the record to say that the jury would have returned a verdict for the defendants if this evidence had not been received upon the part of the defendants or had been received as offered on the part of the plaintiff. It is true the jury might have found for the defendants because of a breach of the warranty on account of the disabled condition of the safe, but from the evidence in the case we are not assured that this necessarily would have followed.

Several instructions given by the court were also erroneous for the reasons given above. This necessarily leads to a reversal of this case.

The judgment is reversed. Costs awarded to the appellant.

SULLIVAN, C. J., and AILSHIE, J., concur.

(23 Okl. 254)

LINSON v. SPAULDING.

(Supreme Court of Oklahoma. Feb. 23, 1900.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 901*)—REVIEW—PRESUMPTIONS—BURDEN OF SHOWING ERROR.

Error is never presumed by the Supreme Court. It must always be shown affirmatively by the record, or it will be presumed that no prejudicial error was committed by the trial court, and the judgment will be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3870; Dec. Dig. § 901.*]

2. APPEAL AND ERROR (§ 1072*)—REVIEW—OVERRULING MOTION FOR NEW TRIAL.

The overruling of a motion for a new trial pro forma by a trial court is not in itself, and in the absence of any claim that the judgment of the court on the merits of the cause is erroneous, sufficient to require a reversal of the cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4233½; Dec. Dig. § 1072.*]

Error from District Court, Kingfisher County.

Action between J. T. Linson and D. V. Spaulding. From the judgment, Linson brings error. Affirmed.

Wylie, Noffsinger & Hinch, for plaintiff in error. W. A. McCartney and W. L. Moore, for defendant in error.

DUNN, J. This case presents an appeal from a judgment of the district court of

Kingfisher county. There is but one point relied on by counsel for plaintiff in error to secure a reversal, which is that a motion for a new trial was overruled by the trial court pro forma. No contention or claim is made that in fact the judgment was wrong on the merits.

A case from the Supreme Court of the Territory of Oklahoma—Board of Commissioners of Washita County v. Hubble, 8 Okl. 169, 56 Pac. 1059—declared the familiar rule that: "Error is never presumed by the appellate court. It must always be shown affirmatively by the record, or it will be presumed that no prejudicial error was committed by the trial court, and the judgment must be sustained." In the light of this, it will be seen that we must, in the absence of a showing of error in the case, conclude that the judgment of the lower court was correct in all particulars, that both parties had a fair trial, that the court duly and fully considered their different claims, and for its conclusion rendered a judgment in strict accordance with the law giving proper relief to the proper party. This being true, conceding the question to be properly raised, the ends of justice in our judgment would not be attained by remanding such a case for another trial for the reason here urged. The cases of Lewis v. Hall, 11 Okl. 684, 69 Pac. 890, and Pinson & Sunday v. Prentise, 8 Okl. 143, 56 Pac. 1049, appear to be in point on the question. In the case of Lewis v. Hall, supra, Justice Pancoast in the consideration thereof said: "If the judgment was correct, no good purpose could be served by reversing the case, but, on the contrary, great injury would be done to the defendant in error. The plaintiff in error having failed to bring the case here in such form as to enable this court to examine the entire record, and determine whether or not there was, in fact, error in the judgment of the court below, and the presumption being in favor of the correctness of the judgment of the trial court, this case must be affirmed." In the case of Pinson & Sunday v. Prentise, supra, Mr. Justice Hainer said: "The only question that should be considered by this court is: Did the trial court render a proper judgment in the case? And, if the court rendered a proper judgment, what sound reason can be given that the overruling of a motion for a new trial, even pro forma, is prejudicial to the substantial rights of the plaintiffs? We cannot assent to establish a rule of practice in this territory which would require this court to reverse a case upon such a frivolous ground, regardless of the merits of the case and the justness of the decision of the trial court."

The judgment of the trial court is accordingly affirmed.

KANE, C. J., and TURNER, WILLIAMS, and HAYES, JJ., concur.

(26 Okl. 383)

FIRST NAT. BANK OF COLLINSVILLE v. DANIELS.

(Supreme Court of Oklahoma. May 10, 1910.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 568*)—DISMISSAL—CASE-MADE SETTLED IN PARTY'S ABSENCE.**

A proceeding in error brought to this court on a case-made, where it does not appear from the record or otherwise that the defendant was present either personally or by counsel at the settlement, or that notice of the time thereof was served or waived, or what amendments suggested, if any, were allowed or disallowed, will be dismissed on motion of defendant in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2523-2529; Dec. Dig. § 568.*]

*(Additional Syllabus by Editorial Staff.)***2. APPEAL AND ERROR (§ 798*)—PROCEDURE—HEARING OF MOTIONS.**

It is the uniform practice in the Supreme Court to take up all motions filed in causes on the docket as soon after the filing of the same as the opposing party shall have reasonable opportunity to make answer thereto, but there is no rule requiring parties to give notice of the hearing of the court on a motion to dismiss.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3155; Dec. Dig. § 798.*]

3. APPEAL AND ERROR (§ 568*)—CASE-MADE—SETTLEMENT.

An order that a further extension of 30 days be granted to defendant to make and serve a case-made on appeal to the Supreme Court, and that plaintiff be given until a specified date to suggest amendments and 5 days in which to settle the case, contemplated that plaintiff should have 5 days' notice of the settlement of the case.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 568.*]

Error from Rogers County Court; Archibald Bonds, Judge.

Action by S. W. Daniels against the First National Bank of Collinsville. Judgment for plaintiff, and defendant brings error. Dismissed.

William M. Hall and James S. Davenport, for plaintiff in error. J. R. League, for defendant in error.

HAYES, J. On the 8th day of March, 1910, the court rendered an opinion in this case sustaining a motion of defendant in error to dismiss upon the ground that no notice was served by plaintiff in error upon defendant in error of the time and place the case-made would be presented to the trial judge for settlement. A petition for rehearing was thereafter filed, and the court, after examining the briefs filed in support of the petition, has reached the conclusion reached in its former opinion and adheres to same. But, since language was used in the former opinion that might be misleading to the bar, in the statement of the general rule applicable to the questions raised by this motion, the former opinion is withdrawn, and this opinion upon the petition for rehearing shall con-

stitute also the opinion of the court on the merits of the motion to dismiss.

Plaintiff in error complains in his petition for rehearing that the motion to dismiss was considered and ruled upon by the court without notice to him of any hearing thereon. There is no statute or rule of court requiring that parties to a proceeding in this court shall be given notice of the hearing of the court upon a motion to dismiss. It has been the uniform practice of the court since its organization to take up and consider all motions filed in causes on the docket as soon after the filing of the same as the opposing party shall have had a reasonable opportunity to make answers thereto. Rule 3 requires 10 days' notice prior to the commencement of each term of the court shall be given by the clerk of the court to all the attorneys of the day on which each cause shall be heard; but this rule applies to the submission of causes on the merits and has no application to motions. No motion shall be argued unless by direction of the court. Rule 4. All motions shall be in writing, and, when a motion is filed with the clerk, it must show service on the opposite party as to the time it will be filed, and he shall have 10 days thereafter in which to answer the same. Rule 5. A consideration of all motions as soon after they have been filed as will permit the opposing party to file briefs in opposition thereto is necessary to the dispatch of the business of the court and often results in saving litigants useless expense and avoids delay in the administration of justice.

The case-made in this proceeding was signed and settled by the trial judge in the absence of defendant in error and without notice to him of the time and place the same would be signed and settled. In *Ft. Smith & Western Ry. Co. v. State Nat. Bank of Shawnee*, 105 Pac. 647, in the body of the opinion, the general rule applicable to this class of cases, quoted language of section 233 of Burdick's Work on New Trials and Appeals, is stated as follows: "It is a well-established rule that, if no notice of the time of settlement is given or waived, and there is no appearance of the opposite party, either in person or by counsel, the case so settled is a nullity." There are exceptions to the general rule as stated in the language of the text. *Kansas Farmers' Mutual Fire Ins. Co. v. Amick*, 36 Kan. 99, 12 Pac. 338, illustrates the exception. In that case it was held that, although the record did not affirmatively show that notice had been given of the time when the case would be settled and signed, if it appeared that amendments were suggested by defendant in error all of which had been allowed, defendant could not complain of want of notice; or, if some of the amendments which had been suggested had been disallowed and were immaterial, he could not complain. The facts in *Ft. Smith & Western Ry. Co. Case*.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

supra, fail to bring that case within the exception to the general rule requiring notice, and it is correctly stated in the syllabus of the opinion that: "A proceeding in error brought in this court on a case-made, where it does not appear from the record or otherwise that the defendant was present, either personally or by counsel at the settlement, nor that notice of the time thereof was served or waived, nor the date of the signing and settlement, nor what amendments suggested were allowed, or disallowed, will be dismissed on motion of defendant in error." The *Kansas Farmers' Mutual Fire Insurance Company v. Amick*, supra, was approved and followed by the territorial Supreme Court in *Symms Grocer Co. et al. v. Burnham, Hanna, Munger & Co.*, 5 Okl. 222, 47 Pac. 1059, in which latter case it appeared from the record that defendant in error had suggested amendments, all of which had been allowed, and, in addition thereto, had waived notice of the time and place of settling the case-made, and a notice was held unnecessary.

We think that the rule so as to include the exceptions may be stated as follows: A case-made, which has been signed and settled without notice to defendant in error of the time and place of signing and settling same, will not be considered, unless it appears: First, that defendant has waived such notice or appeared in person or by counsel at the time and place of settling same; second, that defendant suggested amendments all of which were allowed; third, that defendant suggested amendments all of which were allowed, except those that were immaterial. *Christie v. Carter*, 56 Kan. 166, 42 Pac. 708. In the case at bar, notice was not given and was not waived. It is not made to appear whether any amendments were suggested, or whether, if suggested, they were allowed.

It is contended by plaintiff in error that the order extending the time in which to make and serve the case-made does not require that notice of the time and place of settling same shall be given. The language of the order is not free from ambiguity and reads as follows: " * * * It is hereby ordered by the court that a further extension of 30 days from said April 13, 1909, be granted to said defendant to make and serve a case-made on appeal to the Supreme Court in said cause and plaintiff be given until June 1, 1909, to suggest amendments and five days in which to settle case." Defendant in error was plaintiff below. If it was not intended by the last clause of that portion of the order quoted above to require that he should have five days' notice of the settlement of the case, then the order provides that defendant in error be given until June 1, 1909, to suggest amendments and five days in which to settle the case. But defendant in error was not attempting to settle the case, and to so construe this language of the order not only

leads to an absurdity, but convicts the trial judge of an attempt to deprive defendant in error of notice of the time and place of settlement of the case if he has such power. We think no such meaning is contemplated by the order but it was intended that defendant in error should have five days' notice of the settlement of the case.

For the foregoing reasons, the petition for rehearing is denied, and the cause dismissed.

DUNN, C. J., and WILLIAMS, TURNER, and KANE, JJ., concur.

(25 Okl. 59)

PAULTER v. MANUEL

MANUEL v. PAULTER et al.

(Supreme Court of Oklahoma. Nov. 9, 1909.
Rehearing Denied May 17, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 14*)—CROSS-APPEAL—DISMISSAL.

A cross-appeal must be prosecuted like other appeals, or they will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 14.*]

2. APPEAL AND ERROR (§ 407*)—CROSS-APPEAL—FAILURE TO SERVE CITATION.

Under the law in force in the Indian Territory at the time of the admission of the state, a citation is one of the necessary elements of a cross-appeal taken after the term, and if it be not issued and served upon the appellee to the cross-appeal before the end of the next ensuing term of the appellate court, and be not waived, the cross-appeal becomes inoperative.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 407.*]

3. APPEAL AND ERROR (§ 1019*)—REPORT OF MASTER—SETTING ASIDE.

The legal presumption where the evidence is conflicting is that the findings of fact of a master in chancery are correct, and his report will not be set aside unless it appears with reasonable clearness that he has fallen into a mistake of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4008-4010; Dec. Dig. § 1019.*]

4. DEEDS (§ 68*)—CANCELLATION OF INSTRUMENTS (§ 58*)—VALIDITY.

Where a grantor is of a mind so weak and ignorant that she had no intelligent conception of the quality or the quantity of land she was undertaking to convey, and had no intelligent idea of the price offered and paid her, does not understand numbers, and cannot count money, and is so ignorant and weak-minded that she does not know whether \$15 is more than \$30, or whether \$10 is more than \$100, and where the consideration was grossly inadequate, a court of equity, upon application of the injured party, will grant relief by setting aside the conveyance; and, where the property has been conveyed by her grantee, and a reconveyance by him cannot be ordered, a court of equity will retain jurisdiction, and grant the plaintiff judgment for the value of her land, less the amount actually received by her from her grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 149-155; Dec. Dig. § 68; Cancellation of Instruments, Cent. Dig. §§ 118-120; Dec. Dig. § 58.*]

Appeal from the United States Court for the Western District of the Indian Territory at Muskogee; William R. Lawrence, Judge.

Action by Robert J. Manuel, guardian of Lizzie Manuel, against J. F. Paulter and the Oklahoma Land Company. Decree for plaintiff and defendant Paulter appeals, and plaintiff brings cross-appeal against the Oklahoma Land Company. Affirmed.

This action was originally brought in the United States Court for the Western District of the Indian Territory at Muskogee, by Robert J. Manuel as guardian of Lizzie Manuel, hereinafter called plaintiff, against J. F. Paulter and the Oklahoma Land Company, hereinafter called defendants. Plaintiff alleges in his complaint that Lizzie Manuel is a Creek freedwoman, and that as such she had allotted to her, and has received, from the government of the United States 160 acres of land, situated a few miles west of Muskogee in the Creek Nation, as her surplus allotment; that she is now, and has been during all her lifetime, a person of unsound mind, and mentally incapable of managing her own affairs, and incompetent to contract. He charges that on April 28, 1904, defendant Paulter, knowing full well that Lizzie Manuel was a person of unsound mind, and incapable of understanding or transacting any kind of business, especially business relating to the sale of land, and knowing that she was without sufficient knowledge as to the value of land, by persuasion and coaxing induced her to execute and deliver to him a warranty deed conveying 120 acres of land; that said deed expressed a consideration of \$500, while, as a matter of fact, the sum of only \$220 was paid by defendant Paulter to her; that on the 28th day of May, 1904, defendant Paulter, with full knowledge of Lizzie Manuel's condition, by persuasion and coaxing induced her to execute to him a second warranty deed conveying 40 acres of such allotment; that said deed expressed a consideration of \$150. He also charged that on December 17, 1904, while an application was pending in the United States Court for the Western District of the Indian Territory for an inquiry as to the sanity of the said Lizzie Manuel, and for the appointment of a guardian of her person and estate, the defendant Paulter pretended to make a sale to the Oklahoma Land Company of a portion of the land purported to be conveyed by the deeds from Lizzie Manuel to him. He alleges that said pretended sale was made by the defendant Paulter to the Oklahoma Land Company for the purpose of divesting defendant Paulter of the title to the land before the court could adjudge Lizzie Manuel a person of unsound mind and appoint a guardian of her estate. Plaintiff prays for a judgment of the court, declaring the deeds from Lizzie Manuel to Paulter void, and for judgment against the Oklahoma Land Company, decreeing that the deed executed by Paulter to it be declared void and direct-

ing the same to be canceled, and for general and special relief.

Defendants filed separate answers to plaintiff's petition, and each of them denies that Lizzie Manuel was, at the time of the execution of the deeds to Paulter, a person of unsound mind, and mentally incapable of contracting, and deny that at the time of making such sale her conduct and conversation was such as to apprise defendant Paulter of the condition of her mind, and each denies that the consideration paid by Paulter to her was wholly inadequate. Defendant Paulter alleges that in the deed executed by Lizzie Manuel on April 28, 1904, there was included 40 acres of land, allotted to her as her homestead, which should not have been in the deed, and that there was therefore 40 acres that should have been included; that the deed of May 28th was executed by her for the purpose of correcting this error, and that he had reconveyed to Lizzie Manuel the 40 acres that was included by mistake in the first deed. Both defendants deny that the sale of the land by defendant Paulter to the Oklahoma Land Company on December 17, 1904, was made for the purpose of divesting the title to said lands out of the defendant Paulter and into the land company, and thereby avoid the effect of an adjudication of Lizzie Manuel as being insane, and the appointment of a guardian for her person and estate; and allege that said sale was made in good faith for valuable considerations, and that the Oklahoma Company had no knowledge or notice, at the time of its purchase of the land from Paulter, of the mental condition of Lizzie Manuel, and no actual notice of the pendency of the petition of plaintiff to have her adjudged insane and a guardian of her person and estate appointed. The case was referred by the court to a special master, to report findings of fact and conclusions of law. The master, by his report or findings of fact, found the issues of fact as to the mental condition of Lizzie Manuel at the time of the execution of said deeds by her to Paulter as alleged in plaintiff's complaint. He further found that the consideration paid by Paulter to her was grossly inadequate, and that, while the evidence showed that the sum of \$250, was paid by the defendant Paulter for her land, she had realized for her own benefit only the sum of \$58. He further found that the land at the time of its sale to the Oklahoma Land Company was worth the sum of \$1,500; that the Oklahoma Land Company did not know, and did not have any actual notice of, the mental condition of Lizzie Manuel when it bought the land of Paulter. He found as his conclusions of law that the deeds from Lizzie Manuel to Paulter were voidable; that the petition pending in the probate court asking that Lizzie Manuel be declared insane was not constructive notice to the Oklahoma Land Company, and that the Oklahoma Land Company was an innocent purchaser for value without notice, and

had a good title to the land in controversy, and recommended that a decree be rendered declaring the Oklahoma Land Company the owner of the land in controversy, and that plaintiff recover against the defendant Paulter the value of said land at the time of the execution of said deeds, the sum of \$1,500, less the sum of \$58, actually used by Lizzie Manuel for her benefit. A decree was rendered by the court in conformity with the recommendations of the master. From this decree defendant Paulter filed his appeal in the United States Court of Appeals for the Indian Territory, and plaintiff prosecutes herein his cross-petition against the Oklahoma Land Company, by which he seeks to have reversed that portion of the decree which declares that the Oklahoma Land Company is the owner of the land in controversy, and that it acquired same for a valuable consideration, without notice, either actual or constructive, as to the mental condition of Lizzie Manuel at the time she conveyed the same to Paulter.

N. A. Gibson and Masterson Peyton, for appellant, Paulter. Gibson & Thurman, for appellee Oklahoma Land Co. S. B. Daws, for appellee Manuel.

HAYES, J. (after stating the facts as above). The judgment in this action was rendered in the United States Court for the Western District of the Indian Territory at Muskogee on the 29th day of June, 1907. On the 19th day of September, 1907, appellant presented to the Honorable William R. Lawrence, Judge of the United States Court of Appeals for the Indian Territory, his petition for appeal, which was allowed, and the transcript was filed in the United States Court of Appeals for the Indian Territory on October 21, 1907, where the cause was pending on the admission of the state. On the 17th day of October, 1907, appellee Robert J. Manuel, as guardian of Lizzie Manuel, presented to the said William R. Lawrence his petition for a cross-appeal, which was allowed, and the transcript was filed in this court on March 14, 1908. No citation was issued by Judge Lawrence at the time he allowed the cross-appeal, and none has been issued by this court, or any member thereof. By the cross-appeal, appellee in the main appeal seeks to have reversed that portion of the judgment of the trial court which decrees the Oklahoma Land Company to be the owner of the land in controversy. The Oklahoma Land Company was not a party to the appeal taken by appellant, Paulter, and entered no general appearance in this court to the cross-appeal before the end of the next ensuing term of this court after the cross-appeal was taken. Counsel for the Oklahoma Land Company in their brief have raised the question of this court's jurisdiction to determine any matters raised by the cross-appeal. It has several times been held

by this court that the act of Congress of March 3, 1905 (Act March 3, 1905, c. 1479, par. 12, 33 Stat. 1081 [U. S. Comp. St. Supp. 1909, p. 219]), put in force in the Indian Territory the federal appellate procedure, and that such procedure governs all appeals taken from judgments rendered in the United States courts of the Indian Territory before the admission of the state. *Kelley v. McCombs et al.*, 102 Pac. 186; *Parks v. City of Ada*, 103 Pac. 607. Cross-appeals must be prosecuted like other appeals. *The S. S. Osborne*, 105 U. S. 447, 28 L. Ed. 1065; *Hilton v. Dickinson*, 108 U. S. 165, 2 Sup. Ct. 424, 27 L. Ed. 688; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246. Citation is one of the necessary elements of an appeal taken after the term, and if it be not issued and served before the end of the next ensuing term of the appellate court, and be not waived, the appeal becomes inoperative. *Parks v. City of Ada*, supra; *Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127. On the 28th day of March, 1908, appellee, Robert Manuel, as guardian, had issued by the clerk of this court a summons in error, notifying appellant, J. F. Paulter, and the Oklahoma Land Company of his cross-appeal, and this summons in error was served, but appellee could not complete his cross-appeal in this manner. While no specific form of citation is required, and it is probable that the notice contained in the summons in error would be sufficient if the clerk of the court had had authority to issue citation, yet the clerk is without such authority. *Parks v. City of Ada*, supra; *Freeman v. Clay et al.*, 48 Fed. 840, 1 C. C. A. 115; *United States v. Hodge*, 3 How. 534, 11 L. Ed. 714. The cross-appeal, therefore, after the expiration of the ensuing term of this court after the allowance thereof, became inoperative, and we can review nothing attempted to be presented by it.

Counsel for appellant, in the main appeal, urge in their brief several assignments of error, but all the different assignments urged by them in effect present but one contention, which is that, at the time Lizzie Manuel executed the deed of conveyance to appellant, she was a person of sound mind, with sufficient mental capacity to make the conveyance; that she received a fair consideration for the land conveyed, and no fraud was perpetrated in the transaction. This contention presents only issues of fact. Many witnesses for both parties testified before the master upon these questions, and the master, after hearing all the evidence, found upon all these issues against appellant, and the trial court approved and confirmed his findings, and entered judgment accordingly. The master found: "That Lizzie Manuel was, at the time of signing the deeds to J. F. Paulter, and has been continuously from her childhood, of a very weak mind, and very ignorant. Her mind is so

weak, and she is so ignorant, that she has no intelligent conception of the quantity nor quality of the land she was undertaking to convey, nor did she have any intelligent idea of the price offered and paid to her. She does not understand numbers, nor can she count money. When she made her mark to the deeds, and had the same explained to her by members of the Buck family who went with her and a notary public, she did not know, nor had she mental capacity to comprehend, that she was conveying 120 acres of land, and was to receive therefor \$250. She understood that she was only selling land to get money; but what or how much land was conveyed, or how much money she was receiving or to receive, was beyond her comprehension. She was then, and still is, so ignorant and weak-minded that she does not know whether \$15 is more or less than \$30, or whether \$10 is greater or less than \$100. That her weakness of mind was sufficiently apparent, from her conduct and conversation, to attract the attention of the purchaser, Paulter, and put him upon notice and inquiry concerning her mental capacity to contract. * * * The sum of \$250 paid by the defendant Paulter for said land was grossly inadequate." We have carefully examined all the evidence; and, while there is some conflict, we believe that the master was fully warranted in the finding above set out. Under the rule of the jurisdiction in which this case arose and was tried, the legal presumption, where the evidence is conflicting, is that the finding of fact of the master in chancery is correct, and his report will not be set aside, unless it appears with reasonable clearness that he has fallen into a mistake of fact. *Blake-more v. Johnson*, 103 Pac. 554; *Guarantee Gold Bond Loan & Sav. Co. v. Edwards*, 164 Fed. 809, 90 C. C. A. 585.

The master does not find that Lizzie Manuel is insane, or that she is without mental capacity sufficient to transact any business whatever, but he finds that her mind is so weak, and she is so ignorant, and her intelligence is so inferior, that she was unable to comprehend or understand the nature or character of the transaction by which she conveyed her land to appellant. This woman from childhood has had a very weak mind, bordering on idlcy. She, however, is not entirely without mental capacity, for she has sufficient intelligence to know how to work, is a good cook, and discharges the other duties of a servant satisfactorily to those employing her. She is able to transact minor and unimportant business, such as buying clothing, small quantities of groceries, and knows the value thereof. She understood what it was to have a bank account, and that money could be drawn by issuing checks thereon. She is unable to read and write, but at several times after the sale of her land she requested others to draw checks for her upon the bank where she had her ac-

count for small amounts, but the evidence is convincing that she was incapable of understanding the nature and character of the transaction between her and appellant. She did not then know, and does not now know how many acres of land she had conveyed, or its value, and is and was at the time she executed the deed mentally incapable of understanding same. She cannot count 10, and does not know which is greater, \$10 or \$100, and has no idea of values whatever above small amounts, such as the price of a dress, pair of shoes, or small quantities of groceries. After the restrictions upon her power to sell her allotment were removed, she at once became anxious to sell the same. Witnesses testify, and it is not controverted or denied, that she gave to appellant as her reason for wanting to sell that she wanted to sell the land before somebody else sold it, and she would not get the money. The reason assigned by her to appellant for wanting to sell the land was sufficient to put him on notice of her inability to understand the nature and character of her rights and interest in and to the land and her power to control the same. At the time of the sale she was living with a family by the name of Buck. Several members of this family accompanied her to town on the day the deed was executed, and were present at the time of the execution of the deed. One member of this family received \$100 of the money purported to have been paid by appellant to Lizzie Manuel for the land. This incident, together with the conduct of the members of the Buck family, show them to have been interested in the sale. Mrs. Buck, who received the money, executed her note for the amount, but the same, although due, has never been paid. All the members of the Buck family who were present at the execution of the deed appeared as witnesses for appellant at the trial. But their evidence as to what took place at the time of the execution is at variance with the evidence of the notary who took the acknowledgment and with the evidence of each other. The notary stated that he made no explanation of the deed at the time of the execution thereof, except that he read the same; that Lizzie Manuel said she understood it, but he did not know whether she did or not. Some members of the Buck family testified that a full explanation of the deed and its contents was made to her. Others testified that nothing was done except the reading of the deed by the notary; and the members of the family who testify that the deed was explained to her could not remember what parts of the deed were explained, or what was said; and, although this transaction was consummated by appellant in person, and he is in full possession of all the details surrounding the same, he did not testify. The consideration paid by him was grossly inadequate.

It was not necessary, in order to entitle appellee to relief, to show that she was, at

the time of the execution of the deed, insane, or so mentally weak that she was entirely disqualified to transact any business. It was sufficient to show that her mental weaknesses and infirmities were such that she was at that time incapable of understanding the nature and magnitude of the transaction, and that there was gross inadequacy of consideration for the conveyance. From these circumstances imposition or undue influence will be inferred, and they alone are sufficient to secure the aid of a court of equity. *Allore v. Jewell*, 94 U. S. 506, 24 L. Ed. 260. In the case of *Harding et al. v. Wheaton*, 2 Mason, 378, Fed. Cas. No. 6,051, Mr. Justice Story said: "Extreme weakness will raise an almost necessary presumption of imposition, even when it stops short of legal incapacity; and, though a contract in the ordinary course of things, reasonably made, with such a person might be admitted to stand, yet if it should appear to be of such a nature as that such a person could not be capable of measuring its extent or importance, its reasonableness, or its value fully and fairly, it cannot be that the law is so much at variance with common sense as to uphold it." Mr. Chief Justice Marshall, discussing this same case on appeal to the Supreme Court of the United States, in *Harding v. Handy*, 11 Wheat. 103, 6 L. Ed. 429, said: "If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case is among its best-settled principles." Mr. Justice Field, in *Allore v. Jewell*, supra, after quoting the language of Mr. Justice Story and Mr. Chief Justice Marshall, said: "The same doctrine is announced in adjudged cases, almost without number; and it may be stated as settled law that, whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside." The doctrine of this case finds recognition and support in cases from the highest courts of almost every state in the Union. *Jones v. McGruder*, 87 Va. 360, 12 S. E. 792; *Flshburne v. Ferguson's Heirs*, 84 Va. 87, 4 S. E. 575; *Turner v. Utah Title Insurance & Trust Co.*, 10 Utah, 61, 37 Pac. 91; *Taylor v. Atwood*, 47 Conn. 498; *Ashmead et al. v. Reynolds et al.*, 134 Ind. 139, 38 N. E. 763, 89 Am. St. Rep. 238; *Ikerd et al. v. Beavers*, 106 Ind. 483, 7 N. E. 326; *Wilkie, Gdn., v. Sassen*, 123 Iowa, 421, 99

N. W. 124; *Clark v. Lopez*, 75 Miss. 932, 23 South. 648, 957; *Richards v. Donner*, 72 Cal. 207, 13 Pac. 584; *Walling v. Thomas et al.*, 133 Ala. 423, 31 South. 982.

The master, under the order of court, reported both findings of fact and conclusions of law. He found that the Oklahoma Land Company, at the time it purchased the land in controversy from appellant, had no knowledge or notice of the mental condition of Lizzie Manuel when she conveyed the land to appellant, or of other circumstances surrounding the transaction; that said company was an innocent purchaser for value, and has good title to the land in controversy. This finding and conclusion of the master was confirmed by the trial court, and has not been assigned or urged in this case as error; nor has any contention been made by appellant that the trial court was without authority in this proceeding to award appellee judgment for the damages sustained by her by reason of the transaction and the act of appellant conveying the land to the Oklahoma Land Company. His sole contention is that the evidence does not support the master's findings as to the condition of appellee's mind and the consideration paid for the land. Under the application of the rule that appellant in his brief shall specify separately the errors complained of, and shall argue and support with authorities each point relied upon, we forego a consideration of this action of the court, and have made no extensive examination of the authorities with reference thereto, but the judgment of the court in this respect finds support in *Cole v. Getzinger et al.*, 96 Wis. 559, 71 N. W. 75.

Finding no error in the assignment urged and relied upon in this court, the judgment of the trial court is affirmed.

KANE, C. J., and WILLIAMS, DUNN, and TURNER, JJ., concur.

(25 Okl. 749)

ST. LOUIS & S. F. R. CO. v. TOWN OF TROY et al.

(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

RAILROADS (§ 227*)—REGULATION OF SERVICE —REASONABLENESS OF CORPORATION COMMISSION ORDER.

When the evidence reasonably tends to show that a railway company has not provided adequate and reasonable passenger facilities at a certain station, and the Corporation Commission so finds, an order of the commission requiring it to stop another train each day engaged in interstate commerce, when the stopping of such trains will not reasonably prevent the making of their interstate connections or interfere with same, must on appeal be regarded as just, reasonable, and correct.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 741; Dec. Dig. § 227.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from the Corporation Commission.

Proceeding by the Town of Troy and others before the State Corporation Commission to compel the St. Louis & San Francisco Railroad Company to stop an interstate train at a certain station. From an order granting the relief, the railroad appeals. Affirmed.

W. F. Evans, E. T. Miller, and R. A. Kleinschmidt, for plaintiff in error. Chas. West, Atty. Gen., and Geo. A. Henshaw, Asst. Atty. Gen., for defendants in error.

KANE, J. The complaint filed in this case prayed that a regular agent be installed to perform all the duties usually performed by station agents, including telegraph service, at the town of Troy, and also alleged that the passenger facilities furnished by the plaintiff in error were inadequate, and prayed for an order requiring trains Nos. 9 and 10, known as the fast trains on appellant's line of road, running from St. Louis to Sherman, Tex., be stopped on flag to perform passenger service. Upon hearing, the commission found that Troy was situated half way between Ravia and Mill Creek, on the line of the defendant, in Johnston county, being about six miles from either place; that only one passenger train a day each way stopped there, one being a north-bound local train due between 7 and 8 a. m., and the other a south-bound local, due between 10 and 11 p. m. Upon the hearing the commission issued the following order: "The complaint alleges inadequate passenger service, and asks that the defendant be required to stop passenger train No. 9, south-bound, and No. 10, north-bound, on flag at Troy. Also to require the defendant to maintain an agent who is a telegrapher and to bulletin trains, etc. The commission finds from the evidence that Troy is situated half way between Ravia and Mill Creek, on the line of the defendant, in Johnston county. The commission further finds from the evidence in this case that only one passenger train a day stops at town of Ravia, going south between nine and ten o'clock p. m., and another, between eight and nine a. m.; that where more than one passenger train is operated a day over a line of road that at least two trains a day each way should stop and perform passenger service at local stations. The commission is therefore of the opinion that passenger trains Nos. 9 and 10 operated on the defendant's line of road should stop on flag at the town of Troy. As to the other part of this complaint that the defendant should maintain an agent who can bulletin trains it appears from the defendant's testimony that this requirement has already been met, that it now has an agent who sells tickets, looks after freight and bulletins trains. It is therefore ordered that the defendant, the St. Louis & San Francisco Railroad Company, shall on and after the 1st day of October stop passenger trains Nos. 9 and 10 on flag at the town of Troy,

and that the defendant bulletin the arrival of trains as is done at other stations." To reverse this order this proceeding in error was commenced.

The only serious question presented to this court by counsel in their respective briefs is the right of the commission to enter an order stopping these trains. As stated by Mr. Hutchinson, superintendent of the railway company, in his evidence: "We have no objection to the complaint except the stopping of the trains." The evidence showed: That the town of Troy is a place of about 300 population, with one general store, two small stores. That Ragon is an inland town about four miles from Troy, and about the same size, and would do its railway business at Troy if facilities were improved. Some cotton and a great many ties are shipped from Troy, and considerable cattle would be shipped from there if the accommodations were adequate for that purpose. That two passenger trains stop there, one the north-bound train, due between 7 and 8 o'clock a. m., and the south-bound, due between 10 and 11 o'clock p. m. The trains that stop are local trains. The only through trains the company runs over this line are Nos. 9 and 10, between St. Louis, Mo., and Texas points, via Sherman, Denison, and Ft. Worth; the south-bound being due at Troy at 11:05 a. m., and the north-bound at 2:47 p. m.

We think there is ample evidence tending to establish the inadequacy of the passenger service at the town of Troy; indeed, there is little or no controversy on this question. The contention of counsel for plaintiff in error seems to be that, even if the service is inadequate, the Corporation Commission has no power to make an order requiring these particular trains to stop, because they are through interstate trains. In support of this contention, they call attention to Mississippi R. Com. v. I. C. R. Co., 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209, and Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 323, 28 Sup. Ct. 121, 52 L. Ed. 230. The following quotation from the first of these cases, copied from brief of counsel, probably states their position with as much clearness as possible: "The order cannot be viewed alone in the light of ordering a stop at one place only which might require only three minutes as asserted. It is a question whether these trains can be stopped at all at any particular station when proper and adequate facilities are otherwise afforded such station. If the commission can order such a train to be stopped at a particular locality under such circumstances, then it could do so as to other localities, and in that way the usefulness of a through train would be ruined, and the train turned from a through to a local one in Mississippi. The Legislature of a state could not itself make such an order, and it cannot delegate the power to a commission to do so in its discretion, when adequate fa-

cilities are otherwise furnished. The transportation of passengers on interstate trains as rapidly as can with safety be done is the inexorable demand of the public who use such trains. Competition between great trunk lines is fierce and at times bitter. Each line must do its best even to obtain its fair share of the transportation between states, both of passengers and freight. A wholly unnecessary, even though small, obstacle, ought not in fairness be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals." We do not believe the order of the Corporation Commission is out of harmony with the rule laid down in the foregoing decisions. We believe the rule to be that, if proper and adequate passenger facilities are otherwise provided, the Corporation Commission is without power to require interstate trains to stop at any particular station. But the Supreme Court of the United States has sustained orders of Corporation Commissions requiring through fast trains to stop where it was found that the local passenger service was inadequate. The Legislature of the state of Ohio passed a law requiring at least three passenger trains each way to stop at all towns containing a certain population. In the case of *Lake Shore & Michigan Sou. Ry. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702, it was held that this was not an unreasonable requirement, and that, if the railroad company desired to operate through passenger trains, it should operate a number in excess of the three required to stop by the provisions of the law. In the case of *Mississippi R. Com. v. I. C. R. Co.*, supra, the court held that a state may, where the facilities for local travel are inadequate, compel a railway company to stop through interstate fast trains. To the same effect are *Cleveland, etc., Ry. Co. v. Illinois*, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868, and *Gladson v. Minnesota*, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064. In *M., K. & T. Ry. Co. v. Town of Witcher et al.* (handed down by this court at the last term) 106 Pac. 852, it was held that: "Where a railroad company has not provided adequate and reasonable facilities for the accommodation of local traffic to and from a certain place which is within 11 miles of the county seat, a city of over 30,000 inhabitants, located on the same railroad, an order of the Corporation Commission requiring it to stop at said point another train each way engaged in interstate commerce when the stopping of such trains would not reasonably prevent the making of their interstate connections, or interfere with same, will not be construed on review in this court as unreasonable." In the case at bar it has not been shown that the stopping of trains Nos. 9 and 10 on flag would materially interfere with or hamper interstate passenger traffic. At least there is no such showing as will over-

come the presumption that must be indulged in by this court that the order appealed from is just and reasonable. *M., K. & T. Ry. Co. v. Town of Norfolk et al.* (decided at the last term of this court, and not yet officially reported) 107 Pac. 172, is also in point on the proposition now under discussion. In that case, after careful review of the authorities, it was held: "Where a railroad company has provided adequate and reasonable facilities for the accommodation of traffic to and from a certain place, an order of the Corporation Commission requiring it to stop another train engaged in interstate commerce at said point is unreasonable."

Counsel for plaintiff in error in a supplemental brief contend that the facts in the foregoing case are so similar to the facts in the case at bar that that case ought to be decisive of this. We cannot agree with counsel. While Norfolk and Troy approximate each other in population and general commercial importance, the evidence showed Norfolk to have two railways making practically the same points with trains stopping as follows: North-bound, 1:20 p. m., local freight carrying passengers and freight daily except Sunday, between 12:10 p. m. and 1:10 p. m.; south-bound, 2:25 p. m.; local freight carrying passengers and freight daily except Sundays, 9:55 a. m. These trains stop at all stations. The court held this service to be adequate. In the instant case we believe the evidence reasonably discloses the inadequacy of the passenger facilities furnished the people of the town of Troy and vicinity, and fails to show any material interference with interstate traffic.

It follows that the order of the Corporation Commission ought to be affirmed. It is so ordered. All the Justices concur, except WILLIAMS, J., absent and not participating.

(47 Colo. 573)

BROAD RUN INV. CO. v. DEUEL & SNYDER IMPROVEMENT CO. et al.

(Supreme Court of Colorado. April 4, 1910.)

1. WATERS AND WATER COURSES (§ 152*)—APPROPRIATION OF WATER RIGHTS—DETERMINATION OF PRIORITIES.

The special proceeding outlined by *Mills' Ann. St. § 2421*, providing that no recognition of any priority of water rights shall be regarded by any water commissioner in distributing water until claimant by application to the proper court has obtained leave and made proof thereof and received his decree therefor, is not a proper one to sustain a claim of priority under section 2268 (Rev. St. 1908, § 3176), giving a priority to the owner of a meadow watered by the natural overflow of the stream whose supply is diminished by the construction of irrigation ditches by others, where such priority would relate back to an earlier date, and so injure the rights of others whose priorities had been adjudicated in a statutory proceeding.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 152.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. WATERS AND WATER COURSES (§ 152*)—APPROPRIATION OF WATER RIGHTS—DETERMINATION OF PRIORITIES—CONCLUSIVENESS OF ADJUDICATION.

A general adjudication of water rights under statutory provisions therefor is conclusive as to parties to the proceeding properly served with notice, and unless impeached for fraud, or application for a review thereof is made by the parties within two years, the provisions of the decree are final and binding.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 152.*]

3. WATERS AND WATER COURSES (§ 152*)—APPROPRIATION OF WATER RIGHTS—PRIORITIES—DETERMINATION—"MATTERS ARISING SUBSEQUENT TO THE DECREE."

Within the rule that Mills' Ann. St. § 2434, authorizing a claimant of an irrigation priority at any time within four years from a final decree in a statutory adjudication proceeding to bring a suit hitherto allowed by the proper court to determine the priority, authorizes such an action by parties to that proceeding only when their right of action accrues out of "matters arising subsequent to the decree," the quoted phrase means claims of priority for an appropriation made subsequent to the lowest appropriation included in the decree.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 152.*]

4. WATERS AND WATER COURSES (§ 152*)—APPROPRIATION OF WATER RIGHTS—DETERMINATION OF PRIORITIES.

Mills' Ann. St. § 2268, provides that the owner of a meadow watered by the natural overflow of a stream may, when such flow is diminished by the construction of irrigation ditches by others, construct a ditch for the irrigation of the meadow. Section 2434 authorizes a claimant of an irrigation priority within four years from a final decree in a statutory adjudication proceeding to bring any suit hitherto allowed by the proper court to determine the priority. Section 2435 provides that after four years from a final decree all parties whose interests are affected shall be deemed to have acquiesced in it, and thereafter all persons shall be forever barred from setting up any claim to priority adverse or contrary to the effect of the decree. *Held*, that the claimant of a right under section 2268 in favor of a ditch constructed subsequent to a general adjudication decree could not, more than four years after such decree, maintain a proceeding to establish his right relating back to a date prior to the rights adjudicated in the general decree.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 152.*]

Appeal from District Court, Weld County; Christian A. Bennett, Judge.

Special proceeding by the Broad Run Investment Company against the Deuel & Snyder Improvement Company and others. From the decree, petitioner appeals. Affirmed.

James W. McCreery, for appellant. H. N. Haynes, for appellees.

CAMPBELL, J. The Broad Run Investment Company, a corporation, claimed an appropriation of water for irrigation in water district No. 1 of 90 second cubic feet, with a priority as of December 27, 1900, the date of the beginning of work on its Trowel ditch, which was thereafter diligently completed and the water from it applied to a beneficial use. It also claimed that the ditch was con-

structed, in part, to carry and utilize an additional appropriation, acquired by its grantor, of 15 second cubic feet under what is commonly known as the "meadow act" (section 2268, Mills' Ann. St.; § 3176, Rev. St. 1908), and which resulted as the natural overflow of the waters of the stream upon its adjoining meadow lands as early as the year 1875, and which has been continuously used and enjoyed by it and its grantor down to the time of the filing of its petition in June of 1903. This proceeding was instituted by petitioner by filing its petition under section 2421, Mills' Ann. St., which, among other things, declares that no recognition of any priority shall be regarded by any water commissioner in distributing water in times of scarcity until such time as the claimant, by application to the proper court, has obtained leave and made proof thereof and received his decree therefor. The petitioner here contends that as the original adjudication of water priorities in this water district was made in November, 1895, and as its ditch was not constructed until 1900, and no priority has hitherto been judicially awarded to it, it is entitled in the special proceeding provided by section 2421 to an adjudication thereof, which it prays for, naming the other ditches and appropriations which may be affected by the decree which it asks, even though, as to the 15 second feet, the decree sought would, if rendered, conflict with and antedate some of the priorities fixed in the original decree. The court appointed a referee to take testimony and make findings of fact, which was done, and on such finding the court rendered a decree awarding to petitioner 90 second cubic feet of water, whose priority was to date from the beginning of the construction of its ditch in 1900, concerning which there is no controversy here, but refused to allow the appropriation based upon the so-called "meadow act." The latter portion only of the decree is appealed from, and the only question argued here is whether petitioner is entitled to a decree for its ditch of a priority of 15 second cubic feet, to date, by way of relation, to the earliest time it enjoyed and had the benefit of the natural overflow of the stream upon its meadow lands.

As preliminary to the main discussion, we observe that several of the priorities, as fixed by the original decree of adjudication rendered in 1895, are of a date later than that which petitioner claims as a "meadow" appropriation by way of relation. Necessarily, therefore, if a decree in its favor, as prayed for, is granted, it would materially and injuriously affect and subordinate a number of priorities under the original decree, because it would antedate them. Though objection has not been raised by the respondent that this proceeding is not the proper remedy, we notice the point for ourselves that we may not be understood as sanctioning the practice

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of entertaining the statutory special proceeding, when, as here, it appears that an adjudication as to the meadow priority is invoked by one who claims that it was not a party to the original adjudication proceeding, and when, if the decree passes, it will materially affect and interfere with the priorities of the original decree. It is true that, under section 2434 of the statute, permission is granted to persons who were not parties to, or who did not appear in, the proceedings which culminated in the original decree, to establish their right to the use of water by some appropriate action or suit, such as was allowed in any court of competent jurisdiction before the so-called "adjudicating statutes" were enacted, even though a determination was sought of priorities claimed to be earlier in time than any of those established by the statutory decree. Yet this is not authority for saying that in the special proceeding under section 2421, which is the one here employed, it is competent for the court to permit a suitor thus to have determined his claim of right to such a priority. *Crippen v. K. Y. Irr. Co.*, 32 Colo. 447, 76 Pac. 794, decided after this proceeding was begun, says the section does not contemplate such a case. If such relief can, in any event, be granted to one not a party to the original proceeding, the available remedy is a suit in equity, and not a proceeding under the statute. For that reason alone, the trial court properly refused to award the priority under consideration, wholly irrespective of the merits. But, since the question of the proper remedy is not raised by the respondent here, and the remedy invoked was the right one for establishing one of petitioner's priorities of a date subsequent to the entry of the decree, we proceed to determine the controversy concerning the other priority claimed, upon its merits, and as if the appropriate remedy was employed.

The facts of this case are, as found by the referee, that, beginning with the year 1881, the meadow lands of the petitioner, during ownership by its grantor, were irrigated as the result of the natural overflow of the stream on whose banks the meadows are situate, and until about the year 1886 crops of hay were grown as the result of that method of natural irrigation. Beginning about the year 1886, a number of large ditches and reservoirs were constructed taking water from the stream, with the result that so much of its waters were diverted that the amount of the natural overflow upon this meadow was materially diminished, and to such an extent that its then owner at one time constructed a ditch through which waters from the stream were diverted in an equal quantity for its artificial irrigation. This ditch seems to have been abandoned, at least its use was discontinued, and the owner afterwards became a stockholder, or a part owner, in another ditch, to which a different priority had been awarded, and through which he irrigated his meadow. These conditions prevailed at the

time of, and for a period of nearly nine years before, the rendering of the original adjudication decree in 1895. Before that decree was rendered, and pending that proceeding, a number of other owners of meadow lands, situate with reference to the stream the same as the lands of petitioner, after the natural overflow was lessened, and after they had constructed ditches through which to enjoy their meadow appropriations, appeared in that proceeding and offered their proofs and received for their ditches decrees as of a priority relating back to the time when they first enjoyed the benefits of the natural overflow of the stream. Petitioner's grantor, however, did not avail himself of this privilege, and no steps were taken by him, or by petitioner, directly to utilize the meadow appropriation through a ditch until the month of December, 1900, more than three years after the decree was rendered, except through the abandoned ditch and from a third ditch, as above mentioned. The referee found, and the trial court approved the findings, that under sections 2434, 2435, *Mills' Ann. St.*, the petitioner's rights, if any it ever had, were barred. There was also a finding that petitioner was guilty of laches and had acquiesced in the provisions of the decree to such an extent that it ought not to maintain this proceeding. In substance, section 2434, so far as material here, authorizes a claimant of an irrigation priority, at any time within four years from rendering a final decree in the statutory adjudication proceeding, to bring any suit hitherto allowed in a proper court to determine and establish such priority. Section 2435 reads: "After the lapse of four years from the time of rendering a final decree, in any water district, all parties whose interests are thereby affected shall be deemed and held to have acquiesced in the same, except in case of suits before then brought, and thereafter all persons shall be forever barred from setting up any claim to priority of rights to water for irrigation in such water district adverse or contrary to the effect of such decree."

The precise question thus presented for determination respecting the bar of the statute has not been directly or expressly, though, in principle, we think it has been, decided by this court. The general adjudication statutes have often been before this tribunal for consideration. They have been held to be a legitimate exercise by our General Assembly of the police power of the state, and the proceeding thereby furnished is in the nature of a proceeding in rem. *Louden Irr. Canal Co. v. Handy D. Co.*, 22 Colo. 102, 113, 43 Pac. 535. In this and other cases we have decided that, as to parties to such proceedings, the decree is res adjudicata, and unless impeached for fraud, or application for a review thereof is made by the parties within two years, the provisions of the decree are final and binding, at least as to them. *Louden Irr. Canal Co. v. Handy Ditch Co.*, supra;

Ditch Co. v. Ditch Co., 22 Colo. 115, 43 Pac. 540; *New Mercer Ditch Co. v. Armstrong*, 21 Colo. 357, 40 Pac. 989; *Crippen v. X. Y. Irr. D. Co.*, supra. In *Canal Co. v. Loutsenhizer Ditch Co.*, 23 Colo. 233, 48 Pac. 532, it was said that a decree in such proceedings is conclusive as to the parties thereto after the expiration of two years. It was also held that, under section 2434, right to bring such action to establish priorities as it authorizes, within four years after a statutory adjudication has been made, may be exercised only by those who were not parties to that proceeding, or, if parties thereto, whose right of action accrues out of matters arising subsequent to the decree. See, also, *Crippen Case*, supra. It is entirely clear that "matters arising subsequent to the decree" means claims of priority for an appropriation made subsequent to the lowest appropriation included in the decree. This is expressly stated in the *Crippen Case*, where it was said that the section, speaking of section 2421, applies to an adjudication of priorities of a date later than the lowest one fixed by former decrees. The *Crippen Case* clearly foreshadows the ruling, if it does not, in effect, determine, that the bar of the statute (section 2435) applies to such a claim as is here involved. That was a case where one who was a party to the original proceeding, but offered no proof of his priority, claimed that the two years' limitation did not apply to him, but the court said that it did. It also again said that section 2434—the four years' limitation—refers to an independent action and may be invoked only by those who were not parties to the original proceeding, while section 2421 applies to all persons who seek to establish priorities of a later date than the lowest one fixed by an original decree.

We cannot sanction the claim of the petitioner here. It is that, irrespective of the question of time, one who has acquired an appropriation for his meadow lands, as the result of the natural overflow of the waters of the stream, may, when the same has become diminished in quantity, and whenever thereafter it suits his convenience, construct a ditch and have a priority awarded to date back by way of relation to his meadow appropriation, even though such priority antedates the priorities fixed by a previous statutory decree. We think *Ft. Lyon Canal Co. v. Arkansas Valley, S. B. & Irr. L. Co.*, 39 Colo. 332, 90 Pac. 1023, the opinion in which was handed down after the briefs in this action were filed, is conclusive against petitioner. It was there held that, after the lapse of four years from the time of rendering a water decree in any water district, all persons are forever barred from setting up any claim adverse to its effect, and that the bar applies to appropriations in different districts taking waters from the same stream, preventing an independent action by an appropriator in one water district against another appropriator in a different water dis-

trict to determine their relative rights after the lapse of the period of four years, although these respective appropriations, sought to be readjudicated, were obtained in separate statutory proceedings in different water districts, and the appropriator in neither district was a party or appeared in the proceedings in the other. The opinion in that case is an exhaustive discussion of the subject, and reviews many of the cases in this court, including those which we have cited in this opinion. If the statute operates as a bar in such a case, it certainly does in the case at bar.

The same conclusion may be reached by another process of reasoning. We may rightfully assume that in the original decree of adjudication the proper notices were given and published, which, if the statute in that respect was complied with, would bind this petitioner, the same as if he had actually appeared in, or participated in, the original proceeding, since it was in the nature of a proceeding in rem, the petitioner a legal resident, and the priority which it claimed was for lands situate in this water district. In *Combs v. Farmers' H. L. C. & R. Co.*, 38 Colo. 420, at page 426, 88 Pac. 396, 398, it was said: "Ample provision is made for personal service of notice upon ditch owners, and for publication of notice for those who cannot thus be served, and this notice requires not only all owners of ditches and other persons interested therein, but also all persons interested as owners or consumers of water, to be present at the hearing provided for, and present proofs of their priority of right to water by appropriation." And it was further said in that case that this statutory proceeding contemplates that there shall be an adjudication not only of the priorities of appropriation of water between ditch companies and owners of ditches, but also "an adjudication of all other questions of law and questions of right growing out of, or in any way * * * connected therewith." While it is true that the petitioner here did not, during the pendency of the original adjudication proceeding, file therein its claim of priority of right through the ditch in question, because it was not then constructed, yet it did claim, and here asserts, that it was then the owner of a priority which was conferred upon it by the so-called "meadow act," and which had been diminished by reason of other appropriations, and certainly this claim of an appropriation grew out of, and was involved in and connected with, the claims of appropriation by other ditch, canal, and reservoir owners. The proceeding contemplated not only an adjudication to ditch, reservoir, and canal owners, but an adjudication as to all persons who claim appropriations of water by whatever means or medium such appropriation was made and enjoyed. Because of the diminished flow of the natural waters of the stream, petitioner was not able to enjoy its meadow act appropriation to its full extent for more

than nine years before the final decree was rendered. It, or its grantor, claimed to own an appropriation in this water district while these proceedings were pending. It is charged with notice thereof, and though it was deprived of the natural flow of the stream, and had constructed, and had for a time used, a ditch with which to obtain water for its meadow lands, and for a portion of the time used other appropriations for irrigating the same, still it did not, as it might have done, construct a ditch while the original proceeding was pending and apply for and attempt to get a decree therefor with which to utilize its meadow appropriation.

Our conclusion, therefore, and for the reasons given, is that whether petitioner was, or was not, a party to the original proceeding, it is bound. If a party, or properly served with notice, the two years' limitation operates as a bar. If not a party, or if not duly served with notice, the four years' statute is a bar. And this is so since section 2434 provides that an independent action or proceeding in a competent court of jurisdiction may be brought by one who was not a party to the original proceedings, within four years from the rendering of the final decree, even though in such action a judgment might be rendered affecting or superseding some one or more clauses of the final decree; and as it also appears that no such independent action, or other proceeding, statutory or other, was instituted by petitioner within four years after the rendering of the original decree, we are of opinion that section 2435 bars petitioner's rights, for it expressly says that, after the lapse of four years from the time of rendering a final decree, all persons who have not, in the meantime, by the independent action provided for in the preceding section, had their rights judicially ascertained, are forever barred from setting up any claim and priority of rights to water for irrigation in such water districts, adverse or contrary to the effect of the decree. Petitioner's claim of right with respect to his meadow appropriation, if determined by the court in this proceeding in accordance with his claim, would be adverse and contrary to the effect of the decree of 1895; hence it is altogether clear, under the express language of the statute, as construed by our previous decisions, that the claim is barred. We are not called upon to press an opinion as to the finding of the court that petitioner's laches and acquiescence estop it to assert the claim which it now makes, since we are satisfied that the statute of limitations is a complete bar. In *Whols v. McIntosh*, 19 Colo. 22, 34 Pac. 278, and *Greer v. Heiser*, 16 Colo. 306, 26 Pac. 30, there may be expressions inconsistent with what is here decided; but, if so, such former observations, or holdings, have been modified or superseded by our later cases, none of which are referred to in this opinion,

and which are in entire harmony with the conclusions herein reached.

The judgment of the district court is affirmed.

STEELE, C. J., and MUSSER, J., concur.

(32 Nev. 360)

GIBSON et al. v. HJUL et al. (MITCHELL, Intervener). (No. 1,858.)

(Supreme Court of Nevada. April 30, 1910.)

1. PARTIES (§ 93*)—IMPROPER INTERVENTION—OBJECTIONS.

Even though intervener did not have such an interest in the result of the suit between plaintiffs and defendants as would entitle him to intervene, yet he having been permitted to do so, and, after plaintiffs dismissed their complaint, the case having gone to trial between intervener and defendants on the issues raised by their pleadings, intervener having thus virtually become the plaintiff, and defendants, at the time plaintiffs dismissed their complaint, not having asked to have the entire proceedings dismissed, but, without further objection, proceeded to trial on the issues raised by their answer to intervener's complaint, the court had jurisdiction of the parties as well as of the subject-matter.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 93.*]

2. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR.

Rejection of evidence to show acts of ownership by intervener's grantor was harmless; defendants not questioning the ownership of such grantor to a time six years after such acts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

3. TRIAL (§ 59*)—ADMISSION OF EVIDENCE—ORDER OF ADMISSION—DISCRETION.

The court has discretion to admit evidence out of the regular order subject to the later supplying of other evidence which will establish its relevancy or materiality.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 138-145; Dec. Dig. § 59.*]

4. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Even if it was permissible, on cross-examination of one who had testified that he and his partner had given up their case, to ask him how or why they had given it up, exclusion of the testimony, immaterial on any issue, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

5. MINES AND MINERALS (§ 22*)—LOCATION—NOTICE—RECORDING.

A notice of location of a mining claim is not required by Comp. Laws, § 206 et seq., to be recorded.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 45; Dec. Dig. § 22.*]

6. MINES AND MINERALS (§ 38*)—NOTICE OF LOCATION—ADMISSION IN EVIDENCE.

A notice of location of a mining claim, while not answering the requirements of Comp. Laws, § 210, for a certificate of location, and so not evidence of an act of location, is admissible in support of a claim of adverse possession, and to explain testimony.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

7. MINES AND MINERALS (§ 21*)—CERTIFICATE OF LOCATION—RECORD.

Filing of a defective certificate of a location of a mining claim, or failure to file any certificate, does not invalidate the claim.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 21.*]

8. MINES AND MINERALS (§ 19*)—NOTICE OF LOCATION.

Notice of location of a mining claim is not required to be strictly exact, and is not controlling; courses and distances given therein yielding to monuments erected on the ground.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 19.*]

9. MINES AND MINERALS (§ 17*)—DISCOVERY SHAFT.

Though ore was not discovered in a so-called "discovery shaft" on a mining claim, it is enough that the locator subsequently found valuable ore in other workings on the claim, and where ore was unquestionably discovered did work more than the equivalent of that required for a discovery shaft.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 24-28; Dec. Dig. § 17.*]

10. MINES AND MINERALS (§ 38*)—RIGHTS AS BETWEEN DIFFERENT LOCATORS—EVIDENCE.

Evidence, in a suit for mining lands, the parties claiming under different locations, and defendants also claiming under adverse possession, held sufficient to sustain a judgment for defendants.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

11. MINES AND MINERALS (§ 18*)—LOCATION OF CLAIM—END LINES.

That the end lines of a mining claim are not parallel does not invalidate the location, but only affects extralateral rights.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 36; Dec. Dig. § 18.*]

Appeal from District Court, Eureka County.

Action by Angus R. Gibson and another against P. H. Hjul, administrator of John Pardy, deceased, and another. Henry K. Mitchell intervened, and, from a judgment for defendant Pardy, appeals. Affirmed.

Henry K. Mitchell, in pro. per. C. L. Harwood and Cheney, Massey & Price, for respondents.

NORCROSS, C. J. This action concerns the title to a certain piece of mining ground on Prospect Mountain in the Eureka mining district, Eureka county, Nev. The ground in question appears to have been embraced within the several mining claims following, named in the order of their location: "Grindstone," "Sam Tilden," "Beehive," and "Fannie." Plaintiffs instituted this action October 13, 1906, basing their right to recover upon the "Fannie" location. Prior to making this last-named location, the plaintiffs had been lessees of the said John Pardy, deceased, who was an original defendant, and who died subsequent to the rendition of judgment in the action. Plaintiffs based their right to recover upon the Fannie location upon the theory that the Beehive location was void because of the fact that its locator, the said John

Pardy, was at the time of making the location a deputy United States mineral surveyor. After the defendants had filed their answer to plaintiffs' complaint, proceedings were suspended in the court below for the reason that the question of the right of a deputy mineral surveyor to locate a mining claim was then pending in this court in the case of *Hand v. Cook*, 29 Nev. 518, 92 Pac. 8. The decision of this court in the *Hand v. Cook* Case, *supra*, having been adverse to plaintiffs' contention, plaintiffs appeared in court in person and dismissed their complaint. Prior to the dismissal of the complaint, Henry K. Mitchell, who had been the attorney for the plaintiffs, was granted permission to intervene and filed a complaint in intervention, claiming title to the ground in controversy by virtue of a deed, dated March 15, 1907, for the Sam Tilden claim from one Maurice Hartnett. The defendants' objection to the right of the said Henry K. Mitchell to intervene in the action having been overruled, defendants filed an answer and subsequently an amended answer to the said intervenor's complaint in intervention. The case was tried upon the issues raised upon the complaint in intervention and the amended answer thereto. The defendant J. H. Byerly having no interest in the controversy other than that of lessee of the defendant John Pardy, and his lease having expired prior to the entry of judgment in the case, judgment was entered in favor of the defendant Pardy. The Sam Tilden location was made by the said Maurice Hartnett March 9, 1889. The Beehive location was made by the defendant Pardy July 27, 1899, and covers the major portion of the Sam Tilden claim. These two locations are the only ones directly involved in the action. The issues as made by the defendants were a denial of the allegations of the intervenor; the allegation of the location of the Beehive; the possession thereunder continuously from the time of such location; that such possession was open, adverse, and notorious; the forfeiture of the Sam Tilden claim; and, also, a special plea of the statute of limitations of both two and five years. The case was tried by the court; but the court, deeming certain equitable features to be involved in the case, impaneled a jury in an advisory capacity. General and special issues were submitted to the jury, which were found in favor of the defendant Pardy. The findings were adopted by the court, and a decision and judgment entered in favor of the said defendant. From the judgment, and from an order denying the intervenor's motion for a new trial, the intervenor has appealed.

The motion for new trial was based upon the grounds: (1) Insufficiency of the evidence to justify the decision of the court, and that such decision is contrary to the evidence, and that the same is against law. (2) Errors

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In law occurring at the trial and excepted to by the intervener.

A preliminary question is raised by counsel for respondents which goes to the jurisdiction of the lower court to entertain the complaint in intervention. We need not, we think, determine whether the intervener had such an interest in the result of the suit between the original plaintiffs and defendants as would entitle him to intervene, or whether the situation presented at that time falls within the rule laid down in the case of *Harlan v. Eureka Mining Co.*, 10 Nev. 92, as contended. Had the plaintiffs remained in the suit and the issues raised upon the plaintiffs' complaint and the defendants' answer been tried and determined, the position of counsel for respondents might be correct. After the plaintiffs dismissed their complaint, the case went to trial between the intervener and the defendants upon the issues raised by their respective pleadings. The intervener became virtually the plaintiff in the case. At the time the plaintiffs dismissed the complaint, defendants did not ask to have the entire proceeding dismissed, but, without further objection, proceeded to trial upon the issues raised by their answer to the intervener's complaint. We think, under this state of facts, the court had jurisdiction of the parties as well as the subject-matter.

The statement on motion for new trial presents nine assignments of error, which we will consider in order.

Error is assigned in admitting in evidence the laws or regulations of the Eureka mining district. These regulations were offered in evidence in support of defendants' objection to the admission in evidence of the notice of location of the Sam Tilden claim; defendants contending that such notice was not in accordance with the district regulations. The objection to the admission of the notice in evidence was overruled and the notice admitted. Even conceding, for the purposes of this case, that those regulations were erroneously admitted, appellant was in no way injured thereby.

Error is assigned in the ruling of the court excluding as evidence a certain notice recorded by the said Maurice Hartnett, December 19, 1893, in the office of the county recorder of Eureka county, which notice was filed in pursuance of the act of Congress relieving locators from the necessity of doing annual labor for the year 1893. This notice was offered for the purpose of proving an act of ownership upon the part of intervener's grantor at the time of filing such notice. As this notice was filed nearly six years prior to the date of the initiation of defendants' claim, and as they have not questioned the ownership of the Sam Tilden claim by intervener's grantor prior to the date of the location of the Beehive claim, we are unable to see where this proposed evidence was material and herein its rejection could possibly be prejudicial error.

Error is assigned in the ruling of the court excluding the evidence of Maurice Hartnett offered for the purpose of proving that the Sam Tilden claim was one of a group of claims known as and called the "Excelsior Group." It is difficult to understand the making of this assignment, in view of the fact that the record upon appeal contains the following from the testimony of the said Maurice Hartnett: "Maurice Hartnett then testified: 'That the property conveyed was and is the "Sam Tilden" in suit and constitutes one of the Excelsior Group which he conveyed by the deed offered.'" The deed which was admitted in evidence over the defendants' objection also described the claim as one of the Excelsior Group.

Error is assigned in overruling intervener's objection to the testimony of W. C. Stewart and A. R. Gibson relating to a lease from the defendant Pardy. This evidence, we think, was clearly admissible as showing or tending to show possession by Pardy and work done or being done upon the claim in question. While, at the time this evidence was offered, defendant Pardy had not offered his proof of location of the Beehive claim, this evidence was subsequently supplied. The court has the discretion to admit evidence out of the regular order, subject to the supplying of other evidence later which will establish its relevancy or materiality.

Error is assigned in sustaining the objection interposed by the defendants to a question asked the witness A. R. Gibson to explain how or why he and his partner gave up their lease. The witness had previously testified that he and his partner, Stewart, had given up their lease. Conceding, without deciding, that the question was permissible in cross-examination, we are unable to see wherein the exclusion of this testimony could possibly have been prejudicial to the intervener, as it was not material to the issues presented.

Error is assigned in admitting as evidence defendants' notice of location of the Beehive mining claim. A notice of location of a mining claim is not required to be recorded under the statutes of this state (Comp. Laws, § 208 et seq.) Comp. Laws, § 210, provides for the filing of a certificate of location which must contain certain specified statements. A certificate complying with the provisions of this section is made "prima facie evidence of the facts therein stated." The section further provided: "Any record of the location of a lode mining claim which does not contain all the requirements named in this section shall be void." The notice admitted in evidence does not answer the requirements of a certificate of location, in that it fails to contain at least the fifth requirement: "The dimensions and location of the discovery shaft, or its equivalent, sunk upon the claim." The notice, we think, was admissible as evidence of an act of location and in support of defendants' claim of adverse pos-

session, and, also, for purposes of explaining the testimony of defendant Pardy and other witnesses. Defendant did not rely on it as a certificate of location or offer it in evidence as a certificate. *Jones v. Prospect Tunnel Co.*, 21 Nev. 352, 31 Pac. 642. The filing of a defective certificate of location or the failure to file any certificate does not invalidate the claim. We had occasion to go into this question very fully in the case of *Ford v. Campbell*, 29 Nev. 578, 92 Pac. 206. In that case we held that the failure to file a certificate of location in accordance with the provisions of the statute did not render a location void, but that the effect of failure to file such certificate was to impose upon the claim owner the burden of proof to establish by other evidence that a valid location had in fact been made. In this case defendants, we think, established, independent of record proof, the essential requirements of a valid location of the Beehive claim.

A further objection to the admission in evidence of the notice of location of the Beehive claim is based upon "a variance between the allegata and probata, in this, that the answer alleges its first course to be at a point commencing south 30° degrees east, 292 feet, from the southwest corner of Eldorado patent No. 140, and its last course to be thence south 30° degrees east, 840 feet, while the notice offered claims in each course above stated 32½ degrees east." We think this objection is without merit. Notices of location are not required to be strictly exact, and they are not controlling. The courses and distances described in the notice yield to the monuments erected on the ground. 1 *Lindley on Mines*, §§ 381, 382; *Book v. Justice M. Co. (C. C.)* 58 Fed. 106.

Error is assigned in the finding made by the trial court that a vein, lode, or rock in place was discovered at the time of the Beehive location or in sinking the discovery shaft. It may be seriously questioned whether the evidence shows a discovery in the so-called "discovery shaft." The evidence, however, shows clearly that the defendant Pardy subsequently found valuable ore in other workings upon the claim, some of which ore was extracted and shipped and was of a value in excess of \$100 per ton. It is a reasonable deduction from the evidence that the work done in other parts of the claim where ore was unquestionably discovered was more than the equivalent of that required for a discovery shaft. Conceding, without deciding, that this finding was erroneous, it does not, we think, affect the result in this case.

The last assignment of error goes to the sufficiency of the evidence to justify the decision and judgment. The defendant Pardy, after testifying that he located the Beehive claim at the time stated in the notice, and that he built posts or monuments at the corners described, further testified: "I did \$100 worth of work on the Beehive mine for the year 1899, after my location of the claim,

and each year since, up to the present time, I have done \$100 worth of work on the Beehive. When I located the Beehive mine, I was familiar with the ground on which it is located and with the surrounding ground. The ground I located was unoccupied and open to location as mining ground. At the time of my locating it, there had not been any work done on the ground located as the Beehive for a period of at least eight or ten years. I examined the ground and ascertained that the annual labor had not been performed on it, since the time of my location of the Beehive mine. I have had the open and actual possession of the ground against Maurice Hartnett and his grantee as alleged, H. K. Mitchell, and against all others up to the commencement of this suit. Maurice Hartnett, nor any one else, ever informed me I had located ground of his. Maurice Hartnett knew I was working the ground, and did not interfere with my so doing. For over seven years Maurice Hartnett saw me work the ground, doing the annual labor and other work, and did not prevent me from doing the same. He never told me he owned the ground. When I made the location of the Beehive, there was what I call ore or mineral-bearing matter at the location point or discovery shaft. The mine was located on a zone of mineral-bearing lime. That all the limestone on that side of the Prospect Mountain be considered the lode or ledge of mineral-bearing rock." The witness further testified: "That, after said location of said Beehive, I took a considerable quantity of paying ore from the said Beehive mine."

A. R. Gibson, a witness for defendant Pardy, testified that he, together with W. C. Stewart, had leased the Beehive claim from the defendant Pardy and had extracted ore therefrom and shipped the same to reduction works; that the said Maurice Hartnett was aware of the work being done by them upon the Beehive claim, but made no claim whatever that he owned the property. The witness further testified that he had been familiar with the property for a number of years, and that the annual labor was not done on the ground for many years until the Pardy location was made.

W. C. Stewart testified that he was associated with the witness A. R. Gibson in a lease of the Beehive mine from the defendant Pardy; "that Maurice Hartnett knew of the said lease and of the work that the said Stewart and Gibson were doing on the said Beehive mine; and that the said Hartnett never objected thereto, but, on the contrary, lent them some tools to work with on the said mine."

The contention made by counsel for appellant that the proof shows that the end lines of the Beehive claim are not parallel is of no force in this case, as such a fact, if it be a fact, does not make the location invalid, but could only affect extralateral rights,

which are not involved in this case. Section 365, Lindley on Mines.

There is evidence in this case that, at the time of the location of the Beehive claim, the Sam Tilden claim was subject to forfeiture for failure to do the annual labor required; that, since the location of the Beehive claim, the defendant Pardy has been in the open, notorious, and adverse possession thereof against the intervener and his grantor and against all the world.

The judgment and order appealed from are affirmed.

SWEENEY, J., concurs.

TALBOT, J. I concur in the affirmance of the judgment of the district court in favor of the defendants for reasons not relating to the invalidity of the location of the Beehive by John Pardy at the time that he was United States deputy mineral surveyor. If the action as between the intervener, who is in the position of a plaintiff, and the defendants, who are the only parties to this appeal, depended upon whether such a surveyor could make a valid location of a mining claim, it might be proper for this court to frankly reverse its decision and correct its conclusion in *Hand v. Cook*, 29 Nev. 518, 92 Pac. 3, because the federal courts, acting within the jurisdiction vested in them for finally construing federal enactments, as well as the United States Land Office and the Supreme Court of Utah, have placed an interpretation upon the act of Congress the reverse of that given by a majority of the members of this court in that case.

In *Waskey v. Hammer*, 170 Fed. 36, 95 C. C. A. 310, the United States Circuit Court of Appeals, in an opinion by Judge Ross, concurred in by Judges Gilbert and Morrow, after citing section 452, U. S. Rev. St. (U. S. Comp. St. 1901, p. 257), which provides that "the officers, clerks and employes in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands," and stating that the later rulings in the Land Department were to the effect that this statute is applicable to a deputy surveyor, said: "In the case of *Hand v. Cook*, 29 Nev. 518, 92 Pac. 3, a majority of the Supreme Court of Nevada held that the statute in question did not apply to a deputy mineral surveyor; but the reverse was held by the Supreme Court of Utah in the case of *Lavagnino v. Uhlig*, 28 Utah, 1, 71 Pac. 1046, 99 Am. St. Rep. 808. It will not do for a court to take a strained and narrow view of the language employed by Congress in its enactments, but rather give such a construction as will carry into effect its obvious intent. We entertain no doubt that a deputy mineral surveyor is an employe 'in the General Land Office,' within the meaning of the statute. * * * Nor do we see that there is any much clearer way to prohibit an act than to say expressly that

it is prohibited. That Congress did in the section in question. In the case of *Prosser v. Finn*, 208 U. S. 67, 28 Sup. Ct. 225, 52 L. Ed. 392, the Supreme Court held that section 452 applied to a special agent of the Land Department who had made an entry under the timber culture act (Act March 3, 1873, c. 277, 17 Stat. 605, as amended by Act March 13, 1874, c. 55, 18 Stat. 21). The court said: "The difficulty in the way of any relief being granted to the plaintiff arises from the statute prohibiting any officer, clerk, or employe in the General Land Office, directly or indirectly, from purchasing or becoming interested in the purchase of any of the public land. That a special agent of the General Land Office is an employe of that office is, we think, too clear to admit of serious doubt. * * * It is not clear, from any document or decision to which our attention has been called, what is the scope of the duties of a special agent of the land office, but the existence of that office or position has long been recognized. Suffice it to say that they have official connection with the General Land Office, and are under its supervision and control with respect to the administration of the public lands. *Wells v. Nickles*, 104 U. S. 444, 28 L. Ed. 825; 1 Land Dec. Dep. Int. 606, 620; Instructions to Special Timber Agents, 2 Land Dec. Dep. Int. 814, 819-822, 827, 828, 832; Circular of Instructions, 12 Land Dec. Dep. Int. 499. They are in every essential sense employes in the General Land Office. They are none the less so, even if it be true, as suggested by the learned counsel for the plaintiff, that they have nothing to do with the survey and sale of the public lands, or with the investigation of applications for patents, or with hearings before registers and receivers. Being employes in the General Land Office, it is not for the court, in defiance of the explicit words of the statute, to exempt them from its prohibition. Congress has said, without qualification, that employes in the General Land Office shall not, while in the service of that office, purchase or become interested in the purchase, directly or indirectly, of public lands."

In my opinion, these decisions of the highest federal courts construing this act of Congress are conclusive until or unless the Supreme Court of the United States reverses the case of *Waskey v. Hammer*, which is reported to be pending before that tribunal at this time on a writ of certiorari, or unless it reverses its own decision in *Prosser v. Finn*, or makes an improbable distinction by holding that a United States deputy mineral surveyor is not an officer or employe of the General Land Office when a special agent is held to be such an employe.

It is shown by the evidence, and apparently conceded, that John Pardy posted the notices and did the work regularly required for making the location, and did the annual work every year on the Beehive. Assuming that the location of this claim was void because

John Pardy was a deputy mineral surveyor at the time it was made, there are obstacles which would prevent a recovery by the intervenor.

As to the Sam Tilden claim, on which he relied as having been located 10 years before the Beehive, it appeared that notices of location had been posted and retored; but the jury found that the location work required by the rules and regulations of the mining district and the annual work required by the laws of Congress, had not been performed. If the Sam Tilden had been properly located, it might be said that, if its locator remained in possession and continued to claim the ground, he could hold it without doing the annual work as against any one who failed to make a valid new location. But there is evidence supporting the plea of the statutes of limitations for actions for mining claims and for real estate interposed by defendants and tending to show an abandonment of the ground by the locator of the Sam Tilden and an estoppel against him, in addition to any mere failure to do the annual work which might result in forfeiture upon the making of a new valid location. The testimony of the locator of the Sam Tilden that he had done the annual work was contradicted by witnesses who asserted that no work had been done on the ground for 8 or 10 years before the location of the Beehive. The jury found the special issues in favor of the defendants, and the findings were approved by the court.

In the statement, which is to be commended for its conciseness while apparently fully and clearly presenting the issues raised, evidence indicating abandonment of the ground and acts which would estop the claimant under the Sam Tilden location from asserting a right to it is apparently uncontradicted. There was testimony that the locator of the Beehive had done the work for seven years with the knowledge of the locator of the Sam Tilden, who did not object or tell him that he owned the ground; that the locator of the Sam Tilden knew that the lessees were working on the Beehive and never made any objection, but, on the contrary, loaned them tools to work with and procured a tapeline and helped them to measure off the land, and never told them that he owned or claimed the ground or not to work or trespass there; and that he said he hoped they would get ore and that he would not bother about it.

In view of the weakness of the intervenor's claim under these circumstances, as apparently found by the jury, and considering the finding that the necessary location work had not been done on the Sam Tilden at the time the notices for its location were filed and recorded in the year 1889, that the annual work had not been done for so many years prior to the location of the Beehive in 1899, and that no objection had been made by

the locator of the Sam Tilden to the work being done on the Beehive for seven years after its location, and that, instead of objection being made, assistance and encouragement were given by him to the lessees working on the Beehive, and the evidence of acts relating to an estoppel and a bar under the statute of limitations, enough appears to sustain the judgment, regardless of any question of the insufficiency or invalidity of the location of the Beehive.

(58 Wash. 327)

MUEHLMAN v. SPOKANE & I. E. R. CO.
(Supreme Court of Washington. May 13, 1910.)

1. APPEAL AND ERROR (§ 846*)—REVIEW—FINDINGS UNSUPPORTED BY EVIDENCE.

Findings unsupported by evidence must be disregarded on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 846.*]

2. MASTER AND SERVANT (§ 185*)—SAFE PLACE TO WORK—DEFECTIVE SCAFFOLD.

Where competent men were employed to erect a scaffold for the use of themselves and co-employees, and suitable material was furnished therefor, and they were not instructed outside of a direction to construct it, and a co-employee not present when the scaffold was built thereafter fell and was injured on account of defective construction due to the use of improper material, the employer is not liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 335-421; Dec. Dig. § 185.*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Charles H. Muehlman against the Spokane & Inland Empire Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Robertson, Miller & Rosenhaupt, for appellant. Graves, Kizer & Graves, for respondent.

CROW, J. This action was commenced by Charles H. Muehlman against the Spokane & Inland Empire Railroad Company to recover damages for personal injuries. A verdict was returned in his favor, but thereafter the defendant's motion for judgment non obstante veredicto was sustained and the action was dismissed. The plaintiff has appealed.

The sole question presented for our consideration is whether the trial court erred in sustaining the motion. The respondent railroad company was erecting depots at stations along its line of road, and one P. L. Peterson was in general charge of the work. The appellant, a carpenter, was injured at Waverly, where a new depot was being erected. Experienced carpenters employed by Peterson were doing the work, during the progress of which it became necessary to construct a scaffold for their use. Thereupon the foreman directed them to erect the scaffold.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fold, but gave no further instructions. Suitable material was on the ground. The carpenters without supervision of appellant or its foreman selected such material as they needed, and built the scaffold according to their own plans. Thereafter they used the scaffold for about one week. During this period appellant and another carpenter had been left at Spring Valley, one of respondent's stations, to complete work on another depot. On August 29, 1907, they reported at Waverly to work with the carpenters on the depot there. Appellant was set to work upon the scaffold with the other carpenters, and while so engaged a plank and cross-piece broke, causing him to fall. He contends that the scaffold was not properly constructed; that it was of insufficient strength; that improper material had been used; that the respondent was negligent in failing to furnish him a safe place to work or a safe scaffold on which to work; and that by reason thereof he was injured without any negligence upon his own part. The jury answered a number of interrogatories, and appellant relies upon the following answers: "(1) Q. Did the defendant have at its railway depot at Waverly sufficient and proper material for the erection of such a scaffold as was necessary for the construction of the building? A. No. 2) Q. Did the defendant intrust the erection of the scaffold to competent carpenters? A. No." There is no evidence to sustain these findings. Four or five disinterested witnesses testified that the respondent did have an abundance of suitable material at its depot at Waverly for use in the erection of a proper scaffold; that the material actually used was selected by the carpenters who built the scaffold; that one McNulty and one Johnston, experienced carpenters, built that portion from which the appellant fell, and that one of them selected the particular plank and cross-piece which broke and caused appellant's fall, although it did not distinctly appear which one did so. The evidence further shows that respondent did intrust the erection of the scaffold to competent, experienced carpenters, who built it for the use of themselves and of other carpenters engaged in building the depot. None of this evidence is disputed. Appellant made no attempt to meet it. The witnesses who testified to these facts were neither parties to nor interested in this action, and there was no other evidence on the subject. The findings above quoted, being unsupported, must be disregarded.

Answering a further interrogatory, the jury found, and the evidence shows, that the respondent did not exercise any supervision over the erection of the scaffold, or give any instruction in regard to it other than to direct that it be constructed. Ascribing the utmost value to appellant's evidence, it appears that the falling of the scaffold was caused by the carelessness or bad judgment of the carpenters in selecting and using un-

safe material in its construction, although respondent had provided an abundance of proper, safe, and sound material. In support of its motion for judgment the respondent cited and the trial court followed *Metzler v. McKenzie*, 34 Wash. 470, 76 Pac. 114. In every essential particular that case and this one are identical. In each it appeared that the plaintiff had no part in building the scaffold; that it was customary for the carpenters engaged in the erection of the building to construct for use such scaffold as they might need in the progress of the work, and to do so without any direction as to details by the foreman; that the master through the foreman retained no supervision over the erection of the scaffold and gave no directions with reference thereto; that the master furnished on the ground a sufficient quantity of suitable material for its erection which he intrusted to competent, experienced, and skillful workmen, and that the only negligence, if any, which caused the injury, was that of the workmen in selecting and using improper material. In the *Metzler Case* we said: " * * * Where the master retains no supervision in regard to it, but provides suitable materials therefor, and intrusts the duty of its construction to skillful workmen, he is not liable to one of the workmen for injuries resulting from the falling of the staging, though insufficiently built. * * * The respondent, through his foreman, Thomas, furnished suitable and adequate materials and competent coservants. He did not undertake to furnish the scaffolding, on which appellant stood when injured, in an adjusted condition. It was usual and customary for the employes, including appellant, while at work on this structure, to construct and adjust staging out of the materials provided by respondent. It is illogical to compare such temporary staging with some machine which is all adjusted, so that its sufficiency can be ascertained before the employe is called upon to use it. We think that the action at bar falls within the rule announced in the above authorities, that, where competent men are employed to do some work on a structure upon which scaffolding, or some other appliance to support the workmen, is required, 'the employer to furnish the materials, and the employed to construct or adjust the scaffolding or other appliance, the employer is not liable to one of the employes for the careless act of another employe done in the construction, adjustment, or maintenance of the structure or appliance.'" In *Cheatham v. Hogan*, 50 Wash. 465, 97 Pac. 499, 22 L. R. A. (N. S.) 951, the scaffold which had been originally erected by certain employes for their use in finishing a portion of the building was afterwards adopted and used for other purposes by the owner whose foreman directed the plaintiff to go upon it. An examination of the facts involved in the *Cheatham Case* will show that they materially differ from those of the *Metzler Case* or the one now be-

fore us. In the Cheatham Case, referring to the Metzler Case, we said: "But, while this case decides the law correctly on the facts shown, we think it has no bearing on a case like the one at bar. The rule undoubtedly is that a master who retains no supervision over the erection of a scaffold, and gives no direction in regard to it further than to direct that it be constructed, and provides suitable materials for its construction and intrusts the duty to skillful workmen, is not liable to one of the workmen who is injured by the falling of the scaffold because of insufficient construction—this on the principle that the master is not responsible to the workmen who construct the scaffold nor to one who is engaged in a common employment with them in such a way as to be regarded as their fellow servant for the sufficiency of their own work. But the rule has no application to a servant who did not construct the scaffold, and who is not a fellow servant of the servant who did construct it."

The undisputed evidence now before us shows that the appellant, with the carpenters who built the scaffold, was engaged in such a way as to be regarded as their fellow servant, although he, like the plaintiff in the Metzler Case, was not present when and where the scaffold was built. In Cleary v. General Contracting Company, 53 Wash. 254, 101 Pac. 888, the doctrine of the Metzler Case was held inapplicable, when the injured plaintiff was a subcontractor for whose use the scaffold had been furnished by the defendant corporation which had agreed as a part of the contract of employment to construct and furnish a safe scaffold for the plaintiff's use. There is an utter absence of evidence here showing or tending to show any negligence on the part of the respondent in failing to discharge any duty which it owed the appellant.

The judgment is affirmed.

RUDKIN, O. J., and MOUNT, PARKER, and DUNBAR, JJ., concur.

(53 Wash. 697)

LOHMAN v. CLAUSSEN et al.

(Supreme Court of Washington. May 11, 1910.)

En banc. On petition for rehearing. Denied.

For former opinion, see 104 Pac. 624.

PER CURIAM. Learned counsel for appellant, in his petition for rehearing en banc in this case, proceeds upon the theory that the judgment appealed from, and affirmed by our decision of October 29, 1909, was a personal judgment against Henry Lohman, and that we have overlooked this fact. In our former decision it was stated that the judgment appealed from was rendered against appellant as administrator. In order that

there may be no doubt remaining upon this question, we quote from the language of the judgment as shown by the record before us, which is: "That judgment issue against Henry Lohman, as administrator of the estate of Mary A. Lohman, deceased, in the sum of \$500, in favor of Henry Claussen, receiver."

Learned counsel's argument is in substance that, since Henry Lohman individually was not a party to the action, therefore judgment for the receiver's compensation could not be thus rendered against him in the action; but, since the record plainly shows that the judgment was rendered against him in the same representative capacity in which he appeared as plaintiff in the action, it is plain that the record furnishes no basis for counsel's argument.

Rehearing is therefore denied.

(58 Wash. 307)

Y. M. C. A. OF NORTH YAKIMA v. GIBSON et al.

(Supreme Court of Washington. May 11, 1910.)

1. PRINCIPAL AND SURETY (§ 118*) — DISCHARGE OF SURETY—ACTS CONSTITUTING.

Where an owner who contracted with a firm for the construction of a building, and obtained from the firm a bond for the performance of the contract, received notice of the dissolution of the firm prior to its abandonment of the work, and thereafter addressed a letter to one of the partners individually, and issued to him a check, without naming or referring to the firm, without intending to release any party to the contract, there was no release by the owner of the copartner, or acquiescence in his release by his partner, so that the surety was not relieved from liability on the ground that the owner released one of the parties to the contract.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 287; Dec. Dig. § 118*.]

2. PRINCIPAL AND SURETY (§ 117*) — DISCHARGE OF SURETY—PAYMENT TO PRINCIPAL—BUILDING CONTRACTS—CONSTRUCTION.

Where a building contract stipulated for payment as the work progressed on the certificate of the superintendent of the work as the representative of the owner, the superintendent, though nominally and in fact the agent of the owner, was the agent of all parties concerned to furnish estimates, and payment by the owner to the contractor on the certificates in good faith and without fraud did not release from liability the surety of the contractor though the superintendent did not perform his duties, but permitted the contractor to prepare estimates, or prepared estimates largely from the books of the contractor, and included therein the value of material on the ground, but not used in the building, so that the estimates were too high.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 117*.]

3. CONTRACTS (§ 198*)—BUILDING CONTRACTS—CONSTRUCTION—"SUBCONTRACTOR."

A building contract requiring the contractor to file receipts with the superintendent and owner showing that each subcontractor had been paid in full to the amount of the estimates, as per the certificate of the previous month, etc., does not require the superintendent or the owner to exact receipts for all claims for labor and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

material, a subcontractor being one who takes from the principal contractor a specific part of the work, and does not include laborers or materialmen.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 198.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6704, 6705; vol. 8, p. 7806.]

4. PRINCIPAL AND SURETY (§ 129*)—DISCHARGE OF SURETY—BUILDING CONTRACTS—CONSTRUCTION.

Where a bond for the performance of a building contract by the contractor reserved to the surety the right to complete the building in case of an abandonment by the contractor, and the surety waived such right after abandonment on condition that the contract for completing the building should be let to the lowest of three bidders who should give a bond for the faithful performance of the contract, and the building on the abandonment of the contractor was completed under a special contract let to the lowest of three bidders, the provision in the original contract for auditing the expense of completion did not apply to the special contract.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 129.*]

5. APPEAL AND ERROR (§ 843*)—QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.

Where, in an action on a building contractor's bond, valid claims against the surety exceeded the penalty of the bond, the question of the validity of another claim was immaterial on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 843.*]

6. PRINCIPAL AND SURETY (§ 38*)—DISCHARGE OF SURETY—GROUNDS.

The surety of a firm of building contractors cannot escape liability on a bond for performance of a contract by the firm for the construction of a building for \$37,994 on the ground that the owner should not have let the contract to a firm which had undertaken contracts to the amount of \$200,000 on a capital of only \$400.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 38.*]

Department 2. Appeal from Superior Court, Yakima County; E. B. Preble, Judge.

Action by the Young Men's Christian Association of North Yakima against James Gibson and another, copartners as Gibson & Smith, James Gibson as successor of Gibson & Smith, and another. From a judgment for defendants, plaintiff appeals. Reversed, with directions.

Englehart & Rigg, for appellant. Wende & Taylor and Peters & Powell, for respondents.

RUDKIN, C. J. On the 13th day of February, 1907, the Young Men's Christian Association of North Yakima, a corporation, organized and existing under the laws of this state, entered into a contract with Gibson & Smith, a copartnership, for the construction of a stone building on certain lots owned by the association in the city of North Yakima. The contract called for the completion of the building on or before the 15th day of October, 1907, for a consideration of \$36,794. A further consideration of \$1,200 was subsequently agreed upon to cov-

er certain changes in the plans and specifications, making the total contract price \$37,994. The only provisions of the contract and specifications deemed material on this appeal are the following: "The construction of the entire work will be supervised by a superintendent, who shall be the authorized representative of the building committee.

* * * Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect, or failure being certified by the superintendent, the owner shall be at liberty, after two days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and, if the superintendent shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work, and to enter upon the premises and to take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and, in case of such discontinuance of the employment of the contractor, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but, if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the superintendent, whose certificate thereof shall be conclusive upon the parties. * * * Between the 1st and 10th of each month during the progress of the work, the building committee will pay to the contractor a sum equal to 80 per cent. of the value of the work done and materials used in the construction of the building during the previous month as assessed by the superintendent, and the balance thirty days after the completion of the work herein included, or a certain number of payments as may be agreed upon, each of said payments to be made on the certificate of the superintendent, signed by him, setting forth the amounts estimated for each part of the work, and that the payment is properly due. Said

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

certificate, however, is in no way to lessen the final responsibility of the contractor, nor to exempt him from liability to make good any work or materials afterward found to be defective. * * * After the first certificate is given by the superintendent, no further certificate will be issued until the contractor files receipts with the superintendent and building committee showing that each and every subcontractor has been paid in full to the amount of the estimate as per the certificate of the previous month. Said receipts shall remain in possession of the building committee or its appointed representative as the property of the building committee. * * * The work herein included shall be commenced as soon as practicable after the contract is signed and the bids accepted, and shall be finished, complete in every detail and ready for acceptance on or before October 15, 1907; or, in case of failure on the part of the contractor so to do, he shall forfeit the amount of \$20.00 per day for each and every day following said date until said completion, said amount to be retained by the association as agreed and liquidated damages, and in full compensation for all damage by the association sustained on account of the failure of the contractor to perform his contract within the time in said contract specified." On the 16th day of February, 1907, the defendant the Aetna Indemnity Company, a corporation, executed and delivered to the association a bond, in the penal sum of \$10,000, conditioned for the faithful performance of the foregoing contract, subject to the following conditions: "If the said principals shall voluntarily abandon said contract, or be lawfully compelled by the obligee to cease operations thereunder by reason of their nonperformance of any of its terms or conditions, then the surety shall have the right, in its option, to assume the said contract and to sublet or complete the same, and, if said contract shall be assumed by the surety, then, as such contract is duly performed, any reserve, deferred payments, and all other moneys provided by said contract to be paid to the principals shall be paid to the surety at the same time and under the same conditions as by the terms hereof such moneys would have been paid to the principals had the contract been duly performed by them. And, if said obligee shall complete or relet the said contract, then any forfeitures provided in said contract against the principals shall not be operative as against the surety, but all reserves, deferred payments, and all other moneys provided in said contract which would have been paid to the principals had they completed the contract in accordance with the terms shall be credited upon any claim the said obligee may make upon said surety. * * * The said obligee shall retain the last payment and reserve due said principals until the complete performance by said principals of all the terms, covenants,

and conditions of the contract on said principals' part to be performed and until the expiration of the time within which liens or notices of liens may be filed, by reason of anything done in or towards the performance of said contract, and until the cancellation and discharge of such liens, if any, and said surety shall be notified in writing before said last payment shall be made or said reserve paid. * * * If any suits at law or proceedings in equity are brought against said surety to recover any claim hereunder, the same must be instituted within six months after the completion of the work specified in said contract." Construction work commenced under the contract soon after its execution, and continued until on or about the 15th day of November, 1907, at which time the contractors abandoned the contract and refused to complete the building. Between the commencement of work and the abandonment of the contract the association paid to the contractors the sum of \$30,635 on monthly estimates certified or O. K'd by the superintendent in charge of the work. In addition to the amount paid to the contractors, the association was compelled to and did pay the sum of \$7,393.72 to satisfy and release certain judgments, liens, and lienable claims against the property, and the further sum of \$11,506.44 to complete the building, making the total cost of the building to the association the sum of \$49,535.16, or \$11,531.36 in excess of the contract price. The present action was instituted against the contractors and the indemnity company, to recover the last-mentioned sum, together with the sum of \$4,820 for 241 days' delay in the final completion of the building. Judgment by default was taken against the contractors, and, from a judgment in favor of the indemnity company after trial, the association has appealed.

The amount paid by the appellant to secure a completion of the building according to the terms and conditions of the building contract is not challenged, and we will therefore direct our attention to the different defenses interposed and urged by the respondent.

The answer alleged affirmatively: (1) That the action was not commenced within six months after the completion of the work specified in the contract; and (2) that the defendant Smith withdrew from the contract and released all his rights and interest therein to the defendant Gibson, and that the appellant and the defendant Gibson released the defendant Smith from all liability under the contract without the knowledge or consent of the respondent. These defenses are not sustained by the testimony. The action was commenced well within six months after the final completion of the building, and there is no competent proof tending to show that the appellant released, or assented to, or acquiesced in, the release of any party to the contract. There is testimony tending

to show that the copartnership existing between Gibson and Smith was dissolved by mutual consent about two weeks before the abandonment of the contract, and that the appellant had notice of such dissolution from newspaper reports and otherwise. It further appears that one letter was addressed to the defendant Gibson individually by the chairman of the building committee, and one check issued to him individually after the dissolution, without naming or referring to the copartnership. But the appellant could not prevent a dissolution of the partnership or a release of one member of the firm by the other, nor could it prevent either of the parties to the contract from carrying out the contract and completing the building. The writing of this letter and the giving of the check did not constitute a release of one of the partners, or an acquiescence in his release by the other partner, in the face of testimony on the part of the appellant that it did not, and did not intend to, release any party to the contract. There was no testimony to the contrary.

It is next contended that the appellant paid moneys to the contractors without requiring them to produce certificates from the superintendent as required by the building contract and specifications. Before each payment was made a certificate in substantially the following form was presented to the building committee:

"North Yakima, Wash., 1907.

"Estimates of material and labor used on the Y. M. C. A. Building during the month of ———, 1907.

Pay roll.....	\$3,029 00
Brick	900 00
Lime	125 00
Sand	150 00
Lumber	250 00
Blacksmithing	27 00
Back on labor from last estimate...	1,626 00

Total	\$6,107 00
\$6,107.00 less 20 per cent.	\$6,107 00
20 per cent....	1,221 40

\$1,221.40 Amount due \$4,885 60

"O. K.—H. W. Hughes, Supt.

"O. K.—B. F. Barge, Chairman.

"Gibson & Smith."

The sufficiency of these certificates is challenged, and it must be confessed that the superintendent was extremely lax in the discharge of his duties. One at least of the estimates was prepared by the contractors, and the others were taken largely, if not wholly, from the contractors' books. It further appears that the estimates in some cases, if not in all, included the value of material on the ground and not used in the building, and that the estimates were too high. If this were an action by the contractors to recover the amount of one or more of these estimates, it may well be that the property owner would not be bound by estimates thus

made or obtained. *Ilse v. Aetna Indemnity Co.*, 104 Pac. 787. But these estimates were merely the bases of partial payments under the contract, and were not intended to be either final or absolutely correct. Had the appellant refused to make payments on such estimates, a release of the surety would doubtless be urged on that ground. While the superintendent was nominally and in fact the agent of the building committee under the provisions of the building contract, he was the agent of all parties concerned for the purpose of furnishing these estimates and, the appellant having acted upon them in good faith and without fraud, we have no hesitation in saying that its conduct in that behalf did not release the surety.

It is next contended that payments were made by the appellant without requiring the contractors to produce receipts showing that all claims for labor and material for the previous month had been paid. If such were the agreement of the parties, the question thus presented is not free from difficulty, but we do not so read their contract. The provision above quoted from the specifications requires the contractors to file receipts with the superintendent and building committee showing that each and every subcontractor had been paid in full to the amount of the estimates, as per the certificate of the previous month. This did not require the superintendent or committee to exact receipts for all claims for labor and material. The term "subcontractor" has a well-defined meaning in building contracts, and the word was doubtless used here in its technical sense. A subcontractor is one who takes from the principal contractor a specific part of the work, and the term does not include laborers or materialmen. *Farmers' Loan & Trust Co. v. Canada & St. Louis Ry. Co.*, 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740. The testimony is indefinite as to what if any part of the work was done by subcontract, but there is no testimony in the record tending to show that any claims were paid without the production of the requisite receipts from subcontractors.

It is next contended that the superintendent did not audit or certify to the cost of completing the building after the abandonment by the contractors prior to the commencement of the present action. There would be force in this contention if the building was completed by the owner after the abandonment under the terms of the original building contract, but the respondent reserved the right to complete the building itself under the terms of its bond in case of an abandonment by the original contractors, and waived that right after such abandonment on condition that the contract for completing the building should be let to the lowest of three bidders who should give a bond for the faithful performance of the contract. The building was completed under this special contract, and the contract as let fixed the cost of

the work. There was no claim to audit under such circumstances and the provision for auditing in the original contract has no application.

It is further contended that the claim for demurrage should have been audited and certified by the superintendent, and this is perhaps true; but, inasmuch as other valid claims exceed the penalty of the bond, a discussion of that question would serve no purpose. Other questions are discussed in the briefs, but they require no special consideration. The respondent is disposed to criticize the appellant for letting the contract to a copartnership that had undertaken contracts to the amount of \$200,000 on a capital of \$400, but it seems to us that that question concerned the surety more than the owner. The surety is the party who guaranteed the faithful performance of the contract, although it seems to have lost sight of that fact, and is now seeking to satisfy the obligation of its bond by showing slight irregularities on the part of the owner, rather than performance of the contract by the principals. On the entire record we are convinced that no substantial or meritorious defense to the action exists, and the judgment is accordingly reversed, with directions to enter judgment in favor of the appellant and against the respondent for the full penalty of the bond, with interest from date of the commencement of the action.

CROW, DUNBAR, PARKER, and MOUNT, JJ., concur.

(58 Wash. 332)

FIREMAN'S FUND INS. CO. v. OREGON R. & NAVIGATION CO.

(Supreme Court of Washington. May 13, 1910.)

1. ACTION (§ 53*)—SPLITTING CAUSE OF ACTION.

Plaintiff, owning at the time part only of a cause of action for tort of defendant, commenced an action thereon, and thereafter, as shown by the answer, defendant settled with the one owning the other part of the cause of action. *Held*, that notwithstanding a cause of action may not be split, and separate actions maintained thereon, in the first place there was only a defect of parties plaintiff which could have been cured by omitting the other owner as a plaintiff, and that, defendant having settled with him, plaintiff thereby became the owner of the entire remaining cause of action, and could maintain the action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549-623; Dec. Dig. § 53.*]

2. RAILROADS (§ 484*)—SETTING FIRES—EVIDENCE.

Evidence that it was the custom of defendant railroad company to clean the ashes and cinders from its locomotives on its main track within a few feet of its depot platform; that they had frequently set fire to the cross-ties; that at the time of the burning of the depot, which communicated fire to plaintiff's property, the wind was blowing from the track towards the platform, and that the fire when first seen was in the platform, a few feet from the main

track—is sufficient to take the case to the jury on question of the cause of the fire, notwithstanding a watchman and engine cleaner of defendant testified no engines were cleaned on such track, or near the depot, the day or evening preceding the fire, and a fireman testified engines were not cleaned at that station, the question of credibility and memory of the witnesses being for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1742; Dec. Dig. § 484.*]

Department 1. Appeal from Superior Court, Whitman County; Chester F. Miller, Judge.

Action by the Fireman's Fund Insurance Company against the Oregon Railroad & Navigation Company. Judgment for plaintiff. Defendant appeals. Affirmed.

W. W. Cotton, R. L. McCroskey, and Ralph E. Moody, for appellant. Miles Poin-dexter and O. C. Moore, for respondent.

GOSE, J. One L. M. Lester, the owner of a stock of general merchandise in the town of Winona, insured it with the plaintiff, a corporation engaged in the fire insurance business, in the sum of \$2,000, which was less than its value. On August 3, 1907, the property was totally destroyed by fire which, it is alleged, originated through the negligence of the defendant company. The plaintiff paid Lester the amount of the insurance, and by articles of subrogation took an assignment of his claim against the defendant to the extent of the amount paid. The defendant, at and before the date of the fire, was operating a steam railroad, which passed through the town of Winona, where it owned and maintained a depot, depot platforms, and other buildings. The goods were stored in a frame building near the depot. Winona is situated at the junction of defendant's main line of road, which runs easterly and westerly at that point, and its Pleasant Valley road, which runs northerly. The depot and coalhouse were between the two lines of road and near the switch. The coalhouse was some 50 feet northeast of the depot, and the store about the same distance northwest of the coalhouse. A platform extended around the depot, and within about a foot of the ties of each line of road. About midnight of August 2, 1907, a fire was observed in the depot platform a few feet distant from the main line track on the south side of the depot, which communicated to the depot and coalhouse, and thence to the building containing the stock of merchandise, completely destroying the store and its contents. The case was tried upon the issues in the second amended complaint and the answer. The negligence charged is that, at the time of the fire, the defendant had stored a large quantity of giant powder, with fulminating explosive caps, in the coalhouse; that the fire originated from ashes and cinders containing live em-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

bers, which the defendant had taken from its engines and deposited on the main line track a few feet from the depot platform; that the fire communicated from the platform and depot to the coalhouse, causing the giant powder and caps to explode with such violence as to shatter and destroy the building, throwing firebrands upon, and setting fire to, the store building. It is also alleged that, before the commencement of the action Lester settled with the defendant for the loss he had sustained in excess of the sum paid him by the plaintiff on the policies. A general demurrer to this complaint was overruled. The defendant joined issue on the charges of negligence, admitted that it had settled with Lester, but denied that the settlement was made before the suit was commenced. At the close of the plaintiff's testimony, the defendant challenged its sufficiency, and moved for a dismissal of the case, and at the close of all the evidence it moved for a directed verdict. From a verdict and judgment for \$2,000 in favor of the plaintiff, the defendant has appealed.

The first error suggested is that the respondent did not own the entire cause of action when the suit was commenced; that there was but one wrongful act, and that but one suit can be maintained; that there being no evidence to support the allegation that Lester settled with the appellant before the commencement of the action, there is a failure of proof, and the case should have been withdrawn from the jury at the close of the respondent's testimony. The following authorities are cited in support of this contention: *Continental Ins. Co. v. Loud & Sons Lumber Co.*, 93 Mich. 139, 53 N. W. 394, 32 Am. St. Rep. 494; *Home Mutual Ins. Co. v. O. R. & N. Company*, 20 Or. 569, 26 Pac. 857, 23 Am. St. Rep. 151; *State Ins. Co. v. O. R. & N. Co.*, 20 Or. 563, 26 Pac. 838; *Fireman's Fund v. O. R. & N. Co.*, 45 Or. 53, 76 Pac. 1075, 67 L. R. A. 161; *Wunderlich v. C. & N. W. Ry. Co.*, 93 Wis. 132, 66 N. W. 1144; *Mobile Ins. Co. v. Columbia & Greenville Ry. Co.*, 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725; *Norwich Union Fire Ins. Society v. Standard Oil Company*, 59 Fed. 984, 8 C. C. A. 433; *Watts v. Southern Bell Tel. & Tel. Co. (C. C.)* 66 Fed. 453; *Southern Ry. Co. v. Blunt & Ward (C. C.)* 165 Fed. 258; *Dietz v. Winehill*, 6 Wash. 109, 32 Pac. 1066; *German Fire Ins. Co. v. Bullene*, 51 Kan. 764, 33 Pac. 467. We think the point is not well taken. As we have seen, the answer admits that the appellant has settled with Lester. When that fact was disclosed it was apparent that the respondent owned the entire cause of action. It is therefore not material whether the settlement occurred before or after the action was commenced. The appellant argues that, when the complaint discloses that all the parties in interest have not united as plaintiffs, a cause of action is not stated. We think it would present a case of a defect

of parties plaintiff. If the appellant's view is correct, in the absence of evidence that the settlement was made with Lester before the action was commenced, it was the duty of the court to withdraw the case from the jury; for it is fundamental that, where a cause of action does not exist when the action is commenced, but arises thereafter, that fact cannot be shown, either by amended or supplemental pleading. The office of an amended complaint is to correctly state a cause of action that existed when the action was commenced, and the office of a supplemental complaint is to state a breach of a legal right connected with the subject of the action, and arising after the action was commenced. The record presents a case where the owner of a part of the cause of action became the sole owner during the pendency of the action, by the voluntary act of the co-owner and the party against whom the cause of action was asserted. The cases cited by the appellant all state the rule that a claim or demand arising out of a single transaction, whether resting in contract or tort, cannot be divided into separate and distinct claims, so that separate and independent actions can be waged upon the several parts. The reason for the rule is that a party against whom there exists but one liability cannot be vexed by a multiplicity of suits by the same or different parties for the breach of a single duty. Stated in another form, a party cannot be permitted, even in a tort, to split a cause of action and bring separate actions for a part of the claim, or several actions where one would suffice. The complaint discloses but one wrongful act, causing but one loss, creating but one liability, and the record shows that the respondent is the entire owner of that liability.

In most of the cases cited the record discloses that others who were not parties still owned an interest in the cause of action. None of the cases cited present the precise question before us. In *German Fire Ins. Co. v. Bullene*, the court remarked: "If we could say from the record brought here that this case alone was pending against the insurance company, and that all of the parties in any manner interested in the policy were before the court, so that the rights of each and all of them could be fully determined, it might be that the plaintiff's judgment could be upheld." At any time before Lester settled he could have been united as a plaintiff, and all the parties in interest would have been before the court. The same thing was accomplished when he settled with the appellant. To hold that his settlement defeated the right of the respondent to proceed with the case would be sacrificing substance to form. The cause of action was not then split, but was in the respondent in its entirety. *Davis v. Seattle*, 37 Wash. 223, 79 Pac. 784, is in point. In that case a married woman commenced an action in her own name to recover for personal injuries. The origi-

nal complaint did not disclose that she was a married woman, but that fact appeared from her evidence. At the close of her testimony, the adverse party moved for a judgment on the ground that the husband was a necessary party. She was then permitted to amend her complaint and unite her husband as a party plaintiff. On appeal this was urged as error, and it was contended that she had no cause of action, and that she could not amend and make her husband, the party having the cause of action, a party plaintiff after the submission of all her evidence. It was held that the wife suing alone could not recover, but that it was not error to permit the amendment.

The respondent offered testimony tending to show that it was the custom of the appellant to clean the ashes and cinders from the engine on the main line track, south and southwest of the depot and within a few feet of the platform, and to permit them to remain there; that they had frequently set fire to the cross-ties; that the wind was blowing from the southwest at the time of the fire; and that the fire when first observed was in the platform on the south side of the depot a few feet from the main line track. A Mr. Broyles, a watchman and engine cleaner in the employ of the appellant at Winona, testified that no engines were cleaned on the main line or near the depot during the day or evening preceding the fire; and a Mr. Ely, a fireman on the main line, testified that engines were not cleaned at Winona. The appellant's second contention is that the presumption arising from the evidence of appellant's custom of cleaning its engines, and the occurrence of other fires at that point, was overcome by its direct evidence, and that it was error for the court to submit that issue to the jury. We think the point is without merit. If the respondent's evidence is true, the appellant had many times been guilty of the grossest negligence. The question of the veracity and credibility of the appellant's witnesses was one of fact for the jury to determine. It might properly have concluded that, in view of the appellant's past conduct, the course of the wind, and the location of the fire when first observed, the memory of the appellant's witnesses was defective, or they did not truthfully relate the facts. The fire occurred, as we have stated, in August, 1907. The trial was had in December, 1908. The jury was the tribunal designated by the Constitution to try the facts. The circumstances related by the appellant's witnesses were of sufficient cogency to carry the case to the jury upon this issue. *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801; *McCullen v. Chicago & N. Y. Ry. Co.*, 101 Fed. 66, 41 C. C. A. 365, 49 L. R. A. 642. The authorities cited by the appellant are spark cases, and are so

different upon the facts that they are not in point.

The learned trial court correctly instructed the jury upon the law applicable to the case. Finding the record free from error, the judgment is affirmed.

RUDKIN, C. J., and FULLERTON and MORRIS, JJ., concur. CHADWICK, J., took no part.

(58 Wash. 302)

MORRISON et al. v. BERNOT.

(Supreme Court of Washington. May 10, 1910.)

1. SET-OFF AND COUNTERCLAIM (§ 29*) — GROUND OF REMEDY—ACTIONS IN WHICH REMEDIES AVAILABLE—ACTIONS FOR INJUNCTION—SET-OFF FOR DAMAGES.

Under Ballinger's Ann. Codes & St. § 4913 (Pierce's Code, § 390), requiring a counterclaim to arise out of a cause of action arising from the transaction alleged in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action, in a suit to enjoin defendant from filling a ditch across his land, which was constructed by plaintiff to drain a lake owned by him, a cause of action for damages to defendant's land from the ditch was not a proper counterclaim.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 49-51; Dec. Dig. § 29.*]

2. APPEAL AND ERROR (§ 165*)—RIGHT OF REVIEW—ESTOPPEL.

Where, after dismissal of a suit over defendant's objection, defendant brought an independent suit on the cause of action set up in his counterclaim, he is estopped from appealing from the judgment of dismissal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 998; Dec. Dig. § 165.*]

3. APPEAL AND ERROR (§ 100*)—DENIAL OF TEMPORARY INJUNCTION—RIGHT OF APPEAL—INSOLVENCY—NECESSITY.

Under Ballinger's Ann. Codes & St. § 6500, subd. 3, prohibiting an appeal from an order denying a temporary injunction unless the superior court judge found that the person enjoined was insolvent, an appeal from an order denying a motion for temporary injunction will be dismissed, where there was no finding of insolvency.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 100.*]

4. APPEAL AND ERROR (§ 169*)—PRESENTATION BELOW—NECESSITY.

Questions not considered by the trial court cannot be reviewed by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.*]

5. APPEAL AND ERROR (§ 102*)—DECISIONS APPEALABLE—RULINGS ON DEMURRER.

An order overruling a demurrer is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 688-698; Dec. Dig. § 102.*]

Department 1. Appeal from Superior Court, Spokane County; J. D. Hinkle and E. H. Sullivan, Judges.

Action by Peter Morrison and others against John Bernot, in which defendant filed a cross-complaint for an injunction, and, after

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the dismissal of the original action, brought a separate suit for injunction. From the judgment dismissing the original action and the order denying a temporary injunction in the second action, defendant appeals, and the appeals were consolidated. Appeals dismissed.

Jones & Salisbury, for appellant. R. M. Barnhart and Fred C. Pugh, for respondents.

RUDKIN, C. J. Many years ago Peter Morrison and others owning lands along the shore of Saltese Lake, in Spokane county, and claiming title to the bed of the lake by virtue of their upland ownership, constructed a drainage ditch from the foot of the lake across certain lands now owned by John Bernot. Before the commencement of the two actions hereinafter mentioned, Bernot threatened to fill in the ditch to protect his lands from erosion and other injuries caused by its construction and maintenance. Morrison and others thereupon commenced an action in the superior court of Spokane county against Bernot to restrain such threatened action on his part. The defendant Bernot by answer and cross-complaint alleged that he had made a valid appropriation of the waters of the lake for irrigation and other purposes; that he proposed to fill in the ditch and dam the foot of the lake to retain the waters therein for the purposes aforesaid; that his lands were damaged by the past maintenance of the ditch, and prayed for injunctive relief restraining the plaintiffs from interfering with him in the prosecution of his enterprise, and for damages for past injuries. The allegations of the answer and cross-complaint were put in issue by reply. Thereafter the court dismissed the action on motion of the plaintiffs, without trial, and against the objection and protest of the defendant. Upon the dismissal of this action, the defendant Bernot commenced a second action against the plaintiffs in the first-mentioned action for injunctive relief. The complaint in the second action was almost identical with the cross-complaint in the first action, except the latter complaint omitted any claim for damages. An application for a temporary injunction in the second action was refused, and appeals have been prosecuted by Bernot from the judgment of dismissal in the first action, and from the order denying the motion for a temporary restraining order in the second action. The two appeals were consolidated and presented to this court on the same briefs and arguments. Important questions of practice and substantive law have been ably presented in the briefs and on the oral argument, but for reasons to be presently stated many of these questions are not properly before us for review.

The first error assigned is based on the dismissal of the first action. Section 4912, Ballinger's Ann. Codes & St. (Pierce's Code, § 79), provides that the answer of the defend-

ant must contain among other things, "(2) a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition." The next section defines a counterclaim as follows: "The counterclaim mentioned in the preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action." Section 5085, Ballinger's Ann. Codes & St. (Pierce's Code, § 727), provides that an action may be dismissed or a judgment of nonsuit entered: "(1) By the plaintiff himself, at any time before the jury retire to consider their verdict unless set-off be interposed as a defense, or unless the defendant sets up a counterclaim to the specific property or thing which is the subject-matter of the action." Under these several sections the appellant contends that his answer set up a counterclaim to the specific property or thing which was the subject-matter of the action, and that it was error to dismiss the first action without his consent. The respondents, on the other hand, contend that the answer contained neither a set-off nor a counterclaim. The claim for damages set forth in the cross-complaint, if treated as an independent cause of action in favor of the appellant, was not a proper counterclaim in an action for injunctive relief, but the claim for damages was a mere incident to the other relief sought, and need not be further considered. Omitting the claim for damages as an independent cause of action, as we must, the cause of action set forth in the counterclaim or cross-complaint and the cause of action set forth in the complaint in the second action are identical, and the commencement of the second action was a clear waiver of any error in the dismissal of the first. In other words, the dismissal of the complaint in the first action carried with it the cross-complaint or counterclaim, and the appellant was at liberty to prosecute an appeal from the judgment of dismissal, or to prosecute a new action for the same cause, but manifestly he could not do both, for the rule is well established that, if a party after judgment against him, prosecutes another action based upon the same cause, he thereby estops himself to appeal from the first judgment or bring error to review it. Carr v. Casey, 20 Ill. 637; Gordon v. Ellison, 9 Iowa, 317, 74 Am. Dec. 353; Liebuck v. Stahle, 66 Iowa, 749, 24 N. W. 562; Ehrman v. Astoria R. Co., 26 Or. 377, 38 Pac. 306. Inasmuch as the appellant has waived his right of appeal from the first judgment, or is estopped to fur-

ther prosecute it, such appeal must be dismissed.

The second appeal is from an order denying a motion for a temporary injunction. Subdivision 3, § 6500, Ballinger's Ann. Codes & St., provides: "That no appeal shall be allowed from any order denying a motion for a temporary injunction or vacating a temporary injunction, unless the judge of the superior court shall have found upon the hearing, that the party against whom the injunction was sought was insolvent." There was no finding of insolvency in this case, and therefore the second appeal must also be dismissed. Nearly the entire argument before this court was addressed to the merits of the respective actions, and more especially to the title of the respondents to the bed of the lake, but these questions were not passed upon by the court below, and cannot properly be passed upon by this court on appeal. It may be that the merits of the case were in a measure considered by the trial court on the hearing of the demurrer to the complaint and answer in the first action, but, if so, the order overruling the demurrer is not appealable, and the merits of the case could not have been considered on the hearing of the motion to dismiss.

The questions which the appellant has presented on this appeal can only be considered by this court after the court below has disposed of them on the final hearing of the second action. For the reasons stated, the two appeals must be dismissed, and it is so ordered.

GOSE, FULLERTON, CHADWICK, and MORRIS, JJ., concur.

(58 Wash. 316)

TSMURA v. GREAT NORTHERN RY. CO.
(Supreme Court of Washington. May 11, 1910.)
MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—LIABILITY—STATUTES.

An employé of a railroad who seeks to avail himself of Act Cong., April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1172), making railroads, while engaging in interstate or foreign commerce, liable for injuries to employes, has the burden of showing that his duties while an employé directly pertained to interstate or foreign commerce, and an employé of a railroad engaging in interstate commerce, who shows that he was injured while loading rails on a flat car in consequence of the negligence of fellow servants, but who does not show whether the rails were old or new, where they came from, where they were to be taken, or where the car was to go when loaded, is not entitled to the benefits of the act.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 265.*]

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Jyntaro Tsmura against the Great Northern Railway Company. From a

judgment for plaintiff, defendant appeals. Reversed and remanded.

F. V. Brown and A. J. Laughon, for appellant. McWilliams & McWilliams, for respondent.

CROW, J. Action by Jyntaro Tsmura against the Great Northern Railway Company, a corporation, to recover damages for personal injuries. From a judgment in his favor, the defendant has appealed.

The appellant contends that the trial court erred in overruling its demurrer to the complaint, its objection to the introduction of evidence, its challenge to the sufficiency of the evidence, and its motion for a directed verdict. Respondent, in substance, alleged that the appellant is a duly organized railway corporation, organized under the laws of the state of Minnesota, doing business as a common carrier by railroad in that state and in the states of Washington and Montana; that the respondent was employed by the appellant at an agreed wage or hire in the capacity of a common laborer in the state of Montana; that on July 6, 1908, the respondent, while so employed, was engaged in the work of repairing appellant's main track and replacing rails thereon, and was directed by appellant's assistant roadmaster and assistant foreman to aid in loading on a flat car a number of rails which lay opposite appellant's railway track and which had been used in repairing the track; that, while respondent and his co-employees were engaged in raising one of the rails from the ground and placing it on the car, certain of such co-employees, at the further end of the rail, suddenly, violently, and without due care, threw their end of the rail on the car in such a manner as to injure the respondent; that the co-employees whose negligence is complained of were common laborers engaged in the same capacity as respondent in constructing and repairing appellant's railway track and loading the rails; that by an act of Congress passed in the year 1908, and approved April 22, 1908 (Act Feb. 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1172]), entitled "An act relating to the liability of common carriers by railroad to their employes in certain cases," under the provisions of which act this case is brought, it was enacted as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her per-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sonal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then to the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employé or where such injuries have resulted in his death that fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé; provided, that no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employé."

The appellant pleaded the defenses of negligence of fellow servants, contributory negligence, and assumption of risk. From these pleadings it is manifest that the respondent predicates his right of action on the act of Congress approved April 22, 1908. The appellant contends: (1) That the act is unconstitutional and void; (2) that, if it be held constitutional, its provisions are not applicable to the facts of this case, it not appearing that the respondent when injured was engaged in interstate commerce. In the *Employer's Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, the Supreme Court of the United States held the act of Congress approved June 11, 1906 (Act June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1909, p. 1148]), known as the "employer's liability act," to be unconstitutional and void, for the reason that, while it was addressed to all common carriers engaged in interstate commerce, and imposed upon them a liability to their servants for damages for personal injuries sustained through the negligence of fellow servants, it did so without qualification or restriction as to the nature of the employment in which the servants were actually engaged at the time of the injury, and that it extended such liability in favor of all servants, whether their employment did or did not pertain to interstate commerce. In other words, the law was held invalid for the reason that it was too broad in its scope, in that it dealt with and regulated the liability of a master to all servants without regard to the fact that many of them might be engaged in the discharge of duties which constituted no part of, or had no connection with, interstate

commerce. The later act, approved April 22, 1908, was drawn and enacted for the express purpose of avoiding these defects, and it is manifest that Congress intended to make it applicable only to a servant who might at the time of his injuries be engaged in the performance of duties directly pertaining to interstate commerce, or, in the words of the act itself, "while he is employed by such carrier in such commerce." We do not think we are called upon to pass upon the constitutionality of the latter act, as in our opinion it cannot in any event be held applicable to the facts before us, and it is only necessary for us to pass upon appellant's second contention.

Assuming that the second act approved April 22, 1908, is constitutional, do its provisions apply to the facts of this case? The evidence shows that the respondent with a number of his fellow servants was engaged in loading rails on a flat car; that it was the duty of all these servants to throw the rail on the car at a given signal; that respondent's fellow servants negligently attempted to throw it before the signal was given, thereby causing his injuries; and that, before loading the rails, respondent and his fellow workmen had been engaged in changing old rails for new rails on appellant's main line. There is no evidence of negligence on the part of the appellant or any of its servants, other than respondent's fellow servants engaged in the same work with him. It is not shown whether the rails were old or new, where they came from, where they were to be taken, or where the car was to go when loaded. The respondent's theory seems to be that, because the appellant was authorized to, and did at times, engage in interstate commerce, and because the respondent was employed in loading a flat car with rails which had been used or were to be used in the repair of its roadbed in the state of Montana, he was necessarily engaged in interstate commerce within the meaning of the act. We cannot assume that every employé of appellant, by reason of his employment, is so engaged. Appellant may have thousands of employes whose duties do not partake of that character. If the act in question is constitutional, it is so because it applies only to servants engaged in interstate commerce. If it is broad enough to include this case in its provisions, it is in our opinion open to the same objections which rendered the earlier act unconstitutional. If respondent is to avail himself of its benefits, the burden devolves upon him to show that the duties which he was performing while an employé of the appellant were of a character that directly pertained to and were a part of interstate commerce. No such showing was made, and appellant's motion for a directed verdict should have been sustained.

The judgment is reversed, and the cause remanded, with instructions to dismiss the action.

RUDKIN, C. J., and MOUNT and PARKER, JJ., concur.

(56 Or. 376)

WHITE v. PRICE.

(Supreme Court of Oregon. May 17, 1910.)

1. CONTRACTS (§ 280*)—PERFORMANCE—SUFFICIENCY.

Where defendant agreed to pay plaintiff a certain sum for procuring relinquishment of a claim of a homestead, so that his son might enter on it, on condition that no contest were filed before a certain date, and such contest was filed, no recovery could be had of defendant on the agreement, though the withdrawal of the contest was procured, and though the son entered on the land and might be liable for the reasonable value of the services.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 280.*]

2. COSTS (§ 60*)—APPORTIONMENT—DISMISSAL OF CAUSE.

On a decree dismissing plaintiff's suit on defendant's contract to pay for procuring relinquishment of a claim of homestead so that defendant's son might enter thereon, on condition that no contest were filed before a certain date, such a contest having been filed but withdrawn and the son having entered the land, each party must bear his own costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 261-271; Dec. Dig. § 60.*]

Appeal from Circuit Court, Marion County; William Galloway, Judge.

Action by B. H. White against W. C. Price and another. From a judgment for plaintiff, defendant Price appeals. Reversed and decree entered dismissing suit.

The complaint in this case alleges: "That on or about the 6th day of April, 1908, plaintiff and defendant W. C. Price, entered into an oral agreement and contract wherein and whereby it was agreed by and between plaintiff and said defendant Price that if the plaintiff would induce and secure one George H. Palmer to relinquish to the government of the United States a certain homestead right held by said George H. Palmer on the S. W. ¼ of section 9, township 5 N., range 4 W., Canyon county, state of Idaho, and would otherwise assist said defendant Price in securing said tract of land as a homestead to be filed upon, under the general laws of the United States regulating the taking of homesteads, by Austin Price, a son of the defendant W. C. Price, upon said services being rendered, the said defendant W. C. Price would pay to plaintiff the sum of \$600 for such services. That in pursuance of said agreement said defendant W. C. Price deposited the sum of \$600 with the said defendant National Bank as security for the performance of said agreement on the part of said defendant W. C. Price, with the agreement and understanding that said sum was to be paid over and delivered to plaintiff upon the performance of the agreement aforesaid, and the said defendant National Bank received said sum of \$600 with full notice and knowledge of said agreement by and between plaintiff and defendant W. C. Price, and has ever since and does now retain said sum of \$600 as a special deposit under the terms of said agreement,

and that plaintiff is entitled to be paid out of such sum so deposited. That in pursuance of said agreement, and in pursuance of said sum of \$600 being deposited with said bank as aforesaid, the said plaintiff secured from the said George H. Palmer a relinquishment to said lands, and delivered the same to said defendant W. C. Price, to be returned to the United States Land Office in the state of Idaho, in the district where said lands are situated, and the said defendant W. C. Price duly caused said relinquishment to said lands to be filed in the said land office, and thereupon the said plaintiff under said agreement accompanied said defendant W. C. Price and his said son Austin Price to the state of Idaho, and pointed out to them the said lands, and purchased and bought in a certain contest proceeding, which had been filed against said homestead in the said land office in said district and state of Idaho, and caused the same to be canceled and withdrawn, and otherwise aided and assisted in securing said lands, as a homestead, to be filed upon by said Austin Price, according to said agreement and under and by virtue of the laws of the United States regulating the taking of public lands as a homestead, and that thereupon the said Austin Price, under the direction of said defendant W. C. Price, duly made application to the said land office and duly filed upon said lands, according to said agreement, and under and pursuant to the provisions of the general laws of the United States regulating the taking of homesteads, and is now in the possession of said lands as aforesaid. That plaintiff has fully performed all of the terms and conditions of said agreement upon his part to be performed, and has paid out and expended in acquiring and securing said homestead to said Austin Price under the terms of said agreement the sum of \$370.50 in cash, and, in addition to such expenditure, was absent from his place of business for seven days or thereabouts and suffered great loss and inconvenience on account thereof, and that, by reason of the foregoing, there is now due and owing the plaintiff the said sum of \$600. That after said agreement had been performed by plaintiff as aforesaid, and on or about the — day of April, 1908, the said defendant W. C. Price notified the said defendant bank not to pay over to plaintiff the said sum of \$600, and the said defendant bank ever since has, and does now, refuse to pay over to plaintiff the said sum of \$600 or any part thereof. That said defendant W. C. Price is wholly insolvent and has no property within the state of Oregon subject to execution or out of which said plaintiff could secure his said claim. That plaintiff has no adequate or sufficient remedy at law against the said defendant W. C. Price, and that the said defendant bank threatens to turn over said money to said defendant Price, and that, unless the said defendant bank is immediate-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ly restrained and enjoined by an order of this court from delivering or paying to said defendant W. C. Price said sum of money, that plaintiff will suffer irreparable injury and damage." The complaint concluded with a prayer for an injunction pendente lite, and for a decree against defendant W. C. Price for the sum of \$600 and costs, and an order of the court directing the defendant bank to pay over to plaintiff the sum of \$600. The answer admitted the first paragraph of the complaint, specifically denied the other allegations thereof, and set up fraud and misrepresentation on the part of plaintiff in obtaining the contract, which latter allegations are denied in the reply.

A. O. Condit and Geo. G. Bingham, for appellant. Grant Corby and C. W. Corby, for respondent.

MCBRIDE, J. (after stating the facts as above). Without passing on the various other questions raised on the appeal, we are satisfied that plaintiff is not entitled to relief as against these defendants. The evidence shows conclusively that Austin Price, son of W. C. Price, was desirous of securing a homestead location; that plaintiff informed him that he knew of a claim near Notus, Idaho, which the then occupant would relinquish to him for \$600; that W. C. Price, the father of Austin, agreed to advance the money for that purpose, providing there should be no contest filed by April 9, 1908; and that in pursuance of that agreement he deposited with defendant bank the sum of \$600, which was received and placed in the general funds of the bank, and a cashier's check for the amount placed in the safe in an envelope containing this indorsement, signed by defendant Price: "I, Mr. Price, deposit \$600 with the United States National Bank, to pay for homestead relinquishment #8552, entry of S. W. 4 of section 9 in T. 5 N of range 4 west under sec. 2290. Providing there is no contest filed by Apr. 9, 1908, against said claim. W. C. Price." Defendant and his son, Austin, went to look at the land, and the next day Austin Price, accompanied by plaintiff, went to Boise City, had an attorney prepare his homestead application, and, in company with plaintiff, went to the land office, where the application was sworn to, and, together with the relinquishment, delivered to the register, who then informed them that one Andrews had filed a contest against the claim of Palmer, whose relinquishment they had just filed. Thereupon Price, at the suggestion of plaintiff, demanded the return of the relinquishment and application, which were refused by the register. Price then left the land office, in company with plaintiff, without paying the fees upon his application, and they returned to Middleton, but W. C. Price had gone to Parma. Austin Price followed him to that place, leaving plaintiff at

Middleton. Plaintiff sought Andrews and induced him to withdraw his contest. He then returned to Boise and filed Andrews' relinquishment, and paid the filing fee of \$16 on Austin Price's application, taking the land office's receipt therefor, which he subsequently gave to Austin Price. This was completed on the 9th of April. On the same day plaintiff and Austin Price took the train at Caldwell, and at Parma met W. C. Price, who repudiated the whole transaction. The day before this defendant Price, on being informed by his son of the contest, told him he would not have anything more to do with the matter, and they agreed to drop it. But this was not communicated to plaintiff, although defendant claims he notified him over the phone on the 8th of April that he would have nothing further to do with the matter.

Defendant Price had no interest in the land, and could have none without a violation of the laws of the United States. His position in regard to the matter was analogous to that of surety or guarantor for payment of a sum of money to become due upon a consideration passing from plaintiff to his son. He was entitled to stand upon the strict letter of his contract. If no contest was filed by April 9th, he was required to pay the money. If one was filed by that date, he had a right to refuse to do so. When, on April 8th, he found that a contest had been filed, he was released from liability unless he chose to waive the default, which he certainly did not do. Whether or not Austin Price voluntarily assented to the filing of the application and took possession of the land can make no possible difference, as he was not an agent with authority to bind his father.

There was considerable testimony on the part of the Prices tending to show that plaintiff had taken advantage of their intimate friendship and church relations to deceive them into entering into this contract in the first instance, but this is strenuously denied by plaintiff, and in our view of the case is not necessary to its decision. Whatever remedy plaintiff may have against Austin Price for services rendered in the matter of procuring his homestead he is precluded by the very terms of the deposit from enforcing any claim against the fund so created or against W. C. Price.

Under the circumstances, however, we will not require plaintiff to pay the costs. There will be a decree dismissing this suit; each party bearing his own costs.

(56 Or. 381.)

DECKER v. DECKER.

(Supreme Court of Oregon. May 17, 1910.)
DIVORCE (§ 27*)—GROUNDS—CRUEL AND INHUMAN CONDUCT.

Where a husband, in the presence of his wife and children, applied vile epithets to his wife, and on her showing resentment assaulted

her, and never afterward made any apologies nor expressed any regret for his language or violence, his conduct constitutes a ground for divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 62-83; Dec. Dig. § 27.*]

Appeal from Circuit Court, Baker County; William Smith, Judge.

Suit for divorce by Ida A. Decker against J. F. Decker. From a judgment refusing a divorce, plaintiff appeals. Reversed, and a divorce ordered.

This is a suit for divorce. To the complaint, which charged cruel and inhuman treatment and personal indignities, was interposed a general denial. Upon the trial a stipulation was entered into, providing for the care, custody, and support of the minor children. The evidence showed that defendant, without any cause, called plaintiff a whore, and other vile names, in the presence of their children, and used vile language in regard to her mother, whereupon she struck him a light tap on the cheek with the back of her hand, doing him no injury. Enraged at this, he struck her on the face with his fist, cutting her cheek, and pushed her into another room and choked her until one of his sons pushed him aside. He never afterward made any apologies or expressed any regret for his language or violence. The accusations against plaintiff's chastity were false, and defendant never attempted to justify them, and introduced no testimony to contradict that above recited. The circuit court refused a divorce, and plaintiff appeals.

F. M. Saxton, for appellant.

MCBRIDE, J. (after stating the facts as above). Had defendant expressed any regret for his unmanly and brutal conduct, there might be some ground for concluding that it would not be repeated. A good woman should not be compelled to live with a brute who applies vile epithets to her in the presence of her children, and then beats her for resenting them, especially where he has expressed no regret for his conduct.

The decree of the lower court is reversed, and plaintiff will be granted a divorce, with costs and disbursements. In other respects the decree will follow the stipulation on file.

(41 Mont. 191)

ALYWIN v. MORLEY et al.

(Supreme Court of Montana. April 25, 1910.)

1. CONTRACTS (§ 169*)—CONSTRUCTION—INTENTION OF PARTIES.

The court in construing an ambiguous and uncertain contract must place itself as near as may be in the situation of the parties at the time of the making of the contract, and construe it in the light of the surrounding facts bearing on the transaction.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 752; Dec. Dig. § 169.*]

2. PARTNERSHIP (§ 52*)—EVIDENCE—SUFFICIENCY.

Evidence held to warrant construction of a contract that one of the parties, in consideration of an advance of money, was to have a quarter interest in the venture, and not merely to receive one-fourth of the profits.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 52.*]

3. APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS.

A finding supported by substantial testimony will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

4. ACCOUNT (§ 1*)—EQUITABLE ACTIONS—CONDITIONS PRECEDENT.

One may not sue in equity for an accounting where he has never given the adverse party an opportunity to account.

[Ed. Note.—For other cases, see Account, Dec. Dig. § 1.*]

5. ACCOUNT (§ 12*)—EQUITABLE ACTIONS—SCOPE OF REMEDY.

One knowing the exact amount claimed to be due him based on a percentage of a specified sum has an adequate remedy at law, and has no occasion to sue in equity for an accounting.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 62-70; Dec. Dig. § 12.*]

6. PLEADING (§ 149*)—CROSS-BILL—"ANSWER."

Under Rev. Codes, §§ 6530, 6540, defining an answer as a general or specific denial of the complaint controverted by defendant, etc., and a statement of any new matter constituting a defense or counterclaim, and defining a counterclaim, without making any mention of a claim by one defendant against a codefendant, there is no such pleading as a cross-bill.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 149.*]

For other definitions, see Words and Phrases, vol. 1, pp. 408-410; vol. 8, p. 7575.]

7. JUDGMENT (§ 18*)—PLEADING—NECESSITY.

A judgment without a pleading to support it cannot stand.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 34-37; Dec. Dig. § 18.*]

8. APPEAL AND ERROR (§ 193*)—QUESTIONS REVIEWABLE—SUFFICIENCY OF COMPLAINT.

The question of the sufficiency of the complaint to state facts constituting a cause of action is never waived, and may be raised for the first time in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1240; Dec. Dig. § 193.*]

9. ACCOUNT (§ 17*)—SUIT IN EQUITY—PLEADINGS.

Where the complaint stating facts sufficient to constitute a cause of action for an accounting against several defendants was found to be untrue, so that plaintiff could not invoke the aid of equity, a defendant praying for an accounting against codefendants, to support a judgment in his favor, must allege in his pleadings a cause of action for an accounting against the codefendants.

[Ed. Note.—For other cases, see Account, Dec. Dig. § 17.*]

10. APPEAL AND ERROR (§ 327*)—PARTIES ON APPEAL.

Where, in a suit for an accounting, a defendant obtained a judgment against two codefendants who appealed therefrom, the plaintiff,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

who had obtained no judgment, and the remaining defendants, were not necessary parties.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 327.*]

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by F. P. Alywin against E. A. Morley and others. From a judgment for defendant Estella Conroy against E. A. Morley and another, the latter appeal. Reversed and remanded.

Kremer, Sanders & Kremer, for appellants. Maury & Templeman and J. O. Davies, for respondent.

SMITH, J. On the 31st day of July, 1907, the plaintiff brought this action in the district court of Silver Bow county against the above-named defendants, and in his complaint he alleges that in the month of May, 1904, he, together with J. R. Davenport, E. A. Morley, and Mrs. Minnie Bornholdt, entered into an agreement wherein they became mining copartners for the purpose of carrying on a leasing business on what was known as the tailings dump of the smelter plant of the Parrot Silver & Copper Company; that Morley had secured a lease or privilege to work the tailings and extract the valuable metals therefrom, and said lease or privilege became the property of the copartnership; that each of the parties owned a one-fourth interest in the copartnership; that Morley assumed and took active charge of the operations, and looked after the shipment and sale of the precipitates on behalf of the association; that, after conducting the business for some time, Davenport sold and conveyed his interest to the defendant Estella Conroy, and she became, by common consent of all the parties, a copartner in the business; that the agreement of copartnership entered into between the parties is as follows: "Butte, Montana, May 25th, 1904. Whereas, E. A. Morley has secured a lease from the Parrot Silver & Copper Company for the handling of the tailings at their smelting plant, and, whereas, the said E. A. Morley proposes to enter into an agreement with J. R. Davenport and others for the erection of a precipitating plant at the above mentioned tailings dump, it is hereby agreed between E. A. Morley and J. R. Davenport that the said J. R. Davenport is to furnish sufficient funds for the erection of a plant to be mutually agreed upon. It is also understood and agreed that the said J. R. Davenport is to be reimbursed for his outlay in the erection of the plant from the first clean-ups of precipitates. In consideration of this outlay the said J. R. Davenport is to receive one-fourth ($\frac{1}{4}$) interest in the net proceeds of the proposition, and is to have a voice in matters pertaining to the operation of the plant according to his holdings. The above mentioned E. A. Morley and others

have made an outlay of about \$500 in the erection of a plant on the above mentioned grounds, a portion of which will be used in the plant to be constructed, and it is understood and agreed that the said E. A. Morley and his associates are to be reimbursed from the first clean-ups the full amount of their outlay. It is also understood and agreed that F. P. Alywin and Mrs. Minnie Bornholdt are each a one-fourth ($\frac{1}{4}$) owner in the above mentioned lease and are parties of the above contract and agreement. [Signed] E. A. Morley. J. R. Davenport, Mrs. Minnie Bornholdt. Francis P. Alywin."

Plaintiff further alleges that before the commencement of the action the defendants Morley and Bornholdt excluded him from any participation in the business, and denied that he had any rights therein; that on the 24th day of December, 1906, he demanded of all of the defendants a full, true, and detailed account of the receipts and expenditures, and of all things pertaining to said leasing and precipitating business, and demanded a complete accounting and settlement of all of its affairs, and payment of any moneys due him therefrom, but that said demand has been refused. The complaint then alleges that the copartnership realized a large amount of money from the precipitating business in which it was engaged, and that Morley and Bornholdt converted the greater part thereof to their own use. An accounting is prayed for.

The separate answer of the defendant Estella Conroy reads as follows: "Comes now the defendant Estella Conroy, above named, and for her separate answer to the complaint of plaintiff on file herein alleges: (1) That this defendant is now, and ever since the 15th day of September, 1905, has been, a copartner with the plaintiff Alywin, above named, and E. A. Morley and Minnie Bornholdt of the defendants, above named, in and to that certain leasing business more particularly specified and set out in the complaint of the plaintiff on file herein and owing in said business a one-fourth interest therein. (2) That, notwithstanding her repeated demands from the defendants Morley and Bornholdt for an accounting in said business, the said Morley and Bornholdt have not accounted to her and will not account to her. (3) That the copartnership in said business has not been settled, and that this defendant is entitled to the sum of one thousand (\$1,000) dollars from the defendants Morley and Bornholdt aforesaid by virtue of the profits accruing from said partnership business and to other sums. Wherefore, this defendant prays for an accounting on said partnership business, and for judgment against such of the parties hereto in such an amount as her right and interest shall appear, and for such other and further equitable relief as she may be entitled to in the premises."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date. & Reporter Indexes

The defendants Morley and Bornholdt by their separate answer denied that Davenport was ever a partner in the business; denied that the privilege of working the tailings of the Parrot Company ever became an asset of any copartnership in which the plaintiff was a member; denied that either the plaintiff or Davenport ever owned a one-fourth interest in any property belonging to the association; admitted that Davenport sold his interest in the association to Estella Conroy; denied that the agreement between the parties, as set forth in the complaint, constituted a copartnership agreement or was ever intended as such. They alleged that on the 14th day of May, 1904, Morley and Bornholdt entered into a contract in writing with plaintiff as follows: "Agreement. Whereas, E. A. Morley has secured a lease from the Parrot Silver & Copper Company for the handling of the tailings at their smelter in Butte for profit, and whereas, F. P. Alywin has a process for leaching and precipitating which he claims can be used with success on the tailings above mentioned; Now, therefore, for and in consideration of the knowledge and use of said process, the said E. A. Morley hereby agrees to pay over to the said F. P. Alywin one-third of the net proceeds of the working of said tailings under the process put into use by the said F. P. Alywin. It is further understood and agreed that, should the process not prove profitable, the said F. P. Alywin is to stand one-third of the expense of putting in the plant and making the test. Signed and sealed the day and date above written. [Signed] E. A. Morley. F. P. Alywin. Mrs. Minnie Bornholdt." They then alleged that, pursuant to the provisions of the said contract, Alywin undertook to demonstrate and make a success of his alleged process for leaching; that Morley and Bornholdt advanced the sum of \$700; that the process was a complete failure; that thereupon Alywin stated that he could procure a party to advance the money necessary for the erection and construction of a precipitating plant, and Morley and Bornholdt then agreed that, if he would procure such a party and devote his entire time and attention to the operation of the plant and make it a success, they would allow him to participate in the net profits of the plant substantially on the terms set out in the agreement last quoted; that Alywin agreed to this, and, pursuant thereto, sent the defendant Davenport to Morley's office for the purpose of entering into an arrangement; that "thereupon these answering defendants made to the said Davenport two propositions, namely; one proposition that he should put into the enterprise the sum of \$2,000, and by the payment of said sum should be entitled to a one-fourth interest in the entire enterprise, and a second proposition that he should pay into the concern \$2,000 for the erection of a plant, which said sum should be repaid to him, and thereafter he should receive one-

fourth of the net profits of the precipitating plant, and should have no further interest in the enterprise except in the net profits of the operations thereof; that the said Davenport accepted the latter proposition, and thereupon the instrument set out in the complaint was drawn up by the defendant Morley;" that the parties to the first agreement always understood that Alywin's interest was contingent upon success and upon his continued operation of the plant, and that, in the event of his quitting the said plant at any time, his interest would cease; that on or about the 10th day of September, 1904, said Alywin quit and abandoned said enterprise, and then and there stated that he had no further interest in the said plant or in said enterprise. It is then alleged that on or about July, 1904, Alywin sold his interest in the enterprise to Davenport, and Morley afterwards bought the interest from Davenport.

For replication the plaintiff denied each and every allegation of the amended answer. As a separate answer to the affirmative matter set forth in the answer of Estella Conroy, the defendants Morley and Bornholdt denied that Conroy had any interest in the enterprise except a one-fourth interest in the net profits thereof. They denied that she was ever a copartner, denied that she had ever made a demand for an accounting, or that either of the defendants had ever failed or refused to account to her, but, on the contrary, they alleged that she had received from them all that she was entitled to under the agreement. They denied that she was entitled to the sum of \$1,000 or any other sum as set forth in her answer. They then alleged affirmatively "that, before the said Estella Conroy procured any assignment of any interest whatever in the net profits of the operation of said plant or any assignment whatever from said Davenport, she was fully informed by these answering defendants as to the right of said J. R. Davenport in the net profits of the operation, and fully understood and agreed to all the matters hereinabove alleged as to the rights of the said Davenport, and agreed that, in the further operation of the said plant, she was to participate in the net profits of the operation of such plant to the extent of one-fourth of said net profits, and had no interest whatever in the plant; that thereafter, to wit, on the 15th day of June, 1906, an account was stated, settled, and agreed upon by and between Estella Conroy, acting by her duly authorized agent, J. H. McQueeney, and the defendant Morley, relative to all matters pertaining to the operation of said plant under said contract referred to, and thereupon the said defendant Estella Conroy, by her duly authorized agent, acknowledged full settlement and satisfaction of all claims and demands which she had or claimed to have against these answering defendants Morley and Bornholdt." This latter allegation was put

in issue by a further answer on the part of Estella Conroy.

The cause was tried to the district court of Silver Bow county sitting without the aid of a jury. The following findings of fact were made:

"(1) That on the 14th day of May, 1904, the plaintiff, F. P. Alywin, and the defendants E. A. Morley and Mrs. Minnie Bornholdt, entered into an agreement to operate a precipitating copper plant at the tailings of the Parrot smelter and to divide the net profits, if any, arising from such operation equally amongst them.

"(2) That immediately thereafter the three persons named began the erection of said precipitating plant, and completed it on or before May 25, 1904.

"(3) That on the 25th day of May, 1904, the plaintiff, F. P. Alywin, and the defendants E. A. Morley, Mrs. Minnie Bornholdt, and J. R. Davenport, entered into a contract, whereby it was agreed that the said Davenport should furnish sufficient money to build a new precipitating planer plant at the tailings of the Parrot smelter, and should be reimbursed from the first net proceeds of the precipitating business. That the said Alywin, Morley, and Bornholdt had expended the sum of about \$500 in the erection of the old plant, and should also be reimbursed from the first net proceeds of the said precipitating business, and that each of the four persons named should have a one-fourth interest therein.

"(4) That the said Davenport furnished the money, to wit, the sum of \$2,000, with which to build the new plant, and the same was built at and near the site of the old plant between the 25th day of May, 1904, and the 15th day of June, 1904, and was operated continuously from its completion to the 29th day of May, 1906.

"(5) That the plaintiff was placed in charge of the said plant as foreman, and continued so in charge until on or about the 10th day of September, 1904, when he was discharged by the defendants Morley and Bornholdt for want of attention to the duties of his position.

"(6) That on the 1st day of June, 1904, the plaintiff mortgaged to the defendant Davenport his interest in said business to secure loans made in the past and to be made in the future by the latter to the former.

"(7) That on or about the 10th day of September, 1904, the plaintiff abandoned said business, left the state of Montana, and ever since has resided outside the state of Montana, and during the continuance of said business thereafter took no interest in or paid any attention to it.

"(8) That from the 25th day of May, 1904, to on or about the 10th day of September, 1904, the said business did not pay, and no profits were derived from the operation of said plant.

"(9) That on the 22d day of November,

1904, J. R. Davenport sold and assigned to E. A. Morley all his title and interest in and to Alywin's interest in said business.

"(10) That on the 15th day of September, 1905, J. R. Davenport sold to the defendant Estella Conroy, with the consent of the said Morley and Bornholdt, his interest in said business and plant, and thereafter the said Conroy held said interest upon the same terms and [as?] the said Davenport had held it.

"(11) That on or about the 29th day of May, 1906, the said plant was sold for the sum of \$4,000, and thereafter, so far as the parties hereto are concerned, the business of producing copper from precipitation ceased.

"(12) That the gross receipts of said business from the 25th day of May, 1904, to the 29th day of May, 1906, amounted to the sum of \$48,664.40, and the total expenses to the sum of \$30,556.90.

"(13) That the net profits of said business, amounting to the sum of \$18,107.50, were from time to time divided equally among E. A. Morley, Mrs. Minnie Bornholdt, J. R. Davenport, or his successor in interest, Estella Conroy, and one John W. Thomas. That the sum derived from the sale of said plant was divided between E. A. Morley and Mrs. Minnie Bornholdt, and that Estella Conroy received no part thereof."

The court also drew the following conclusions of law: "(1) That the plaintiff, F. P. Alywin, and the defendants E. A. Morley and Mrs. Minnie Bornholdt, were copartners from the 14th to the 25th day of May, 1904.

"(2) That the plaintiff, F. P. Alywin, and the defendants E. A. Morley, Mrs. Minnie Bornholdt, and J. R. Davenport, became copartners on the 25th day of May, 1904, and continued to be such until on or about the 10th day of September, 1904.

"(3) That on or about the 10th day of September, 1904, the partnership as to F. P. Alywin was dissolved.

"(4) That, as to E. A. Morley, Mrs. Minnie Bornholdt, and J. R. Davenport, the partnership continued until the 15th day of September, 1905, when Estella Conroy took the place of J. R. Davenport therein.

"(5) That E. A. Morley, Mrs. Minnie Bornholdt, and Estella Conroy continued to be copartners until the 29th day of May, 1906, when the partnership was dissolved.

"(6) That the plaintiff is not entitled to an accounting from the defendants or either of them.

"(7) That the defendant Estella Conroy is entitled to an accounting from the defendants E. A. Morley and Mrs. Minnie Bornholdt to receive from them one-fourth of the selling price of said plant, to wit, the sum of \$1,000, and to have judgment against them for said sum.

"(8) That the appearing defendants are entitled to a judgment of dismissal against the plaintiff and for their costs expended."

And afterwards the court made and filed the following decree: "It is ordered and adjudged that as to the plaintiff, F. P. Alywin, the complaint be dismissed upon the merits of the suit, and that the defendant Estella Conroy do have and recover from the defendants E. A. Morley and Minnie Bornholdt the sum of \$1,000." From this decree and an order denying them a new trial, the defendants Morley and Bornholdt have appealed to this court.

1. It is contended on the part of the appellants that the language employed by the parties in the agreement, which is denominated by the plaintiff and by the defendant Conroy, a partnership agreement, is plain and free from ambiguity, and that its clear meaning is that Davenport was to have simply a one-fourth interest in the net profits of the enterprise, and therefore defendant Conroy had no interest whatsoever in the sum of \$4,000, realized by Morley from a sale of the plant to the Parrot Company. So far as the record discloses, there is no controversy between the parties to this appeal over any of the profits of the business as such, but the sole question is whether Conroy, through Davenport, acquired a one-fourth interest in the proceeds of the sale of the plant. The district court held that she did, and this is the main point in controversy between the parties. It is argued on the part of the appellants that, when the parties agreed that Davenport was to have a voice in matters pertaining to the operation of the plant according to his holdings, he tacitly acknowledged that without such provision he would not have any voice in the operation of the plant, on account of the fact that his interest pertained solely to the profits; and it is further argued that if, as is now claimed by the defendant Conroy, Davenport secured at that time a one-fourth interest in the entire enterprise, it would have been wholly unnecessary to provide that he should have a voice in the matter of the operation, because of the fact that his partnership interest would give him such voice without special agreement. On the other hand, it is maintained by the respondent Conroy that the phrase "net proceeds of the proposition" includes not only net profits, but also includes a one-fourth interest in whatever sums were derived from the venture, either in the way of profits or upon a final sale of the property. We have given this clause of the contract a great deal of thought and consideration. The language employed is somewhat peculiar. On the one hand it may be argued that, if the intention was to give Davenport simply a one-fourth interest in the profits, it would have been very easy to have said so; on the other hand, if he was to become equally interested with his associates in the entire venture, including the plant, there would have been no difficulty whatever in simply declaring that fact. We cannot avoid the conclusion that the contract on its face

is ambiguous and uncertain; that its meaning is not clear. This being the case, it was the duty of the district court to construe it in the light of all the surrounding facts and circumstances bearing upon the transaction. In other words, it became the duty of the court to place itself, as near as might be, in the situation occupied by the parties at the time they entered into the agreement. There is positive testimony on the part of Morley and Bornholdt that the agreement with Davenport was as set forth in their separate answer; that is to say, that they gave him his option to allow his money to be permanently invested, and receive as consideration therefor a one-fourth interest in the whole enterprise, or to withdraw the amount advanced by him from the first proceeds of the sale of precipitates, and take simply a one-fourth interest in the net profits of the concern. This testimony, if uncontradicted, would have fully warranted the court in believing that the words "net proceeds of the proposition," as found in the written agreement, were intended to mean net profits. The testimony is clear, explicit, and reasonable. However, J. R. Davenport, the other party to the agreement, declared that there was no such arrangement between the parties, that no such option was ever given, and that the understanding was that he was acquiring a one-fourth interest in the entire venture. The district court evidently credited the story told by Davenport, and discredited that of the appealing defendants. This is manifested by the findings of fact made by the court. Under these circumstances, there being substantial testimony to warrant the findings, this court cannot interfere with the result. *Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860; *White v. Barling*, 41 Mont. —, 108 Pac. 654; *Quirk v. Rich*, 41 Mont. —, 107 Pac. 821.

2. The record appears to disclose the fact that Mrs. Conroy was not present at the trial, either personally or by counsel. No evidence was offered in her behalf. It is significant that in her answer she claims the sum of \$1,000 and other sums, not as a part of the proceeds of the sale of the plant, but "by virtue of the profits accruing from the partnership business." The plaintiff does not appear to have been personally at the trial. All of the testimony relating to the conditions under which the Morley-Bornholdt-Davenport contract was executed was introduced by counsel for the plaintiff, and by the defendants Morley and Bornholdt without objection. No objection could have been successfully interposed thereto, for the reason that the evidence was relevant to the controversy between those parties. So far as the record discloses, no demand was ever made for an accounting by the respondent, and no claim can now be made, in view of the findings of the trial court, that she is entitled to more than a share of the \$4,000 received from the sale of the plant. The

testimony shows conclusively, and the court by implication found, that all of the profits derived from the enterprise had been fully accounted for by Morley, and divided between the parties prior to the commencement of Alywin's action. Upon this state of facts, had the defendant Conroy commenced the action, she would undoubtedly have failed of relief in a court of equity for two reasons: (1) That she had never given Morley and Bornholdt an opportunity to account (see *Ayotte v. Nadeau*, 32 Mont. 498, 81 Pac. 145); and (2) that she knew exactly the amount claimed to be due her, to wit, a certain percentage of \$4,000, and therefore she had no occasion to invoke the aid of a court of equity. See *Wetzstein v. Boston & Mont. C. C. & S. Min. Co.*, 28 Mont. 451, 72 Pac. 865. The phrase, "and to other moneys," found in her answer, is meaningless in the light of the findings. She made no effort to show that any other moneys were due her, and the findings disclose the fact that the only claim she could have was for a share of this \$4,000. The record shows affirmatively that no accounting was necessary between these defendants. As the defendant Conroy failed to substantiate her allegation that she had demanded in accounting with her codefendants, and she alleged no necessity for an accounting, her answer, in the light of the findings, discloses simply a claim against them at law for \$1,000. See 15 Ency. Pl. & Pr. 1031.

Counsel for respondent freely concede in her brief that the bill or complaint for an accounting should contain the particular allegations contended for by the appellants; but they maintain that the real question is: Does the plaintiff's complaint state a good cause of action for an accounting?" and not: Is the defendant's answer sufficient to support a judgment?" They contend that, as the complaint is undoubtedly sufficient, it is the duty of a court of equity, after having once obtained jurisdiction, to do complete justice by determining the whole controversy so as to prevent future litigation and multiplicity of suits. They cite *Raymond v. Came*, 45 N. H. 201, *Vierra v. Montes*, 135 Cal. 126, 66 Pac. 241, section 20, *Street's Fed. Equity Practice*, and section 198, *Rev. Codes*, in support of their position. They also say in their brief: "We concede that as a general rule a cross-bill is necessary to entitle a defendant to affirmative relief, but opposing counsel fail to note that a suit for an accounting is an exception to the rule." And they cite 1 Am. & Eng. Ency. of Law & Practice, p. 755, to this effect: "As a general rule, to entitle a defendant to affirmative relief, it is necessary that he file a cross-bill. But in suits for an accounting, in order to entitle the defendant to credits for items in his favor in the accounting and a decree in his favor in case the balance on the accounting is in his favor, a cross-bill is not necessary. * * *

It seems that an accounting may also be directed as between codefendants and a decree entered settling their rights inter se without the necessity of a cross-bill. In such cases accountings are only directed where a case is made out between the codefendants and is supported by the evidence." They also cite *Downes v. Worch*, 28 R. I. 99, 65 Atl. 603, 13 Am. & Eng. Ann. Cas. 647, and note.

In this state there is no such pleading as a cross-bill. The only fact pleading allowed on the part of the defendant is an answer (*Rev. Codes*, § 6530), which must contain: (1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief, or a specific admission or denial of some of the allegations of the complaint, and also a general denial of all the allegations of the complaint not specifically admitted or denied in the answer; (2) a statement of any new matter constituting a defense or counterclaim. *Rev. Codes*, § 6540. Section 6541, *Rev. Codes*, defines a counterclaim. No mention is made of a claim against a codefendant. Without deciding whether under our Code practice a defendant may obtain affirmative relief in an action for an accounting by filing a pleading in the nature of a counterclaim against a codefendant, we will assume that neither a cross-bill nor an answer containing a counterclaim is a necessary pleading on the part of a defendant against a codefendant in a case where the plaintiff has and states a cause of action. Relying upon this assumption, it may be said that the defendant Conroy's case was properly before the court for complete adjudication and relief against all other parties to the action at the beginning of the trial. It will, however, be conceded that the judgment in her favor must rest upon some proper pleading, either her own or that of the plaintiff. A judgment without a pleading to support it cannot stand; and this is the reason why the question whether a complaint states facts sufficient to constitute a cause of action is never waived and can be raised in this court for the first time.

The complaint of Alywin is, on its face, sufficient; but the facts therein stated are untrue in point of fact. The court so found. Therefore, if Alywin had, in his complaint, stated the facts as they actually existed, his complaint would not have set forth a cause of action. It has been judicially determined that he was not entitled to an accounting, and therefore the aid of a court of equity was improperly invoked by him. Those allegations of his complaint which he failed to substantiate became so much surplusage; and, the answer of the respondent being insufficient to state an affirmative cause of action for an accounting against the appellants, the decree has no pleading to sustain it. The respondent relied upon the ability of the plaintiff to make out a cause of action. At

her peril. She should either have filed a proper pleading in her own behalf, if that can be done in an action like this—one upon which she could rely in case the plaintiff failed to make out a case—or she should have taken part in the trial and assisted Alywin in proving the allegations of his complaint. She did neither. The result is that, so far as the record discloses, she has a judgment against Morley and Bornholdt, without a pleading to support it, founded upon an alleged cause of action at law, in the final determination of the merits of which the appellants have a right to a trial by jury. This right could not be taken from them by an assertion on the part of the plaintiff, a third party, that he had a cause of action which he in fact did not have. If Alywin was not entitled to an accounting on the facts, and Mrs. Conroy was not entitled to any on either her pleadings or the facts, then the cause should have been dismissed as to both.

In the case of *Schulz v. Schulz*, 138 Ill. 665, 28 N. E. 808, a father brought an action against his son to declare and enforce a resulting trust, for an account, and for a decree against defendant for any balance of money found due upon the accounting. At the hearing the complainant abandoned all claims for moneys due on an accounting, and asked for a decree respecting the real estate only. After a decree in favor of the complainant, the defendant in the Supreme Court contended that the cause should have been sent to the master to take and report an account. It was held that, as the defendant had filed no cross-bill, he was not entitled to any affirmative relief.

In the case of *Brewer v. Norcross*, 17 N. J. Eq. 219, which was an action for an accounting between partners, the defendant asked to have the affairs of another and different partnership between the same parties examined and settled. The court said: "If the balance upon the settlement of the account, in respect to which the bill is filed, should prove to be in favor of the complainant, but, upon the settlement of both accounts, the balance should be in favor of the defendant, what remedy could he have, or what decree could be pronounced upon the pleadings as they stand? If, in this aspect of the case, the defendant has any equity, he can have relief only by way of cross-bill."

In the case of *Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229, it was held, in effect, that the general rule that affirmative relief will not be granted a defendant unless he files a cross-bill applies to a bill for dissolution of a partnership and an accounting, where one of the partners desires affirmative relief upon grounds other than that of an adjustment of the accounts of the partners.

The Supreme Court of Arkansas, in *Trappall v. Byrd*, 22 Ark. 10, said: "The law is well settled that a court of chancery will make a decree between codefendants accord-

ing to the equity of the case as founded upon the pleadings and proof between the complainants and defendants, but will not make a decree between them as to a matter outside of the pleadings and proof between the complainants and defendants, unless by cross-bill."

We understand the rule to be in jurisdictions where the cross-bill is an appropriate pleading that one may be filed whenever the defendants, or either of them, have equities arising out of the subject-matter of the original suit, which entitle them to affirmative relief which they cannot obtain in that suit (*Whittemore v. Patten* [C. C.] 84 Fed. 51); also, that in suits for an accounting a cross-bill is unnecessary in order to enable the defendant to recover the amount found due him upon the accounting, if the subject-matter upon which he bases his claim for affirmative relief is the same as that set forth in the complaint or bill; but that whenever a defendant seeks affirmative relief, not based upon a case embodied within the issues tendered by the plaintiff, either by his pleadings or evidence, he must show his right thereto by appropriate pleadings in his own behalf. In this case the plaintiff failed to make out any cause of action. Therefore his entire case failed. His pleadings could no longer be considered. He was out of court. There was nothing in the case presented by him upon which to predicate a cause of action in favor of the respondent. Therefore her cause of action was necessarily beyond the scope of his case. It related to an independent matter, and must have had a pleading to support it in order to warrant the court in entering judgment in her favor. He demanded an accounting to which he was not entitled. She made no demand. The defendants were within their rights in refusing his demand. It seems, therefore, to follow that she may not predicate a right of recovery in this action upon the unwarranted demand made by him. A cross-demand cannot be germane to an alleged cause of action which has no existence in fact.

Whatever has been said in this opinion to the effect that the respondent's sole claim against the appellants was for a share of the moneys derived from the sale of the plant is not to be construed as a determination that such could have been her only claim. It is suggested in the brief of her counsel that she may have been entitled to a larger sum. But she is not an appellant, and no exceptions on her part are found in the record. The district court seems to have found that the profits were properly divided. As she does not complain of these findings, we must assume that she is satisfied therewith. Hence the statement heretofore made that the amount allowed her is the full extent of her claim.

3. It is contended that the respondent's answer is insufficient for the reason that there is no proper allegation of the probative

facts attempted to be set forth. There is apparently some warrant for the suggestion, but, in view of what has already been said, it becomes unnecessary to decide the question.

4. It is also suggested by counsel for the respondent that the association formed under the contract of May 25, 1904, was rather a "joint adventure" than a "copartnership." We do not decide the exact nature of the relation because it seems unnecessary to do so.

5. We are of opinion that neither Alywin nor Davenport was a necessary party to the appeal.

The judgment and order appealed from are reversed, and the cause is remanded to the district court of Silver Bow county.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(41 Mont. 1)

KELLY v. HYNES et al.

(Supreme Court of Montana. March 26, 1910.
On Motion for Rehearing, May 3, 1910.)

1. APPEAL AND ERROR (§ 1011*) — REVIEW — FINDINGS ON CONFLICTING EVIDENCE.

Where the evidence is conflicting, but does not clearly preponderate against conclusions reached by the trial court, findings will not be disregarded or set aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

2. APPEAL AND ERROR (§ 760*) — BRIEFS — FAILURE TO REFER TO EVIDENCE.

In absence of definite reference in appellants' brief to evidence as to a particular subject in support of their contentions, the Supreme Court cannot undertake to examine the record to ascertain what the evidence is, and must presume there was no evidence on the subject.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3095; Dec. Dig. § 760.*]

3. WATERS AND WATER COURSES (§ 143*) — APPROPRIATION — IRRIGATING DITCHES — RIGHTS OF OWNERS.

So long as the required volume of water is maintained at the heads of irrigating ditches of parties entitled to water, other parties damming sources of the supply need not permit any flow from their reservoirs, whether it consists of the natural outflow or of the conserved flood water.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 143.*]

4. WATERS AND WATER COURSES (§ 143*) — APPROPRIATION — IRRIGATING DITCHES — RIGHTS OF OWNERS.

The most that ditch owners are entitled to claim at any time is that the amounts to which they are respectively entitled shall flow to the head gates of their ditches.

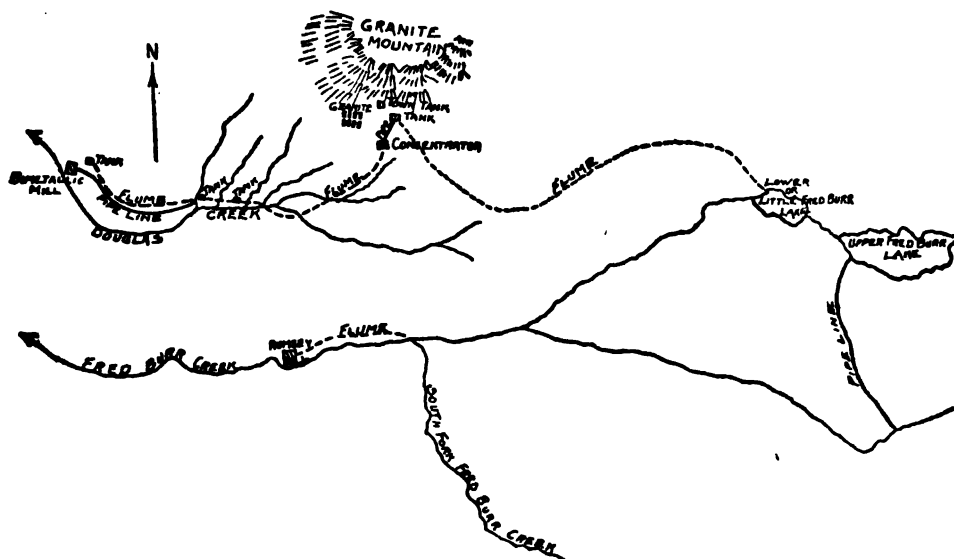
[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 143.*]

Appeal from District Court, Granite County; Geo. B. Winston, Judge.

Action by Sidney A. Kelly against Annie M. Hynes and others. There was a decree in favor of plaintiff, and defendants, Annie M. Hynes, Thomas F. Hynes, and R. R. McLeod and the defendants Granite Bi-Metallic Consolidated Mining Company and Fred Burr & Granite Ditch Company appeal. Modified and affirmed.

W. E. Moore and Word & Word, for appellants. Rodgers & Rodgers and Wingfield L. Brown, for respondent.

BRANTLY, C. J. This action was brought to determine the rights of the plaintiff and the defendants Hynes and wife and McLeod to the use of the water flowing in Fred Burr creek, in Granite county, and to adjust the relative priorities and amounts of their respective appropriations. As indicated by the annexed outline map, the stream has its sources on the west slope of the mountains, and flows into the valley toward the north-west.



*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
108 P.—50

At some distance below the junction of its three principal branches are situated agricultural lands, owned and occupied by the plaintiff and the defendants Hynes and McLeod. To irrigate these lands they have ditches, diverting water from the main stream near where it debouches into the valley. The Hynes ditch with its laterals is nearest to the mountains; those of the plaintiff and defendant McLeod are a short distance below, the latter being farthest down. When the action was originally instituted, it presented a controversy solely between the plaintiff and Hynes and wife; the allegations of the complaint being that these defendants at the time were diverting water to the use of which plaintiff was entitled by priority of appropriation, thus doing him irreparable injury. McLeod was made a defendant ostensibly because he was and is entitled to the joint use with plaintiff of the oldest right upon the stream, both holding under direct or mesne conveyances from a common predecessor, and because he was and is the owner of other rights based upon appropriations of later dates. Upon a prima facie showing made by Hynes and McLeod that the defendants Granite Bi-Metallic Consolidated Mining Company and the Fred Burr & Granite Ditch Company, hereinafter referred to as the Mining Company and the Water Company, were causing the interference complained of by the plaintiff, and were in any event necessary parties to the action in order to determine all the conflicting rights, they were made parties defendant. The principal issues tried and determined arose upon the claim of right by the companies to maintain dams at the outlets of the lakes designated on the map as the Upper and Lower Fred Burr lakes, the apparent sources of the north branch of the stream, for storage of flood waters, and incidentally to divert into the upper lake, by means of a pipe line, a portion of the water flowing in the middle fork of the stream, and to convey the water thus obtained by means of a flume to the town of Granite to supply its inhabitants, and also the mining and reduction works of the Mining Company at Granite and at the mill on Douglas creek below. Involved in this controversy was also the right, asserted by the companies, to increase their supply by diverting into the flume, by means of intakes, the water of small streams and springs issuing from the slope of the mountain above the line of the flume between the lakes and the town. The contention of the plaintiff and the other defendants was that the companies by these various devices seriously interfered with the natural flow of the stream, and thus deprived them of the amount of water to which they were entitled under their respective appropriations.

The Mining Company based its claim of a prior right to the use of the water, for the purpose for which it and its associate Water

Company were diverting it, mainly upon three different appropriations: The first, made by one Degenhart, of 150 inches, in March, 1876; a second made by one Owens, of 200 inches, in July, 1879; and a third, of 500 inches, made by one John McLeod in 1886. In 1888 the Granite Mountain Mining Company, the immediate predecessor of the defendant Mining Company, acquired by mesne conveyances a one-half interest in the Degenhart right, and the entire interests of the owners of the other two. At that time these rights were appurtenant to and were used to irrigate the lands now owned by the plaintiff. These lands were also acquired by the Granite Mountain Mining Company at the same time it acquired the water rights referred to. This company and the Water Company then began to divert water at the outlet of the Lower Fred Burr Lake. In the year 1889 they constructed a dam across the outlet of this lake, and thereafter conveyed water by means of the flume indicated on the map to the town of Granite, and to the reduction works of the Granite Mountain Mining Company. They also supplied the Bi-Metallic mill, then owned by an associated corporation known as the Bi-Metallic Mining Company. None of the water which was so diverted to the town of Granite or the works of the Granite Mountain Mining Company ever returned to Fred Burr creek, but such of it as escaped as waste or surplus flowed into Douglas creek. This condition continued until this company was succeeded by the Mining Company in 1898, which then became the owner of all of its property, as well as that of the Bi-Metallic Mining Company, with which it was then consolidated. In addition to the rights thus acquired, the Granite Mountain Mining Company and the Water Company also made various other appropriations in different amounts, ranging in date from April 11, 1887, to February 11, 1890, at points on tributaries of the stream, in the neighborhood of the lakes. This company also made appropriations on March 6, 1886, and on February 11, 1890, to supply water to its mill at Rumsey. The appropriation of the water to be conveyed by the pipe line was made by the Water Company in January, 1902, and the line was completed during that year. The amount thus conveyed is between six and seven inches. In 1889, and in the following years, the companies also increased the height of the dam at the outlet of the lower lake, and erected another at the outlet of the upper lake for the purpose of storing flood waters, in order to increase the supply and render it uniform. The water claimed under these later appropriations was diverted, either through the pipe line into the upper lake, or through the intakes into the flume. On November 30, 1903, the defendant Mining Company by deed conveyed to the plaintiff all its right, title, and interest in the lands heretofore mentioned and now own-

ed by him, together with its interest in the Gegenhart, Owens, and John McLeod water rights, reserving, however, and excluding from the grant, certain privileges in connection with the water rights, which are described as follows: "All the water of said Fred Burr creek which is tributary to Fred Burr Lake, and all the water of said Fred Burr creek or Fred Burr Lake which may have been at any time a portion of or part of said water rights herein mentioned, and which has been used or appropriated, or may be used or appropriated for any use whatever by the Fred Burr & Granite Ditch Company or its predecessors, which are tributary to said Fred Burr Lake. * * * The relationship which the Mining and Water Companies sustain toward each other does not distinctly appear. What this relation is exactly is not important; for though they answered separately, and in the findings and decree are awarded separate rights under the appropriations made by the Water Company and the Granite Mountain Mining Company, the predecessor of the Mining Company, they claim the right to the joint use of the water diverted from the lakes by means of the flume and the intakes used in connection therewith, and were treated as joint owners by the court in its findings. It is sufficient to say that the Water Company is a subsidiary corporation, organized to supply the inhabitants of Granite and the employes of the Mining Company with water, as well as the mining company in its mining and reduction operations.

The plaintiff bases his claim upon a one-half undivided interest in the Degenhart right and in the Owens and John McLeod rights, conveyed to him by the defendant Mining Company. He avers that his right is superior to that of any of the other parties plaintiff and defendant, except that defendant McLeod has a joint interest with him in the Degenhart right, equal in dignity with his own right therein. McLeod bases his claim upon this half interest acquired by him in the Degenhart right through mesne conveyances from the original appropriator, a second appropriation, alleged to have been made by a predecessor, of 300 inches, in 1882, and a third, made by the same predecessor, of 200 inches, in April, 1888. The defendants Hynes base their claim upon an appropriation of 200 inches, which is alleged to have been made in 1882 by a predecessor from whom they acquired the lands they now occupy, with the appurtenant water right. The plaintiff and defendants severally assert, as against each other, right to the amounts claimed by them, respectively, by adverse use for the period prescribed by the statute of limitations.

Upon the evidence the court made special findings as to the dates and amounts of the respective appropriations of the parties, and entered a decree fixing the relative rights and priorities, and enjoining each of them from interfering with the rights of any of the

others. It found that no one of them had acquired a right by adverse user. It awarded to the plaintiff 75 inches under the Degenhart appropriation, as of the date of March 6, 1876; 100 inches under the Owens appropriation, as of the date of July 6, 1879; and 100 inches under the John McLeod appropriation, as of the date of December 4, 1886. To McLeod it awarded 75 inches under the Degenhart appropriation; 75 inches as of the date of December 1, 1882; and 150 inches as of the date of April 1, 1888. To the defendants Hynes it awarded 75 inches, as of the date of June 1, 1883. These rights amount in the aggregate to 650 inches. It found for the companies as to all the rights claimed by them by appropriation, except one of 2,000 inches of the water of Fred Burr Lake, alleged to have been made on April 11, 1887, and certain ones which are alleged to have been made to supply the mill at Rumsey. As to these it made no specific findings. As to the right of the defendant companies to maintain their dams at the lakes and divert water therefrom, the court found as follows:

"Finding No. 15. That the average amount of water flowing in said Fred Burr creek below the dams constructed across said Fred Burr Lakes by the said Fred Burr & Granite Ditch Company and the said Granite Bi-Metallic Consolidated Mining Company, and hereinafter in these findings mentioned, each year, prior to and since the construction of said dams, has been not less than 650 inches of water."

"Finding No. 20. That during the irrigating season of each and every year since said dams were constructed by the said defendant companies, they have allowed and permitted to flow in said creek and out of said lakes, into and down the natural channel of said Fred Burr creek, not less than 650 inches of water.

"Finding No. 21. That the said defendants the Fred Burr & Granite Ditch Company and the said Granite Bi-Metallic Consolidated Mining Company have not during the irrigating season, since the construction of said dams, detained or deprived the plaintiff or either of said defendants Annie K. Hynes, Thomas F. Hynes, or R. R. McLeod, of the ordinary and natural flow or discharge of the waters of said Fred Burr creek as the same would naturally flow and run at such times.

"Finding No. 22. That the defendants the Fred Burr & Granite Bi-Metallic Consolidated Mining Company are the owners of and entitled to maintain and use, for the purpose of storing and conserving therein the waters of said Fred Burr creek and the said Fred Burr lakes, the said dams, and are entitled to store therein the waters of said creek and of said lakes, provided said defendant companies use the water in such a manner that every appropriator herein named, further down the creek, shall have during the irrigating season of each year the use and enjoyment of said waters of said creek substantially according to its natural flow; and the said defendant

companies at all times during the irrigating season of each year must turn down and permit to flow into the channel of said Fred Burr creek below said lakes, and below the said dams across said lakes, not less than 650 inches of water."

From the decree entered upon these findings and from an order denying their separate motions for a new trial, the defendant companies have appealed.

The only contention made is that the evidence is insufficient to justify the findings. Viewing them as a whole, we do not think the contention should be sustained. The evidence is voluminous, and, in some respects, in irreconcilable conflict. It would serve no useful purpose to enter into an analysis of it. We do not find that it clearly preponderates against any of the conclusions reached by the trial court, except in one particular hereafter noted, and, under the rule which must govern this court upon a review of the findings in such cases (*Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Pope v. Alexander*, 36 Mont. 82, 92 Pac. 203, 565; *Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860), we do not feel justified in disregarding them or setting them aside.

One of the principal contentions made is that the court either misconstrued the deed from the Mining Company to the plaintiff of the lands now occupied by him and the appurtenant water rights, or that it disregarded it. Under the evidence, as we understand it, the question whether the reservation is effective, or is void, as is urged by the plaintiff and the other defendants, because it is inconsistent with the grant of the principal thing described in the deed, is wholly immaterial. Prior to the time the Granite Mountain Mining Company acquired the Degenhart, Owens, and McLeod rights, it had been obtaining its supply of water from springs adjacent to its mines and works. As the work of mining progressed, the sources of these springs were drained, and they failed. Thereupon those rights were acquired, and the Water Company was organized as a subsidiary company to perfect devices for the diversion of water and for its sale to the inhabitants of the town, as well as to provide a supply to be used by the company in its mining and reduction operations. It was immediately found that, if the supply was to be made sufficient to meet these requirements, it would be necessary to increase it by conserving the flood waters flowing into the lakes, and also to gather together and make available the small streams and springs along the line of the flume. For this purpose the dams were constructed and the intakes were installed. These devices were improved during the two or three years following immediately upon the acquisition of the rights now claimed by the plaintiff. Finally, in 1902, the pipe line was installed. In the meantime the

Granite Mountain Mining Company and its successor, the Mining Company, were leasing the lands now owned by the plaintiff, and never at any time was any complaint made that the supply in the main stream was not sufficient to meet all the requirements for agricultural purposes, either by these lessees or the defendants Hynes and McLeod or their predecessors. During all these years the defendant companies had a supply to meet all their wants, which they were diverting entirely away from the slope from which the stream is supplied, so that neither the surplus nor waste could return to it. Further, the evidence tends to show, as the court found, that never at any time did the diversion of water by the companies lessen the natural flow in the main stream at the heads of the ditches of the plaintiff and the other defendants. It also tends to show that at no time during the irrigating season, even prior to the building of the dams, did any appreciable amount flow from the lakes down to the main stream through its north fork, but that this branch was supplied mainly by affluents issuing out of the slopes below the dams and the flume of the companies. The only inference possible from this evidence is that the companies relied for their supply, not upon the rights acquired by the purchase from Degenhart and others, because they could not do so, but upon the independent supply acquired by the storage of flood waters, the conservation of other small sources, and the small diversion by means of the pipe line. So far as appears, they would have been found entitled to exactly the same rights as were decreed to them—and these are all to which they appear to have any just claim—if the reservation in the deed had not been made. We cannot gather definitely from anything in the record what view the trial judge took of this deed, and what, if any, effect he gave to the reservation. As we have said, however, it is apparent that the same conclusion would have been reached by him, whatever may have been his view. We shall presume that he regarded it as not affecting the rights of the defendant companies as shown by the other evidence, and therefore shall not undertake to say whether the reservation is void or not.

It is argued that the court erred in impliedly finding against the companies as to the appropriation which is alleged to have been made on April 11, 1887, and those made to supply the mill at Rumsey. The first of these appropriations was made at the outlet of the lakes, for the purpose of securing the right to divert the flood water of the lakes, as well as whatever outflow there might be after the flood season was over. The flume was completed in 1899. It will be observed that the court found that the companies have the right to maintain their dams and divert water from the lakes, not confining them to the flood water merely, but leaving them to divert any water flowing therefrom: the

only restriction imposed being that they do not interfere with the flow of the water in the stream below so as to decrease the flow below 650 inches. The findings award to these defendants all that they can justly claim under this appropriation, though it is not expressly mentioned.

Counsel for the companies do not call attention, in their brief, to any evidence which tends to show diligence in prosecuting the work of diversion under the appropriations for use in the Rumsey mill, nor to any showing that water was ever put to any actual use in the mill, or is now in use. We cannot undertake an independent examination of the large record in order to ascertain what the evidence is. In the absence of definite reference to it, we must presume that there was no evidence on the subject.

In view of the evidence heretofore referred to, touching the outflow from the lakes, we think the court was in error in finding that the companies have always permitted as much as 650 inches to flow over their dams. In fact, the evidence tends to show almost conclusively that, except at flood seasons, this outflow is almost nothing, and that the volume of the stream is maintained at the heads of the ditches of the plaintiff and the other defendants by tributaries flowing into it below the dams. So long as this condition exists, the companies are under no obligation to permit any flow from their reservoirs, whether it consists of the natural outflow or of the conserved flood water. Therefore, while findings 20 and 22 are correct in declaring the fact to be that the companies have not at any time interfered with the flow of the water below the dams, and are therefore entitled to maintain them, they are erroneous in requiring these defendants to permit the amount to which the ditch owners are entitled in the aggregate to flow over the dams. Under the evidence this is impossible unless the trial court is to be understood as holding that, while the dams may be lawfully maintained for storage purposes, the companies must nevertheless use the stored water to keep up the flow of the stream for the benefit of the ditch owners, before they are entitled to divert any to their own uses. The most that the ditch owners are entitled to claim at any time is that the amounts to which they are respectively entitled shall flow to the head gates of their ditches. Sayre v. Johnson, 33 Mont. 15, 81 Pac. 389. They are entitled to nothing more. And since it appears that the companies have not at any time lessened this amount, the ditch owners have no just ground for complaint so long as this condition is maintained, whether the companies divert water from the sources of the stream or confine their use to the stored water. Doubtless this was the theory entertained by the trial court; but, as the findings stand, the ditch owners have the right to de-

mand the use of water which, but for the devices resorted to by the companies, would never under any condition be available for any purpose. If the findings are reformed to meet the conditions as they actually exist, the companies will have no ground to complain, and the ditch owners will have secured all the rights to which they are entitled.

The cause is therefore remanded to the district court, with direction to reform the findings, so as to require nothing further from the companies than that they do not by their diversions decrease the amount of the flow at the heads of the plaintiff's and defendants' ditches below 650 inches. When the decree shall have been modified in accordance with this direction, it will stand affirmed.

Modified and affirmed.

SMITH and HOLLOWAY, JJ., concur.

On Motion for Rehearing.

BRANTLY, C. J. A motion for a rehearing has been submitted by appellants herein; the purpose of it being to obtain a construction of the deed referred to in the original opinion, and to have the order modifying the decree made more specific. After further consideration of the case we are of the opinion that a construction of the deed will not add anything to the rights of the appellants, as they will be fixed by the decree as already modified. The order heretofore made herein is, however, changed to read as follows: "The cause is therefore remanded to the district court, with directions to modify its findings in accordance with the suggestions herein, and to modify the decree accordingly, so as to require nothing further from the companies than that they do not by their diversions decrease the amount of the flow at the heads of the plaintiff's and defendants' ditches below 650 inches. When the decree shall have been modified in accordance with this direction, it will stand affirmed."

The motion for rehearing is denied.

SMITH and HOLLOWAY, JJ., concur.

(82 Kan. 388)

STATE v. CHANCE.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. FORGERY (§ 8*)—MISSPELLING OF NAME.

Where one affixes to a note a signature which he intends shall be regarded as that of another person, the act is not prevented from being forgery by the circumstance that the name is not correctly written.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 26; Dec. Dig. § 8.*]

2. FORGERY (§ 47*)—POSSIBILITY OF DECEPTION—QUESTION FOR JURY.

Where the name "Henry Heinis" is signed to a note with the intention that it shall be supposed to be the signature of "Henry Hein," it cannot be said as a matter of law that the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

difference is so great as to prevent the deception of any person of ordinary prudence.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 123; Dec. Dig. § 47.*]

8. CRIMINAL LAW (§ 371*)—ADMISSIBILITY OF EVIDENCE—OTHER FORGERIES.

Upon the trial of an employé on the charge of uttering a note payable to his employer which he had forged for the purpose of covering up a shortage, evidence that he had forged other notes for the same purpose is competent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

4. INDICTMENT AND INFORMATION (§ 161*)—AMENDMENT BEFORE TRIAL—SCOPE.

By leave of court an information may be amended in matter of substance as well as of form after a plea of not guilty has been entered and before the trial is begun.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 517; Dec. Dig. § 161.*]

Appeal from District Court, Thomas County; Charles W. Smith, Judge.

Alvin C. Chance was convicted of forgery and of uttering a forged instrument, and he appeals. Affirmed.

See, also, 108 Pac. 791.

W. G. Bissell and Ed McKeever, for appellant. F. S. Jackson, Atty. Gen., E. H. Benson, and Park B. Pulsifer, for the State.

MASON, J. Alvin C. Chance was convicted of forgery and of uttering a forged instrument. He appeals. He claims that the information is defective in failing to allege that the forgery was committed with the intent to defraud any one. It alleges in detail that he forged a note purporting to be that of "Henry Hein," writing the signature however "Henry Heinis." It then adds: "That the name 'Henry Heinis' as signed to said note and the name 'Henry Hein' used herein represent * * * the same person, and in signing the name 'Henry Heinis' to the said instrument the said Alvin C. Chance thereby intended to sign the name of 'Henry Hein' thereto, with intent then and there unlawfully to injure and defraud the said Chicago Lumber & Coal Company." The contention is that, although the information says that Chance signed another man's name to the note with intent to defraud a third person, it fails to say that he forged the instrument with that intent. If there is any substantial difference, the last clause quoted may be tied to all those preceding it, and be deemed to characterize every act of the defendant to which any of them refer.

A second contention is that the signature to the note (which the defendant reads Henry Heinis, but which may perhaps be read Henry Heinis) is not enough like Henry Hein to be regarded as a forgery of that name. In *State v. Warren*, 109 Mo. 430, 433, 19 S. W. 191, 192, 32 Am. St. Rep. 681, it is said: "Where the accused attempts to sign the name of a person really existing, but does it so imperfectly or inaccurately that one of

ordinary prudence would not be deceived by it, he cannot be convicted of forgery." This rule seems to assume that persons of less than ordinary acumen are fair game for sharpers and may be defrauded with impunity. It is adapted to make the trial on a charge of swindling an inquiry into the intelligence of the person cheated instead of into the criminality of the defendant. It has been announced in other cases (22 Am. Dec. 321, note; *The Law of Crimes*, Clark and Marshall, p. 586), but probably most courts would now hold that the offense of forgery as well as that of obtaining property by false pretenses may be committed by a device so crude that it could only impose upon the credulous or careless (13 A. & E. Encycl. of Law, 1085; 19 Cyc. 404). But the rule as stated cannot benefit the defendant here. Whether a person of ordinary observation might mistake the words Henry Heinis for the signature of Henry Hein was a question of fact. We cannot say as a matter of law that a person of reasonable prudence might not fall into that error. The theory of the state was that the defendant forged the note in order to cover up a shortage in his own accounts with his employer, the Chicago Lumber & Coal Company. There was evidence that no one of a similar name lived or was known in the community excepting Henry Hein; that he had business transactions with the company which were entered in its books in the defendant's handwriting under the designation "Henry Heinis"; that other entries apparently referring to the same person were written "Hein" and "Heins." This was sufficient to justify the jury in concluding that, if the defendant signed the note, he intended the signature to be regarded as that of Henry Hein, and that the fraud was not so obvious as to be necessarily harmless.

A third complaint is that the state was permitted, in support of the charge of uttering the forged note, to introduce evidence tending to show that the defendant had forged the names of other persons to other notes for the purpose of increasing the apparent assets of the business, and thus covering up his shortage. This evidence had a tendency to prove him guilty of the very offense charged, and the fact that it also tended to prove the commission of other offenses did not render it inadmissible. *State v. Calhoun*, 75 Kan. 259, 88 Pac. 1079; 62 L. R. A. 252, note; 5 *Encyclopedia of Evidence*, 868; 1 *Wigmore on Evidence*, §§ 315, 318.

The final objection urged on behalf of the defendant is that after he had pleaded not guilty, but before the impaneling of the jury was begun, the state was permitted to amend the information by adding a new count thereto. The statute provides that: "An information may be amended in matter of substance or form at any time before the defendant pleads, without leave. The informa-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion may be amended on the trial as to all matters of form, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant." Gen. St. 1909, § 6647 (Code Cr. Proc. § 72). The claim is made that this provision forbids any amendment except in matter of form after a plea is entered. Language to that effect is used in *State v. Bundy*, 71 Kan. 779, 81 Pac. 459; but there the substance of the information was changed after a jury had been impaneled and sworn, and jeopardy had consequently attached. The decision was explicitly based on that consideration, and what is said in the opinion must be interpreted in the light of that fact. The force of the statute is that prior to arraignment and plea the state has an absolute right to amend in any respect, without asking permission, but that on the trial no amendment may be made even by leave of court except in matter of form. The fair inference is that after a plea has been entered, but before the trial has begun, substantial amendments may be made, but only upon order of the court. That is the rule at common law (22 Cyc. 436, 437), and the statute is not less liberal. Convictions have repeatedly been sustained based upon amended informations filed after one trial had been had. *State v. Hart*, 33 Kan. 218, 6 Pac. 288; *State v. Spendlove*, 47 Kan. 160, 28 Pac. 994. Here the defendant was again arraigned and pleaded not guilty to the amended information, and no possible prejudice could have resulted to him from the fact that the amendment was made after instead of before his first plea had been entered.

The judgment is affirmed. All the Justices concurring.

(82 Kan. 392)

STATE v. CHANCE.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

FORGERY (§ 15*)—"MONEYED CORPORATION"—FALSE ENTRIES IN BOOKS.

A company incorporated for the purpose of pecuniary profit, although having no power to engage in banking, or in loaning money, or in writing insurance, is a "moneyed corporation," within the meaning of that phrase as used in the section of the crimes act (Gen. St. 1909, § 2621) declaring one guilty of forgery who fraudulently makes false entries in the account books of an association of that description.

[Ed. Note.—For other cases, see *Forgery*, Dec. Dig. § 15.*

For other definitions, see *Words and Phrases*, vol. 5, p. 4509; vol. 8, p. 7724.]

Appeal from District Court, Thomas County; Charles W. Smith, Judge.

Alvin C. Chance was convicted of making false entries in books of account, and appeals. Affirmed.

See, also, 108 Pac. 789.

W. G. Bissell and Ed McKeever, for appellant. F. S. Jackson, Atty. Gen., E. H. Benson, and Park B. Pulsifer, for the State.

MASON, J. Alvin C. Chance was convicted under the statute (Gen. St. 1909, § 2621) forbidding the making of false entries in a book of accounts kept by a moneyed corporation. He appeals upon the ground that the Chicago Lumber & Coal Company, whose books he was accused of falsifying, being merely a mercantile organization, was not a "moneyed corporation," within the meaning of the section under which he was prosecuted, which reads: "Every person who, with intent to defraud, shall make any false entries, or shall falsely alter any entry made in any book of accounts kept by any moneyed corporation within this state, or in any book of accounts kept by such corporation or its officers, and delivered or intended to be delivered to any person dealing with such corporation, by which any pecuniary obligation, claim or credit shall be or shall purport to be created, increased, diminished or discharged, or in any manner affected, shall upon conviction be adjudged guilty of forgery in the third degree." Gen. St. 1909, § 2621.

This section originated in New York. It was adopted by Missouri as early as 1835, and transplanted to Kansas in 1855. Mississippi also borrowed it. In no one of the four states does a prosecution under it appear to have been reported. The phrase "moneyed corporation" has been long in use in the legislation of New York, where, in the course of an elaborate classification of incorporated companies, it was early given by express enactment a peculiar meaning, limiting its application to those companies having power to loan money upon pledges or deposits, or to make insurance. It has gained considerable currency in that sense, but evidently by reason of the statutory definition. It long ago found its way into the law dictionaries, where, however, the statute was cited as authority for the meaning given. Bouvier's; Burrill's. It has lately appeared in the general dictionaries. Century; Webster's New International.

Some provisions of the national bankruptcy act of March 2, 1867, were made applicable to "moneyed business or commercial corporations." 14 Stat. 535, c. 176, § 37. The phrase quoted is usually written with a comma after the word "moneyed," and that punctuation is in accordance with the meaning intended, as appears from the fact that the original bill read "all corporations," and this was changed by amendment first to "all moneyed and business corporations," and then to its present form. Cong. Globe, 39th Cong., pt. 2, p. 1002. The courts have held that the three adjectives together cover

*For other cases see same topic and section NUMBER in Dec. & Am. D'gs. 1907 to date, & Reporter Indexes

all corporations organized for pecuniary profit, and this judicial interpretation has inadvertently been said to have been placed upon the words "moneyed corporation." 27 Cyc. 824.

In a federal case in New York a statute of limitation of that state applying to actions against a director or stockholder of a moneyed corporation was invoked where the corporation involved was organized under the laws of Kansas. A question was raised as to what was meant by a "moneyed corporation," and the Supreme Court, in passing upon the matter, showed a recognition of the fact that the New York usage was peculiar to that state and resulted from the statutory definition, saying: "The next objection is that * * * the trust company is not a moneyed corporation within the meaning of the section in question. What is meant by the term 'moneyed corporation,' in section 394 [Code], is shown by the definition of that term given in 1 Rev. St. p. 598, § 51, where it is said: 'Sec. 51. The term "moneyed corporation," as used in this title, shall be construed to mean every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurances.' Although this definition refers to the meaning of the term 'moneyed corporation,' as used in that title of the Revised Statutes, we think it is plain that the same term used in section 394 of the Code means the same thing as defined in section 51. The Legislature used a term which was well known in the legislation of New York, and for a long period of years a definite meaning had been given to it in that legislation, and, when speaking of limitations of actions in regard to moneyed corporations, nothing would be more natural than to assume that the term, when thus used, should have the same meaning applied to it as had been defined by the Legislature when enacting legislation in regard to moneyed corporations. This legislation does not assume to enact what shall be 'moneyed corporations,' in other states, but its effect is that when actions are brought in the state of New York, and the question arises whether a foreign corporation is or is not a moneyed corporation, that question will be solved in such a case as this for the purpose of construing the statute of limitations of the state, by reference to the meaning given to the term by the Legislature or courts of New York, rather than by reference to the legislation of another state under which the corporation may have been formed. The question is not what the corporation is, under the legislation of that other state, but whether what it is doing is of that description provided for and designated by the legislation of the state of New York." *Platt v. Wilmot*, 193 U. S. 602, 610, 24 Sup. Ct. 542, 48 L. Ed. 809.

In *State of Texas v. Fidelity & Deposit Co.*, 85 Tex. Civ. App. 214, 230, 80 S. W. 544, 553,

a statute was interpreted which provided the manner of taxing the personal estate of "moneyed corporations." In the opinion it was said: "The expression 'moneyed corporation' was evidently intended to mean all classes of corporations organized and created for business purposes, as distinguishable from public or charitable or other corporations, which are exempted by law from taxation. This we believe to be the usual meaning applied and given to this expression. * * * If the expression 'moneyed corporation' is to be applied in a narrow and restricted sense, the effect would be to create a taxation upon those corporations that handle and deal in money as their business, and would exclude from the operation of the law many corporations engaged in this state in business enterprises which are doubtless as profitable to them as in the case of those engaged in the banking and money loaning business. We should apply this expression in a common-sense way, so as to reach, if necessary, the intention of the Legislature. That intention, in our opinion, being, as evidenced by all the laws on this subject, to tax the property of all corporations which has a permanent situs in this state. The expressions 'moneyed business' or 'moneyed man' are often used, and in their common acceptation and generally understood meaning, we do not apply them solely to the business of handling and loaning money, or to a man whose property merely consists of money; but, as said by the Supreme Court of Pennsylvania in *Jacob's Estate*, 140 Pa. 274 [21 Atl. 319, 11 L. R. A. 767, 23 Am. St. Rep. 230], 'that the word money is properly known and used as indicating property of every description is well known.' Thus it is very common to refer to a person as a 'moneyed man' because of his large possessions, yet those possessions may consist exclusively of real estate."

In *Upton, Assignee, v. Tribblecock*, 91 U. S. 45, 47, 23 L. Ed. 203, it was said: "The capital stock of a moneyed corporation is a fund for the payment of its debts." Plainly the word "moneyed" was not there used in the restricted sense. The particular concern involved happened to be an Illinois insurance company, but the sentence has been frequently quoted in connection with various kinds of corporations organized for profit, but having no banking, loaning, or insurance powers. *Hamor v. Taylor-Rice Engineering Co. (C. C.)* 84 Fed. 392, 395; *State Trust Co. v. Turner*, 111 Iowa, 664, 673, 82 N. W. 1029, 53 L. R. A. 136; *Kelly v. Clark*, 21 Mont. 291, 321, 53 Pac. 959, 42 L. R. A. 621, 69 Am. St. Rep. 668; *Lane's Appeal*, 105 Pa. 49, 60, 51 Am. Rep. 166; *Gogebic Investment Co. v. Iron Chief Mining Co. et al.*, 78 Wis. 427, 431, 47 N. W. 726, 23 Am. St. Rep. 417.

The question is not what the words "moneyed corporation" mean at this time according to approved usage, but what they meant when the statute containing them was enacted. *Clearwater v. Bowman*, 72 Kan. 92,

82 Pac. 526. The New York definition was not in terms adopted by the Legislature of Missouri or by that of Kansas. It cannot fairly be deemed to have been adopted by implication in either state. In Missouri in 1835 there was no general law whatever in relation to corporations other than one regarding the service of summons upon them. In Kansas in 1855 there was no statutory classification of corporations according to their purposes. In neither state was there any separate class of business corporations to which the term "moneyed" applied. The section preceding that under consideration forbade the making of false entries in the records of public offices, concerning demands in favor of or against the state, or of any county, township, or city, thus protecting the books of public corporations. The natural inference is that, in adopting a similar provision concerning the book accounts of "moneyed corporations," the expression quoted was used in a broad popular sense, rather than with a narrow technical meaning; the purpose being to cover all private corporations having a capital stock and employing money for gain, as distinguished from those not designed for pecuniary profit, such as religious, benevolent, or educational organizations.

The judgment is affirmed. All the Justices concurring.

(82 Kan. 450)

STATE v. JOHNSON et al.†

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

BAIL (§ 75*)—FORFEITURE—FAILURE OF ACCUSED TO APPEAR.

In a criminal case pending before a justice of the peace on a charge of misdemeanor, where a continuance has been granted, and the defendant has been released upon a bond given to secure his attendance at a certain day and hour, at which time the case is set for trial, it is within the discretion of the court, if the defendant appear only by attorney at the time and place specified for trial, to proceed with the trial or to refuse to proceed and to forfeit the bond.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 309-321; Dec. Dig. § 75.*]

Appeal from District Court, Franklin County; C. A. Smart, Judge.

Action by the State against H. B. Johnson and O. E. Dick. Judgment for defendants, and the state appeals. Reversed and remanded.

F. S. Jackson, Atty. Gen., and W. B. Pleasant, for the State. F. A. Waddle, for appellants.

SMITH, J. This action was brought in the district court of Franklin county by the county attorney in the name of the state. The petition alleged all the facts stated in the agreed statement of facts hereinafter set forth, and had attached thereto as an exhibit

the bond, of which the following, omitting the caption and certificate of approval, is a copy: "State of Kansas, Franklin County—ss.: Whereas, upon good cause shown, the trial of the above-entitled cause is this 7th day of December, 1908, postponed unto the 15th day of December, 1908, at nine o'clock a. m., at the office of the above-named justice in said township: Now, we, the undersigned, residents of said county, bind ourselves to the state of Kansas, in the sum of two hundred dollars, that said defendant, L. N. Burlingame, will appear before said justice at the time and place appointed for said trial, then and there to answer the complaint in said cause alleged against him. H. B. Johnson. O. E. Dick." The answer of the defendants was: (1) A general denial; (2) that at the time and place appointed for the trial Burlingame appeared by counsel and demanded a trial, but that the county attorney objected and refused to proceed with the trial at that time. Upon the trial of the issues joined, the case was tried before the court without a jury.

A transcript of the docket of the justice of the peace before whom the criminal action had been pending was introduced in evidence and showed that the justice had before the continuance declared the bond forfeited, and the facts generally stated in the agreed statement. In addition, the parties by their attorneys made the following agreed statement of facts: It is agreed by and between the parties to this action: That on the 7th day of December, 1908, a criminal action was commenced by the state of Kansas against one L. N. Burlingame before J. W. Spangler, who was then and at all times hereinafter mentioned a duly elected, qualified, and acting justice of the peace of Pomona township, Franklin county, Kan. That said action was entitled the State of Kansas, Plaintiff, v. L. N. Burlingame, Defendant. That at the commencement thereof the said county attorney filed in said justice court of said Spangler, and with said Spangler, a complaint in writing in six counts, in each of which counts it was alleged, in substance, that said Burlingame, at a date mentioned therein, in the year 1908, did within the county of Franklin and the state of Kansas willfully and unlawfully barter and sell spirituous, malt, and other intoxicating liquors without taking out or having any permit to sell intoxicating liquors as provided by law. That said complaint was duly sworn to by said county attorney, and at the request of said county attorney said justice of the peace thereupon issued his warrant in writing to the sheriff of said county for the arrest of said defendant, Burlingame, and thereupon the said sheriff on said day at once duly served said warrant by arresting said Burlingame and bringing him before said justice of the peace and then made his return upon said warrant and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied June 17, 1910.

filed the same with said justice, and then and there in fact had said Burlingame in actual custody and in said court before said justice on said December 7, 1908. That thereupon for good cause shown the trial of said cause was adjourned and postponed by said justice until 9 o'clock a. m., on December 15, 1908, and it was then and there on December 7th ordered and adjudged by the said court that said Burlingame should furnish his recognizance in the sum of \$200 that said Burlingame would appear before said court at said time and place appointed for said trial, then and there to answer the complaint filed against him, and in default thereof he be committed to the jail of Franklin county. Whereupon, and immediately upon the making of said order, and while said Burlingame was in the actual custody of and held by said sheriff, the defendants executed the bond sued upon in this action for the appearance of said Burlingame at the time and place set for said trial, and said bond was furnished on behalf of said Burlingame and approved and filed as alleged in the petition, and was executed to procure the release of said Burlingame from said sheriff. That upon the filing of said bond and upon account of the execution of it said Burlingame was then and there duly released from said custody. That at the time to which said trial was adjourned, to wit, on December 15, 1908, at 9 o'clock a. m., the state of Kansas appeared by said county attorney with at least 10 witnesses ready to try said cause. That the said Burlingame appeared not and did not attend said court or come in or to said court or before said justice or to the office of said justice, and could not be found. That, the hour of 9 o'clock having fully arrived, said case was called for trial, and immediately thereafter said Burlingame was called by the sheriff by order of said court three times audibly at the front door of the office of said justice, and each of said bondsmen was called by the sheriff at said door and called to bring into court said Burlingame and save their recognizance; but said Burlingame did not come and was not brought into court and did not appear before said justice or in his court on said day, and has never since appeared before him, but willfully absented himself from said court. That at the time and place set for said trial, to wit, at 9 o'clock a. m., on said December 15th F. A. Waddle, a regularly practicing attorney of said county, employed by said defendant, appeared in said court as attorney for said Burlingame and requested that a trial of said cause be had in the absence of said Burlingame, to which the county attorney objected, which objection was sustained by the court, and the cause was then continued till December 29, 1908, at 9 o'clock."

It will be observed that six charges were made in the complaint before the justice of the peace of separate violations of the prohibitory liquor law, and that, if the defend-

ant had been convicted on any of the charges, it would have been the duty of the justice of the peace to impose a fine of not less than \$100 and a sentence of at least 30 days' imprisonment in the county jail for each offense. The bond called for the appearance of the defendant at 9 o'clock a. m., December 15, 1908, at the office of the justice of the peace in the township. The petition alleges that on the day prior to such 15th day of December the defendant had fled from the county and never thereafter appeared. This allegation does not appear to have been agreed to in the agreed statement, nor to have been proven. The case was called at the hour, time, and place set for the appearance of the defendant in the bond, and neither he nor his bondsmen appeared in person, but the defendant appeared by attorney and demanded a trial, and the court on the objection of the county attorney refused to proceed and continued the case, and thereafter a third continuance was had, and the case was finally dismissed; neither the defendant nor his attorney having appeared otherwise than as stated.

The sole question presented is whether, in such case, the justice of the peace is bound to accept the appearance of the defendant by attorney and to proceed with the trial in the absence of the defendant, and the question is to be determined by the construction of sections 5649, 5690, and 5825, Gen. St. 1901, which read:

"Sec. 5649. No person indicted or informed against for a felony can be tried unless he be personally present during the trial; nor can any person indicted or informed against for any other offense be tried unless he be present, either personally or by his counsel."

"Sec. 5690. For the purpose of judgment, if the conviction be for an offense punishable by imprisonment, the defendant must be personally present; if for a fine only, he must be personally present, or some responsible person must undertake for him to pay the judgment and costs; judgment may then be rendered in his absence."

"Sec. 5825. All proceedings, including the mode of procuring and the grounds for a change of venue, upon the trial of misdemeanors before a justice of the peace, shall be governed by the provisions of the Code of Criminal Procedure so far as the same are in their nature applicable, and in respect to which no provision is made by statute."

On the part of the appellee it is contended that the appearance by the defendant by attorney, who requested to proceed with the trial, was a complete satisfaction of the conditions of the bond. The converse of the proposition is insisted upon by the state, and it is contended that at most it is a matter within the discretion of the justice of the peace to proceed with the trial or not, and that in a case like the one in point, where imprisonment in case of conviction is a necessary part of the judgment, the discretion

should be exercised as it was in this case.

In *Kenworthy v. El Dorado*, 7 Kan. App. 643, 53 Pac. 486, it was held that, in a case pending before the police judge of the city, it was error to take the forfeiture of the recognizance when the defendant appeared by attorney and demanded a trial; but that appears to be a case in which only a fine could be imposed as a penalty in case of conviction. That case, at any rate, does not decide the interpretation of the sections copied above. Construing sections 5649 and 5690, it simply holds that the presence of the defendant at the time forfeiture of the bond was taken was not necessary.

It does not appear that there is any provision in the procedure before justices of the peace in misdemeanors bearing upon the question of the presence of the defendant at the time of the trial, and for the purposes of this case we shall assume that section 5649 applies to such case. Construing, then, section 5649 with section 5690, the question to be determined is whether a justice's court on the trial of a case which, if it result in a conviction, involves the immediate imposition of a jail sentence upon the defendant, is compelled by these statutes to proceed with the trial in the absence of the defendant when he appears only by attorney and demands a trial.

In *State v. Baxter*, 41 Kan. 516, 21 Pac. 650, where the trial in the district court was for assault and battery, it is held that the "personal presence of the defendant during a trial for a misdemeanor is not absolutely required. * * *"

In *State v. Ellvin*, 51 Kan. 784, 33 Pac. 547, it is said: "Where the defendant, near the close of his trial for a misdemeanor, renders himself unable to attend the trial by the voluntary use of intoxicating liquors, and an application is made for a continuance of the trial upon that ground, a denial of the same will not be held to be fatal unless there is a clear abuse of discretion; and held that, under the circumstances of this case, there was no abuse of discretion."

This was a trial for a violation of the prohibitory liquor law, and the presence of defendant is treated as a matter of discretion in the trial court. While the statutes prohibit the trial of a person on the charge of felony in his absence, and inferentially permit the trial of a defendant on a charge of misdemeanor in his absence, neither provision expressly confers upon the defendant the right to be present at a trial or a privilege of being absent therefrom. Inferentially section 5649, which prohibits his trial for a felony in his absence, implies a right to be present, and inferentially, it may be said, this section implies his right on a trial for any other offense to be absent if he appear by attorney; but, as we have seen (*State v. Ellvin*, supra), the court may in its discretion proceed with the trial in his absence. For the purposes of

judgment under section 5690, if the conviction be for an offense punishable by imprisonment, he must be personally present; if by a fine only, judgment may be rendered in his absence, if some responsible person undertake for him to pay the judgment and costs. Since the statute in no misdemeanor case explicitly confers the right of the defendant to be absent on his trial for a misdemeanor, and expressly requires his presence when judgment is rendered therein, if the judgment be for imprisonment, as it must have been in this case if a conviction had been had, we are inclined to view the matter of the right of the defendant to a hearing in his absence as within the discretion of the court. These statutes are to be construed with reference to the purpose sought to be accomplished, and, in view of the history of criminal litigation, the statutes of our state above copied substantially conform to the rule at common law, and may almost be regarded as a re-enactment of the common law. At common law, for lessor misdemeanors punishable only with fine the presence of the defendant at the trial was not essential, but for misdemeanors punishable with imprisonment it was essential.

A pertinent discussion of the question involved is found in *Warren v. State*, 19 Ark. 214, 68 Am. Dec. 214. The following is an excerpt from the opinion therein: "The counsel for the appellant maintains that under these provisions of our Code, as well as by the terms of the common law, Emerson, the defendant in the indictment, had a right to appear by his counsel, plead to the indictment, and thus discharge his recognizance; and we are cited to several Vermont and English decisions in support of this position. We have examined the cases to which we have been referred by counsel, and find that they only go to the extent that a verdict may be rendered, and a judgment pronounced against a defendant upon a charge of a slight misdemeanor, without his being personally in court at the time; and this is the purport of the statute, as held in the case of *Sweeden v. State*, 19 Ark. 205, just decided. We presume our statutory provision was intended to be what it really is, declaratory of what the law was before its passage; or, in other words, it is a legislative interpretation of the law as it stood at the time. Taking our statute as being declaratory of what the law was, we feel no hesitancy in saying, independent of other considerations, that it is purely a matter of discretion with the court before which a criminal prosecution for a misdemeanor is depending whether the defendant shall or shall not be permitted to answer to the indictment by attorney or agent, without personally appearing in court himself to be exercised or not, according to the circumstances in each particular case; and it, being a matter of sound discretion in the court, cannot be controlled or reviewed by this court on error or appeal. But suppose, for the argu-

ment, that Warren had been permitted to appear for Emerson, and answer to the indictment, would that fact satisfy the condition of the recognizance in this case? We think most clearly not, and we are sustained in this conclusion by the very authorities to which we have been referred by the counsel for the appellant."

We conclude that in criminal cases in this state, where the defendant is under bond to appear and answer the charge at a certain day and hour, it is within the discretion of the court, if the defendant appears by counsel and requests a trial, to proceed with such trial; that, if the offense is one for which imprisonment is to be inflicted in case of conviction, the discretion should ordinarily be exercised by refusing to proceed with the trial. In any event, in such case, the defendant must be present at the sentence. If the court be satisfied that the nature of the offense is such that in case of conviction imprisonment will not be inflicted as a penalty, the court may in its discretion try the case in the absence of the defendant, and, if some responsible person appears and undertakes for the defendant to pay the judgment and costs, the judgment also may be rendered in his absence.

It appears in this case that the court exercised its discretion properly, and refused to proceed with the trial, and the facts all appearing by agreement and the record of the court, and it appearing therefrom that the case was one in which imprisonment must have been inflicted as a part of the penalty in case of conviction, the judgment is reversed, and the case is remanded, with instructions to render judgment upon the forfeited bond as prayed for. All the Justices concurring.

(32 Kan. 429)

BAILEY v. RIVERSIDE TP.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. PLEADING (§ 204*)—SEPARATE COUNTS—GENERAL DEMURRER.

Where a pleading consists of more than one count, each count must, as against a general demurrer, be considered as if standing alone and constituting the entire pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486-490; Dec. Dig. § 204.*]

2. PLEADING (§ 216*)—SEPARATE COUNTS—DEMURRER.

In such a case neither facts involved in the action nor the averments of another count, unless incorporated by reference into the pleading demurred to, can properly be considered upon such hearing.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 535-539; Dec. Dig. § 216.*]

3. NEW TRIAL (§ 157*)—WAIVER OF ERROR.

Where, upon the hearing of a motion for a new trial, the court requests the applicant to point out specifically the defects complained of, and such applicant declines and neglects to do so, such failure will be regarded as a waiver of

any error committed by the court in overruling such motion.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 157.*]

Appeal from District Court, Trego County; J. C. Ruppenthal, Judge.

Action by Robert L. Bailey against Riverside Township. Judgment for defendant, and plaintiff appeals. Affirmed.

A. D. Gilkeson, John S. Dawson, and E. H. Hogueland, for appellant. John E. Heslin, for appellee.

GRAVES, J. This action was commenced by the township of Riverside, Trego county, in the district court of that county, to recover of appellant moneys received by him as township treasurer and not accounted for. The action was upon the official bond of the treasurer, against Robert L. Bailey and his sureties C. P. True and John W. Green. Upon the trial a verdict was returned against the defendants for the sum of \$326.69, and a judgment was entered accordingly. From this judgment the defendants appeal.

A demurrer to the petition of the township was filed by the appellants, which was overruled. This ruling of the court is claimed to be erroneous. The petition consisted of two counts; one covering the period extending from the time when Robert L. Bailey was appointed to the office of treasurer until his subsequent election thereto, and the other covering the term for which he was elected. It is conceded that the first count, when considered alone is sufficient; but it is insisted that the averments of the other count and certain facts disclosed by the evidence should have been considered in connection with such first count, in which case that count would be so modified that a demurrer would lie against it, and therefore the demurrer ought to have been sustained. Of course, this theory cannot be sustained, as every count or cause of action in a pleading must, as against a demurrer, stand or fall upon its own averments. *Butler v. Kaulback*, 8 Kan. 668; *L. N. & S. Ry. Co. v. Wilkins*, 45 Kan. 674, 28 Pac. 16; *Gilchrist v. Schmidling*, 12 Kan. 263.

Besides, a demurrer to the petition is heard and decided before any testimony is presented, and when it would be impossible for the court to know what facts would be shown upon the trial. In this view we think that the counts, when considered as the court must have considered them, are sufficient, and that it was right in overruling the demurrer.

The case as presented consisted of a long account of receipts and disbursements of cash, and was peculiarly appropriate for the consideration and decision of a jury, and we are unable to see where any just criticism can be made to the verdict. If we

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were in any doubt as to whether or not the judgment of the district court should be affirmed, the action had upon the hearing of the motion for a new trial would remove that doubt. During this hearing the defendants were challenged to point out to the court wherein the verdict was excessive or erroneous, as alleged in the motion. This they declined and failed to do, and the court for this reason overruled the application. This refusal on the part of the defendant's attorney was alone sufficient to justify the court in overruling the motion for a new trial, and sufficient to constitute a waiver of any error which the court might have committed in the decision. It is the duty of every attorney, engaged in the presentation of a cause to a court, to assist in reaching a just conclusion by stating fully and frankly to the court, when requested, all that he knows about the question under consideration. With such a statement the court might be able to grant the relief at once, and save further delay and expense. A court has the right, upon such an application, to have the errors complained of pointed out fully and clearly, and concealment or evasion of pertinent facts by the attorney is a violation of professional duty which will justify a refusal of the order requested. *State v. Everett*, 62 Kan. 275, 62 Pac. 657; *State v. Ballet*, 63 Kan. 710, 66 Pac. 1005.

We see no error, and the judgment of the district court is affirmed. All the Justices concurring.

(82 Kan. 364)

NELSON v. BOARD OF COM'RS OF BUTLER COUNTY.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

ESTOPPEL (§ 68*)—CLAIM IN JUDICIAL PROCEEDINGS.

In an appeal to the district court from an award of damages allowed by the county commissioners for the establishment of a highway, the county attorney in his statement to the jury stated that the land did not belong to the appellant, as a public highway had long ago been established upon that same line by the Legislature. On the trial the county attorney introduced an act of the Legislature (Laws 1872, c. 181) by which in 1872, a road was established on all sectional lines in that and other counties. At the proper time the appellant requested the court to instruct the jury to disregard the fact that a public highway had been established on such line, which was refused. *Held* error.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 165-169; Dec. Dig. § 68.*]

Appeal from District Court, Butler County; G. P. Aikman, Judge.

Action by George C. Nelson against the Board of County Commissioners of Butler County. Judgment for defendant, and plaintiff appeals. Reversed.

George J. Benson, and T. A. Kramer, for appellant. F. S. Jackson, Atty. Gen. (K. M. Geddes and C. A. Leland, of counsel), for appellee.

GRAVES, J. This is an action to recover damages on account of establishing a public highway over the land of the appellant. The road was regularly established under the statute. The county commissioners allowed the appellant \$134, and he appealed from this allowance to the district court, where the verdict was in favor of the county, and now he appeals to this court.

Only two questions are presented—Irregularity of the court, by which the appellant was prevented from having a fair trial, and misconduct of the county attorney, which prevented the appellant from having a fair trial. Upon the statement of the case the county attorney made the following statements to the jury: "There won't be any evidence here to show that Mr. Nelson ever owned the land over which this public highway is located; but there will be evidence that this public highway was located in 1872. The evidence will be that this public highway was located in 1872, long before Mr. Nelson or any one else, except the government, had it. The evidence will be that the government and the Legislature of the state of Kansas located that public highway before ever any patent was issued to it." To this the appellant objected and excepted, and asked to have it withdrawn from the consideration of the jury, which was refused by the court. Upon the introduction of the evidence the county attorney introduced chapter 181 of the Laws of 1872, which declared all section lines in several counties, among which was Butler, to be public highways. This was also objected to. At the proper time the plaintiff requested the court to give the following instruction to the jury, which was refused: "The fact, if it be a fact, that prior to the time the road in question was located by the board of county commissioners a road may have been provided for along the same line by the act of Congress, or some other method, cannot be taken into consideration by you in estimating the damage in this case. In other words, plaintiff is entitled to just as much damages as he would be if such road had not been previously located or provided for." Otherwise the case was tried in the manner usual in such cases. On the question of damages it was undisputed that 2½ acres of land were taken for the road, and were worth at least \$12 per acre. It was not pretended that the landowner received compensation for this by benefits or otherwise. There was nothing in the evidence sufficient to justify a verdict for the plaintiff for less than \$30, and a much larger verdict was justifiable. It was clearly erroneous for the court to permit the county attorney to call the attention of the jury to this act of the Legis-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lature. No purpose is apparent for doing so other than to influence and mislead the jury. The error in making the statement was emphasized by the refusal to exclude it from the jury upon request. The instruction to the jury requested by the plaintiff was proper, and ought to have been given. Commissioners of Lyon Co. v. Kiser, 28 Kan. 279; Commissioners of Wabaunsee Co. v. Bisby, 37 Kan. 253, 15 Pac. 241; Briggs v. Commissioners of Labette Co., 39 Kan. 90, 17 Pac. 331; Cowley County v. Hooker, 70 Kan. 372, 78 Pac. 847.

In the case of Wabaunsee County v. Bisby, supra, it was said in the opinion: "The county was treating this matter as if no road had ever been located there. Whatever proceedings had taken place prior to that time the county commissioners were entirely ignoring; they were saying to the defendant: We are about to locate and establish a road over your land, and, if you claim damages, you must present your claim. And after the county board has done this, it cannot be heard to say: A public road is already established over this same route, and therefore the plaintiff is not damaged." Page 255 of 37 Kan., page 242 of 15 Pac.

The only thing that can be said to avoid a reversal here is that no prejudice resulted from the error committed. This conclusion, however, is not apparent. The verdict is erroneous. It cannot be justified under the evidence, and therefore something must have misled the jury. No other reason appearing for the conduct of the jury, we conclude that it was the result of this error, and therefore the judgment is reversed. All the Justices concurring.

(32 Kan. 476)

GILBERT v. GRUBEL

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. PARTNERSHIP (§ 105*)—BREACH—RIGHT OF ACTION.

G. owned a business located in Kansas City, Kan. He wished to dispose of a one-half interest therein to some person who was familiar with it and capable of becoming manager thereof, and with whom he might subsequently form a partnership. B., who claimed to understand the business, proposed to purchase one-half thereof, and they entered into an agreement, which was in substance as follows:

B. was to manage the business and receive out of the profits thereof the sum of \$15 per week for his services. When the profits amounted to the sum of \$900, G. was to have the whole amount thereof, which was to be in full satisfaction for the one-half interest sold to B.

The contract was carried out as contemplated until the profits amounted to \$779.52, when G., without cause, forcibly ousted B., and terminated the contract. *Held*, that a cause of action for damages accrued in favor of B. immediately.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 168; Dec. Dig. § 105.*]

2. DAMAGES (§ 124*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

In an action by B., founded upon the facts above described, the measure of his damages would be such sum as would fairly compensate him for the loss sustained. In estimating this amount it would be proper to consider the value of the property to which he would have been entitled when the contract was completed, and how much of the agreement was unfinished at the time he was ousted therefrom.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 326-338; Dec. Dig. § 124.*]

3. CONTRACTS (§ 332*)—ACTION FOR BREACH—PLEADING.

Where, in such an action by B., his petition alleges the execution of the contract, its performance in good faith by him until practically finished, and his wrongful exclusion from the opportunity to complete the contract and receive the benefit of the property thereunder as stipulated, a demurrer to such petition should be overruled.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 332.*]

Porter, J., dissenting.

Appeal from Court of Common Pleas, Wyandotte County; H. J. Smith, Judge.

Action by William P. Gilbert against George Grubel, Jr. Judgment for plaintiff, and defendant appeals. Affirmed.

J. E. McFadden and O. Q. Clafin, Jr., for appellant. John T. Sims, for appellee.

GRAVES, J. This action was commenced for the purpose of recovering damages for a breach of contract. The facts are sufficiently stated in the petition, which reads:

"The plaintiff for his cause of action against the defendant says: (1) That on the — day of December, 1906, for a valuable consideration moving between them, the plaintiff and defendant duly executed the written contract, a copy of which is hereto attached, marked 'Exhibit A,' and made a part of this petition. (2) That at the time the defendant was engaged in several kinds of business, one branch of which was being conducted in the name of the Kansas City, Kan., Gravel Roofing Company, of which the defendant was the owner and sole proprietor. That the teams, wagons, tools, patterns, and implements belonging to and used in said business were of the value of \$900. (3) That by the terms of said agreement the defendant employed the plaintiff to take charge of and manage said business, and agreed that he (the defendant) would take all the net profits of the business, and out of the same would pay the plaintiff the sum of \$15 per week until such time as the profits should equal the sum of \$800, and then he would, in addition to paying the aforesaid sum of \$15 per week, give the plaintiff for his said services a half interest in said company, and thereafter the profits should be divided equally between them. (4) That thereupon the plaintiff, at the request of the defendant, and pursuant to said con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tract, took charge of said gravel roofing business and the aforesaid property used therein, and managed the same successfully and profitably until on or about the 1st of July, 1907, when the defendant, in violation of said agreement, and without any cause for so doing, took the business and property used therein out of the possession and charge of the plaintiff, and refused to carry out his said contract, against the will and without the consent of the plaintiff. (5) That the said business was well established, in good territory, in Kansas City, Kan., and had a good line of patrons. That said company did a large amount of business at a fair profit, and had no losses at any time. That the defendant kept all accounts relating to the business. That he collected all bills for work, and out of the proceeds thereof furnished all material to be used in the prosecution of the work, and the plaintiff simply received his \$15 per week from the defendant, but was not permitted to see and know the state of accounts, except as he could keep them partially in memory. (6) The plaintiff says that said company made net profits on its contracts, and that during the time it was operated as aforesaid the same amounted to \$779.52, or within \$20.48 of the full amount it was necessary to earn, net, to entitle the plaintiff to a half interest in said business and the property used therein under the terms of said contract, when the defendant wrongfully and forcibly ousted the plaintiff and refused to permit him to complete his contract. (7) The plaintiff says that said company was a going concern, and had a well-established growing business, and a half interest therein would have been worth more than half the value of the property of the company, which had been increased by the addition of a horse and buggy, paid for out of the proceeds of the business at a cost of \$168, making the value of the property \$966, one-half of which the plaintiff has been deprived of by the aforesaid wrongful conduct of the defendant; and the plaintiff has in like manner been deprived of his interest in the good will of said established business, which was worth \$500. (8) Plaintiff further says that he has at all times been ready, able, and willing to perform said agreement in good faith on his part, and would have done so if he had not been prevented by the defendant, as hereinbefore stated. That since he was ousted from said business he has lost the stipulated salary of \$15 per week, to his further damage \$150. Wherefore by reason of the premises the plaintiff demands judgment against the defendant for the sum of \$1,134, the aggregate of his damages so as aforesaid sustained, and for costs."

"Exhibit A.

"This agreement entered into this _____ day of December, 1906, between George Grubel, Jr., of the first part and W. P. Gilbert,

party of the second part, witnesseth said party of the first part owner and sole proprietor of business known as Kansas City, Kan., Gravel Roofing Company of its property and rights; to the value of eight hundred dollars, wishing to dispose of one-half interest of said business to said party of second part under the following conditions: First: That there shall be eight hundred dollars with interest at six per cent. per annum paid to party of first part out of profits of the business. (Said) party of second part for good and efficient service as manager shall receive fifteen dollars per week as salary until the profits of the business has paid to party of the first part eight hundred dollars with interest at six per cent. per annum as above said. Then party of the second part is to be considered as having one-half interest in the company and to receive one-half of the profits.

"Witness our hands this _____ day of December, 1906."

To this petition the defendant filed a demurrer, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled. This ruling of the court is claimed to be erroneous.

It is contended that a cause of action did not and could not accrue upon the contract until the profits arising from the business had reached the sum of \$800, and according to the petition they amounted to only \$779.52. The petition, however, further alleges that when the profits had reached the latter sum, the defendant "without any cause, and against the will and without the consent of the plaintiff, wrongfully and forcibly ousted the plaintiff, and refused to permit him to complete his contract." The defendant, having wrongfully and forcibly rendered it impossible for the plaintiff to complete his contract, cannot take advantage of his failure to do so; he cannot be permitted thus to profit by his own wrong. We think the demurrer was properly overruled. The answer was, first, a general denial; second, an admission of the contract; and, third, an allegation that plaintiff did not understand the business, and by his mismanagement operated it at a constant loss. The reply was a general denial. The case was tried to a jury.

It is claimed that there was error committed by the court in permitting the plaintiff to establish his case by secondary and incompetent evidence. The complaint as stated in the brief of the appellant reads: "The evidence of the plaintiff was from the beginning to the end made up of conclusions, mere guesses and assumptions, and was secondary. There was a regular set of books kept, in which all of the transactions pertaining to the business were recorded—books from which it could be shown the exact amount of business done and the cost of

all labor and material employed in carrying on the work. The plaintiff, as well as the defendant, had access to these books at any and all times, and yet, without any effort by the plaintiff to have these books brought into court, without any knowledge on the part of the plaintiff as to what they contained, without any showing that they had been lost or destroyed, or that they were beyond his control, the court, over repeated objections, allowed the plaintiff to give evidence of his own manufacture concerning the very essential things he was obliged to prove in order to recover." This statement is somewhat overdrawn, but not entirely without foundation. The court doubtless anticipated that when the defendant made his case, the testimony would be sufficiently supplemented and corrected to cure whatever defects had occurred. It ought to be said in this connection that the defendant had possession of all the books of account, and was familiar with them, while the plaintiff had nothing, not even his own memoranda, which he had from time to time turned over to the defendant, from which to make up the accounts of the business. He was compelled to testify from memory, and to estimate quantities and values. The defendant in making his case produced the books containing a complete history of the business, which he had kept, and testified fully concerning the same. The evidence of the plaintiff and the defendant constitutes the whole of the material and important testimony in the case. We think the evidence when considered as a whole was sufficient, and that no material or prejudicial error was committed in its admission.

The evidence concerning the plaintiff's management of the business was not admitted for the purpose of showing whether it had been profitable or not. The plaintiff did not agree to manage the business so as to make it profitable; he only undertook to give "good and efficient service as manager." The purpose of this evidence was therefore to show whether or not the plaintiff was so inefficient and incompetent as to justify the defendant in terminating the contract as he had done. In establishing a fact of this nature, the distinctions between the best and secondary evidence and between the introduction of books of original entry and the personal memory of witnesses are not so important as they would be were a different subject being investigated. Here the accurate ascertainment of accounts between the parties, the price of materials, a detailed statement of receipts and disbursements, while proper, were not controlling. The real question was whether or not the plaintiff had been grossly incompetent, indifferent, or reckless in his management. Upon this question evidence not technically in accordance with strict legal rules might be permitted without committing prejudicial error.

It is claimed that the court erred in its instructions given to the jury and in the refusal of those requested by the defendant. These instructions because of their length cannot be reproduced here, and will be considered generally. Some of the instructions given, if considered alone, might seem to be misleading; but, when considered as a whole and with reference to the theory upon which the case was tried, they seem to state the law clearly and correctly. The controlling questions in the case were these: If the defendant wrongfully and forcibly terminated the contract just when it was about completed on the part of the plaintiff as claimed by him, and thereby made its completion impossible, the defendant would be liable to the plaintiff for damages which would compensate him for his loss. On the other hand, if as the defendant claims, the plaintiff was ignorant of the business, and by his mismanagement caused continuous losses instead of profits, then the defendant might terminate the contract at any time. The instructions of the court presented these questions to the jury in a manner that cannot be fairly criticised.

As to the measure of damages, it was agreed by the parties that, if the contract was carried out as contemplated, the plaintiff should have one-half of the business, which was valued by them at the time the contract was entered into at the sum of \$900. Assuming that the contract was so carried out on the part of the plaintiff, until it had yielded the amount of profits stipulated less \$20.48, and then the defendant wrongfully terminated the contract, it seems that the reasonable value of the property which plaintiff was to receive, and which he had earned within a mere trifle, would not be unreasonable compensation for his loss. It is about what the ordinary mind would regard as fair and just. It is urged however, that inasmuch as the full amount of \$800, the sum stipulated, had not been earned in profits, the plaintiff was without remedy. If the deficiency had been only 20 cents, we suppose the same rule would apply. It is said that the contract does not say anything about a substantial compliance with the agreement, but only that when the profits equal \$800. True, but neither does the contract say that the defendant may at his pleasure terminate the agreement at a time when the plaintiff will suffer great loss, for which he cannot recover compensation; on the contrary, the time is unlimited within which the stipulated profits shall be earned. Where parties in their contracts do not cover contingencies which are liable to occur, they will be presumed to have intended that, if an unexpected contingency should arise, they will each do whatever under the circumstances will be fair and just. When courts are called upon to adjust differences between parties in such a case, they must be

guided in their deliberations by the universally recognized principles of justice and common fairness between man and man. A technical and literal interpretation of the contract which violates manifest justice will not be adopted, but its language will be extended or restricted so as to render it just and fair upon the presumption that the parties so intended.

We cannot concur with the interpretation contended for by the appellant in this case. Other questions are discussed by counsel; but, as those discussed dispose of the case, none other need be considered.

The judgment of the trial court is affirmed.

JOHNSTON, C. J., and BURCH, MASON, SMITH, and BENSON, JJ., concurring.

PORTER, J. (dissenting). There were two sides to this lawsuit. I cannot agree that the plaintiff's evidence was admitted for the purpose of showing that he had not been inefficient in the management of the business. That he had not been efficient was a matter of defense. It is true, the petition alleges that he had been efficient and competent, but the relief was demanded on the ground that the profits of the business amounted to \$779.52, a sum so near the amount stipulated in the contract that equity would regard the condition as substantially complied with. He undertook to show that the profits had amounted to this sum, and was permitted to introduce secondary evidence for that purpose, without any attempt to procure the best evidence, and other incompetent testimony was admitted in support of the same contention. It is true that he stated that in his opinion the profits approximated the amount claimed, but there was no competent evidence offered showing that the profits of the business amounted to as much as \$1. The plaintiff knew nothing of the cost of the material, except in a few instances; he knew nothing about the amount required by the firm to keep contract work in repair, and it was impossible for him, or for the jury from his evidence, to determine that there had been any profits. He testified to the amount expended for labor during a portion of the time the contract was in force, and he stated that the business, from its nature, was generally considered a profitable business. Of course, equity would not deny him relief because the profits did not amount to \$800, but, on the theory of his petition, it was necessary for him to establish by a preponderance of the evidence that there had been some profits; it was also necessary in order to determine the proper measure of his damages. He may be entitled to recover damages, but the case should be reversed, and a new trial ordered because of the errors in the admission of evidence.

(32 Kan. 412)

HOTHAM v. BERRY.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY (§ 194*) — CONTRIBUTION BETWEEN SURETIES.

Where two persons become sureties upon a promissory note, and one of them pays the note two days before maturity, the principal being then and for some time before and after unable to pay, such premature payment will not of itself relieve the other surety from contribution.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 606-623; Dec. Dig. § 194.*]

2. PRINCIPAL AND SURETY (§ 194*) — CONTRIBUTION—RELEASE OF SURETY.

In such a case where one of the sureties furnishes the money to pay the note and intrusts it to another, to be used for that purpose and such other for his own purposes obtains the check of a third person in exchange for the money received from the surety and with such check pays the note, such payment will not, because made in that manner, release the other surety from contribution.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 606-623; Dec. Dig. § 194.*]

Appeal from District Court, Atchison County; B. F. Hudson, Judge.

Action by J. C. Hotham against E. M. Berry. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

James W. Orr, W. P. Waggener, and James M. Challis, for appellant. J. L. Berry, for appellee.

GRAVES, J. This action was commenced in the district court of Atchison county by the appellant to compel contribution from the appellee for money paid by the appellant in the discharge of promissory notes upon which they were co-sureties. The plaintiff was not satisfied with the judgment of the district court and appeals. The case was tried in the district court upon the written statements of the witnesses, and the same testimony is presented here.

The notes were executed by J. W. Buils as principal to George Storch as payee, and by J. C. Hotham and E. M. Berry, the parties hereto, as sureties. There were four notes all dated March 30, 1903. One for \$200 was payable four months after date, another for \$200, payable six months after date; one for \$334.70 and one for \$65.30, each payable nine months after date. The last-named note was payable to Oscar Lips as payee instead of George Storch. About the time the first note became due, the principal being unable to pay it, the appellant furnished the money with which it was paid. It is claimed that the payment was made two days before it became due and the district court so found, and upon this finding held that it was a payment before default by the principal and operated as a release of the co-surety from con-

tribution. As we understand the law of contribution, it is founded upon the rules of equity. Co-sureties have, under these rules, been held to share the burdens of the obligation equally except where the rule of equality has for some substantial reason been broken. No mere technical legal rule should be permitted to override the rules of justice and fairness which have always been recognized as existing between sureties. Under the circumstances, we think the time of payment immaterial. It was evident some time before the payment of Hotham that Buis, the principal, would be unable to pay the note at maturity. It was apparent that nobody's rights could be injuriously affected by payment two days before maturity, and it has been since shown that no harm was done by this premature payment. It would have been a vain and useless thing for the appellant to have waited until the expiration of the two days upon the possibility that the principal, who was known to be hopelessly unable to pay, might not make default. The law does not require the performance of a vain and useless act. Berry, the co-surety, lost nothing by Hotham's prompt action. Why he should be released from the performance of his obligation to pay his proportion of this joint liability we are unable to see. No reason has been suggested. It seems to us to be a case where a naked technical rule of law is invoked to avoid the performance of a just and equitable duty. No fair and reasonable excuse has been stated for this refusal to pay.

We also think that Hotham ought to be credited with the payment of the last two notes. While the check of the De Kalb Telephone Company was actually used to make the payment, it was simply the form in which the money furnished by Hotham had reached the exchange. The check was by every reasonable intentment the property of Hotham, and the mere fact that the money while on its way from the hands of Hotham to Storch had become transferred into this check does not change the real substantial fact that Hotham's money paid the notes. The De Kalb Telephone Company was under no obligation to pay these notes, and the check was issued by it because of the benefit it had received from the money furnished by Hotham. The money of Hotham in this roundabout manner paid the debt of Berry. It seems that, under the equitable considerations by which the relations between sureties are supposed to be controlled, no just reason exists for the technical distinction drawn by appellee between direct payment by Hotham made personally, and payment by another for him with a check obtained with his money from a third person. The fact remains that the debt was paid and that Hotham furnished the money by which it was extinguished.

Berry does not seem to have any just

cause of complaint because Hotham did not personally pay Storch with cash out of his own hand. It does not seem just that this whole burden should be borne by Hotham and Berry escape from the performance of his fair and just portion thereof. It has been said that one surety cannot require contribution from another until the debt has been actually paid, and yet as a general rule one co-surety may enforce contribution from another without having paid anything if he by some arrangement with the creditor has assumed and satisfied the debt of his principal. In this way equity regards the substance of the transaction and ignores its form. 1 Brandt on Guaranty and Suretyship, § 311.

The conclusions here reached will make it unnecessary to consider other questions discussed by counsel.

The judgment of the district court is reversed, with direction to enter judgment in favor of the appellant against the appellee for an amount equal to one-half the gross sum paid by Hotham less payments made to him by Buis. All the Justices concurring.

(82 Kan. 541)

PRUNTY et al. v. CONSOLIDATED FUEL & LIGHT CO.

CAUBLE et al. v. SAME.

(Supreme Court of Kansas. May 7, 1910.)

1. PLEADING (§ 123*)—ANSWER—GENERAL DENIAL.

The usual form of a general denial is that defendant denies each and every allegation of fact in the petition; but an answer in which defendant "denies each and every allegation in the second amended petition herein that is prejudicial to defendant" is sufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 255; Dec. Dig. § 123.*]

2. WORDS AND PHRASES — "ADVERSE" — "PREJUDICIAL."

The word "adverse" is defined as "opposite," "hurtful," "unfavorable"; and as synonyms of "prejudicial" are given "hurtful," "injurious," "disadvantageous."

[For other definitions, see Words and Phrases, vol. 1, p. 223; vol. 6, pp. 5501, 5502; vol. 8, p. 7760.]

Burch, J., dissenting.

Appeal from District Court, Wilson County; James W. Finley, Judge.

Actions by G. R. Prunty and Nettie B. Prunty against the Consolidated Fuel & Light Company, and by William Cauble and Lydia Cauble against the same defendant. Judgments for plaintiffs, and defendant appeals. Reversed and remanded.

Atwood Cady, for appellant. B. F. Carter and C. W. Shinn, for appellees.

PER CURIAM. The appellees in each of these cases filed their petition against the appellant for the purpose of canceling in each

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

case an oil and gas lease. The appellant filed a demurrer in each case, which was by the court overruled. Thereupon the appellant in one case filed an answer in which it "denies each and every allegation in the second amended petition herein that is prejudicial to the rights of the defendant"; and in the other case the appellant filed an answer which "denies each and every allegation in the plaintiffs' petition herein that is adverse to the rights of the defendant." Thereupon the appellant in each case filed a motion for a judgment in its favor on the pleadings, and the appellees in each case filed a motion for judgment on the pleadings in their favor. After argument, the court in each case overruled the motion of the appellant and sustained the motion of the appellees.

It must be observed that this was not a submission of either case to the decision of the court upon the pleadings; but, while each motion called for a judgment upon the pleadings, the motions were adversary, each party claiming judgment in his favor, the appellant contending that the petition stated no cause of action against it, and the appellees contending that the answer was a nullity and raised no issue, that the answer denied no fact specifically, but left to the court to determine what was "adverse" and "prejudicial" and to consider such matter traversed. We have examined the petitions and think the court was correct in overruling the demurrer and motion for judgment on the pleadings directed thereto.

As to whether the motion of the appellees for judgment on the pleadings was correctly decided depends upon whether the answer in each case was sufficient to put the plaintiffs therein upon their proof; whether in fact the answer raised any issue. The usual form of a general denial to a petition in this state is that defendant denies each and every allegation of fact in the petition contained. In *Munn v. Taulman*, 1 Kan. 254, 81 Am. Dec. 508, a denial in this form, "denies each and every allegation in plaintiff's petition alleged against him," while not approved as good form, was held sufficient to apprise the plaintiff what defense was intended to be set up in bar of his claim. In Webster's Universal Dictionary, in the definition of "adverse," among the synonyms given are "opposite," "hurtful," "unfavorable"; and as synonyms of "prejudicial" are given "hurtful," "injurious," "disadvantageous." In so simple a matter as a general denial there is no occasion to depart from the well-recognized form, and probably the court could without prejudice have sustained a motion to make these answers more definite and certain; but we do not think the answers were nullities and so defective as to raise no issue, but were sufficient to apprise the appellees what defense was intended to be maintained in bar of their claims.

The judgment, therefore, in each case is reversed, and each case remanded for further proceedings in accordance with these views.

BURCH, J., dissenting.

(82 Kan. 548)

HUGHES v. DELAUTRE.

(Supreme Court of Kansas. May 7, 1910.)

EJECTMENT (§ 108*)—EVIDENCE—DIRECTING VERDICT.

In an action to recover land, where the title appeared to be in plaintiff, but there was evidence tending to show that defendant was by purchase the equitable owner of at least one-half of the property and entitled to its possession, and that plaintiff knew of all these transactions when he purchased the property, and knew that defendant had been in possession of the property, paying taxes and claiming ownership, for years before the transfer of the legal title to him, it was error to sustain a demurrer to defendant's evidence, and give judgment for plaintiff.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 108.*]

Appeal from District Court, Seward County; William H. Thompson, Judge.

Action by A. J. Hughes against John Delautre. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Thomas A. Scates and Albert H. Watkins, for appellant. J. P. McLaughlin and C. G. Messerly, for appellees.

PER CURIAM. Action to recover two lots in Liberal. In 1901 the lots were owned by Hughes and his son-in-law, Naylor. Naylor gave a mortgage on his half to Beasley for \$421. There is testimony that afterwards, and before March 2, 1902, Hughes sold his half interest to Naylor. On that date Naylor sold the property to McMains, who gave a new mortgage on the whole to Beasley for \$668.85. The mortgage covered \$191.45 of debt belonging to Naylor, and this interest Naylor assigned to Hughes, who collected the money in August, 1903. When Naylor sold the property to McMains, he surrendered possession of the same. In December, 1902, McMains sold the property to Delautre and Blake, and soon afterwards Blake conveyed his interest to Delautre. Since that time Delautre has been in continuous possession of the property. The deeds from Hughes to Naylor, and later from Naylor to McMains, were not recorded, and it is claimed that they were lost. In 1908 Hughes obtained a warranty deed to the lots from Naylor, and a quitclaim deed from McMains, and then brought this action. On the trial Hughes produced an abstract, which it was admitted showed the state of the record and the record title to the lots to be in Hughes. Delautre then offered evidence tending to show that Hughes had sold his interest to Naylor, and of the sale of the property by Naylor to Mc-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Mains, also the mortgages mentioned, some evidence tending to show knowledge by Hughes of the transfers and the mortgage which purported to cover the whole property, as well as admissions and statements of his that he had formerly parted with his interest in the property, and also proof that Delautre had been in possession of the property for about five years, and had paid the taxes on it except for one year. The court sustained a demurrer to Delautre's evidence, and gave judgment for Hughes.

This was error. While the legal title appeared to be in Hughes, there was evidence tending to show that Delautre was the equitable owner of at least one-half of the property, and entitled to the possession of the same. The testimony tends to show that Hughes knew of all these transactions and transfers. If Naylor had not conveyed the lots to Hughes, he could hardly have claimed ownership as against Delautre, because his deed to McMains was not recorded; and from some of the testimony it appears that Hughes is in no better position, at least as to the half-interest formerly owned by Naylor. He is bound to know that Delautre had been in possession of the property, paying taxes and claiming ownership, for years before the transfer from Naylor to himself, and must be held to know what an inquiry would have disclosed. The testimony of appellant cannot be ignored. It tended to show an interest and right of possession in Delautre, and a demurrer to his evidence should not have been sustained.

Judgment will be reversed, and the cause remanded for a new trial.

(82 Kan. 406)

DODY v. STATE BANK OF COMMERCE.
(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

GARNISHMENT (§ 251*)—WRONGFUL GARNISHMENT—MEASURE OF DAMAGES.

In an action to recover damages for the wrongful attachment of money and notes by way of garnishment, where there is no malice nor grounds for the recovery of exemplary damages, the measure of damages is interest on the money and notes during the time they were held under the garnishment process and the necessary expenses incurred in regaining possession of the property. Neither the loss of prospective profits in the general business of the owner because a part of his property was garnished nor injury to his credit are elements of damage.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 475; Dec. Dig. § 251.*]

Appeal from District Court, Marion County; O. L. Moore, Judge.

Action by W. A. Dody against the State Bank of Commerce. Judgment for plaintiff for less than the amount claimed, and he appeals. Affirmed.

W. H. Carpenter, for appellant. H. S. Martin, for appellee.

JOHNSTON, C. J. This was an action to recover damages for the wrongful garnishment of the funds and property of appellant. It is alleged that the State Bank of Commerce filed an affidavit for attachment and caused a garnishment summons to be issued and served on the Marion State Bank, thus tying up a deposit of appellant in that bank as well as two promissory notes, and that, when certain checks on the deposit which came into the hands of the State Bank of Commerce prior to the garnishment proceeding were presented, they were necessarily refused. It was alleged, too, that when the garnishment proceeding was tried the district court decided in favor of appellant dissolving the garnishment, and that upon appeal this decision was affirmed. *Bank v. Dody*, 71 Kan. 98, 79 Pac. 1092. In the present action the court instructed the jury that appellant was entitled to recover any damages necessarily incurred in releasing his property from the garnishment, that is, he could recover: First, his personal expenses, including the value of his time, if any had been proven; second, he could recover a reasonable attorney's fee incurred by him in securing the release of his property and the necessary expenses of his attorney; and, third, he might recover the interest upon the money as well as the value of the property impounded by the garnishment. In the findings the jury allowed him \$245.35 as interest on the notes; \$185.40 as interest on the money; and \$80 as attorney's fees. Appellant, who was a country merchant and also engaged in the cattle business, insisted that he had sustained a loss of profits by reason of the wrongful garnishment, and also that his credit was impaired by the same cause, for both of which he was entitled to recover. The court, however, instructed the jury that these things were too remote, speculative, and uncertain to form the basis of a recovery, and of this ruling complaint is made.

In this there was no error. No malice was shown, and there was no claim that appellant was entitled to exemplary damages. In the absence of malice, appellant was entitled to the actual damages resulting from being dispossessed of his property during the time it was detained, together with the necessary expenses incurred in gaining possession of the same. As the money and notes were restored to him, the material injury suffered was the deprivation of their use while they were impounded by the garnishment. If there had been deterioration, a loss of part, or some special damage, proximately and naturally resulting from the garnishment, this might have been recovered; but in view of the character of the property, and that all taken was recovered, the value of the use as well as the necessary expenses was a fair measure of damages. The injury to credit and the loss of profits in appellant's general

business alleged to have arisen from the tying up of some of his capital for a time are collateral disadvantages and are too speculative and remote to afford a basis for assessing damages. While the authorities are not uniform, they are generally to the effect that the loss of prospective profits is not an element of damage in cases of this kind. In some instances where the loss of profits is the direct and proximate result of a wrong, and it can be measured with certainty, it is allowed. For instance, in *Hoge v. Norton*, 22 Kan. 374, where a herd of cattle were wrongfully attached and placed in an inferior pasture and given improper care, which operated to prevent the ordinary increase in weight and value, and where the loss was the direct result of the wrong and was susceptible of reasonably certain measurement, it was held that the gains so prevented might be recovered. In somewhat similar cases the same measure has been employed. *Brown v. Hadley*, 43 Kan. 267, 23 Pac. 492; *Enlow v. Hawkins*, 71 Kan. 633, 81 Pac. 189; *Gas Co. v. Bailey*, 77 Kan. 296, 94 Pac. 258. Other cases furnish examples of losses of profits which were deemed to be too remote, contingent, and uncertain to warrant their allowance. *M., K. & T. Rly. Co. v. City of Fr. Scott*, 15 Kan. 435; *Walrath v. Whittekind*, 26 Kan. 482; *Harvester Works Co. v. Cummings*, 26 Kan. 367; *Gas Co. v. Glass Co.*, 56 Kan. 614, 44 Pac. 621; *States v. Durkin*, 65 Kan. 101, 68 Pac. 1091; *Railway Co. v. Thomas*, 70 Kan. 409, 78 Pac. 861.

The appellant was a merchant and was also engaged in carrying on a farm as well as the cattle business. How far the detention of the money and notes may have lessened his profits as a merchant farmer and stockman is largely a matter of conjecture. How much of the losses in his general business were attributable to a tying up of a part of his capital, and how much to other causes, would have taken the jury into the region of speculation. It is altogether too remote and uncertain to form a safe basis of recovery, and the same is true of the alleged injury to credit. *Casper v. Klippen*, 61 Minn. 353, 63 N. W. 737, 52 Am. St. Rep. 604; *Union National Bank of Chicago v. Cross and another*, 90 Wis. 174, 75 N. W. 992; *Myers v. Farrell*, 47 Miss. 281; *Trawick v. Martin Brown Company*, 79 Tex. 461, 14 S. W. 564; *Mitchell v. Harcourt et al.*, 62 Iowa, 349, 17 N. W. 81; *Davidson v. Oberthier*, 42 Tex. Civ. App. 337, 93 S. W. 478; *Crymble v. Mulvaney*, 21 Colo. 203, 40 Pac. 499; 4 *Sutherland on Damages*, § 1101. See, also, monographic note to *Tisdale v. Major*, 68 Am. St. Rep. 72.

The value of the use of the property may be recovered, and where, as here, it consisted of money and notes that were withheld from appellant, the interest thereon from the time they were detained under the garnishment is

a fair measure of such value. Appellant invokes the rule of liability which is applied where a bank refuses to pay money to a depositor; but, as appellant had no deposit with appellee, that rule does not apply.

In its cross-petition in error appellee complains of a ruling of the trial court as to the allowance of attorney's fees; but as its proceeding was brought under the old Code, and not within a year from the time the motion for a new trial was overruled and the final judgment rendered, this complaint is not open to our consideration.

The judgment of the district court will be affirmed. All the Justices concurring, except GRAVES, J., who did not sit.

(32 Kan. 522)

HAWKINS v. WINDHORST.†

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

BILLS AND NOTES (§ 92*)—SALES (§ 174*)—CHECK—CONSIDERATION.

The mutual and concurrent promises of parties in the sale and purchase of cattle wherein a check was given by the purchaser as a partial payment for the cattle sold constitute sufficient consideration for the check; and, when an action is brought by the payee against the drawer on the protested check, the drawer cannot defend on the ground that no cattle were received by the purchaser, when it appears that the cattle were tendered to him, and that the nondelivery of them was due to the failure of the purchaser to perform his part of the agreement.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 92;* Sales, Cent. Dig. § 434; Dec. Dig. § 174.*]

Appeal from District Court, Edwards County; Charles E. Lobdell, Judge.

Action by Miley Hawkins against E. C. Windhorst. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

F. Dumont Smith and A. C. Dyer, for appellant. G. Polk Cline and W. G. Fairchild, for appellee.

JOHNSTON, C. J. This was an action by Miley Hawkins to recover from E. C. Windhorst the proceeds of a bank check drawn upon her account by her husband, Fred Windhorst. There is testimony to the effect that Fred Windhorst purchased 92 head of cattle from Hawkins, and as part payment gave the check in suit to Hawkins, that the cattle were taken to Windhorst's in accordance with the agreement, but he declined to receive them, and the check having been received and protested, this action was brought. It appeared in the trial that Fred Windhorst had acted as agent of his wife in business transactions, including the issuance of checks, but to what extent and for what purposes were matters of dispute. The scope of the agency of Fred Windhorst and the means of establishing it were matters of contention at the first trial,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied June 17, 1910.

and the judgment then rendered was reversed because of rulings rejecting evidence which tended to show that he was the agent of his wife, with authority to sign her name to a check on her account. *Hawkins v. Windhorst*, 77 Kan. 674, 96 Pac. 48, 17 L. R. A. (N. S.) 219, 127 Am. St. Rep. 445. On the second trial evidence was received tending to show that Fred Windhorst acted for his wife in banking matters, that he deposited money in the bank in her name, and drew checks against the account, which were sometimes signed E. C. Windhorst by Fred Windhorst, and sometimes signed with his name alone. But checks signed in either way were accepted by the bank and paid from her deposit and charged to her account. This course of dealing was known to Hawkins at the time the transaction was had and the check delivered to him on the contract. He states that he carried out his part of the agreement on which the check was paid by taking the cattle over to Windhorst and offering to deliver them to him.

At the close of the testimony the court instructed the jury, and the following constitutes the entire charge, the latter paragraph of which is the subject of complaint:

"For plaintiff to recover in this case, he must prove to your satisfaction by a preponderance of the evidence that Mr. Fred Windhorst had authority to check on his wife's account for his own transactions; second, that he gave this check in question for a valuable consideration.

"If he has proven both of these facts your verdict should be for the sum of the check with interest at the rate of 6 per cent. from its date.

"If you believe from the evidence that the check in question was given as a part of the purchase price of the cattle, which Mr. Windhorst or his wife never received, and that they never actually received anything for the check, then your verdict should be for the defendant."

The contention is that, as the cattle were never accepted by the Windhorsts, the last paragraph of the instruction practically advised the jury to find in favor of the defendant. In effect, the jury were instructed that, unless the cattle were accepted by the appellee or her husband, there was no consideration for the check. It was a written contract, a negotiable instrument, and by virtue of the statute it imports a consideration. Gen. St. 1909, §§ 1644, 5277. According to some of the testimony, the check for \$500 was issued and delivered to appellant in the execution of mutual agreements between the parties. There was testimony that it was issued by one having authority to make contracts and to issue checks upon appellee's bank account. The sale of the cattle including the giving of the check resulted in an obligatory contract. Assuming that Fred Windhorst had the author-

ity claimed, and which he appeared to have, the check was a pro tanto payment on the cattle purchased. If it was given and taken for that purpose and without other conditions, it was as much a payment as if a promissory note had been accepted or as if cash had been paid. As between the parties, it was a valid instrument when it was given and accepted because there was not only the presumption of consideration, which arises under the law, but there were the mutual concurrent promises between the parties and these constitute a good consideration. It is fundamental that an agreement to do something as well as mutual promises between parties affords a sufficient consideration for the giving of commercial paper. 9 Cyc. 323; 1 Parsons on Notes & Bills, 191. Of course, if appellant after taking the check, had failed to deliver the cattle for which payment had been made by the check, appellee might have defended against appellant's action on the ground of an entire or partial failure of consideration, but appellee cannot by nonperformance on her part destroy the consideration of the check or invalidate the contract. Appellant, it appears, performed his part of the contract, and the other party cannot, as we have seen, base a failure of consideration upon his own failure to perform.

For the error in the instruction, the judgment will be reversed, and the cause remanded for a new trial. All the Justices concurring.

(82 Kan. 422)

KAMERA v. MISSOURI BOILER WORKS.
(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—INSTRUCTIONS—"NEGLECT." "NEGLIGENCE."

In a case where strict accuracy of expression required an instruction that it is the duty of an employer to *exercise ordinary care* to furnish his employes with a reasonably safe place in which to work, the omission of the words italicized is not ground of a reversal, where the jury were also told that the employer is liable only for such injuries to his employes as result from his negligence, and that "negligence" is the failure to use ordinary care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1148; Dec. Dig. § 293.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

Appeal from Court of Common Pleas, Wyandotte County; H. J. Smith, Judge.

Action by Fred Kamera against the Missouri Boiler Works. Judgment for plaintiff, and defendant appeals. Affirmed.

Dana, Cowherd & Ingraham and J. McCabe Moore, for appellant. Enright & Screechfield and E. C. Little, for appellee.

MASON, J. The Missouri Boiler Works, a corporation, appeals from a judgment recovered against it by Fred Kamera on ac-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

count of personal injuries received while in its employ. He was hurt by the falling of a scaffold on which he stood while at work. The defendant maintains that there was nothing in the evidence tending to show that it knew of any defect in the scaffold, or that it had any better opportunity than the plaintiff to acquire such knowledge. We conclude, however, there was justification for a finding that the original construction, which was the work of the defendant, was negligent, and that the resulting insecurity was not obvious to the plaintiff. Another ground upon which a reversal is asked is that the court gave an instruction which included the statement that "it is the duty of an employer * * * to furnish his employes with a reasonably safe place in which to work." Doubtless this definition was inaccurate, for the courts are agreed that the employer is not an insurer of the safety of the place in which his employes work, but is only bound to use ordinary diligence to make it safe. Yet the rule has often been stated in substantially the form adopted by the trial court. In a note in 6 L. R. A. (N. S.) 602, 603, in which the cases bearing upon every phase of the matter are fully collected and classified, it is said of this diversity of expression: "An examination of the opinions of the courts on the subject discloses that these different forms of statement of the rule are often used interchangeably and as meaning practically the same thing. The tendency to disregard or ignore the difference between these two forms frequently manifests itself in different cases decided by the same court. Sometimes a single case even will afford inherent evidence that the court regarded these different statements merely as different forms of the same rule, and did not regard the variation in phraseology as affecting the measure of the master's duty." That note (page 605) cites many decisions reversing judgments on account of the instruction here complained of, and others (page 608) refusing to do so because the rule was accurately stated elsewhere in the charge. In the case annotated (*Armour & Co. v. Russell*, 75 C. C. A. 416, 144 Fed. 614, 6 L. R. A. [N. S.] 602) that consideration was held ineffectual to cure the error; the court, making an extreme application of the doctrine of presumed prejudice, saying: "The presumption * * * is that error produces prejudice. It is only when the fact so clearly appears as to be beyond doubt that an error challenged did not prejudice, and could not have prejudiced, the complaining party that the rule that error without prejudice is no ground for reversal is applicable." Page 417 of 75 C. C. A., page 615 of 144 Fed. (6 L. R. A. [N. S.] 602).

In the present case the jury were told in effect that a recovery depended upon the proof of negligence in the construction or

maintenance of the scaffold, and that by negligence was meant a failure to exercise ordinary care. We cannot believe they were misled as to the true measure of the defendant's responsibility. An instruction asked by the defendant contained the phrase "under the law defendant was only obligated to furnish plaintiff with a reasonably safe place to work." A new trial ought not to be granted merely because the instructions include an expression which, although not strictly accurate, has been repeatedly used by reviewing courts.

The judgment is affirmed. All the Justices concurring.

(82 Kan. 472)

HOLLINGSWORTH v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

TELEGRAPHS AND TELEPHONES (§§ 66, 71*)—FAILURE TO DELIVER MESSAGE—DAMAGES.

In an action for damages for the failure to deliver a death message, *held*, that the evidence shows such wanton and reckless disregard of the rights of the plaintiff as warrant exemplary damages, and that the sum of \$700 allowed by the jury is not excessive.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 74; Dec. Dig. §§ 66, 71.*]

Porter, J., dissenting.

Appeal from District Court, Shawnee County; A. W. Dana, Judge.

Action by Merle Hollingsworth against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles Blood Smith, Samuel Barnum, and George H. Fearons, for appellant. J. B. Larimer and C. F. Spencer, for appellee.

PORTER, J. Plaintiff sued for damages occasioned by the failure of the defendant to deliver a telegram informing her of the dangerous illness of her father. The telegram was sent from Carthage, Mo., March 7, 1908, at 9:30 p. m. It was addressed to the plaintiff at her residence, No. 626 Tyler avenue, Topeka, and was received at Topeka at 9:40 p. m. It was not delivered until about 10 o'clock the next morning, and the plaintiff failed to reach the bedside of her father until several hours after his death, which occurred after midnight, March 8th. If the telegram had been promptly delivered on the night that it was sent, she could have taken an earlier train and reached her father's bedside about nine hours before his death. On account of not having received an answer to the first telegram, a second was sent from Carthage on the morning of the 8th, and the plaintiff repaid her sister the toll for both, amounting to \$1.60. The jury awarded her \$700 damages. The defendant appeals.

We find nothing substantial in any of the claims of error with respect to the introduction of evidence or the instructions. The only real question in the case is whether the damages are excessive. The testimony of the defendant was that the message was sent out for delivery within 10 minutes after it was received; that it was taken to the house where the plaintiff lived. She and her sister occupied only a part of the house at No. 626 Tyler avenue, and it was admitted that neither of them was at home at the time, and that they did not return until some time after 10 o'clock that night. The rules of the company do not provide for the delivery of messages between midnight and 8 o'clock a. m. This message was sent out on the first delivery the next morning, which was Sunday, and was delivered to the plaintiff about 10 o'clock in the forenoon.

The evidence tending to show that an attempt was made to deliver the telegram on the night it was received consisted of the testimony of the delivery clerk, who testified that he remembered the message coming in and knew he sent it out by a boy. The delivery sheet was introduced in evidence showing that it was sent out at 9:45 p. m. and returned at 10 p. m. The witness who made the entries on this sheet testified to them. He also testified that this was the only message he sent with the boy on that trip. The messenger, a boy 17 years old, testified that he took the message and went first to No. 624 Tyler avenue, and was told on inquiry that No. 626 was next door south; that he went there and knocked four or five times, but was unable to raise any one; that it was a double house; that he then went to the south half of the house, and inquired if they could tell him where the party was that lived at No. 626; that he was informed there that the party had not been home for several days; that he made other inquiries, but was unable to deliver the message and returned it.

On the part of the plaintiff Mrs. Garrigus testified that she lived in a part of the house at No. 626 Tyler avenue; that she was alone in the house that night; that there was a light in the front room and in the dining room; that no one came to the house inquiring for the plaintiff or left any word or any message for her that evening. The testimony of the plaintiff also shows that the place to which the telegram is addressed is only about five blocks from the telegraph office where it was received; that the plaintiff and her sister had lived at No. 626 Tyler avenue for 1½ years; that the plaintiff for about 4 years prior thereto had been employed in the millinery business at Paxton & Paxton's store, and was acquainted with all the employees of that firm, and with the people living on the east side of the street in her block; and that at the time the telegram was received her

name appeared in the city directory with her occupation given as that of a milliner with Paxton & Paxton, and her address as No. 626 Tyler avenue. It was also shown in evidence that, it being Saturday night, the store where plaintiff was employed remained open for business until 10 o'clock, at which time the plaintiff left the store and went to her home. The defendant does not claim to have made any effort to deliver the telegram at the place where plaintiff was employed.

Inasmuch as the jury may have disbelieved the testimony of the defendant tending to show an honest effort to deliver the message on the night it was received, and in view of the fact that no effort was made to deliver it at plaintiff's business address which could have been easily ascertained by referring to the city directory, the amount awarded by the jury cannot be considered excessive.

The judgment is therefore affirmed.

JOHNSTON, C. J., and BURCH, MASON, SMITH, GRAVES, and BENSON, JJ., concurring.

PORTER, J. (dissenting). In this case there is an absence of evidence disclosing any such aggravated circumstances or wanton disregard of the rights of the parties as was shown in the case of *Telegraph Co. v. Gilstrap*, 77 Kan. 191, 94 Pac. 122, and in *Telegraph Co. v. Lawson*, 68 Kan. 660, 72 Pac. 233. The writer is therefore of the opinion that the plaintiff should be required to remit one-half of the judgment. As said by the court in *Telegraph Co. v. Bodkin*, 79 Kan. 792, 796, 101 Pac. 652, 654: "The award of exemplary damages should be measured according to the circumstances of aggravation or mitigation, and made reasonable in view of the conduct of the wrongdoer in the particular case. The amount should not be so small as to be trifling, nor so large as to be unjust, but such as candid and dispassionate minds can approve as a punitive example to warn against similar lapses from duty."

(33 Kan. 546)

ROLAND v. ST. JOSEPH & G. I. RY. CO.
(Supreme Court of Kansas. May 7, 1910.)

WATERS AND WATER COURSES (§ 179*) —
BRIDGES—OBSTRUCTION OF WATER COURSE.

A petition, alleging that defendant railroad crossed a river at a point where the waters occasionally overflowed the low ground on each side, and that to prevent an obstruction it was necessary to have an opening several hundred feet on each side of the river, but that defendant constructed its roadbed on an embankment with only a short bridge over the river, which was insufficient to carry off the water at ordinary high-water mark, and that the embankment obstructed the water and the overflow of the low ground to plaintiff's damage, showed a violation of the railroad company's obligation to provide for the overflow water, and was not demurrable.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 179.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from District Court, Doniphan County; William I. Stuart, Judge.

Action by John C. Roland against the St. Joseph & Grand Island Railway Company. Judgment for defendant, and plaintiff appeals. Reversed.

S. M. Brewster and Ryan & Ryan, for appellant. J. J. Baker and R. A. Brown, for appellee.

PER CURIAM. John C. Roland brought an action against the St. Joseph & Grand Island Railway Company to recover damages on account of the flooding of his lands, occasioned by its bridge across a stream. His petition was held to be fatally defective, and he appeals. Its allegations, so far as here important, are in substance that the defendant's railroad crosses Wolf river at a point where the waters of that stream occasionally overflow the low ground on each side, the roadbed being upon an embankment some six feet high, measured from the level of such low ground; that "said defendant * * * knew * * * that said stream overflowed as aforesaid and widened out on either side, and that it required, and was necessary to have, an opening of several hundred feet on either side of said Wolf river to carry off the water in time of heavy rains and floods, yet said defendant constructed said roadbed as aforesaid, and as a part thereof constructed a short bridge, not to exceed 90 feet in length, with piling driven down in the stream and timbers extending down about 30 inches below the top * * * of said roadbed, entirely insufficient to carry off the water at ordinary high-water mark, and insufficient to let the water of said Wolf river pass through or under said roadbed; that said embankment, roadbed, and bridge were so constructed as aforesaid that the same formed * * * a dam and obstruction to the water of said Wolf river and the overflow water of the low ground on either side thereof; that the said roadbed, bridge, and railroad were so constructed * * * negligently, carelessly, and willfully, and with full knowledge that the same would dam up the water of Wolf river, and the overflow water therefrom, in times of high water and floods, damage plaintiff's lands and crops." The defendant claims that the petition shows that the water, the obstruction of which is alleged to have caused the plaintiff's injury, had overflowed the banks of the stream, and was therefore surface water, which could be obstructed without occasioning liability. The allegation is that the embankment and bridge operated as a dam to the water of the river, as well as to the overflow, so that the contention, if otherwise good, would not apply to the entire pleading. The record, however, fairly presents the question whether the obligation of a railroad company in laying its track

over a stream and the adjacent low ground is merely to allow room for the passage of so much water as can be carried within the banks. This question has already been answered in the negative in *Manufacturing Co. v. Bridge Co.*, 81 Kan. 616, 106 Pac. 1034, and upon the authority of that case the judgment must be reversed.

(32 Kan. 550)

WA KEENEY LAND & INVESTMENT CO.
v. ANDREW et al.

(Supreme Court of Kansas. May 7, 1910.)

TAXATION (§ 762*)—TAX DEED—SUBSEQUENT TAXES—DISTRIBUTION.

Where a five year old compromise tax deed which was void on its face for failure to recite how much of the total consideration was applied to each of the several tracts conveyed stated the amount for which each tract was originally sold and also for which the taxes were compromised, but did not recite what part of the amount which was paid as subsequent taxes for one year accrued against each tract. It will be presumed that the total payment on that amount was distributed in the proportion indicated by the original selling prices, and this presumption will not be altered by the fact that the amounts fixed by the compromise did not bear the same relation to each other.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 762.*]

Appeal from District Court, Greeley County; Charles E. Lobdell, Judge.

Action by the Wa Keeney Land & Investment Company against George H. Andrew and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

D. R. Beckstrom, for appellants. W. M. Glenn, Lee Monroe, and Geo. A. Kline, for appellee.

PER CURIAM. The sole question presented in this case is whether a five year old compromise tax deed which was held to be void upon its face for a failure to recite how much of the total consideration was applied to each of the several separate tracts conveyed can be validated by a presumption to be drawn from the other recitals. In *Gibson v. Kueffer*, 69 Kan. 534, 77 Pac. 282, the court decided that the statute required a tax deed covering several separate tracts to show not only how much each was originally sold for, but also for how much it was conveyed. The deed there involved was held invalid because the amounts paid for subsequent taxes were stated merely in gross, but whether these amounts could have been apportioned upon any presumption to be derived from other parts of the deed was not considered. In *Nagle v. Tieperman*, 74 Kan. 53, 85 Pac. 941, 88 Pac. 969, a somewhat similar deed was involved, but there the taxes upon the several tracts happened to have originally been equal, and the suggestion naturally arose out of that situation that, in the absence of anything to indicate the contrary, the presumption would

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

be that the equality continued. In *Kessler v. Polkosky*, 81 Kan. 69, 105 Pac. 7, although the amounts for which the tracts were sold were unequal, it was held that upon the presumption of continuity the subsequent taxes should be deemed to have accrued against each in the same proportion. In *Van Hall v. Goertz*, 82 Kan. 142, 107 Pac. 534, the principle was applied to a compromise tax deed.

Here the deed states the amount for which each tract was originally sold, and also the amount for which the taxes against it were compromised. It does not recite, however, what part of an amount which was paid as subsequent taxes for one year accrued against each tract. In accordance with the cases cited, it will be presumed that the total payment on this account was distributed in the proportion indicated by the original selling prices. That the amounts fixed by the compromise did not bear the same relation to each other will not alter the presumption.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith.

(82 Kan. 548)

LECOMPTÉ v. SMITH et al.

(Supreme Court of Kansas. May 7, 1910.)

1. TAXATION (§ 762*)—TAX DEED—SEPARATE TRACTS—CONSIDERATION.

Where land covered by a tax deed was sold in four separate tracts and the deed showed the price of each tract, the aggregate of which was the exact consideration recited in the granting clause, the deed was not objectionable for failure to show the amount for which each tract was conveyed.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 762.*]

2. TAXATION (§ 762*)—TAX DEED—RECITALS—SUBSEQUENT TAXES.

Since payment of subsequent taxes is no part of the consideration for a tax deed, it need not recite the amount of such taxes paid by the purchaser.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1514; Dec. Dig. § 762.*]

3. TAXATION (§ 762*)—TAX DEED—HIGHEST BIDDER.

Since the highest bid that can be received at a tax sale is the entire amount of taxes, interest, penalties, and costs, and the only higher bid is the entire amount thereof for a portion of the tract, a tax deed reciting that no one offered to take a less quantity of land than the description sufficiently showed that the purchaser was the best bidder at the tax sale.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 762.*]

4. TAXATION (§ 761*)—TAX DEED—SEVERAL DESCRIPTIONS—CERTIFICATE OF SALE.

A tax deed for four separate lots recited that "the said property was, severally as aforesaid, struck off to him [the purchaser] at the prices aforesaid and a certificate of purchase issued to him by the treasurer." Held that, though the recital of the certificate is in the singular number, the deed having been of record for five years, the recital would be construed as though the word "severally" was repeated after the word "and," making it read "and severally a certificate of purchase was issued to

him by the purchaser," and, as so construed, the deed was not objectionable for failure to show the issuance for a separate certificate of sale for each tract.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 761.*]

Appeal from District Court, Kearny County; W. H. Thompson, Judge.

Action by W. F. Lecompte against L. V. Smith and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Lee Monroe and George A. Kline, for appellant. O. H. Foster, Fred J. Evans, and Edgar Foster, for appellees.

PER CURIAM. The appellant brought this action to set aside a tax deed issued to the appellee L. V. Smith. At the time of bringing the action, the tax deed had been of record more than five years, and the appellees were in possession of the land. The question involved is whether the tax deed is void upon its face. If valid upon its face, the judgment of the court must be affirmed.

Three objections are made to the validity of the deed. The first is for a failure to state in the deed the amount for which each tract was conveyed. The land in question was sold in four separate tracts. As shown by the face of the deed, the first tract, No. 1, was sold for \$13.20; No. 2, for \$10.86; No. 3, for \$6.76; No. 4, for \$6.92. The aggregate of these amounts is \$37.74, which is the exact consideration recited in the granting clause of the deed for the conveyance. The deed on its face also undertakes to recite the amount of taxes paid by the purchaser on each tract for the four years following the sale; but this is not a necessary recital, as the payment of subsequent taxes was no part of the consideration for which the deed was made. *Jones v. Garden City*, 81 Kan. 59, 106 Pac. 997.

The second objection is that the deed fails to show with certainty that the appellee was the best bidder at the tax sale. We think the deed is not open to this objection. It recites: "And whereas, at the place aforesaid, as they were as aforesaid severally, and in due course, offered for sale, and sold to L. V. Smith of the county of Finney and state of Kansas, * * * having offered to pay the whole amount of taxes, interest, penalty, and costs then due and remaining unpaid on each of the said parcels, tracts, and lots of said property hereinbefore described and severally numbered, to wit, on the parcel, tract, or lot in said description numbered 1, the sum of thirteen dollars and twenty cents (\$13.20); on that numbered 2, ten dollars and eighty-six cents (\$10.86); on that numbered 3, six dollars and seventy-six cents (\$6.76); on that numbered 4, six dollars and ninety-two cents (\$6.92); for the whole of each of said parcels, tracts, and lots, re-

*For other cases see same topic and section, NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

spectively, which, as to each of them was the least quantity bid for, and payment of said several sums, aggregating the sum of thirty-seven dollars and seventy-four cents, having been made by him to the treasurer, the said property was, severally as aforesaid, struck off to him at the prices aforesaid, and a certificate of purchase issued to him by the treasurer." The deed shows that the appellee Smith bid the whole amount of taxes, interest, penalty, and costs on each tract, which as to each of them was the least quantity bid for. The highest bid that can be received at a tax sale is the entire amount of taxes, interest, penalties, and costs, and the only better bid there can be is that some one should bid to take a portion of a tract at the entire amount. The tax deed recites that no one offered to take a less quantity of land; hence it appears the land was sold for the highest bid possible, and it is not to be presumed that there were two best bids.

The third objection is that the deed shows affirmatively that the treasurer failed to issue a separate certificate of sale for each tract of land. The recital of the deed is "the said property was, severally as aforesaid, struck off to him at the prices aforesaid, and a certificate of purchase issued to him by the treasurer." It was the duty of the treasurer to issue a separate certificate for each tract of land sold, although several tracts of land may be embraced in one tax deed, and the recital here is that the tracts were severally struck off to the purchaser and a certificate of purchase issued to him by the treasurer. While this recital of certificate is in the singular number, indulging the presumption which should be indulged to support every tax deed which has been of record more than five years, we should repeat the word "severally" after "and," making it read, "and severally a certificate of purchase was issued to him by the treasurer."

Indulging the presumptions which it has been repeatedly held by this court should be indulged to sustain a tax deed under the provisions of section 7680, Gen. St. 1901, this deed should be held valid on its face; and the judgment is affirmed.

(82 Kan. 458)

WATT v. MISSOURI, K. & T. RY. CO.
(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 230*)—INJURIES TO STOCK—QUESTIONS FOR COURT AND JURY—CONFLICTING EVIDENCE.

In an action by a shipper against a railroad company to recover damages for injuries to stock alleged to have been caused by delay in transportation, where the principal question in dispute was whether the shipment was made under a written contract as the defendant claimed, or under the common law as the plaintiff

claimed, and the evidence was conflicting, it was error for the court to hold as a matter of law that the contract was not binding on the plaintiff.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 230.*]

2. PRINCIPAL AND AGENT (§ 170*)—CONTRACT—RATIFICATION.

Upon the evidence in this case, it was error to deny a request for an instruction to the effect that, if the plaintiff used the contract upon which the defendant claimed the stock was shipped in order to secure a return pass from the point of destination, and thereby obtained from the defendant something of value which he would not otherwise have obtained, he must be held to have ratified the execution and signing of the contract, although he may not have expressly authorized any one to sign it for him.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 638-643; Dec. Dig. § 170.*]

3. EVIDENCE (§ 208*)—ADMISSIONS—PLEADINGS.

While an abandoned pleading no longer serves to define the issues, it has some evidentiary force in the nature of an admission on the part of the pleader, and should be received in evidence for what it is worth.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 713-725; Dec. Dig. § 208.*]

Appeal from District Court, Bourbon County; John C. Cannon, Judge.

Action by D. M. Watt against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

John Madden and W. W. Brown, for appellant. John H. Crain, for appellee.

PORTER, J. Plaintiff sued to recover for injuries to a car load of horses shipped from Ft. Scott, Kan., to Ft. Worth, Tex. The petition alleged that the shipment was under a written contract, a copy of which was attached thereto. The horses were shipped on the afternoon of September 14, 1906, and it is claimed that they should have arrived at Ft. Worth in about 36 hours, which would have been Sunday morning; that in fact they arrived Monday morning; that they were en route about 27 hours longer than they should have been; that the car was left standing at different places on the road for several hours, and was switched around to such an extent that the horses were crowded and several of them were injured. The court sustained a demurrer to the petition, presumably on the ground that there was no allegation that the plaintiff had given written notice of the injuries, as provided in the written contract. The plaintiff then filed an amended petition, setting up a common-law shipment, and alleging that the averment in the former petition, to the effect that the horses were shipped under a written contract was a mistake of fact made by his attorney, and that there was no contract in writing. The answer was a general denial, and an

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

averment that the shipment was made under a written contract, a copy of which was attached to the answer as "Exhibit A," which is identical with the contract set out in the first petition. The answer then alleged as a defense the failure of the plaintiff to give written notice of the claim, and also that the plaintiff by the terms of the contract released the value of the horses to \$100 per head. There was a further defense that, in accordance with the United States statutes, the defendant was compelled to unload the horses for water, feed, and rest, which it did. The reply was a verified denial of the written execution of the contract, or that the same was signed by any one having authority from the plaintiff to sign his name. On the trial the evidence showed that D. M. Watt, the plaintiff, had bought and shipped horses and mules for several years; that in 1906 he made from 25 to 30 shipments to Texas; that he ordered the car for the horses in question through an employé of the horse and mule market at Ft. Scott. This employé gave the order to the station agent of the defendant by telephone. The company set the car out at the place requested, and it was loaded and the shipment made.

The plaintiff testified that he usually made his shipments under contracts similar to Exhibit A; that he went to the railway station on the day of the shipment in question for the purpose of signing a contract; that he found no one at the station, and came away without seeing the agent. He did not go with the horses, but took a passenger train to Ft. Worth. After the horses were shipped, and on the same day, he sent one McLaughlin, an employé of the horse and mule market, to the station agent to procure the contract and mail it to him at Ft. Worth so that he might get a return pass. The evidence is that when McLaughlin asked the agent for the contract the agent requested him to sign the same and to sign it P. M. Watt instead of D. M. Watt, because that was the name of the shipper as the agent understood it over the telephone. McLaughlin signed it P. M. Watt, and received a duplicate copy, which he sent to the plaintiff at Ft. Worth. Across the face of it appeared the words, in red ink, "Contract signed by Ed McLaughlin." At Ft. Worth the plaintiff took the duplicate sent to him to the live stock agent of the company, and by means of it received transportation from Ft. Worth to Ft. Scott, which he used. The defendant offered in evidence the plaintiff's first petition, with Exhibit A thereto attached. The court sustained an objection to this on the ground that there was no evidence to show that plaintiff had ever had anything to do with the contract, or was bound by it in any way. This was manifestly error. While the abandoned pleading no longer served to define the issues, it was some evidence in the nature of an admission on the part of the plaintiff, and should have been received

for what it was worth. *Reemsnyder v. Reemsnyder*, 75 Kan. 565, 570, 89 Pac. 1014; 1 Encyc. Pl. & Pr. 625, 626; 16 Cyc. 971, 972.

The defendant also offered in evidence a copy of the order of the railroad commissioners, permitting railroads to limit their common-law liability on shipments of freight. The copy was properly certified by the secretary of the board. An objection to this was sustained. In the same connection the defendant offered to prove by the agent at Ft. Scott that he was in possession of the tariffs which governed the rates of stock shipments at the time the horses were shipped, and that there were two rates in force over the defendant's line—one for shipments made under contract like Exhibit A, and another 20 per cent. higher under the common law—that these tariffs had been duly filed with the Interstate Commerce Commission and duly published in accordance with the laws of the United States. To this evidence an objection was also sustained. The court appears to have held as a matter of law that there had been no proof offered by the defendant showing the execution of a written contract binding upon the plaintiff. Apparently, for the same reason, the court denied a request for an instruction asked by the defendant, to the effect that if the plaintiff used the contract known as Exhibit A after the shipment was made, in order to secure a return pass from Ft. Worth, and thereby obtained from defendant something of value which he would not otherwise have obtained, he must be held to have ratified the execution and the signing of the contract, although he may not have expressly authorized any one to sign it for him.

We think the court erred in sustaining the objection to the evidence and in refusing the instruction. Whether the written contract under which the defendant claimed the horses were shipped was the contract of the plaintiff was a disputed question of fact. The issue was squarely raised by the pleadings. The plaintiff does not appear to have produced any evidence at the trial that his attorney was mistaken in the facts at the time the first petition was drawn. On the contrary, there is evidence that before the petition setting up the written contract was filed the plaintiff and his attorney secured copies of the contract from the agent of the defendant at Ft. Scott. The abandoned pleading, as we have seen, contained some evidence tending to show a written contract binding on the plaintiff. In addition to this there was evidence which tended to show that the plaintiff had ratified the act of his agent in signing the contract. There is no question that it was the intention of the plaintiff to execute a contract with the form and character of which he was familiar, and that he was only prevented from doing so by being unable to find the station agent. He authorized another person to get the contract for him, knowing that in order to do so it must

be signed, and afterwards used it knowing all the facts with respect to its execution, its terms and conditions, and by means of it received a return pass which he could not have obtained except for the contract. These facts were all in evidence, and from them a jury would have been justified in finding that he ratified what his agent did, and was as much bound by it as if he had signed the contract himself. *Ehrsam v. Mahan*, 52 Kan. 245, 34 Pac. 800; *McKinstry v. Citizens' Bank*, 57 Kan. 279, 46 Pac. 302; *Aultman Co. v. Knoll*, 71 Kan. 109, 79 Pac. 1074.

It is said in the syllabus of *McKinstry v. Citizens' Bank*, supra: "One who accepts the benefits of a contract, made without authority in his behalf, after being fully informed of all its terms, must also accept the burdens imposed on him by the contract." The court should have admitted in evidence the original contract, as well as the abandoned pleading and the other evidence, offered for the purpose of showing that the plaintiff, with full knowledge of the terms and conditions of the contract, had ratified it by accepting the benefits which it conferred. The court could not say as a matter of law that there was no evidence showing that a contract in writing was executed which was binding upon the plaintiff. For the same reason the evidence offered by the defendant for the purpose of showing authority from the board of railroad commissioners, permitting the defendant to limit its common-law liability on shipments of freight, and the fact that there were two tariffs in existence covering shipments of the kind in question, should have been admitted. The instruction asked correctly stated the law as to the ratification of the unauthorized acts of an agent, and should have been given. *Aultman Co. v. Knoll*, supra, and cases cited.

There is a further complaint because the court refused to submit to the jury the following special questions: "(1) Did plaintiff, or some one for him, sign and deliver to the defendant company a written contract covering the shipment? (2) Did the plaintiff, or some one for him, execute the written contract offered in evidence as Exhibit A? (3) Did the plaintiff take Exhibit A at Ft. Worth and obtain thereby a pass from Ft. Worth to Ft. Scott for himself? (4) Did the plaintiff by the use of Exhibit A. at Ft. Worth, Tex., obtain from the defendant the service of passing him back to destination free of charge?" The questions relate to facts which were directly in issue, and the defendant was entitled to have the finding of the jury thereon.

Other questions are argued in the brief which are not deemed necessary at this time to pass upon, for the reason that on another trial they may not be raised.

For the reasons stated, the judgment must be reversed, and the cause remanded for another trial. All the Justices concurring.

(82 Kan. 367)

HOWERTON et al. v. KANSAS NATURAL GAS CO.†

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. MINES AND MINERALS (§ 78*)—CANCELLATION OF INSTRUMENTS (§ 45*)—BREACH OF LEASE BY LESSEE—BURDEN OF PROOF—CONSTRUCTION OF OIL AND GAS LEASE.

An oil and gas lease provided that the lessee should pay \$50 per year for each gas well upon the leased premises during the time gas should be marketed therefrom. Adhering to the decision on a former hearing (*Howerton v. Gas Co.*, 81 Kan. 553, 106 Pac. 47) that the contract contemplated that other wells should be drilled with reasonable diligence to utilize this lease, it is further held, that the burden of proof is upon the plaintiff to show that a remedy in damages is not an adequate remedy for the failure of the lessee to proceed to drill other wells to protect the land from drainage and to obtain gas therefrom.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 78; * *Cancellation of Instruments*, Dec. Dig. § 45.*]

2. CANCELLATION OF INSTRUMENTS (§ 10*)—OIL AND GAS LEASE—BREACH.

Having failed to make this showing, the decree for cancellation cannot be sustained.

[Ed. Note.—For other cases, see *Cancellation of Instruments*, Cent. Dig. §§ 7, 9, 18-22; Dec. Dig. § 10.*]

3. MINES AND MINERALS (§ 78*)—BREACH OF OIL AND GAS LEASE—MEASURE OF DAMAGES.

The measure of damages is the sum of \$50 per year for each well from the time it ought to have been drilled.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 78.*]

Benson and Graves, JJ., dissenting.

On rehearing. Former opinion overruled and case reversed and remanded.

For former opinion, see 81 Kan. 553, 106 Pac. 47.

Eugene Mackey, John J. Jones, and Jones & Reed (Mackey & Scully, of counsel), for appellant. Baxter D. McClain and Farrelly & Evans (*amicus curiæ*), for appellees.

BENSON, J. This action has been reconsidered by the court after argument upon a rehearing heretofore allowed. The facts are stated in the first opinion. *Howerton v. Gas Co.*, 81 Kan. 553, 106 Pac. 47.

Upon a careful consideration of the arguments made upon the rehearing and of the authorities, the court is satisfied with the former opinion except in one particular. It was held that there was no adequate remedy in damages for the default of the defendant. Upon a review of the findings of the district court, and of the evidence, upon which the conclusions of law of that court were based, we now hold that the plaintiff failed to show, as he was required to do in order to obtain equitable relief, that damages would not afford an adequate remedy. The default consisted in the failure to properly develop the leased territory by drilling

and operating a reasonable number of wells necessary for that purpose, and the failure to market gas and make the payments, stipulated for the well completed. No reason is shown why witnesses of experience, acquainted with the gas field, may not testify with reasonable accuracy as to the number of wells which should have been drilled on the leased land both for protection from drainage by neighboring leaseholds and to obtain the gas, underneath the land. No insurmountable obstacle to such proof is perceived by the court, and, in the absence of evidence that it cannot be produced, it is concluded that the plaintiff is not entitled to a remedy by forfeiture or cancellation of the lease. This conclusion is supported by *Harris v. Ohio Coal Co.*, 57 Ohio St. 118, 48 N. E. 502, cited in the first opinion, and other adjudicated cases which have followed that decision. It needs no authority, however, to support the proposition that, if there is an adequate remedy in damages, no other relief can be obtained. The burden was upon the plaintiff to show either by the nature of the case, or by proper evidence, that such damages could not be ascertained with reasonable certainty. Failing in this, the judgment of cancellation cannot be sustained.

It should be observed that this is not a case where royalties payable in a share of the product are provided for, but is an agreement to pay \$50 per annum for each gas well. The measure of damages therefore is the sum the plaintiff has lost or may lose by the failure of the defendant to complete the number of producing wells reasonably necessary to develop the resources of the leased land and to protect its lines. When plaintiff has received \$50 per year for each well from the time it should have been drilled, he will have received the full compensation agreed upon in the lease. Under the terms of the lease, he has no share in the product of the wells, no concern as to the disposition which shall be made of that product, and the rules to be applied in leases where the lessor is given a royalty are not entirely applicable here. Penalties and forfeitures are not favorites of the law, and if, in this case, the damages which the lessor sustains from the breach of the contract can be ascertained with reasonable certainty, no forfeiture can be adjudged. It should also be observed that the plaintiffs during all this long delay for which they now seek a forfeiture made no complaint other than that the test well was leaking. Some affirmative action ought at least to have been taken by them indicating a purpose to insist upon a forfeiture before summarily declaring it.

If it shall be ascertained upon another trial that such a rule cannot be applied, an alternative decree may be entered upon proper proof adduced to support it, providing that the defendant shall proceed within a reasonable time, fixed by the court, to drill wells, and develop and protect the land

leased, as before indicated, and pay the amounts stipulated in the lease for such wells, as well as for the well already completed, or, failing to do so, that the lease be canceled. To this end proper amendments of the pleadings should be allowed if requested or found to be necessary.

The judgment is reversed and the cause remanded for further proceedings in accordance with these views.

JOHNSTON, C. J., and BURCH, MASON, and SMITH, JJ., concurring.

BENSON, J. (dissenting). A re-examination of this case has confirmed the views expressed in the first opinion. I am unable to see how the rule of damages announced by the court can be applied to afford adequate relief. How many wells should be drilled and when they should be drilled will, I believe, result in mere conjecture, even after the most patient judicial inquiry. The plaintiffs had a right to expect an actual demonstration by a reasonably diligent use of the drill. The opinions of witnesses, however confidently given, must necessarily be speculations. The evidence shows that wells were drilled around this tract during the year before the trial, some of which were dry. Who can say how many wells to be drilled on this tract will produce gas in marketable quantities? The result of drilling each successive well may change the prospect and consequently vary the obligation of the lessee. If a new well or wells should diminish the pressure in the others, the prospect would be affected unfavorably. If that result should not follow, the prospect might be improved. If the operations should result in several dry wells, the situation would be again changed. In each contingency an estimate of the number reasonably necessary would be varied. If it be suggested that in case the probable result cannot be foretold the plaintiff has no equity to be preserved, the answer is that in just such cases equity furnishes the only adequate relief. The plaintiffs had sufficient faith in the resources of the land to contract for its development and incur it with a lease. The defendant has sufficient faith to agree to make such exploration and operate the wells for the benefit of both parties. That there is gas to be utilized is shown by the test well; but the defendant now refuses to go further, and, when summoned to answer for its default, stood entirely upon its supposed legal rights, claiming that it was justified under the contract in refusing to operate or pay for the one well or to drill others. The lease provides for its own indefinite extension if gas is found in paying quantities. Such gas has been found. Can the lessee delay work and defer payment indefinitely? It has pursued and is pursuing active operations in drilling gas wells on adjacent leases with varying success, and other parties are also drilling

in the same vicinity and marketing gas therefrom. The effect these operations may have upon this lease seems not to affect the views or conduct of the defendant, although the migratory character of oil and gas is well known and has been often referred to in judicial decisions, and made the bases of requirements for prompt action. The right of the plaintiffs to reasonable returns from their property under this lease is disregarded, and no promise is given to proceed. In this situation the remark of the Pennsylvania Supreme Court in *Munroe v. Armstrong*, 96 Pa. 307, is pertinent, viz., that the lessee is "bound to operate or quit."

While the terms of the lease referred to in that case were different from the one now under consideration, in view of the obligation of the parties here, as interpreted by the court, the above language seems applicable. The alternative decree provided for will, I fear, be found difficult to frame, and difficult to enforce, and may only serve to perpetuate litigation. It is hoped, however, that it will be the means of administering justice, in case that end is not reached by an award of damages, which seems to the writer improbable.

GRAVES, J., concurs in this dissent.

PORTER, J. (Specially concurring). I think the court should declare as a matter of law, from its knowledge of conditions in the oil and gas territory, that witnesses of experience can testify with reasonable accuracy what number of wells would be required properly to develop the land embraced in the lease including such wells as would reasonably be necessary to protect the land from drainage from other wells, and that since judicial knowledge takes the place of proof we should hold that the action to forfeit or cancel the lease cannot be maintained because it appears that the plaintiff has an adequate remedy in an action for damages.

(82 Kan. 500)

BRICE et al. v. SAYLER et ux.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. TAXATION (§ 796*)—SALE FOR TAXES—PERSONS ENTITLED TO ATTACK.

The state issued to a purchaser a certificate of purchase of school land. A forfeiture was attempted and a certificate was issued to a second purchaser, for the forfeiture proceedings were void. The land was sold for taxes, a tax deed was issued, and the tax purchaser paid out the first school land certificate and obtained a patent. The tax proceedings were defective. In an action by the patentee to quiet his title, the two holders of school land certificates set up their titles and asked for affirmative relief. Judgment was rendered for the patentee, and the second certificate holder only appealed. *Held*, it is no longer material whether the plaintiff proceeded under the statute or in equity, and

appellant cannot complain of defects in the tax proceedings.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 796.*]

(Additional Syllabus by Editorial Staff.)

2. TAXATION (§ 697*)—SALE FOR TAXES—REDEMPTION—TENDER OF AMOUNT DUE—PERSON ENTITLED.

Land held by an assignee of a school land contract was resold under void forfeiture proceedings. Subsequently the land was sold for taxes and the holder of the tax deed paid out the contract of the assignee, and obtained a patent. *Held* that, as the assignee was the only person who could redeem from the tax sale, a tender by the certificate holder through the forfeiture proceedings of the amount of the tax lien to the tax purchaser was of no avail.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 697.*]

Appeal from District Court, Gray County; Gordon L. Finley, Judge.

Action by Harry Brice and others against E. T. Sayler and wife. Judgment for plaintiffs, and defendants appeal. *Affirmed*.

B. F. Milton, James B. Naylor, Robert Stone, and George T. McDermott, for appellants. Scates & Watkins, for appellees.

BURCH, J. Bettelheim held the land in controversy as the assignee of a valid school land contract issued in 1885. An attempt was made to forfeit his rights in 1895, but the proceedings were void. The land was resold in 1901, and Sayler became the assignee of the contract issued upon the second sale. The taxes on the land were not paid, and it was sold to the county at tax sale in 1903. Brice took an assignment of the certificate of sale in 1906, procured a tax deed, paid out Bettelheim's contract, and obtained a patent in 1909. It may be conceded for the purpose of the decision that the assignment of the tax sale certificate and the tax deed were invalid. Before the patent was issued, Bettelheim tendered to the county treasurer the amount due on his contract, and Sayler tendered to Brice the amount of the tax lien. Both tenders were refused. After receiving his patent, Brice brought suit to quiet his title. Bettelheim answered, claiming title under the first school land contract. Sayler answered, claiming title under the second school land contract. Judgment was rendered for Brice, and Sayler appeals.

In this court Sayler derides the tax proceedings under which Brice claims. Brice scoffs at the forfeiture proceedings which support Sayler's contract. Brice says he stands in Bettelheim's shoes. Sayler says Bettelheim's shoes were lost, and that Brice must recover on the strength of the tax proceedings, and not on the weakness of the forfeiture proceedings. Bettelheim, having been sent out of court barefoot, made no attempt to come up, and consequently cannot be heard. The key to the solution of this problem lies here: Sayler did not rest content

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

with disputing the strength of Brice's title. He became an aggressor, put his own title in issue, and asked affirmative relief against Brice and Bettelheim. Bettelheim adopted the same course against Brice and Sayler, and the court was called upon to adjudicate, not the relative strength, but the actual validity, of each man's claim to the property.

Bettelheim claimed the elder title, and the first question was: Did the forfeiture proceedings cut him off? Sayler does not undertake to defend the service of the notice of forfeiture. It had no legal force. The second sale was a nullity. Sayler has no shadow of title, and consequently he went out of the case. The remaining question was: What effect did the tax proceedings have upon Bettelheim's unforfeited contract rights? Sayler had no interest in this question or its answer. The court decided in favor of Brice, and Bettelheim does not complain.

Since Bettelheim was the only person who could redeem from the tax sale, Sayler's tender to Brice amounted to nothing. It is not now material to Sayler whether the petition upon which Brice recovered was based upon the statute or conformed to the procedure in equity. Sayler was defeated on his own pleading, and cannot be prejudiced by Brice's recovery from Bettelheim.

The judgment of the district court is affirmed. All the Justices concurring.

(82 Kan. 558)

BROWN v. WILKERSON et al.

(Supreme Court of Kansas. May 7, 1910.)

APPEAL AND ERROR (§ 488*)—SUPERSEDES—EFFECT OF APPEAL.

Gen. St. 1909, § 6190 (Code Civ. Proc. § 596), providing that, where an order discharging a temporary injunction shall be made and the party obtaining the injunction shall appeal from the order, the court shall fix a time not exceeding 10 days from the discharge within which the appeal shall be perfected, and during such time the execution of the order shall be suspended until the decision of the case on appeal, does not apply where the temporary injunction is not vacated till a hearing on the merits and the rendition of a final judgment setting aside the injunction, and, till such a final judgment is stayed, the preliminary injunction is not in force pending an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2277-2278; Dec. Dig. § 488.*]

Appeal from District Court, Shawnee County; A. W. Dana, Judge.

Action by Frank J. Brown against J. M. Wilkerson and others. From a judgment for defendants, plaintiff appeals. Appellant's application denied.

A. B. Quinton and Edwin A. Austin, for appellant. J. B. Larimer, for appellees.

PER CURIAM. The plaintiff in an injunction action obtained a temporary injunction and gave a bond. On a final hear-

ing judgment was rendered for the defendant; the preliminary order being set aside. The plaintiff appealed within a time fixed by the court, not exceeding 10 days, and claims that, by virtue of this appeal, his temporary injunction and the bond supporting it remain in force. The statute (Gen. St. 1909, § 6190 [Code Civ. Proc. § 595]) provides: "When an order discharging * * * an attachment or temporary injunction shall be made in any case, and the party who obtained such * * * injunction shall appeal from such order to the Supreme Court, the court or judge granting such order shall, upon application of the appellant, fix the time, not exceeding 10 days from the discharge or modification of such attachment, or injunction, within which the appeal shall be perfected, and during such time the execution of said order shall be suspended and until the decision of the case upon appeal, if the appeal be taken; and the undertaking given upon the allowance of the attachment shall be and remain in full force until the discharge shall take effect. If the appeal be not taken within the time limited, the order of discharge shall become operative and be carried into effect."

Here the temporary injunction was not vacated until the hearing on the merits, but, assuming that the order of vacation may be treated as a separate ruling preceding the judgment, and that the plaintiff by his appeal has stayed the operation of that ruling, the final judgment itself supersedes the prior proceedings, and, until it is stayed by some court or order, no injunction is in force.

Appellant's application denied.

(82 Kan. 400)

KELLY & LYSLE MILLING CO. v. SCHREIBER.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. REFERENCE (§ 100*)—EXCEPTIONS TO REPORT OF REFEREE—NECESSITY.

Under the provisions of the old Code (sections 293, 295; Gen. St. 1901, §§ 4740, 4742), a report of a referee appointed by the district court could be assailed by a motion to set it aside or by proper exceptions thereto filed upon the coming in of the report, and it was not essential that exceptions be taken to errors occurring on the trial before him if such errors appeared of record.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 157-168; Dec. Dig. § 100.*]

2. EXCEPTIONS, BILL OF (§ 2*)—STATUTORY PROVISIONS.

The amended Code makes no provision for exceptions or for bills of exception. Laws 1909, c. 182; Gen. St. 1909, c. 95.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 2; Dec. Dig. § 2.*]

Appeal from District Court, Wyandotte County; J. McCabe Moore, Judge.

Action by the Kelly & Lysle Milling Company against L. Schreiber. From an order

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

setting aside findings of referee and granting a new trial, plaintiff appeals. Affirmed.

Adrian F. Sherman, John H. Atwood, and W. W. Hooper, for appellant. Angevine, Cubison & Holt and S. I. Hale, for appellee.

PORTER, J. The plaintiff sued to recover a balance alleged to be due on account of sales of several car loads of wheat shipped to the plaintiff by the defendant after crediting him with the market value of the wheat, and charging him with drafts drawn against the same and with freight, interest, and storage charges. Issues were joined and the cause was referred to a referee. The referee's report was duly filed with his findings of fact and conclusions of law. The defendant moved to set aside the findings of fact and conclusions of law, and for a new trial, and also for an order directing the referee to return all the evidence introduced at the hearing. The plaintiff filed a motion to confirm the report and for judgment in accordance therewith. The district court ordered the referee to return the evidence, and, after this order had been complied with, overruled the plaintiff's motion to confirm the report, and made an order setting aside the referee's findings and granting a new trial. The plaintiff brings the case here for review, and alleges that the court erred in setting aside the findings and in granting a new trial.

Plaintiff claims that the district court had no power to review the findings of the referee, except on a bill of exceptions signed by the referee and filed in the cause. This is the only question to be determined. It is purely one of practice, and, moreover, a question which can only arise in a case tried before the amendment to the Code because the new Code does away with all exceptions and bills of exceptions. Under the provisions of the Code in force when the case was tried, it was always considered good practice for a party wishing to except to the rulings of a referee to prepare a bill of exceptions and have the same allowed by the referee before the report was filed. *De Long v. Stahl*, 18 Kan. 558; *Davis v. Finney*, 37 Kan. 165; 14 Pac. 460; *Newton v. Toeva*, 82 Kan. 15, 107 Pac. 543. Section 295 of the Code (Gen. St. 1901, § 4742) made it the duty of the referee to sign any exceptions taken to any order or decision made by him and return the same to the court making the reference. But the only purpose of a bill of exceptions is to preserve and present objections to rulings made during the progress of the hearing which otherwise would not appear of record, such as the admission or rejection of testimony or like matters. No bill of exceptions, however, was necessary when there was no dispute as to what the rulings were or what the evidence was upon which they were based. This is undoubtedly true, although no cases will be found in which the court has passed upon the precise question. The referee's report could be assailed by a motion to set it aside or by

proper exceptions thereto filed in the case upon the coming in of the report, and it was not essential that exceptions be taken to errors occurring on the trial before him, if such errors appeared of record. When the court passed upon the defendant's motion and set aside the report and granted a new trial, it had before it all the evidence presented to the referee together with his findings, and it was the duty of the court to set the report aside if the findings were not supported by the evidence or if the conclusions of law were erroneous. *Owen v. Owen*, 9 Kan. 91; *Jones v. Franks*, 33 Kan. 497, 6 Pac. 789; *Chandler, Adm'r, v. Dye*, 37 Kan. 765, 15 Pac. 925; *Krapp v. Aderholt*, 42 Kan. 247, 21 Pac. 1063; *Bank v. Showers*, 65 Kan. 431, 70 Pac. 332. In the syllabus of *Krapp v. Aderholt*, supra, it is said: "A referee is an officer of the court appointing him, and the court has full authority to supervise and control his report. It can set aside, and confirm, and modify the report, as the facts and law require." It was within the power of the court to refer the case again either to the same or another referee or to hold the case for trial before the court.

The plaintiff's contention is based upon a misconception of the relations between the court and the referee. The latter is merely an officer of the court with limited powers defined by the order appointing him. He is not a court from which an appeal lies to the district court. His report has no force or effect until it is confirmed by the court. The power exercised by the court in passing upon the referee's report is not appellate, and therefore the rule that exceptions are necessary to authorize a review by an appellate court of the rulings by a referee has no application. The following decisions from other courts hold that exceptions may be first taken in the court which appointed the referee: *Edwards & Beardsley v. Cottrell & Babcock et al.*, 43 Iowa, 194; *Washington County v. Jones*, 45 Iowa, 260; *Hodgin v. Toler et al.*, 70 Iowa, 21, 30 N. W. 1, 59 Am. Rep. 435; *Walton v. Walton's Estate*, 63 Vt. 513, 22 Atl. 617; *Abernathy v. Withers*, 99 N. C. 520, 6 S. E. 378.

It is the general rule that exceptions are not necessary where the error is apparent on the face of the record. On the contrary, some decisions will be found which hold that exceptions are necessary to raise any question as to the correctness in conclusions of law (*Amboy, Lansing & Traverse Bay R. R. Co. v. Byerly*, 13 Mich. 439) but this is not the law in Kansas (*Martsof v. Barnwell*, 15 Kan. 612; *Cemetery Association v. Hanslip*, 82 Kan. 20, 107 Pac. 785). For the purpose of such a review the evidence is not necessary, as the findings of fact are taken as true. *Cemetery Association v. Hanslip*, supra.

It is not deemed necessary to consider any of the other questions discussed in the briefs, as the judgment granting a new trial must be affirmed. All the Justices concurring.

(82 Kan. 398)

ALTOONA STATE BANK v. HART.
(Supreme Court of Kansas. May 7, 1910.)*(Syllabus by the Court.)***1. FRAUD (§ 13*)—FRAUDULENT REPRESENTATIONS.**

False representations are actionable when made fraudulently—that is, to induce another to part with his money or property—if believed and acted upon, and made with knowledge of their falsity, or when made for such purpose by one who has no knowledge upon the subject, but who intends to convey, and does convey, the impression that he does have actual knowledge that they are true, and thereby deceives the other to his injury.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 3-5; Dec. Dig. § 13.*]

2. FRAUD (§ 49*)—TRIAL (§ 352*)—FRAUDULENT REPRESENTATIONS — CONDUCT OF JUDGE—SUBMISSION OF SPECIAL QUESTIONS—ADMISSIBILITY OF EVIDENCE.

Questions, concerning the sufficiency of a petition, the competency of evidence, the practice in submitting special questions to a jury, and the surrender of notes given for money obtained by fraudulent representations, are considered.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 44, 45; Dec. Dig. § 49.* Trial, Cent. Dig. §§ 840, 842; Dec. Dig. § 352.*]

Appeal from District Court, Wilson County; James W. Finley, Judge.

Action by the Altoona State Bank against I. M. Hart and others. Judgment for plaintiff, and the mentioned defendant appeals. Affirmed.

Howard J. Hodgson, for appellant. Hudson & Sheedy, for appellee.

BENSON, J. The appellant, Hart, sold a laundry plant to J. W. Mordy on August 1, 1905, and took from him a chattel mortgage upon the property to secure the consideration. Mordy was at that time an employé of appellant in the laundry, and immediately took possession of it. On June 1, 1906, he asked the bank for a loan of \$600 to pay off the mortgage. Hart went with him to the bank, and to induce its officers to loan the money stated to them that \$600 would clear the plant of all indebtedness, and pay all that Mordy owed thereon, and that he (Hart) would release the mortgage on receiving that sum. He also said that the laundry was worth from \$1,200 to \$1,500, and was doing a good business. In the course of the negotiations it was proposed that V. R. Mordy, a brother of J. W. Mordy, should join with the last-named person and his wife in signing notes for the money. As a further inducement to the bank to make the loan, Hart stated that the name of V. R. Mordy would make the notes absolutely good; that V. R. Mordy was good for the amount. Relying upon these representations, and believing them to be true, the bank, upon the release of the chattel mortgage, made the loan, and took three promissory notes, signed by J. W. Mordy and wife and V. R. Mordy, for \$200

each, payable, respectively, in 5, 10, and 15 months thereafter, and paid the \$600 to Hart. The statement that \$600 was the amount unpaid on the mortgage was untrue. After applying that amount on the mortgage \$450 still remained due upon it, for which J. W. Mordy and wife gave their notes to Hart, but without the knowledge of the bank. About August 1, 1907, Hart took back the laundry from Mordy, surrendered the notes for \$450, and in a few days sold it to Chas. Lopeman. Learning of this transfer, the bank sought payment of its notes. V. R. Mordy, the surety, refused to pay, and declared that they could not be collected. J. W. Mordy and wife had left Altoona, their former residence, and they were insolvent. V. R. Mordy was likewise insolvent. This action was then brought by the bank against Hart and Lopeman and the Mordys for false representations in obtaining the \$600. The jury found for the plaintiff, and judgment was rendered against Hart for that amount, with interest. He appeals. The Mordys made default.

In answer to special questions the jury found that the plaintiff had made no effort by legal proceedings to collect the notes, that the plaintiff had not tendered them back to Hart or the Mordys, and that J. W. Mordy and wife and V. R. Mordy were insolvent when the money was obtained. The appellant, Hart, by his answer, and in his testimony denied making any of the representation above stated, but the jury found for the plaintiff upon all the issues, and there was evidence to sustain the finding. The facts, substantially as stated above, having been alleged in the petition, and established by the findings and verdict, must be considered as proven. The representations that the \$600 so borrowed paid the indebtedness of J. W. Mordy, and that V. R. Mordy was financially good, were material representations. They were made to induce the bank to loan the money. They were relied upon, and the money was paid over in the belief that they were true, when in fact they were false. These facts are also established by the verdict. False representations are actionable when made fraudulently—that is, to induce another to part with his money or property—if believed and acted upon and made with knowledge of their falsity or when made for such purpose by one who has no knowledge upon the subject, but who intends to convey, and does convey, the impression that he does have actual knowledge that they are true, and thereby deceives the other to his injury. 20 Cyc. 24. *Da Lee v. Blackburn*, 11 Kan. 190. The appellant, of course, had knowledge of the amount due upon the mortgage. Whether he had knowledge of the financial condition of the surety or not he made positive assertions as though possessed of such knowledge, the effect of which was for the jury to determine.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

An objection was made to the introduction of any testimony on the ground that the petition was insufficient to disclose a cause of action. A motion was also made for an order requiring the plaintiff to elect upon which of two supposed causes of action it relied. The petition contained a statement of facts sufficient to constitute a good cause of action for damages for fraudulent misrepresentation. It stated only one cause of action. It is true that the notes were set out, and indebtedness upon them was alleged, and some other details, perhaps unnecessary to be stated, were given, but the defendant could not have been prejudiced by a mere history of the transaction. The facts constituting the cause of action were stated, and the petition was sufficient.

Complaint is made because the court permitted evidence to be given of the subsequent transfer of the plant from Mordy back to Hart, and the transfer by Hart to Lopeman. These transactions were alleged in the petition as a part of a scheme to place the property beyond the reach of the bank. The issue against Lopeman was determined in his favor, but the evidence was properly received. The finding in favor of Lopeman could not make the admission of the evidence erroneous. The testimony was proper to be considered by the jury in support of the charge of a fraudulent purpose and conspiracy. The fact that Lopeman was free from guilty knowledge does not relieve Hart against whom the issue was determined.

The court informed the jury that the special questions were submitted by the defendant, Hart. He complains of this as indicating to the jury that he, and not the court, desired the jury to answer them. The force of this objection is not easily discoverable. Besides, the questions so submitted contained a recital that: "The defendant, I. M. Hart, requests the court * * * to submit to the jury * * * the following special questions." The language of the court was only a confirmation of what was written on the paper handed to the jury.

Several instructions were excepted to; but when all the instructions are read together they are not erroneous.

In compliance with the request of the defendant, Hart, the jury were directed to return more definite answers to certain questions, to which they had responded by answers commencing, "We believe," and like expressions. The court informed the jury that they could answer "Yes" or "No" to these questions, which they afterwards did to some of them. The defendant, Hart, complains of this direction to the jury, but the court only informed the jury what form of answer would be definite, without indicating any opinion whether the answer should be negative or affirmative. The province of the jury was not invaded. The court is not bound to

leave a jury, without information, to grope in the darkness to ascertain in such a situation what is meant by a definite answer.

It is urged that a failure to tender back the notes before suit was fatal. The notes were in the hands of the payee after maturity, and were produced in evidence. No suggestion was made to the district court, and none is made here, that the appellant can be injured because the notes are still held by the bank. He did not ask for their surrender or delivery on payment by him of the judgment. The makers are insolvent, and upon the evidence the notes appear to be worthless. What the rights of the appellant may be with respect to the notes in case he pays the judgment is immaterial upon the issues tried.

Further comment upon the assignment of errors is unnecessary. The verdict and findings of the jury upon conflicting evidence, approved by the trial court, concludes the inquiry as to the facts, and no errors are found in the proceedings.

The judgment is affirmed. All the Justices concurring.

(82 Kan. 509)

SHEPPARD v. WICHITA ICE & COLD STORAGE CO.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1001*)—REVIEW—QUESTIONS OF FACT.

Where there is some evidence tending to support a verdict to justify an appellate court in overturning it on the ground that it is contradicted by the settled and unquestioned laws of nature or by some established principle of mathematics, mechanics, physics, or the like, the undisputed physical facts must demonstrate beyond any reasonable doubt that the evidence is false, and that the verdict is without support in fact or law.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1001.*]

2. MASTER AND SERVANT (§ 276*)—EVIDENCE—SUFFICIENCY TO SUPPORT VERDICT.

The evidence in this case examined, and held, that the physical facts are not shown to be such as to authorize the court to say that the story told by the plaintiff's witnesses is false or improbable.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.*]

Appeal from District Court, Sedgwick County; Thomas C. Wilson, Judge.

Action by L. H. Sheppard against the Wichita Ice & Cold Storage Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Stanley, Vermillion & Evans, for appellant. C. V. Ferguson, for appellee.

PORTER, J. The plaintiff sued to recover damages for injuries caused by his falling into an open tank of hot water while in defendant's employ. The jury awarded him

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

damages in the sum of \$2,000. The defendant appeals.

The defense was contributory negligence. The plaintiff had been in the employ of the defendant 5½ days. He had only been at work in and about the room where the accident occurred a half day. The room was undergoing repairs, and the floor was being taken up, and the plaintiff was engaged in carrying out the lumber. The defendant sought to show that the room was so light that the plaintiff should have seen the tank before he stepped into it. The evidence shows that there were two skylights in the roof over the room each six feet long and three feet wide; that there were several doors and windows including two windows in the north about 18 or 20 feet away, and an opening in the north wall 7 feet by 4 feet, distant about 12 feet from the tank. In addition, the floor between the opening and the tank had been taken up. The plaintiff testified that at the time of the accident he was looking on the floor for a pinch bar, and was feeling along with one hand trying to find it; that it was so dark where he was that he did not see the tank, and walked into it. He also testified that a pile of lumber on the floor obstructed to some extent the light from a door back of him, and that the skylights were obscured by dirt and smoke. He was corroborated by a witness who was present, and testified that it was dark near the tank, and that there was a weak vapor of steam escaping from it at the time. There was also testimony that another tank called the brine tank had been raised about four feet from the floor on account of the repairs which were being made, and that this tended to shut off a part at least of the light from the windows and openings.

There is only one proposition argued in the brief, which is that the testimony of the plaintiff's witnesses is not to be credited or given any weight whatever because of the physical facts; that, the size of the room and the number of doors and openings from which light was admitted being conceded, it is physically impossible that the testimony of the plaintiff's witnesses can be true. It is said in the defendant's brief that, "before this verdict can be sustained, this court must feel satisfied that, notwithstanding all the windows and openings, it was so dark about the vat that the plaintiff could not see his danger." We do not so understand the law or the functions and authority of the court. We may have grave doubts whether it was so dark about the vat as to prevent the plaintiff from seeing his danger. The jury have said that it was. The question for us to determine is whether there is legal evidence in the record to support this finding. The defendant urges that, in order to sustain the verdict, the court would be required to ignore the evidence of its own senses and its own experience in like matters. The question is squarely presented, therefore, whether the physical

facts in this case are such that we can say there is no legal evidence to support the verdict. A similar contention was raised in the "wool case" (*Insurance Office v. Woolen-Mill Co.*, 72 Kan. 41, 82 Pac. 513), where the court declined to disturb the verdict of a jury far more at variance with the undisputed physical facts and well-known laws of nature than is the verdict here. It was urged again, but unsuccessfully, upon another state of facts and circumstances in the recent case of *Smith v. Railway Co.*, 82 Kan. 136, 107 Pac. 635.

Appellate courts do not hesitate to reverse a judgment where a principle of law judicially known to the court requires it notwithstanding the trial court may not have taken judicial notice thereof. It is equally clear that appellate courts will take judicial notice of the unquestioned laws of nature, of the laws of mathematics, and of physics; and, where the trial court has refused to recognize them and has approved a verdict supported by some evidence, but so far at variance with the undisputed physical facts as to demonstrate that the evidence is false and the verdict unjust, it becomes the duty of the appellate court to reverse the judgment. Speaking of the duty of an appellate court in this respect, Mr. Elliott in his work on Evidence (section 39) says: "Even though it may not be authorized to weigh evidence and pass upon the facts, it may, and should, so use its judicial knowledge as to bring about justice. Thus, there are often undisputed physical facts clearly shown in evidence, and, by applying to them a well-known law of nature, of mathematics, or the like, it is demonstrated beyond controversy that the verdict or finding is based upon what is untrue and cannot be true. In such cases, it is very generally held that the appellate court should take judicial notice of the law of nature or mathematics or quality of matter, or whatever it may be that rules the case, and apply it as the trial court should have done." This principle was recognized by the court in *Young v. Railway Co.*, 57 Kan. 144, 45 Pac. 583, where the plaintiff who was injured at a railroad crossing testified that, when within a distance of 100 feet from the crossing, she looked and listened for the train, and then stopped again, and looked and listened, but did not see the train until she was struck. It was held that her testimony contradicted herself, because, if she had looked, she must have seen the train, for it was in plain view. Again, upon the same principle, in *Railroad Co. v. Holland*, 60 Kan. 209, 56 Pac. 6, a judgment for the plaintiff was reversed with directions to enter judgment for the defendant. That was a crossing case, and the plaintiff testified that she looked and listened, but did not see the train. The jury made a finding that she was not negligent. The finding was held to be "little less than absurd" because her evidence was in plain contradiction of the physical facts.

The same doctrine has frequently been recognized and followed by other courts. *Lake Erie & Western Railroad Company v. Stick*, 143 Ind. 449, 41 N. E. 365; *Cleveland, etc., R. Co. v. Berry*, 152 Ind. 607, 53 N. E. 415, 46 L. R. A. 33; *Bornscheuer v. Traction Co.*, 198 Pa. 332, 47 Atl. 872; *Payne v. C. & A. R. Co.*, 136 Mo. 562, 38 S. W. 308; *Hudson v. R. W. & O. R. Co.*, 145 N. Y. 408, 40 N. E. 8; *Medcalf v. St. Paul City Ry. Co.*, 82 Minn. 18, 84 N. W. 633; *Hunter v. N. Y., O. & W. R. R. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246. In the case last cited the plaintiff, who was a brakeman, was injured by striking his head against an arch of a tunnel. The car upon which he was riding was identified, and its height above the rails and the height of the arch in the tunnel established by the plaintiff's evidence, so that it was undisputed that the space between the top of the car and the arch of the tunnel was four feet and seven inches. He testified that at the time he received the injury he was sitting down on the top of the box car. There was a cut or gash on his forehead, and it was undisputed that, in order to have received the blow at that point, his head must have been at least four feet eight inches above the top of the car. The trial judge submitted to the jury the question of the possibility of the accident happening in this way, saying: "If the plaintiff was sitting down, it is for you to say whether his head would reach to that height." In the opinion it is said: "Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends on the nature of the subject, the issue involved, and the apparent justice of the case. The rule that permits a court to do so is of practical value in the law of appeal, where the evidence is clearly insufficient to support the judgment. In such case, judicial notice may be taken of facts which are a part of the general knowledge of the country, and which are generally known and have been duly authenticated in repositories of facts open to all, and especially so of facts of official, scientific, or historical character." There was no evidence showing the height of the plaintiff, but the court took judicial notice that the average height of man is less than six feet, that the average length of the body from the lower end of the spine to the top of the head is less than thirty-six inches, and came to the conclusion that a man whose forehead would be four feet seven inches above the seat upon which he was sitting must be at least nine feet high, and, since history affords no instance of man attaining such height, the court took judicial notice of the fact that a man could not strike his head under those circumstances, and reversed the judgment.

In the case at bar the undisputed physical conditions surrounding the plaintiff at the time he received his injuries furnished a strong argument against the credibility of

his testimony, but this is as far as the record authorizes us to go. Where there is some evidence tending to support a verdict, to justify an appellate court in overturning it on the ground that it is contradicted by the settled and unquestioned laws of nature or by some established principle of mathematics, mechanics, physics, or the like, the undisputed physical facts must demonstrate beyond any reasonable doubt that the evidence is false, and that the verdict is without support in fact or law. To justify such a conclusion in this case would require information on a number of matters of more or less importance concerning which the record is silent. For instance, we have information as to the number of windows, doors, and openings and their size, but the dimensions of the room are not stated, although the abstract contains a blue print, from which if it be drawn to a scale we may assume that the building was 32 feet square. There are no directions marked on the plat, but, assuming that the top of the map is north, the iceroom, which is 16 feet square, is in the northeast corner of the building. The room in which the accident occurred is 16 feet east and west by 32 feet north and south, with an "L" extension on the south and east 16 feet square. There are no windows in the south, one window and one door on the west, and two doors on the east side of the "L" extension. In that part of the room where the dip tank appears to be located the openings are in the north, and consist of two windows and an opening in the wall seven feet by four feet. The plat shows four tanks in addition to the one in which the plaintiff was injured, or two tanks extending across the room. It is impossible to tell which. Nor is it possible to tell from the plat either the location or dimensions of the brine tank which was raised up about four feet and which the plaintiff claimed obstructed the light. It is stated in the brief that this tank is east of the iceroom, with a passage between them, but, if we are correct in our assumption as to the directions on the map, it would be a physical impossibility for it to be located east of the iceroom. Again, we know from the record that the accident occurred just after the noon hour, January 17th, but whether it was a bright, clear day, or a dark, gloomy one, we are not advised. In answer to special questions, the jury found that the doors, windows, skylights, and other openings in the room where the hot water vat was located did not admit sufficient light to enable the plaintiff to see it. The vat itself appears to have been in the main room immediately north of the angle formed by the southwest corner of the iceroom. The vat was level with the floor. It was 3 feet long and 20 inches wide, and there was a slight mist or vapor of steam rising from it. It is reasonable to suppose that the brine tank which was raised up about four feet cast some shadow on the floor, just as a table, desk, or any solid article of fur-

niture will do in an ordinary room. With no information as to the size or dimensions of this tank or its location with respect to any particular door or window, we are unable to say that the story told by the plaintiff's witnesses is either improbable or untrue.

The judgment will therefore be affirmed. All the Justices concurring.

(82 Kan. 528)

YURANN et al. v. HAMILTON et ux.
(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. PLEADING (§ 271*)—AMENDMENT OF ANSWER AFTER JUDGMENT.

Where a petition is filed in the district court and an answer is filed thereto purporting to be the answer of the defendants but entirely unsigned, and the case is set for trial, and tried in all respects as if the answer had been signed, and the attention of the court is not called to the failure of the defendants to sign their answer until after judgment, it is not error to permit the answer to be amended by signing the same.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 819; Dec. Dig. § 271.*]

2. APPEAL AND ERROR (§ 1015*)—REVIEW—FINDINGS.

On a motion for a new trial based on alleged accident and surprise growing out of an alleged agreement as to a waiver of evidence between the attorneys for the parties plaintiff and defendant, the finding of the court as to the existence of such agreement made upon conflicting affidavits, and the overruling of the motion in accordance with such finding, cannot be reviewed here.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3875; Dec. Dig. § 1015.*]

3. LANDLORD AND TENANT (§ 67*)—SALE FOR TAXES—RIGHT TO PURCHASE—ESTOPPEL OF TENANT.

Land in the hands of the receiver of a corporation was sold for delinquent taxes in September, 1900, to F. In May, 1902, F. sold the tax certificate to H. March 1, 1903, H. rented the land of the receiver, and took possession of it as tenant. In September, 1903, H. received a tax deed to the land, and thereafter claimed possession and right to the land under the tax deed, but paid his rent according to contract. *Held*, that as such tenant he was under no obligation to pay the taxes, and was not estopped from taking the tax deed and holding thereunder.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 197, 198; Dec. Dig. § 67.*]

4. CORPORATIONS (§ 559*)—RECEIVERS—RESTRAINING CREDITORS—PERSONS BOUND BY ORDER.

By buying the tax certificate H. did not become a creditor of the corporation, and was not barred by an order of the court appointing the receiver which restrained creditors of the corporation from interfering with the property of the corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 559.*]

Appeal from District Court, Marshall County; Sam Kimble, Judge.

Action by Jason Yurann individually and as trustee against John L. Hamilton and wife. Judgment for defendants, and plaintiffs appeal. Affirmed.

W. W. Redmond and W. S. Glass, for appellants. E. A. Berry, for appellees.

SMITH, J. In 1899 and for some time prior and subsequent thereto, the Blue Rapids Company, a corporation, owned the 40-acre tract of land which is in dispute and which is located in Marshall county, Kan. The taxes levied against the land for 1899 were not paid. Litigation having been commenced between certain of the stockholders of the corporation, and the corporation itself in the district court of that county, the court in March, 1900, appointed one Russell receiver of all the real and personal property of the corporation. Russell was succeeded as receiver in February, 1901, by one Winter. At the tax sale in 1900 the land was sold for the taxes of 1899 to one Frazier, and in May, 1902, Frazier assigned the tax certificate to the appellee J. L. Hamilton. In March, 1903, Hamilton leased the land of the receiver Winter under a verbal lease for one year for \$20, and took possession of the same. September 12, 1903, the county clerk issued and delivered to Hamilton a tax deed to the land, which was filed for record on the same day. Some time after the issuance of the tax deed, Hamilton paid the receiver the \$20 rent of the land for one year, and thereafter held possession of the land under the claim of ownership, refusing to re-rent at the close of the year, but continuing in possession thereof until the trial of this action. The appellant Yurann was a stockholder in the Blue Rapids Company, and as a result of the litigation in the company the land in question was by decree or otherwise conveyed to Yurann as an individual and as trustee for six other stockholders of the corporation. In August, 1908, Yurann, for himself and as trustee as aforesaid, began this action against Hamilton and wife by filing a petition in the district court of Marshall county to set aside the tax deed issued to Hamilton. In due time Hamilton filed an answer thereto, which for some reason was not signed by himself or by attorney. In addition to disclosing the facts heretofore recited, it appeared that the order of the court directing the receiver to take charge of the real and personal property of the corporation contained the following: "All creditors of said Blue Rapids Company are hereby enjoined from in any way intermeddling with the property hereby directed to be turned over to said receiver, and all officers, directors, agents, and tenants of said the Blue Rapids Company are hereby enjoined from interfering with or disposing of said property of said company and described herein in any way except to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

transfer, convey, and turn over the same to said receiver." The case was set for trial and tried at the October, 1908, term of the court, and resulted in a judgment in favor of the defendants, the appellees.

The appellant in the progress of the trial offered numerous objections to the introduction of evidence by the appellees, but no objection appears to have been made on the ground that no answer had been filed. The case was tried as if at issue. In due time after the judgment was rendered in favor of the appellees, the appellant filed a motion for a new trial on the statutory grounds, and also set forth that the cause was in default, no answer having been filed therein, and alleged error in permitting defendants to introduce testimony without the filing of an answer. Thereupon, upon the application of the appellees, the court allowed the answer to be signed by the attorney for the appellees. In the motion of the plaintiff for a new trial an affidavit was introduced on the part of the plaintiff tending to show a verbal agreement between the attorneys of the parties in regard to certain evidence, or the submitting of the case without certain evidence, which agreement was said to have been made before the parties announced themselves ready for trial, and, in response thereto, the attorney for the defendants asked time to prepare his counter affidavit denying the statements made in the affidavit of the plaintiff, and, at the suggestion of the court, he was allowed to state the substance of his proposed affidavit, which would be considered by the court, and he was given leave to reduce it to writing afterward, which was done.

The order of the court allowing the answer to be signed and the order allowing the defendant's attorney to make a statement of facts and afterward to reduce the same to writing in an affidavit, and considering the oral statement on the motion for a new trial, are alleged as error. An answer was really filed, lacking the signature of defendant's attorney, and the case was tried as if it were in fact a valid answer. The order allowing the answer to be signed should have been allowed as a matter of course. The accepting of an oral statement on the hearing of the motion was, of course, irregular, but the statement was afterward reduced to writing, and is certified by the court in the case-made; and that it accords with the oral statement is not questioned. The two affidavits relating to accident and surprise arising out of an agreement between the attorneys presented an issue of fact which the court decided in favor of the defendants on the conflicting evidence, and we cannot say that the court erred in its determination.

It is contended on behalf of appellant that the order of the court above copied enjoining all creditors of the corporation from intermeddling with the property of the company turned over to the receiver is decisive

of this case; that Hamilton by purchasing the tax sale certificate became a creditor of the company, and that the acceptance of the assignment of the certificate and the tax deed and holding possession of the land thereunder were in violation of this order. We cannot concur in this view. The tax proceeding was not instituted by Hamilton, but by the state. In fact, the corporation had allowed the taxes on the land to become overdue before the appointment of the receiver, and it cannot be contended that the state could be enjoined from proceeding to sell the land for unpaid taxes as in other cases. If the state had the right to sell the land for the taxes, Hamilton, or his grantor, Frazier, or any other person, had the right to purchase at the tax sale. The corporation, the appellant, or any one else interested in the land, had a right to redeem it from the tax sale at any time before the issuance of the deed.

Again, it is argued that Hamilton did not take possession of the land under the tax deed, but as tenant of the receiver, and that at the time the tax deed was issued he was indebted to the receiver for rent, which he soon thereafter paid, for a sum greater than the amount due upon his tax certificate, and inferentially it is claimed that he should have paid the amount due to himself on the tax certificate and accounted to the receiver only for the balance of rent due. This also is untenable. Neither his contract with the receiver nor his relation to any of the parties interested in the land imposed upon him the duty to pay the taxes, and a tenant who is under no obligation to pay taxes may purchase the leased premises sold for taxes and assert his title thus acquired against his landlord in defense of a claim for rent. *Weichselbaum v. Curlett*, 20 Kan. 709, 27 Am. Rep. 204; *Smith v. Newman*, 62 Kan. 318, 62 Pac. 1011, 53 L. R. A. 934.

It must also be borne in mind that neither the accruing of the taxes nor the sale of the land for taxes was during the time that Hamilton was the tenant of the receiver on the land. The taxes accrued in 1899. The tax sale was in September, 1900, to Frazier, and Frazier sold the tax certificate to Hamilton in 1902. Hamilton became tenant of the receiver March 1, 1903.

We are unable to see that either the case of *Railway Co. v. Love*, 61 Kan. 437, 59 Pac. 1072, or that of *Cramer v. Iler*, 63 Kan. 583, 66 Pac. 617, is relevant to the questions here involved. The right of Hamilton to acquire the land by tax deed and the two questions of practice, the allowing of the amendment to the answer, and the overruling of the motion for a new trial on conflict of evidence are the only questions presented in the case. No attack is made upon the validity of the tax deed as such.

As we find no error in the three questions raised, the judgment is affirmed. All the Justices concurring.

(32 Kan. 442)

BROWN v. HOME INS. CO. OF NEW YORK.

(Supreme Court of Kansas. May 7, 1910.)

*(Syllabus by the Court.)***1. INSURANCE (§ 145*)—RENEWAL—PAROL AGREEMENT—VALIDITY.**

A parol contract to renew an existing contract of insurance between those having authority to contract by which the same property was to be insured again upon the same terms and conditions as in the original policy is binding upon the parties, although a policy for the new insurance was not issued nor the premium paid when the loss occurred, providing a credit is given and the payment of the premium is not a condition precedent to the validity of the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 276-291; Dec. Dig. § 145.*]

2. INSURANCE (§ 145*)—RENEWAL CONTRACT—CONSTRUCTION.

A stipulation in a renewal contract that the property shall be insured on the same terms and conditions as in the former contract is interpreted to include the essential elements of a contract of indemnity, and does not refer to the steps or methods by which the original contract was reached or executed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 276-291; Dec. Dig. § 145.*]

3. INSURANCE (§ 145*)—RENEWAL POLICY—VALIDITY.

The fact that the representative of the insurance company had no authority to consummate the original contract of insurance, and that the approval of the home office was necessary to its validity, is no reason why the renewal contract made by the same agent should be likewise approved, where it appears that such agent had in the meantime been clothed with authority to consummate contracts and to issue policies.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 276-291; Dec. Dig. § 145.*]

Appeal from District Court, Franklin County; C. A. Smart, Judge.

Action by Orpha Brown against the Home Insurance Company of New York. Judgment for plaintiff, and defendant appeals. Affirmed.

Fyke & Snider and F. M. Harris, for appellant. C. L. Randall and S. T. Senton, for appellee.

JOHNSTON, C. J. This was an action to recover on a preliminary parol contract of insurance. In 1904 the Home Insurance Company of New York issued a policy of insurance on a barn and other property belonging to Orpha Brown. In August, 1907, the insured, thinking that her policy was about to expire, applied to F. E. Fiehler, the agent of the company at Wellsville, for a renewal of the contract of insurance, and, although the former contract did not expire for about four months, the agent agreed to renew the insurance on the same conditions and for the same premium as in the former contract. On January 8, 1908, before a written policy had been executed and delivered, the barn was

burned. Later Mrs. Brown tendered the agreed premium and also proof of the loss, but the insurance company denied the existence of a contract of insurance, or that its agent had authority to make one. This action was then brought, and it resulted in a verdict for the full amount claimed by the plaintiff. About the existence of the original contract of insurance there is no question, nor is there any dispute that negotiations were had between the agent of the company and Mrs. Brown for the renewal of the insurance. There is, in fact, no claim that a renewal contract with an authorized agent of the company in which the terms and conditions of the contract were agreed upon would not be binding, even although no premium had been paid or policy issued. The contention is that the appellee based her action upon an agreement that the terms and conditions of the new contract were to be the same as the old one, and that one of the conditions of the old contract was that it should not go into effect until it was approved by the home office in Chicago. It appears that, when the first contract was made, Fiehler was only a sub or soliciting agent, without authority to complete contracts or issue policies of insurance. Before the renewal contract was made, he had been vested with the authority of a local agent and empowered to issue policies the same as other representatives of insurance companies, and, upon request of the company, a license had been issued to him by the state superintendent of insurance. When the renewal contract was made, no intimation was given to appellee that the approval of the home office of the company was required, or that Fiehler was acting in any other capacity than as a general agent of the company.

The contention that one of the conditions of the renewal contract was the approval of the home office because that step was necessary to the completion of the original one is not sound. It is true that the terms and conditions of both contracts were to be alike, but approval by the home office was not written in the policy, nor made a part of the first contract of indemnity. In the application for the original insurance there was a statement that the action of the agent was not binding on the company before the contract had been approved, but that was only a preliminary step towards the completion of a contract made necessary because the company had then no one in Wellsville with authority to consummate a contract. The essential elements of the original contract imported into the renewal contract were that the identical property originally insured, in which there appears to have been no change, should be reinsured upon the same valuation, for the same time and for the same premium as in the original contract. The terms and conditions to which the parties referred re-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lated to indemnity, and not to the methods of reaching or executing the contract. The authority of the agent was no longer a matter of concern to any one. When the renewal contract was made, the company was represented by an agent clothed with apparent and real authority to make a complete and binding contract. He dealt with appellee as one having authority, and not as a mere soliciting agent, and appellee had the right to assume that he had the authority which he appeared to have. All of the essential elements of a contract were agreed upon. No restrictions of authority were mentioned, and there was no suggestion that a subsequent approval of the contract by any one else would be necessary. No policy had been issued, it is true, but a binding contract of insurance may be made without the issuance of a policy. *Insurance Co. v. Stone*, 61 Kan. 48, 58 Pac. 986; *Insurance Co. v. Corbett*, 69 Kan. 564, 77 Pac. 108. It is for a breach of the parol contract and the resulting loss that the action was brought and damages awarded. The premium was not paid when the contract was made, but it appears that a credit was given, at least a cash payment was not exacted. Probably the agent intended to collect the premium when the policy was delivered. The acceptance of a promise to pay or an arrangement to allow the premium to stand as a charge against appellee is enough to complete the contract, and it was therefore as binding upon the parties as if payment had in fact been made. *King v. Cox*, 63 Ark. 204, 37 S. W. 877; *Baldwin v. Phoenix Ins. Co.*, 107 Ky. 365, 54 S. W. 13, 21 Ky. Law Rep. 1090, 92 Am. St. Rep. 362; *Richards on Insurance Law*, pp. 205, 281.

No error being found, the judgment of the district court will be affirmed. All the Justices concurring.

32 Kan. 445)

HUTTO v. KNOWLTON et al.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS (§ 100*)—FRAUD—NOTICE.

The rule that, if an examination of the public records would reveal a fraud, the records themselves furnish sufficient constructive notice of the fraud to set the statute of limitations in motion, does not obtain in favor of a vendee of real estate who procured his conveyance by means of false and fraudulent representations respecting the state of the record, upon which he vendor innocently relied.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 492; Dec. Dig. § 100.*]

Appeal from District Court, Pratt County; B. Gillett, Judge.

Action by Daisy Hutto against Emily Irene Knowlton and others. Judgment for plaintiff, and defendant Knowlton appeals. Reversed and remanded.

George L. Hay, for appellant. R. F. Crick and William Barrett, for appellees.

BURCH, J. The appellant, a resident of the state of Illinois, was made a defendant in an action to quiet title, and answered, praying that a conveyance she had made of the land in controversy be set aside because induced by false and fraudulent representations. A demurrer was sustained to the answer, which stated a cause of action, unless relief were barred by the statute of limitations. The portions of the answer now material read as follows: "That during the month of January, 1903, the said A. W. Ellis, for the purpose of deceiving and defrauding this defendant, represented to this defendant that a tax deed had been issued upon the above-described land, and that he, the said A. W. Ellis, was acting for and representing the said tax deed holder; that the said tax deed holder had been in the possession of said lands under said tax deed for more than five years, and that said tax deed and the possession of said lands under said tax deed for a period of five years and more gave to such tax deed holder a good and incontestable title to said lands, and that, by reason thereof, this defendant was fully, completely, and forever barred from any and all interest that she may have had or claimed in and to said lands; that said tax deed holder to said lands desired to perfect his 'chain of title' to said lands by procuring a quitclaim deed from this defendant, and that, if this defendant would execute a quitclaim deed, he would pay her the sum of \$25, but that, if she failed and refused to give such quitclaim deed, said tax deed holder could easily and would positively institute legal proceedings against this defendant, and thereby perfect his title; that the said A. W. Ellis, in furtherance of said plan, scheme, and conspiracy of said A. W. Ellis and A. S. Fay to deceive and defraud this defendant, sent this answering defendant a deed for said lands already prepared for execution to be signed by this defendant conveying her interest in and to said lands to one O. H. Bock of Pratt, Kan., and directed her to execute said deed, and then at once forward said deed after execution to the National Bank of Pratt, Kan., for delivery, and thereby did represent to this defendant that the said O. H. Bock was the holder of said tax deed; * * * that the said O. H. Bock had no interest in said transaction and no interest in said lands and no interest in the money that was remitted to this defendant for said quitclaim deed more than to receive the record title to said lands under and by virtue of said quitclaim deed for the convenience and accommodation of the said A. W. Ellis and A. S. Fay. This defendant further alleges that the said O. H. Bock on or about the 11th day of February, 1903, and since the execution and delivery of said quitclaim

deed as aforesaid, transferred and conveyed without consideration all his interest in and to said lands to the said A. W. Ellis, and the said A. W. Ellis now holds the record title to said lands. * * * This defendant further alleges that, in truth and in fact, the said O. H. Bock is not now and never has been the holder of a tax deed upon said lands or any part thereof, that the said A. W. Ellis was not then, and is not now and never has been, representing or acting for said O. H. Bock with reference to any tax deed which may have been issued upon said lands; that the said A. W. Ellis is not now, and never has been, representing or acting for any tax deed holder upon said lands or any part thereof; that no tax deed holder was intending to institute legal proceedings against this defendant based upon a tax deed, and that no tax deed had been issued upon said lands that was incontestable, and that there was no tax deed upon said lands that fully, completely, and forever barred this defendant from her interest in said lands, and that the said A. W. Ellis knew at the time the aforesaid statements and representations were made and the aforesaid acts were done and performed that he was not acting in any capacity whatever for any tax deed holder upon said lands, and that no tax deed holder was intending to institute legal proceedings against this defendant based upon a tax deed, and that said tax deed or any tax deed on said lands was not incontestable, and that the same did not fully, completely, and forever bar this defendant from any or all interest in and to said lands."

The answer was filed in November, 1906, within two years after the actual discovery of the fraud, but almost four years after it was committed. The contention is that the public record afforded constructive notice of the fraud sufficient to start the statute, under the authority of *Black v. Black*, 64 Kan. 689, 68 Pac. 662. The second paragraph of the syllabus of that case enunciates the following principle of law: "Where the means of discovery lie in public records required by law to be kept, which involve the very transaction in hand and the interests of the parties to the litigation, the public records themselves are sufficient constructive notice of the fraud to set the statute in motion." This doctrine has been approved and applied in the cases of *Lewis v. Duncan*, 68 Kan. 306, 71 Pac. 577, *Donaldson v. Jacobitz*, 67 Kan. 244, 72 Pac. 846, and *Rogers v. Richards*, 67 Kan. 706, 74 Pac. 255.

In *Black v. Black* the fraud imputed related to the management, settlement, and distribution of the estate of a deceased person. The party charged was the administratrix. The law required her to make manifest her conduct by reports and accounts which were published upon the probate court records for the express purpose of affording information to parties interested. She made

this record, concealing nothing and making no independent representations, and the court held it gave constructive notice to everybody concerned of what was done. The rule itself was admirably expressed, but the foundation of it was not so definitely stated, and may be said to consist in this: Where a public record is required by law to be kept as a source of information respecting property rights and interests, a duty rests upon any one to whom the information is material to improve with diligence the opportunity of learning that which the record discloses. It follows that, if the opportunity be neglected, the interested person will be bound to the same extent as if he had in fact examined the record. But the rule is no broader than its basis, and if for any reason no obligation exists to consult the record, or if the interested person be circumvented from taking advantage of his opportunity, the rule does not obtain.

There is no obligation resting upon a landlord to watch the record for tax deeds fraudulently taken out by his tenant. *Duffitt v. Tuham*, 28 Kan. 292; *St. Clair v. Craig*, 77 Kan. 394, 94 Pac. 790, 101 Pac. 3. Where fiduciary relations exist requiring the disclosure of the true state of facts, there is no reason to anticipate unfaithfulness, and the obligation to search the records is relaxed. *Hinze v. Hinze*, 76 Kan. 169, 90 Pac. 762, 12 L. R. A. (N. S.) 493. And see *Donaldson v. Jacobitz*, 67 Kan. 244, 72 Pac. 846. Likewise, if a party be prevented by fraud from availing himself of the benefit of the record, or be led by such means to forego an investigation of the record, no one participating in the fraud can insist upon the enforcement of the duty to do so. We have here just such a case. The records were not accessible to the appellant, who lived in a distant state. Ellis undertook to impart the very information which, if his statements were true, the records would have furnished. The appellant had no reason to question his veracity, and the law did not oblige her to do so. She had the right to accept his representations as true, and to rely upon them as faithful disclosures of what she would discover from the records if she consulted them. *Matlack v. Shaffer*, 51 Kan. 208, 32 Pac. 890, 37 Am. St. Rep. 270; *Carpenter v. Wright*, 52 Kan. 221, 34 Pac. 798. Since he presumed to report to her the state of the record at the time she made her deed, she was not then required to go to the record itself. After she parted with title, she could have no occasion to consult the record. Therefore the merely constructive notice which it imparted was not sufficient, and the statute did not begin to run until the fraud was otherwise discovered.

The judgment of the district court is reversed, and the cause is remanded, with direction to overrule the demurrer to the answer. All the Justices concurring.

(82 Kan. 440)

MCDUGGLE-CRAIG & CO. v. GREENLEES.
(Supreme Court of Kansas. May 7, 1910.)*(Syllabus by the Court.)***JUSTICES OF THE PEACE (§ 32*)—JURISDICTION—"CITY COURTS."**

The term "city courts" in the proviso of section 1 of the Justices' Code (Gen. St. 1909, § 6361), limiting the jurisdiction of justices of the peace in counties where city courts are established, does not include the county court of Douglas county, and the jurisdiction of justices in that county was not affected by that proviso.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 72, 73; Dec. Dig. § 32.*]

For other definitions, see Words and Phrases, vol. 2, p. 1179.]

Appeal from District Court, Douglas County; C. A. Smart, Judge.

Action by McDouggle-Craig & Co. against J. R. Greenlees. Judgment for plaintiff, and defendant appeals. Affirmed.

A. C. Mitchell and S. D. Bishop, for appellant. W. B. Brownell and Fred A. Clark, for appellee.

BENSON, J. The question to be determined in this case is whether a justice of the peace in Grant township, Douglas county, had jurisdiction of an action for the recovery of money not exceeding \$300 where the defendant was a resident of the city of Lawrence. When the action was commenced and tried, chapter 165, Laws 1901, creating the Douglas county court, was in effect. The defendant's contention is that the amendment of 1899 to section 1 of the Justices' Code deprived the justice of jurisdiction. The amendment provides: "That in any county in which a city court has been or shall be created, justices of the peace outside of the city wherein such court is located shall not have jurisdiction of cases in which any defendant resides in such city. * * * Gen. St. 1909, § 6361. It is argued that, as the provisions of the act creating the county court are similar to various acts creating city courts in several cities, the above proviso should be construed to include this court also.

The similarity of the acts creating various city courts, and some of their points of difference, are noted in *State v. Nation*, 78 Kan. 394.¹ The Douglas county court was given jurisdiction somewhat different from the city courts, although in its principal features not differing from that given to some of them. The rules of practice provided were taken from both the Justices' and the Civil Codes, and some from neither. The clerk of the district court was ex officio its clerk, and the judge was elected by the voters of the entire county. Its title of county court was an apt designation, viewed in the light of its organization and jurisdiction. As the Legislature referred only to city courts in limiting the ju-

risdiction of justices, and created both city and county courts, we cannot presume that it intended to include the latter in the limitation. If the legislative purpose had been to include county courts in the limitation, they would also have been named in the proviso.

The judgment is affirmed. All the Justices concurring.

(82 Kan. 464)

BLAIR v. BLAIR et al.

(Supreme Court of Kansas. May 7, 1910.)

*(Syllabus by the Court.)***1. WILLS (§ 455*)—CONSTRUCTION—INTENT OF TESTATOR.**

In construing a will, the meaning of the words used will be expanded or restricted so as best to express the purpose and intent of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 972, 973, 976; Dec. Dig. § 455.*]

2. WILLS (§ 466*)—CONSTRUCTION.

Where a testator having ample means makes a liberal provision for the "support and maintenance" of his widow, those words will be given a broad and liberal significance when no language is used in connection therewith which tends to restrict or limit their meaning.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 466.*]

3. WILLS (§ 685*)—CONSTRUCTION.

The provision made by a testator for the support and maintenance of his widow cannot be used or diverted to uses or purposes wholly foreign to her maintenance or personal expenses.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 685.*]

4. WILLS (§ 684*) — CONSTRUCTION — "REQUIRE."

Where it is provided in the will that the widow may draw from the estate all the money required for her support and maintenance, the word "require" will not be interpreted to mean an amount needed or necessary for such purpose, but it will be held to include such sum or sums as she may request or wish to use for such purpose.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1627-1628; Dec. Dig. § 684.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6122-6125.]

Appeal from District Court, Atchison County; B. F. Hudson, Judge.

Action by Barbara A. Blair against William A. Blair and others. Judgment for plaintiff, and William A. Blair and certain other defendants appeal. Reversed.

B. P. Waggener, James W. Orr, and James M. Challis, for appellants. C. D. Walker and Ashley, Gilbert & Dunn, for appellee.

GRAVES, J. This is an action to obtain the construction of a will. Edward K. Blair, a citizen and resident of Atchison, died April 7, 1898, in that city, leaving an estate which largely exceeded in value \$100,000. His surviving heirs at law consisted of his widow, Barbara A. Blair, and five children, William A. Blair, John W. Blair, Edward G. Blair, Elwin B. Blair, and Fanny Blair Hackney.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

¹ 96 Pac. 659.

He died testate, and his will was duly probated in Atchison county June 29, 1893. William A. Blair, Harry H. Hackney, and John W. Blair, having been named by the testator as his executors, were duly appointed and legally qualified; and they entered upon the discharge of their duties as such. Harry H. Hackney is the husband of Fanny Blair Hackney, the testator's daughter. The heirs at law now disagree as to the meaning of the will and have commenced this action to obtain a construction thereof. The portion of the will which they desire construed reads:

"Second. I give, devise and bequeath to my beloved wife, Barbara A. Blair, should she survive me, all my property and estate, real, personal and mixed, to have and to hold the same during her natural life, subject to the provisions hereinafter contained.

"Third. It is my will that at my death, my executors, hereinafter named, shall immediately take possession, charge and control, of my property and estate above mentioned, and of my business, and hold and keep my said estate, property and effects intact, and continue the milling business and all my business as it is now carried on and conducted, collecting rents, making necessary repairs, loaning money, and managing and conducting the same in all respects as I, myself, have conducted the same; my object being that all my estate and property shall be kept together and intact and all my business be continued as it now is until such time as hereinafter provided.

"Fourth. It is my will and I direct that my said executors, out of the net proceeds of my business and earnings of my estate and property pay over to my said wife, from time to time, for her support and maintenance, such amounts thereof and at such times as she may desire and request, and if such earnings exceed the amount required by my wife for her maintenance and accumulate in the hands of my said executors, it is my will that they reinvest the same, as fast as they so accumulate, as part of my estate, and that the same be divided among my children as the balance of my estate."

There are no other clauses in the will which modify these provisions or can be useful in determining their meaning. The contention between the parties seems to be concerning the rights of the widow under the will, she claiming that she is entitled to receive upon request, if she so desires, the whole of the income of the estate to use as she may desire without restraint from the executors, while the executors contend that they are limited in their disbursements to her to such amount as may be reasonably necessary for her maintenance and support, or, otherwise expressed, what may be required for her living expenses.

The intent of the testator upon this subject does not seem obscure or difficult to ascertain. The words "support and maintenance," used

in the fourth clause of the will, which reads: "It is my will and I direct that my said executors, out of the net proceeds of my business and earnings of my estate and property, pay over to my said wife, from time to time, for her support and maintenance, such amounts thereof and at such times as she may desire and request, and if such earnings exceed the amount required by my wife for her maintenance and accumulate in the hands of my said executors, it is my will that they reinvest the same, as fast as they so accumulate, as part of my estate, and that the same be divided among my children as the balance of my estate"—are not to be understood in a narrow or limited sense, but were used in their broad and liberal meaning to indicate the general scope and purpose for which the provision was made, rather than to point out or limit its amount. This intent is further indicated by the subsequent clause, which reads: "If such earnings exceed the amount required by my wife for her maintenance," etc. This seems to convey the idea that the testator thought the probability that she would require all the income to furnish her with such maintenance as he intended her to have sufficiently strong to warrant a special suggestion that, in case she did not require that amount, then the executors should use the excess for another purpose.

It seems evident that the testator had a decided purpose to provide his widow with means sufficient to enable her to live in such comfort, elegance, and style as was befitting a widow who had resources equal to the income of his estate to use for that purpose. But it was not his intent or purpose to provide her with means to engage in any enterprise of business or to promote any object wholly foreign to her maintenance in this liberal sense; within these limits, however, she is the sole judge of her expenses. If the executors think she is extravagant in her expenses socially, for pleasure, or otherwise, they may not limit her in means on that account. She is mistress of her own life and independent of them in this respect. The testator evidently reposed full confidence in the judgment and intelligence of his wife, and desired to place her in such a position financially that she could freely live a life of comfort, unlimited in her manner of living except by her own wishes, and he seems by his will to have accomplished this purpose. In the clause, "the amount required by my wife for the maintenance," the words, "the amount required," are not used in the sense of the amount necessary or needed, but they indicate the amount which she may request or demand for such purpose.

This indicates sufficiently the views of the court. We do not understand that any real specific request of the widow has been frustrated by the refusal of the executors to comply with her wishes; but, an excess of income having accumulated, the question was presented as to what her rights would be in

case she should demand funds for a purpose other than maintenance and support, and for their mutual guidance in the future this application was made as a friendly suit. For the purpose of this action, the widow demanded of the executors the sum of \$2,500 for the purpose of distributing it among the children. This we do not think is within the scope of her rights under the will and cannot be enforced.

The district court held that the entire net income from the estate was the absolute property of the widow, regardless of the purpose for which she desired to use it. We cannot concur in this conclusion.

The judgment of the district court is reversed. All the Justices concurring.

(32 Kan. 503)

MIKESELL v. BOARD OF COM'RS OF WILSON COUNTY.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§§ 191, 272*)—PAROLE LAW—RETROACTIVE ENACTMENT.

The parole law (article 5, c. 28, Gen. St. 1909), as applied to this case, is not retroactive, nor is it in violation of article 1 of the fourteenth amendment to the Constitution of the United States, but is valid.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 534, 761; Dec. Dig. §§ 191, 272.*]

2. PARDON (§ 9*)—COSTS—POWER OF GOVERNOR.

Where a person convicted of violations of the prohibitory liquor law is sentenced to a term of imprisonment in the county jail, and also a fine is imposed as the penalty, and is adjudged to pay the costs and to stand committed till the fine and costs are paid, and where, after the commitment to jail, the Governor of the state issues to the prisoner a full pardon so far as he has the power, but the prisoner is held in jail for nonpayment of costs, the district court may parole the prisoner, and six months thereafter may finally discharge such prisoner.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. § 19; Dec. Dig. § 9.*]

3. COSTS (§ 295*)—CRIMINAL PROSECUTIONS—LIABILITY OF COUNTY.

If the prisoner be found insolvent and unable to pay or give security for the same, such costs must be paid by the county, and the county shall become liable therefor at the expiration of one month from such release if such costs are not paid by the defendant. Sections 4378, 2468, Gen. St. 1909.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1109-1123; Dec. Dig. § 295.*]

(Additional Syllabus by the Editorial Staff.)

4. ATTORNEY GENERAL (§ 2*)—ASSISTANT ATTORNEY GENERAL—TITLE TO OFFICE.

Where, in proceedings to collect the costs arising in certain prosecutions under the liquor law, plaintiff alleges he was assistant attorney general, the legality of his appointment and his title to office cannot be determined in such case.

[Ed. Note.—For other cases, see Attorney General, Dec. Dig. § 2.*]

Appeal from District Court, Wilson County; James W. Finley, Judge.

Action by E. D. Mikesell against the Board of Commissioners of Wilson County. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank M. Woodard and W. H. Edmundson, for appellant. E. D. Mikesell, for appellee.

SMITH, J. Mikesell filed his petition in the district court of Wilson county, in which he alleged: The formal facts requisite, and in substance further alleged that in August, 1905, at which time he was the legally appointed, duly qualified, and acting Assistant Attorney General in and for Wilson county, and was empowered to inform of and prosecute violations against the prohibitory liquor law, he filed in the district court thereof an information charging one George Ellis with having committed 52 separate and distinct violations of such law. That thereafter Ellis was regularly tried in said court by a jury, and was found guilty upon each count of the information. That thereupon said court adjudged that Ellis be confined in the county jail for 1,566 days and pay fines aggregating \$5,200, that he pay the costs of the action, and stand committed to the county jail until the fines and costs be paid. That Ellis was committed to jail pursuant to the judgment. That in June, 1906, the Governor of the state pardoned Ellis from the jail sentence and fines, but that Ellis remained in jail on account of the nonpayment of costs assessed against him in the action. That in September, 1907, he was released by the judge of the district court on parole without being required to pay the costs or give bond for the payment thereof, for the reason that he was insolvent and unable to pay the costs or furnish security for the payment thereof. That in September, 1908, said court granted to Ellis an absolute discharge from custody without being required to pay the costs or give bond to secure the payment thereof. That as a part of the costs in the action there was taxed the sum of \$25 on each count on which Ellis was convicted, amounting in all to \$1,300, as a fee to the plaintiff as Assistant Attorney General for the prosecution of the action. That more than one month had elapsed since Ellis was granted an absolute discharge from custody, and that the fee of \$1,300 has not been paid by Ellis, nor by the board of county commissioners of Wilson county, nor by any other person, but remains due and unpaid. Judgment was prayed for in the sum of \$1,300, with interest at 6 per cent. from October 1, 1908, and for costs. The petition was verified. Thereupon the county attorney filed a motion to require the plaintiff to make his petition

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

more specific, definite, and certain in this: (1) To show by what tribunal, court, or person the plaintiff was appointed assistant as alleged; (2) to show authority to represent the state, and if such authority was general or special; (3) to show a copy of such appointment, give the office, book, and page where a record of the appointment was found; (4) to show a copy of the pardon mentioned in the petition. This motion was by the court overruled, and upon the application of the county attorney additional time was given to plead to the petition.

Thereafter the county attorney filed a demurrer to the petition on several grounds, only one of which is argued namely, that the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant for the following reasons: (1) That Ellis was not released from jail in the manner provided in sections 2476 and 5698 of the General Statutes of 1901; (2) that chapter 178, Laws 1907, is unconstitutional and in violation of section 7, art. 1, Const., which vests the pardoning power in the Governor, also in violation of section 10, art. 1, Const. U. S., which provides that no state shall pass any law impairing the obligation of contracts; also in violation of section 1 of the fourteenth amendment to the Constitution of the United States. This demurrer was overruled, and, the defendant declining further to plead, judgment was rendered in favor of the plaintiff for the amount claimed.

As to the motion to make the petition more definite and certain, it required only that the plaintiff plead his evidence and set forth a copy of his written appointment, if any he had. It need hardly be said that the ruling of the court was proper as to each ground. The plaintiff alleged what he claimed to be the facts in plain and concise language and without repetition, and his cause of action was not based upon his appointment to office. His appointment was merely incidental. Hence it was not requisite to set forth a copy thereof in his petition. His appointment was sufficiently alleged under section 110 of the Code (Gen. St. 1909, § 5703), and was duly verified, and could not be controverted in this action, if at all, except by a verified denial. Indeed, it seems that the validity of the appointment could not have been brought in issue by any pleading or motion whatever in this action. In a very analogous case—In re Gilson, Petitioner, 34 Kan. 641, 644, 9 Pac. 763, 765—referring to the appointment of an Assistant Attorney General, it is said: "If the legality of his appointment is to be inquired into, other proceedings must be instituted. The title to his office cannot be determined in this case." See *State v. Bowles*, 70 Kan. 821, 79 Pac. 726, 69 L. R. A. 176; *State v. Williams*, 61 Kan. 741, 60 Pac. 1050. The statute expressly authorizes the appointment of an Assistant Attorney General for the

prosecution of cases in violation of the prohibitory liquor law. The plaintiff assumed to act as such Assistant Attorney General in the prosecution of this case. The court recognized him as such officer, and for the purposes of this case this is sufficient.

We pass to the consideration of the demurrer. It is insisted that the parole law (sections 2459-2472, Gen. St. 1909) has no application to this case, for the reason that by the title of the act and its provisions it applied only to "persons convicted of a violation of the criminal laws of this state," and it is thereby evident that it was intended to apply only to persons sentenced to fine and imprisonment; that at the time the district court undertook to parole Ellis he had been pardoned by the Governor of the state; and that such pardon had relieved him of the jail sentence imposed upon him by the court. It may be conceded that the pardon of the Governor had relieved Ellis of the fine and jail sentence imposed upon him by the judgment, but such parole did not and could not discharge him from jail for the nonpayment of costs. In *re Boyd*, Petitioner, 34 Kan. 570, 9 Pac. 240. He was still lawfully confined in jail, and he was confined by reason of being convicted of a violation of the criminal laws of the state—not confined as a punishment, but " * * * merely as a means of enforcing the legal obligation resting upon him to pay the costs which he by his original wrongful act and his subsequent acts has caused to be made, and which have accrued in the prosecution subsequent to the act for which he is punished, and have accrued, not to the public merely, but to individuals, and are given to such individuals as compensation for their services performed in the prosecution." In *re Boyd*, supra (syllabus). The judgment for costs against him and the order that he be confined in the county jail until such costs should be paid are necessary incidents of his conviction. It is a statutory requirement that such judgment and order be made upon the conviction of a person for a violation of the laws of the state. Prior to the enactment of the parole law (chapter 178, Laws 1907), the county commissioners only had power to discharge the convicted person confined in jail for the nonpayment of costs, but the terms of the parole law, as well as the title, clearly confer this authority upon the district and common pleas courts of the state.

In the appellant's brief, much stress is laid upon the expression used in the syllabus in *Re Ellis*, Petitioner, 76 Kan. 368, 91 Pac. 81: "The board of county commissioners alone has authority to order the release of a prisoner committed to the county jail for a failure to pay a fine and costs." This decision, it is true, was rendered two or three months after the parole law took effect. But no question was pending in that case under the parole law, and the attention of the court

was not therein called to the fact that the parole law had been adopted. The expression was purely obiter dicta in that case, and is not to be regarded in any sense as a construction of the parole law. The application of the parole law being now directly involved in this case, it is held applicable to this case—that is, that this law authorizes the courts designated in the law to parole persons convicted of a violation of the criminal laws of the state and sentenced to pay a fine and to a term of imprisonment in the county jail and adjudged to pay the costs and to be confined in the jail until the fine and costs are paid, even after a full pardon has been granted by the Governor, so far as it is within his power to pardon the convicted person, and the convicted person is held in jail for the nonpayment of costs only.

Ellis was convicted and sentenced before the enactment of the parole law, and it is contended that the parole law, so far as it attempts to affect the liability of Wilson county for costs growing out of the prosecution of Ellis, violates article 1 of the fourteenth amendment to the Constitution of the United States, is retrospective, null and void, that it attempts to create and impose on Wilson county a liability that did not exist at the time of the arrest and conviction of Ellis. The parole law, so far as it affects this case, is simply remedial. At the time of the conviction of Ellis, Wilson county was morally bound at least to pay the costs of his prosecution, if they could not be recovered from him. This moral obligation by the then existing law would become a legal obligation whenever the commissioners of the county saw fit to discharge him, if as is presumable he should remain unable to discharge the obligation himself. If he should not become able to pay the costs, it is not to be presumed that the county commissioners of the county would have kept him in the jail for his whole lifetime because he did not do what he was unable to do. Upon the enactment of the parole law and the discharge of Ellis by the district court thereunder, the moral obligation of the county likewise became a legal obligation. The law is not invalid for the reason that it is retrospective, or that it is in violation of the Constitution of the state or of the United States. Com'rs Sedgwick Co. v. Bunker, 16 Kan. 498; Board of Education v. State, 64 Kan. 6, 67 Pac. 559.

Authority has existed in the boards of county commissioners to discharge from jail persons confined therein for nonpayment of fines and costs ever since 1862. The parole law also authorized certain courts to make such discharge after six months' parole. Such discharge is in no sense a pardon of the crime, nor does it discharge the obligation of the prisoner to pay the costs, but, on the contrary, expressly provides for the collection of the costs by execution.

It is contended that this action cannot be sustained for the reason that the act fixes no time when the claim for costs shall accrue. When the person discharged is found unable to pay or to secure the payment of costs, the provision is that "the costs shall be paid by the state or county as in other cases." Plainly this means other cases provided by law, namely, the provisions compiled in sections 6831, 4378, Gen. St. 1909.

The petition states a cause of action, and, upon the overruling of the demurrer thereto and the refusal of the defendant to plead, judgment against the defendant followed as a matter of course without evidence.

We find no error in the proceedings, and the judgment is affirmed. All the Justices concurring.

(82 Kan. 420)

MORRISON v. PENCE.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR—RULING ON MOTION RELATING TO PLEADING.

The failure of an officer in his answer justifying an alleged illegal arrest and detention to state particularly the offense with which the plaintiff was charged, and the grounds for which the arrest was made, is not material error, where it appears that the plaintiff was fully informed as to the nature of the charge and the cause of his arrest, and was not deprived of any right because of a lack of such information.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.*]

2. FALSE IMPRISONMENT (§ 11*)—JUSTIFICATION BY OFFICER.

A city marshal was regularly appointed and confirmed by the mayor and council, and was sworn into office by a competent officer, but no commission was given to him, nor did he subscribe to an oath. He entered upon the discharge of his duties and later arrested without a warrant one who was committing a public offense in his presence. Held, that the failure of the officer to receive a commission and to subscribe to an oath did not diminish his authority nor prevent him when sued for false imprisonment to justify the arrest on the ground that he was an officer.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 75; Dec. Dig. § 11.*]

Appeal from District Court, Gray County; Gordon L. Finley, Judge.

Action by Edward Morrison against Thomas H. Pence. Judgment for defendant, and plaintiff appeals. Affirmed.

L. A. Madison and B. F. Milton, for appellant. Thomas A. Scates and Albert Watkins, for appellee.

JOHNSTON, C. J. Edward Morrison, who owned and operated a livery barn in Cimarron, staked down a mare on a railroad right of way which was used as a street, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which was in plain view of the principal hotel in the city. His declared purpose was to cure the mare of the habit of lying down when they attempted to drive her past the barn. The mare was thrown to the ground, her head staked down, and her feet were stretched out and each tied to a stake, and in this position she was left for about 30 minutes. There was a city ordinance, which, among other things, prohibited the obstruction of streets, the disturbance of the peace, and the cruel treatment of animals. Complaint was made by a number of citizens of the action of Morrison in staking down the mare and he was told of the complaints and of a contemplated arrest by the city marshal. When the marshal came up, he asked him to unloose the mare, and this Morrison refused to do. Three or four such demands were made and refused when the marshal arrested Morrison without a warrant, and after some resistance compelled him to go to the courthouse, and, not finding the police judge there, Morrison was released. To recover damages for the arrest and imprisonment Morrison brought this action against Pence, the marshal. In his answer Pence alleged that he was the duly appointed and acting marshal of the city, that the arrest was made by him in that capacity without violence, and that no more force was used in making the arrest than was necessary, and that the force actually used was due to the resistance made by Morrison. The verdict of the jury was in favor of Pence, and Morrison complains of several rulings made during the trial.

A motion was made by appellant to require appellee to make his answer more definite and certain by stating particularly the offense for which the arrest was made, but the motion was denied. In this respect the answer was incomplete. Appellee, who was asserting that the arrest was not unlawful, should have informed appellant of the cause of the arrest—that is, that he found the appellant in the act of committing an offense—and was therefore warranted in making the arrest with or without a warrant. The motion might very well have been allowed, but the testimony disclosed that appellant knew well enough the cause of the complaint against his action and the ground for his arrest. It is plain that there was no lack of information why the marshal took him into custody, and there was no limit to the scope of the inquiry because of the incomplete answer. It is only prejudicial error that justifies the reversal of a judgment.

There is also complaint of an instruction by the court to the effect that appellee as marshal had the right to arrest upon view without a warrant any person found violating any ordinance of the city. In this connection, it is contended that appellee was only a de facto city marshal, and that, as such, he can claim no privilege or protection

because of his office. The trial court in its charge referred to the marshal as a de facto officer, but it appears that he was that and more too. He was appointed by the mayor and his appointment confirmed by the city council, and a record of the same was made. He was then sworn into office and assumed the performance of his duties, but it does not appear that a formal commission was issued to him, nor that he subscribed to a written oath. His title to the office was not affected by the lack of a commission. It was the appointment and confirmation which conferred the right to the office, and the commission is only evidence of that right. He should have subscribed to the oath of office which he took, as that, too, furnishes evidence that he was sworn into office. He was regularly appointed and confirmed, and therefore clothed with all the authority which the mayor and council could confer on him, and, when he was sworn into office, there was a substantial compliance with the law. From that time he was required to perform the duties of the office and entitled to plead his official character when his acts were challenged. The omissions mentioned would not have excused him if he had failed to preserve the peace, enforce the law, or arrest one who committed a public offense in his presence. The public has an interest in the performance of duties of the character mentioned, and also that the officer shall have the protection of the law in the performance of such duties. The right to justify as an officer is not for the benefit of the officer alone, and in this instance his justification did not rest merely upon the fact that he was an officer, but upon the added fact that he did that which the law required of him, namely, to arrest appellant when he found him committing an offense which made him subject to arrest and prosecution.

We find nothing prejudicial in the rulings on the instructions, and the evidence appears to be sufficient to sustain the verdict and judgment. Judgment affirmed. All the Justices concurring.

(32 Kan. 525)

FUNK v. SHAWNEE FIRE INS. CO.†
(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

INSURANCE (§ 190; * § 206½, New, vol. 9, Key No. Series) — CONSIDERATION — MORTGAGED PROPERTY.

A mortgage clause in the usual form was attached to a policy insuring the owner of property against loss by fire. The owner then assigned the policy, with the assent of the insurer, to a vendee of the property. *Held*, the original premium supported the insurance of the two interests, that of the owner and that of the mortgagee, and the policy was sustained by that consideration in the hands of the assignee. *Held*, further, that, since the mortgage clause reserved no right to the mortgagee to approve assignments of the policy, the want of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† For opinion on rehearing, see 108 Pac. 1135.

such approval did not affect the validity of the policy in the hands of the assignee.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 468; Dec. Dig. § 199.*]

Appeal from District Court, Marion County; R. L. King, Judge.

Action by John D. Funk against the Shawnee Fire Insurance Company. Judgment for defendant, and plaintiff appeals. Reversed.

H. S. Martin and F. Williams, for appellant. D. W. Mulvane, C. E. Gault, and D. R. Hite, for appellee.

BURCH, J. The Shawnee Fire Insurance Company issued to Nuss, the owner, a policy insuring his farm buildings against fire. A mortgage clause was attached making loss, if any, payable to the Mutual Benefit Life Insurance Company, mortgagee, as its interest might appear, and providing that upon payment to the mortgagee the mortgage should be assigned to the insurer. Nuss sold the farm and insured property to Funk, and as a part of the consideration orally agreed to transfer the insurance policy to Funk. The papers incident to the sale were made out for the parties by Fast, who was also the insurance company's agent. The transfer of the policy was specifically called to his attention, and he was directed to make the necessary change. He assured the parties at the time that everything was all right. Afterward Funk inquired of him: "How it is about that insurance on my property? Are my buildings insured?" Fast replied, "Yes, they are insured." The policy provided that, unless an agreement to the contrary should be indorsed thereon or added thereto, it should be void if change should take place in the title or possession of the property, or if the policy should be assigned before loss. It further provided that no officer or agent of the company had power to waive conditions except by writing indorsed on the policy itself. The policy had been delivered to the mortgagee, remained in the mortgagee's possession, and no written assignment of it was ever made or noted in writing on the instrument. The buildings were burned, and the loss was paid to the mortgagee, who assigned the mortgage to the insurance company. Funk tendered to the insurance company the amount of the mortgage, less the amount of the insurance, and demanded a release. The tender was rejected, and the demand was refused. Funk then brought an action to cancel the mortgage and to recover statutory damages for the refusal to release. A demurrer was sustained to the plaintiff's evidence, and he appeals.

The usual question is raised respecting policy restrictions upon the authority of officers and agents; but the evidence was sufficient to warrant a finding that Fast was the insurance company itself for all purposes of the

transaction in controversy. It follows that the regularity of the assignment of the policy to Funk is not open to question by the company. With this matter aside, the argument to sustain the demurrer is directed to two propositions: First, there was no consideration to support the policy in the hands of the assignee; and, second, the assignment was invalid without the consent of the mortgagee. Neither one is sound.

The premium supported the insurance of two interests, that of the owner and that of the mortgagee. These interests were so far distinct that the situation may be regarded as if two policies had been issued, one to the owner and one to the mortgagee. But the consideration for both was not absorbed by either one. The mortgage clause did not eliminate the owner or his interest. He could discharge the mortgage and in the event of loss collect all the indemnity. His substantial rights, paid for and protected by the policy during its life, he could assign to his successor in ownership.

The mortgage clause reserved to the mortgagee no right to approve or disapprove assignments of the owner's insurance, although changes in the ownership of the property insured are contemplated by the following language: "And this insurance, as to the mortgagee only therein, shall not be invalidated * * * by any change in the title or ownership of the property." Without such a reservation the mortgagee could not restrict the owner's right to assign. The mortgage clause further provided that the mortgagee's insurance should not be invalidated by any act or neglect of "the mortgagor, or owner"; that is, any other owner, including one in succession to the mortgagor. Consequently the mortgagee could have no interest in who became owner besides the mortgagor. The insurer might well have such an interest, and consequently it reserved the right to approve assignments of the policy by the owner.

The judgment of the district court is reversed, and the cause is remanded for a new trial. All the Justices concurring.

(32 Kan. 516)

WOLFE v. STEWART et al.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. CLERKS OF COURTS (§ 11*)—FEES.

Under the provision of section 3030 of the General Statutes of 1901, a clerk of the district court in a county having a population of more than 20,000, and not more than 30,000, is entitled to receive all the fees of his office charged and collected for services rendered by him if such fees do not exceed the amount of \$1,400 per annum. If they do exceed that amount, then he is entitled to receive one-half of the additional fees charged for services rendered by him.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 33; Dec. Dig. § 11.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
106 P.—53

2. CLERKS OF COURTS (§ 11*)—FEES.

In such a county the clerk retired from office at the expiration of his term. He had received the sum of \$1,400 per annum during the time he was in office. He left a large amount of fees charged upon the books of his office for services rendered by him. These fees were collected by his successor from time to time, and paid to the county treasurer. *Held*, that one-half of such fees belong to the retiring clerk, one-half thereof to the county.

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. § 33; Dec. Dig. § 11.*]

Appeal from District Court, Lyon County;
F. A. Meckel, Judge.

Action by U. S. Wolfe against J. C. Stewart and others. Judgment for plaintiff and defendant the Board of County Commissioners of Lyon County appeals. Reversed, with directions.

O. S. Samuel and W. C. Harris, for appellant. Kellogg & Huggins and C. M. Kellogg, for appellees.

GRAVES, J. This is an action against the board of county commissioners of Lyon county commenced by a former clerk of the district court to collect fees claimed to be due him for services rendered while in office, but collected by his successor. The action was tried in the district court of that county where judgment was rendered in favor of the plaintiff, and the county has appealed to this court.

The plaintiff claims that all the fees collected by his successor belong to him, while the county claims that he is entitled to only one-half thereof. The question involves an interpretation of the statute relating to fees and salaries, being section 3030 of the General Statutes of 1901, which reads:

"The clerk of the district court in the respective counties of this state shall charge as full compensation for their services as required by law to be performed by clerks of the district courts the fees as hereinafter provided:

For filing each paper, five cents.....\$.05
Docketing each action on appearance docket, or execution docket, each, fifteen cents 15

"[Here follows a list of the specific fees the clerk is allowed to charge and collect.]

* * * Provided, further, that the clerk of the district court in counties having the following population may retain all fees collected as hereinafter specified: * * * In counties having a population of not less than 20,000 and not more than 30,000, per annum, \$1,400. * * * And if in any year the fees collected shall be more than the sums above specified the said district clerks shall pay to the county treasurer one half of such excess when collected taking duplicate receipts therefor one of which they shall file with the county clerk; and such money shall be-

come part of the general fund of the county."

It is conceded that the population of Lyon county is such that this statute applies to it. The money in controversy represents the fees earned by appellee while he was in office, and by him charged upon the books of his office. His successor in office collected it and deposited it with the county treasurer. A small sum was paid to the county clerk. It seems clear that the fees and salary law intended that the clerk should receive all the fees of his office if they did not exceed the sum of \$1,400 per annum; and, if they did exceed that sum, that he should receive in addition to the sum of \$1,400 per annum one-half of all other fees earned by him. The clerk received the sum of \$1,400 per annum while he was in office, and the fees in controversy are in excess of that amount. The clerk is therefore entitled to one-half of such fees only. The remainder belongs to the county.

We are unable to concur in the conclusion reached by the district court. Its judgment is reversed, with direction to divide the fund in controversy between the clerk and county equally, taxing the costs to the appellee. All the Justices concurring.

(82 Kan. 434)

McNUTT et al. v. NELLANS.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE (§ 95*)—DOUBTFUL TITLE TO LAND.

Equity will not compel a purchaser under an executory contract for the sale of land to accept the title if doubtful or unmarketable.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 257-277; Dec. Dig. § 95.*]

2. VENDOR AND PURCHASER (§ 129*)—"DOUBTFUL TITLE."

A title is "doubtful" if it exposes the party holding it to the hazard of litigation.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 238-244; Dec. Dig. § 129.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2187, 2188.]

3. VENDOR AND PURCHASER (§ 129*) — ENFORCEMENT OF CONTRACT—DOUBTFUL TITLE.

In an action to recover money paid on the purchase price of land on account of the failure of the vendor to furnish an abstract showing clear title, it appeared that the vendor's title rested upon a deed executed by a foreign assignee solely by virtue of an order of a court in the state of Iowa. Before the action was tried, the vendor obtained a judgment quieting his title upon service by publication against the foreign assignor, the assignee, and the party to whom the assignee had conveyed, and asked for specific performance against the plaintiff. *Held*, that the title tendered is so doubtful that the plaintiff should not be compelled in equity to accept the same.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 238-244; Dec. Dig. § 129; * *Specific Performance*, Cent. Dig. § 273.]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

I. PLEADING (§ 93*) — INCONSISTENT DEFENSES.

In such an action, where the defendant answers alleging a full compliance with the terms of the contract, and asks for specific performance and judgment for the balance of the purchase money, and offers proof showing the execution by himself and wife of a deed conveying the land to the plaintiff, he is estopped to claim in the same action that the contract for the sale of the land is void on the ground that the land comprises a homestead occupied by himself and wife and that the wife failed to join in the contract.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 189; Dec. Dig. § 93.*]

Appeal from District Court, Decatur County; W. H. Pratt, Judge.

Action by M. E. McNutt and G. W. McNutt against John L. Nellans. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. F. Peters, for appellant. L. C. Uhl & on, for appellees.

PORTER, J. The McNutt Bros. sued John L. Nellans to recover \$500 paid him on a contract for the purchase of 160 acres of land in Decatur county, alleging a failure on his part to furnish an abstract showing a clear title according to the terms of the contract. The defendant contended that he had fully complied with his contract and asked for specific performance and a judgment against the plaintiffs for the balance of the purchase price and damages. The court found the facts and conclusions of law separately and gave judgment for the plaintiffs. The defendant appeals.

The contract for the sale of the land was made April 11, 1907. At that time the McNutts paid to Nellans \$300 and agreed to pay the balance of \$5,500 July 1, 1907, when the deed and abstract of title were to be delivered. The deed to the land was executed by Nellans and wife in June and deposited in a bank agreed upon as a depository. At the same time the abstract of title was sent to the McNutts, who retained it until July 1st, when it was returned with a request for certain affidavits and requiring the payment of taxes. These requests were complied with some time in July. The abstract showing title in the Lewis Investment Company of Des Moines, Iowa, which took a conveyance of the fee October 12, 1889. Afterwards, in 1895, the investment company, which was a corporation organized under the laws of the state of Iowa, made a voluntary assignment for the benefit of its creditors. June 1, 1897, the assignee obtained an order of the district court of Polk county, Iowa, authorizing him to convey the land in question, and the title of the defendant rests upon a deed executed by the assignee solely by virtue of the order of the Iowa court. August 3, 1907, the attorneys for the plaintiffs notified the defendant that the abstract was not sufficient for the reason that it failed to show a decree or order of a

Kansas court authorizing the foreign assignee to convey the land. In the same letter the defendant was notified that, unless the abstract was perfected in this respect on or before August 8th, the contract would be terminated, and plaintiffs would demand the return of the \$500.

There is no serious contention here that the deed of the foreign assignee conveyed any title. *Thompkins v. Adams*, 41 Kan. 88, 20 Pac. 530; *Watson v. Holden*, 58 Kan. 657, 50 Pac. 883. The defendant concedes that his title was defective, but insists that he was entitled to a reasonable time within which to perfect it. In this we concur, and it may be said that the five days given him by the letter of August 3d was not a reasonable time to perfect his title. *Bell v. Sternberg*, 53 Kan. 571, 574, 36 Pac. 1058. The main contention of the defendant is that before the judgment was rendered in this action he had commenced a suit in the same court to quiet his title and had obtained a judgment which perfected it; and the court finds that such suit was duly commenced, that service was obtained on the several defendants therein by publication, and a decree was duly rendered quieting the title in J. L. Nellans. That decree was rendered on the 18th day of October, 1907, several months before the judgment in this case, and the defendant relies upon the doctrine that equity will not relieve against a sale of land for a defect in the title of the vendor if at the time of the decree he is able to make a good title. The soundness of the general rule may be granted. *Frederick v. Birkett*, 37 Kan. 536, 15 Pac. 510; *Bell v. Sternberg*, supra. But equity will not, by a decree for specific performance, compel a party to accept a title which is so doubtful that it may be exposed to litigation. The court will not cast upon him the risk of litigation and the embarrassment of a questionable title. *Townshend v. Goodfellow*, 40 Minn. 312, 41 N. W. 1056, 3 L. R. A. 739, 12 Am. St. Rep. 736; *Daniell v. Shaw*, 166 Mass. 582, 44 N. E. 991; *Conley v. Finn*, 171 Mass. 70, 50 N. E. 460, 68 Am. St. Rep. 399; 28 A. & E. Enc. of L. 111; *Vought et al. v. Williams*, 120 N. Y. 253, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. Rep. 634; *Morrison v. Waggy et al.*, 43 W. Va. 405, 27 S. E. 314; *Fleming et al. v. Burnham et al.*, 100 N. Y. 1, 2 N. E. 905; *Simon v. Vanderveer*, 155 N. Y. 377, 49 N. E. 1043, 63 Am. St. Rep. 683.

The objection which the plaintiffs still make to the title is that the judgment was rendered upon service by publication and may be vacated at any time within three years. The doctrine, however, is established by numerous decisions that the title of a purchaser in good faith who relies upon a judgment quieting title to the land in his grantor cannot be affected or disturbed by the vacation of the judgment, but is protected by the express provisions of the statute. Section 77,

Old Code; section 83, New Code (Gen. St. 1909, § 5676); *Howard v. Entreken*, 24 Kan. 428; *Loan Co. v. Cable*, 85 Kan. 303, 68 Pac. 1127; *Randall v. Barker*, 67 Kan. 774, 74 Pac. 240.

If, therefore, the plaintiffs had taken a conveyance from the vendor, their title would not be affected by the vacation of the judgment provided they could prove that they purchased in good faith and in reliance upon the judgment. But could they establish their innocence as purchasers in the face of a record disclosing that they had objected to the title for the same defect both before and after the judgment and had finally accepted it, not in reliance on the judgment, but because compelled to do so by the decree of a court in another proceeding to which none of the defendants in the first action were parties? Moreover, the title they agreed to accept by the terms of their contract was to be a clear title, not a doubtful one which might ultimately be made clear by litigation.

There is another feature of the judgment which, though not suggested in the briefs, in our opinion, adds to the doubtful character of the title. The judgment binds no one except those who were parties to it and their privies. The court finds that the only defendants were the Lewis Investment Company, Nelson Royal, its assignee, and H. Gardner Talcott, to whom the assignee conveyed the land. While the foreign assignee and all creditors of the assignor who participated in the assignment are bound by the judgment so far as the rights of a purchaser relying upon it are concerned, it binds no one else. Creditors of the assignor who were citizens and residents of Kansas and who did not participate in the assignment would not be bound by the judgment; and whether there were such creditors does not appear. It is manifest, therefore, that the title is not free from reasonable doubt. Whether courts shall decree specific performance always rests in their sound judicial discretion, and where the title is doubtful the vendee will not be compelled to take it. In determining whether a title is so doubtful that equity will refuse to compel a purchaser to accept it, the court is not required to pass upon the validity of the title itself. The parties whose

possible claims may affect the title are not before the court, and no judgment which the court could render would bind them. It is a general rule that under a contract for a clear title equity will not compel the acceptance of a title which is not a marketable one. A "marketable title" in equity is one in which there is no doubt involved either as to matter of law or fact. *Maupin on Marketable Title*, c. 31. *Herman v. Somers et al.*, Appellants, 158 Pa. 424, 27 Atl. 1050, 38 Am. St. Rep. 851; *Fleming et al. v. Burnham et al.*, supra; *Vought et al. v. Williams*, supra. "And every title is doubtful which invites or exposes the party holding it to litigation. * * * If there be a color of an outstanding title which may prove substantial, though there is not enough in evidence to enable the chancellor to say so, a purchaser will not be held to take it, and encounter the hazard of litigation with an adverse claimant." *Speakman v. Forepaugh*, 44 Pa. 363, 371.

The defendant set up as a further defense that the land in controversy is a homestead occupied by himself and his wife, and contends that because his wife did not join in the contract of sale it was void, relying upon the doctrine of *Thimes v. Stumpff*, 33 Kan. 53, 5 Pac. 431, and *Hodges v. Farnham*, 49 Kan. 777, 31 Pac. 606, where it was held that money given in part payment of an agreement to convey a homestead in which contract the wife does not join cannot be recovered back by the purchaser. The defendant is not in a situation to take advantage of this doctrine of the law. He cannot be permitted to blow hot and cold—to seek the specific performance of a contract, and in the same action claim that the contract itself is void. Besides, his wife joined with him in the execution of the deed, and, so far as the record shows, makes no objection to carrying out the terms of the contract.

The court's findings that the plaintiffs had fully complied with their part of the contract, and that the defendant had failed to furnish an abstract showing clear title, were sustained by the evidence, and it necessarily follows that the plaintiffs were entitled to recover the purchase money paid.

The judgment is affirmed. All the Justices concurring.

(82 Kan. 373)

STATE v. KENNEDY.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. BRIDGES (§ 21*)—MAINTENANCE—POWER OF COUNTY COMMISSIONERS.

Under the provisions of article 2, c. 14, Gen. St. 1909, the board of county commissioners must determine what bridges shall be repaired at the expense of the county, the plans to be followed, the material to be used, and the cost of the work, and must make appropriations to pay for the work. It may appoint a superintendent of repair for each bridge, but is not obliged to do so, and may itself exercise general oversight and supervision of the execution of contracts for such work.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. § 50; Dec. Dig. § 21.*]

2. COUNTIES (§ 49*)—BOARD OF COMMISSIONERS—POWER OF SINGLE MEMBER AS COMMITTEE.

The efficient discharge of its duties may, and frequently does, require the board of county commissioners to perform official services outside of board meetings. In some instances the joint observation and combined participation of all the members may not be necessary, and in such a case a single member, acting as a committee of the board, may render lawful services as a commissioner. Bridge repair work and oversight of the poor farm may afford opportunity for such service.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 56-60; Dec. Dig. § 49.*]

3. COUNTIES (§ 46*)—BOARD OF COMMISSIONERS—COMPENSATION.

The statutes of this state do not limit the compensation of members of the board of county commissioners to pay for services rendered at board meetings, and single members performing services of the kind described in paragraph 1 may be paid therefor the per diem compensation provided by statute, and statutory mileage.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 54; Dec. Dig. § 46.*]

4. COUNTIES (§ 45*)—COUNTY COMMISSIONER—FORFEITURE OF OFFICE—"CORRUPTION."

Corruption, within the meaning of section 2309, Gen. St. 1909, providing that if any county commissioner shall corruptly perform any duty, he shall forfeit his office and be removed, involves the intentional disregard of law from improper motives; and, in order that the payment of excessive or illegal demands against the county may be corrupt, the commissioner must have purposed to violate his official duty, defraud the county by misappropriating its funds, and secure to himself or to some one else unlawful gain.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 53; Dec. Dig. § 45.*]

For other definitions, see Words and Phrases, vol. 2, p. 1629.]

5. COUNTIES (§ 45*)—OFFICERS—REMOVAL—BURDEN OF PROOF.

In an action to remove a county commissioner on the ground that he corruptly performed his duties, the burden of showing corruption rests upon the state. The law presumes honesty and good faith until the contrary is made to appear by evidence, and the commissioner is not called upon to justify himself until something evidencing corruption is offered.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 45.*]

6. COUNTIES (§ 45*)—OFFICERS—ACTION TO REMOVE—EVIDENCE.

In such an action record proof of the number of board meetings attended by the commissioner in a given month merely shows what his compensation for attending board meetings in that month should be. It does not tend to prove that other services were not performed, or cast the burden upon the commissioner of justifying the receipt of more compensation for that month than he was entitled to for attending board meetings.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 45.*]

7. COUNTIES (§ 45*)—OFFICERS—CORRUPTION.

Occasional departures by the board of county commissioners from the statute relating to the allowance of claims against the county, as that claims were not verified, occurring through mere inadvertence, without wrongful intent, and under circumstances exposing the county to no imposition or injury, do not constitute corruption.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 45.*]

8. COUNTIES (§ 45*)—OFFICERS—CORRUPTION.

The payment of claims which are not sufficiently itemized, occurring through a misinterpretation of the statute relating to that subject, does not constitute corruption where the board acts in good faith and relies upon the advice of the county attorney that the claims are sufficiently itemized.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 45.*]

9. COUNTIES (§ 45*)—OFFICERS—NEGLECT—STATUTORY PROVISIONS.

Under section 2309, Gen. St. 1909, providing that if any commissioner or other county officer shall neglect or refuse to perform any act which it is his duty to perform, he shall forfeit his office and be removed, the duty must be personal, and the act must be one which the officer has the legal capacity and authority to perform, or he cannot be guilty of neglect.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 45.*]

10. COUNTIES (§ 45*)—OFFICERS—"NEGLECT."

It is not every oversight or omission within the strict letter of the law which will entail forfeiture of office. The purpose of the statute is to prevent persons from continuing to hold office whose inattention to duty, either because of its habitualness or its gravity, endangers the public welfare; and the "neglect" contemplated must disclose either willfulness or indifference to duty so persistent or in affairs of such importance that the safety of the public interests is threatened.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 45.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4740, 4741; vol. 8, p. 7729.]

11. COUNTIES (§ 45*)—OFFICERS—NEGLECT.

Under the circumstances of this case, it is held that irregularities in the publication of statements of sums of money allowed and in advertisements for bids for bridge repair work, failure to publish estimates of expenditures upon which tax levies were made, and failure to advertise for bids for the repair of a bridge, do not constitute legal causes for the removal of a county commissioner from office on the ground of neglect of duty.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 45.*]

Quo Warranto by the State against M. C. Kennedy. Judgment for defendant.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

F. S. Jackson, Atty. Gen., Lee Bond, and Keplinger & Trickett, for the State. William Dill and A. E. Dempsey, for defendant.

BURCH, J. This proceeding was instituted to remove the defendant from the office of county commissioner of Leavenworth county on the ground that he corruptly performed his duties. The petition was amended to include a charge of neglect and refusal to perform acts which it was his official duty to perform. A commissioner was appointed who, after hearing the evidence and the arguments of counsel, has returned findings of fact and conclusions of law exonerating the defendant. The plaintiff attacks the commissioner's report on numerous grounds. The findings of fact cover every issue raised by the pleadings, and it was unnecessary to extend them further. Some of those which are most important are based upon the testimony of witnesses whom the commissioner chose to believe in preference to others. From an examination of the abstracts it appears that a choice was unavoidable, that it was not arbitrarily made, and that in some instances it necessarily rested in part upon considerations which a printed record cannot present. A number of matters were covered by testimony bringing them within the proved custom and practice regularly governing the transaction of county business. The commissioner appears to have relied upon this testimony in opposition to some evidence to the contrary, the weight and credibility of which he was obliged to determine. Some of the testimony for the state was of such a character that, in the light of all the evidence, the commissioner did not credit it. This observation applies to some matters which the defendant did not notice in his testimony. The commissioner's method in dealing with the evidence had been tested in other respects, and was plainly such as any trial judge would have been obliged to pursue. One of the chief controversies related to the value of bridge work. By consent of the parties, and accompanied by representatives of the parties, the commissioner visited and inspected all of the larger bridges in question and 30 of the smaller ones. Statements and explanations were made by representatives of the parties at the time of these inspections, and the bridges were examined in the light of such statements and explanations, and in connection with the evidence already taken. The course adopted was wise, was consented to, no objections were interposed at the time to anything that occurred, and criticism upon the commissioner's conduct in this respect comes now with poor grace and no force. The court has taken pains to search the record for proof of the burden of the petition—willful corruption, dishonesty, conspiracy to rob and defraud the county, and like charges. There is none. Without discussing the evidence, which is voluminous and conflicting, it is sufficient to

say that it sustains the findings of fact. The only questions to be considered are whether the commissioner misapprehended the law at any material point, and whether his conclusions of law are correct.

The action is prosecuted under chapter 25, § 180, Gen. St. 1868 (section 2309, Gen. St. 1909), which reads as follows: "If any board of county commissioners, or any commissioner, or any other county officer, shall neglect or refuse to perform any act which it is his duty to perform, or shall corruptly or oppressively perform any such duty, he shall forfeit his office, and shall be removed therefrom by civil action in the manner provided in the Code of Civil Procedure." The defendant is charged with corruption in the matter of his salary and mileage for the years 1907 and 1908. The statute reads as follows: "Each member of the board of county commissioners of the several counties of the state shall receive as full compensation for his services for the county the sum of three dollars per day, and shall each be allowed and receive five cents per mile for each mile actually and necessarily traveled in the transaction of any of the duties of said office, to be paid out of the county treasury in quarterly installments: Provided, That the salary of each commissioner shall not exceed in any one year the following amounts: "In counties having a population of * * * more than 35,000 and not more than 45,000, per annum, \$700; * * * Provided, that the salary herein provided shall be in full for all services of every kind performed by such commissioners." Gen. St. 1909, § 3676. The population of Leavenworth county was about 40,000. Consequently the board was governed in the matter of building and repairing bridges by article 2, c. 14, Gen. St. 1909. Under this statute it is the duty of the board to determine what bridges shall be built and what repaired at the expense of the county, and to make appropriations therefor. When the board deems it necessary to build a bridge, it must determine upon the plan and the material to be used and estimate the cost. The board may appoint the township trustee, or the road overseer of the district, or some other persons, to superintend the work of construction. This provision of the statute, however, is permissive. The board is not compelled to appoint a superintendent of construction, and is at liberty to adopt any other method of supervision which shall be to the interest of the county, under the circumstances. When a bridge is completed according to contract the statute provides that it must be accepted and paid for. Substantially the same procedure governs, and the same functions must be performed, in repairing as in constructing bridges. If a superintendent of construction or repair be appointed, he is paid \$1.50 per day for the time necessarily consumed.

There are about 700 bridges and culverts in Leavenworth county maintained by the

county. Owing to ordinary depreciation and successive floods in 1908 and the following years, a very large amount of repair work was necessary during the time covered by the petition. The board adopted a rule making each commissioner from outside the city of Leavenworth chairman of the committee on roads and bridges for his district. As such he gave special attention to the duties of the board relating to bridge matters in his district. In case of a demand for repairs he would ascertain the need, and, if necessary, would visit the bridge for that purpose. If repairs were required, he would notify the county surveyor, who by general order would make an estimate of the cost of the work. The action taken would be reported to the board. If the cost were less than \$100, informal direction for the work to be done would be given, and a contract would be let. Usually contracts for repairs were performed under supervision of the county surveyor, but the committee chairman frequently visited bridges in his district undergoing repairs, for the purpose of scrutinizing the work or finally approving it. When the bills came in they were approved by the county surveyor and audited by the county auditing board, consisting of the board of county commissioners, the county clerk, and the county attorney. In making its recommendations this board relied largely upon the information possessed by the committee chairman in whose district the work was done, and upon the county surveyor. After bills were audited they were presented to the board of county commissioners proper for allowance and payment. The defendant received the statutory compensation for services outside board meetings of the character described, and mileage.

The advantages of the method outlined for dispatching county bridge repair work are obvious. It was simple, reliable, and businesslike. No attempt was made at the hearing to show that it increased the cost to the county. True, it might be abused by a dishonest board into a scheme to furnish illegitimate employment to its members, but there is no proof of such misconduct in this case. The services rendered by the defendant were not performed by him as a private individual or the board, or as an employé of the board. He board itself acted for the county by and through him. He acted solely in the capacity of a county commissioner, representing the county in the conduct and management of its business affairs. He was not usurping any of the functions of road overseer or township trustee, or performing any of the duties of a road superintendent of repair. The efficient discharge of its duties requires the board of county commissioners to perform numerous official services outside of board sessions. The statute quoted does not restrict compensation salary for services rendered at board meetings only, and there is no statute of that character in this state, as there is in some

states. Therefore the defendant was entitled to \$3 per day for whatever time he necessarily consumed, and five cents per mile for each mile actually and necessarily traveled, in looking after county bridge repairs. There is no doubt that the board of county commissioners is an entirety, and must act as such. Its authority cannot be delegated to a single member, and an individual member cannot bind the county. But these principles are beside the question. As a practical matter a certain division of labor is indispensable to the transaction of the public business at board meetings, and if done in absolute good faith, the same division may be extended to certain classes of work which must be performed outside of board meetings. In this case the defendant had general oversight of the poor farm. Another member had general supervision of the courthouse, the courthouse grounds, and the jail. On a given day these two members may be separately occupied with these duties, while the third visits a reported bridge to ascertain what, if any, repairs are needed. Action by the board is required in each instance, but the joint observation and combined participation of all the members would be superfluous. If in such a case the board be guided by the sole motive of rendering faithful and efficient public service within the scope of its lawful powers, each member is entitled to compensation according to the statute.

During the time covered by the petition the board expended for bridgework and material nearly \$36,000. The commissioner found that the board paid a total of \$196.80 more than the work was worth for the repair of seven small bridges, the excess for each bridge being from \$10 to \$49. The defendant voted to pay these bills. The state does not point out how many, if any, of the several bridges were in the defendant's district. It may be assumed that some of them were. The defendant also joined with his associates in paying a bill for the printing of primary election ballots which had been approved by the county clerk and by the auditing board. Afterward a question arose concerning the proper method of computing the printer's compensation. The county attorney was consulted, and the opinion of the Attorney General was taken. The board then demanded that the printer refund a portion of the amount he had received to conform to the Attorney General's interpretation of the law, which the printer did. The original bill was \$1,246 and the amount refunded was \$770. The commissioners were not familiar with the decision of this court in the case of *Honey v. Jewell County*, 65 Kan. 428, 70 Pac. 383, and made the same mistake the commissioners of Jewell county made, which occasioned that suit.

There is no evidence whatever that the appropriations enumerated were corruptly made. Corruption in the sense of the statute quoted involves the intentional disregard of

law from improper motives. The defendant must have purposed to violate his official duty, defraud the county by misappropriating its funds, and secure to himself or to some one else unlawful gain. The principle is well illustrated in two decisions from Idaho rendered under a statute providing for the removal of an officer for charging and collecting illegal fees. In that state county commissioners are entitled to compensation for services rendered at board meetings only. Members of certain boards parceled out among themselves road and bridgework which none but road overseers could legally perform, for which they charged and collected compensation and mileage. In the case of *Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824, collusion, fraud, and corruption were proved, and the guilty commissioner was removed and fined. In the subsequent case of *Ponting v. Isaman*, 7 Idaho, 581, 65 Pac. 434, it was found that the commissioner there prosecuted had acted honestly and in good faith. The syllabus by the court reads: "When proceedings under section 7459 of the Revised Statutes are brought to remove a county officer, and the court finds that such officer acted honestly in making such charges against his county, and honestly believed at the time he presented his claim for allowance, and when he collected the same, that such charges were legal, it is error to remove him from office, and enter judgment against him for the penalty provided by said section." Even if, therefore, the charges made by the defendant for services and for mileage in connection with bridge repairs had been illegal, his innocence, good faith, and integrity would protect him from removal on the ground of corruption. The same rule applies to other appropriations of money. The defendant presented itemized and verified claims for salary and mileage showing the days on which he rendered services and the number of miles traveled in each month. The state introduced the records showing the number of board meetings the defendant attended in each month and proved the distance he lives from the courthouse. Computing salary and mileage from these data, the amounts were less than the defendant received. It is argued that he should have explained the remainder. The state brought the action, and the burden rested upon it to prove corruption on the part of the defendant sufficient to warrant his removal from office. The law presumes he regulated his conduct according to his oath until the contrary is made to appear by proof. *State v. Trinkle*, 70 Kan. 396, 78 Pac. 854. He was not called upon to justify himself until something evidencing corruption was offered. If he did not consume the time or travel the miles for which he charged, the state should have shown the facts. The proof offered had no tendency of that kind. Aside from mere presumption, however, the defendant's official probity was fully established.

In a number of instances bridge bills were

paid which had not been verified according to law. The vouchers were approved by the county surveyor and by the auditing board, and blank forms for verification, which the board provided, were attached, but not filled out. The omission of proper verifications upon the bills was simply overlooked. Such occasional departures from the statute relating to the allowance of claims, occurring as they did through mere inadvertence and without wrongful intent, and under circumstances exposing the county to no imposition or injury, do not, of course, constitute corruption as it has been defined. The same subject is brought forward in the petition under an allegation of neglect and failure to require the verification of accounts. The commissioners have no mandatory power to compel parties to verify claims. They merely have authority to reject unverified claims. The subject of neglect of official duty will be considered later in this opinion.

Numerous bridge bills approved by the county surveyor and by the auditing board were paid which it is charged were not itemized according to law. The work was done under contracts based on estimates made by the county surveyor, was done under the supervision of the surveyor and members of the board, was inspected by the county surveyor when completed, and the county surveyor approved the vouchers before they were presented. The vouchers indicated the bridge on which the work was done, and the amounts of the bills. The members of the board considered with the county attorney the question whether such bills were sufficiently itemized, and accepted his advice that they were. If any mistake were made, which is not decided, it consisted in the misinterpretation of a statute as applied to a particular state of facts. There is no doubt of the ability and the sincerity of the county attorney, or of the good faith of the board. In such cases advice by the county attorney and honesty of purpose on the part of the board protect members of the board from forfeiture of office on the ground of corruption. "Where a board of county commissioners, upon the advice of able and competent attorneys at law, allows certain claims which are not strictly legal charges against the county, its official action in so doing will not render the commissioners liable to the charge of corruption, or forfeiture of office, if the allowances were honestly made, and the board acted merely upon a mistake or error of law as to the liability of the county." *State ex rel. v. Scates*, 43 Kan. 330, 23 Pac. 479. "When it is shown that such officer, a county commissioner, acted in perfect good faith, and under an honest conviction that he was entitled to the compensation claimed and collected, and was acting under the legal advice of the county attorney, it is error to remove him from his office." *Ponting v. Isaman*, 7 Idaho, 581, 65 Pac. 434. Charges of corruption in drawing salary monthly and in making corrections of

covered by the principles applied. It is in effect that the defendant, in order to rob and defraud others, to accomplish the purpose of the conspirators, he neglected to publish estimates of tax levies which had been made and to include them in the monthly statement and refusal to do so and in some cases reads as follows: "The commissioners shall publish a statement, at the regular or special meeting, of the tax levies allowed, and for what purpose, to be published once in each year of general circulation in the county. They shall also publish a statement of the estimate of expenditures for the various purposes upon which they based their levy of a tax for the various purposes of revenue." Gen. St. 1909, § 2099. Another statute prohibits the allowance of any claims or accounts at a special or adjourned meeting, except election expenses and jury fees. Formerly the law provided that the Leavenworth county board should meet quarterly. At the close of each session a proper statement was duly published. Later the law was changed, and monthly sessions were required. The full consequence of this change was not noted, and the board continued to publish statements quarterly as before, but not monthly. This practice was in vogue when the defendant came into office and continued through the years of 1907 and 1908. It will be observed that statements for all monthly allowances were in fact published, and that a statement of allowances made at the last meeting in each quarter was published at the proper time. Therefore all that is left of this charge is that, because of failure to take note of an amendment of the statutes, publication of the allowances at two meetings in each quarter was delayed. The failure to publish estimates of expenditures upon which tax levies were based is of more consequence. Such estimates were always read in full upon the records of the meetings at which they were made, and were afterward printed on the backs of tax receipts, and so were made public in a way, but the statute prescribes publication in a newspaper. At the time of the hearing the county clerk had held his office for some 30 years. The defendant believed it was the clerk's duty to compile financial statements and publish them, and that the clerk knew his duties under orders in force prior to the time defendant became commissioner. The defendant was under the impression that the estimates for 1908 had been published, and never knowing, omitted to perform any duty required of him.

The neglect feature of the removal statute

upon which the prosecution is based is involved only so far as it deals with individual responsibility. The penalty denounced cannot be inflicted on an individual officer because of neglect of duty unless he has neglected to perform some "act which it is his duty to perform." Manifestly the duty must be personal, and the act must be one which he is able to perform, or he cannot be at fault. He cannot be guilty of neglect in failing to perform an act which he has no legal capacity or authority to perform. The duty to publish estimates of expenditures like the duty to publish monthly statements rested upon the board as a board. It was impossible for the defendant alone to make a valid order for publication or to authorize a valid publication in the official, or in any other, newspaper. Those acts were beyond his lawful power, and his neglect must consist, if at all, in participating in an omission of the board. It is not every oversight or omission within the strict letter of the law which will entail forfeiture of office. The statute must be interpreted in the light of the mischief it was intended to remedy. *State v. Bush*, 47 Kan. 201, 27 Pac. 834, 13 L. R. A. 607. The purpose was to prevent persons from continuing to hold office whose inattention to duty, either because of its habitualness or its gravity, endangers the public welfare. Therefore the neglect contemplated must disclose either willfulness or indifference to duty so persistent or in affairs of such importance that the safety of the public interests is threatened. Under all the circumstances stated it is held that a case of neglect within the purview of the statute has not been established.

The condition of the bridges in Leavenworth county has been referred to. Because of the interruption of travel and interference with mail routes the people were clamoring for bridge repairs and roadwork. Under the bridge law if repairs cost more than \$100 the procedure for building bridges must be followed, and this requires an advertisement for bids for 20 days. Under the stress of the circumstances stated the board often shortened the time of advertisement, and in a few instances did so because of other emergencies. It acted deliberately, and with full knowledge of the law. The motive was to protect the property and promote the best interests of the people of the county. In one instance a bridge lay in the creek, and was in immediate danger of being lost and destroyed. On the other hand, in one instance the board was misled, and consequently was mistaken as to the necessity for prompt action. There was credible evidence that all short-time advertisements produced competitive bids. The commissioner finds that all contracts under such advertisements were for the fair and reasonable value of the work. There was no advertisement at all, and there were no competitive bids for the rebuilding of one bridge. The bridge was an important

one on the line between Leavenworth and Wyandotte counties, and was in a dangerous condition. Under the law the duty to advertise for bids rested with Wyandotte county. It declined to proceed in the regular way, but agreed to pay its share of the joint expense if Leavenworth county repaired the bridge. The defendant protested against making a contract without advertisement, but finally deferred to the judgment of his associates, because the welfare of the county required that the bridge be rebuilt at once. One of the members maintained that they always had the right to proceed without advertisement when life and property were at stake. It is undisputed that the work was well done, and the amount paid was reasonable and just. There was no corruption in any of these cases.

The law relating to advertisement for bids is general in its terms. It makes no provision for exceptions and emergencies. This may be from oversight, but more likely it is because in the judgment of the Legislature it would be dangerous to the public to allow all county boards to act upon whatever they might deem to be emergencies. The court does not propose to abate the force of the statute, but it requires a very savage insistence on the letter of the law to demand the defendant's removal from office for what he did. It is expected that boards of county commissioners will be diligent in taking affirmative action to protect and to promote the general welfare. Checks upon their conduct are collateral means to the same ultimate end, but in a particular instance they may operate as embarrassments. Here advertisements were made in all cases except that of the county line bridge, where the defendant protested, and the duty devolved upon another board. The purpose of the statute, competitive bids and fair contracts, was in fact attained through the advertisements made. While the course pursued departed slightly from that prescribed, it is free from culpability of the character the statute denounces. Besides this, the law of quo warranto authorizes the court to take a broad view of motives and circumstances in the case of an official who has assumed the responsibility of rendering the public a genuine service in a somewhat irregular way; and, although not sanctioning the defendant's conduct as legal, the court is not obliged to deprive him of his office on account of it. *State v. Bowden*, 80 Kan. 49, 101 Pac. 654.

The foregoing contains a review of the principal charges made against the defendant. Others are embraced within the same considerations. The findings of fact and conclusions of law returned by the commissioner are approved. Restraining orders heretofore made in the case are set aside, and judgment is rendered in favor of the defendant, with costs. All the Justices concurring.

(82 Kan. 425)

AHERNE v. WA-KEENEY LAND & INVESTMENT CO. et al.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. PROCESS (§ 98*)—SERVICE BY PUBLICATION—AFFIDAVIT—ORDER.

An affidavit, such as is prescribed by chapter 326 of the laws of 1906, was presented to the district court for the purpose of obtaining an order to serve defendants by publication. The court, after examination of the affidavit, found it in all respects in compliance with the law, and thereupon made the order. Notice by publication was given in accordance with such order, and at the proper time a decree to quiet title was entered against all the defendants upon default. Thirty-seven days intervened between the date when the affidavit was sworn to and when the order was made. *Held*, that this lapse of time alone does not make the decree void.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 121-124; Dec. Dig. § 98.*]

2. APPEARANCE (§ 26*)—MOTION TO OPEN DEFAULT—WAIVER OF DEFECTS IN SERVICE OF PROCESS.

Where a judgment has been entered in an action against defendants over whom the court did not have jurisdiction, and such defendants voluntarily request the court to open such judgment under section 77 of the Code of Civil Procedure (Gen. St. 1901, § 4511), and permit them to plead in the action, which request is granted; and the pleadings are filed, and the issues made thereby are litigated by such parties, all questions of jurisdiction are thereby waived, and the parties are in court for all the purposes of the action.

[Ed. Note.—For other cases, see *Appearance*, Cent. Dig. §§ 154-159; Dec. Dig. § 26.*]

Appeal from District Court, Kearny County; William H. Thompson, Judge.

Action by John Aherne against the Wa-Keeney Land & Investment Company and others. Judgment for plaintiff, and defendant land company appeals. Affirmed.

Lee Monroe and Geo. A. Kline, for appellant. Holmes & Yankey, for appellee.

GRAVES, J. An action to quiet title was commenced in the district court of Kearny county October 11, 1906, by John Aherne, who was in possession and claimed title under a conveyance from F. C. Puckett, who held a tax deed to the land. James M. Mason owned the fee title. He had executed a promissory note for the sum of \$600 to A. C. Wilcox, and secured it by a trust deed to the premises, in which trust deed E. Heliker was named as trustee. The note was transferred by Wilcox to the Wa-Keeney Land & Investment Company. In the action to quiet title there were numerous defendants and many tracts of real estate. Service upon all the defendants was made by publication notice under the provisions of chapter 326 of the Laws of 1905. The plaintiff caused an affidavit to be prepared in accordance with the requirements of this statute, which was sworn to September 17, 1906, and plain-

tiff presented it to the court October 24th thereafter, and obtained an order of the court, which reads: "Now, on this 24th day of October, 1905, this cause comes on for hearing upon the application of the plaintiff for an order for service by publication herein, and presents to the court his petition against the above-named defendants, and also presents to the court an affidavit of said plaintiff showing that each and every one of the above-named defendants are necessary parties defendants in the above-entitled action, and that the unknown heirs and devisees and the unknown administrators, executors, and trustees of all of said persons are necessary parties defendant in this action, which said plaintiff desires to have rendered against the said defendants and against the unknown heirs and devisees and the unknown administrators, executors, and trustees of said defendants, and affidavit also sets forth that the plaintiff has diligently endeavored to find the residence or place of abode of the said defendants, and each of them, and has endeavored to find whether or not the said defendants or any of them be alive. And also setting forth that said plaintiff has been unable to ascertain whether said defendants be alive, and the court, having inspected said affidavit, filed in the office of the clerk of the district court of this county, in said action, finds and orders that the matters and things set forth in said affidavit are true, and that the said affidavit is in due form and sets forth the facts required by statute. It is therefore by the court ordered that service by publication be made upon the said defendants and each of them as though the said defendants and each of them were alive, and also in the alternative for service by publication upon the unknown heirs and devisees and the unknown administrators, executors, and trustees of said defendants and each of them that said notice by publication be published in the Lakin Investigator, the same being a weekly newspaper printed and published in Kearny county, Kan., and that the said notice shall be published not less than three consecutive weeks in such weekly newspaper, and that date fixed for the answer of the defendants shall be not less than forty-one (41) days from the date of the first publication; said notice of publication to be in conformity to section 2, chapter 326, Session Laws of 1905. It is further ordered and adjudged that the said notice of publication on such unknown heirs and devisees and the unknown administrators, executors, and trustees of the said defendants be published and embraced in the said publication as the notice of publication on the other defendants herein." In the part of the affidavit which states the names of the defendants who were nonresidents of the state the names of A. C. Wilcox and E. Helker, trustee, were omitted. Publication was made as ordered by the court, the first publication being made October 27,

1905, the time for defendants to answer on or before December 11, 1905. January 24, 1906, a decree was entered in favor of the plaintiff against all of the defendants upon default. After the decree was entered, the plaintiff, Aherne, sold the land to one M. L. Moore, who afterwards conveyed it to W. H. Cramer. Both of these parties purchased in good faith for a valuable consideration and in reliance upon the decree. On May 7, 1907, more than a year after the decree had been rendered, the Wa-Keeney Land & Investment Company as the owner and holder of the note obtained from A. C. Wilcox moved to have the decree opened and be permitted to plead under the provisions of section 77 of the Code of Civil Procedure (Gen. St. 1901, § 4511). It also moved that W. H. Cramer be made a party defendant. These motions were allowed, and both the appellant herein and Cramer appeared and filed answers. The Wa-Keeney Land & Investment Company prayed for a judgment upon its note and a foreclosure of its trust deed. Cramer claimed to be a purchaser in good faith, relying upon the judgment in favor of his grantor, and prayed that he might be protected under the provisions of said section 77 as a purchaser in good faith. In this controversy the Wa-Keeney Land & Investment Company insisted, and now insist, that the decree is void for the reason that the affidavit upon which the order for publication notice was obtained is void because it was stale with age when used for that purpose. The affidavit was sworn to September 17, 1905. It, with the petition, was filed in the office of the clerk of the district court October 11, 1905. The order of the court directing publication to be made was obtained October 24, 1905.

It is insisted that the statute contemplates that the order shall be made upon facts then shown to exist, and not upon facts shown to have existed 37 days prior to the making of the application. Several decisions have been called to our attention which seem to hold that the date of the order, if not simultaneous with the date of the affidavit, must be as nearly so as the circumstances will permit. The statutes under which these decisions were rendered do not appear, however, to be the same as the law of this state. The law of 1905 prescribes the facts which the affidavit shall contain, and requires the court to inspect the same carefully and cause the truth thereof to be established and its form such as the law prescribes. When the court with all the facts before it adjudicates that the affidavit, both in form and substance, is in full compliance with the law, it may make an order directing that the defendants be notified by publication, prescribing the time such notice shall be published, when the defendants shall answer, and that the notice contain such other facts as the statute requires.

When a judgment has been rendered upon

service obtained in pursuance to such careful precautionary steps, it should not be lightly overthrown. The court had full jurisdiction to make the order requiring service by publication, and, however irregularly that jurisdiction may have been exercised, the order cannot be held to be void. The question has lost much of its importance, however, since the action of the appellant, who holds the promissory note of defendant Mason, assigned to it by A. C. Wilcox, whose name was omitted from the plaintiff's affidavit as being a non-resident of the state, and of the defendant W. H. Cramer, who claims to be a purchaser in good faith of the land in controversy under the decree. These parties caused the decree to be opened up under section 77 of the Code, and obtained permission to plead in the case. The appellant filed an answer and cross-petition asking for judgment upon its promissory note and a foreclosure of the trust deed. W. H. Cramer claimed to have purchased the land in good faith and in reliance upon the decree obtained by the plaintiff, Aberne, and prayed that he be protected under the provisions of section 77 of the Code. The appellant by its reply challenged the jurisdiction of the court, and denied the good faith of Cramer. Under these issues, the sufficiency of plaintiff's affidavit was the chief question litigated. The court held the affidavit sufficient, and refused any relief. From this judgment, the Wa-Keeney Land & Investment Company appeals to this court. We are unable to see any material error in the action of the court. The affidavit may have been irregular, but it was not void. The appellant is not in a very good position to complain, however, for its voluntary application to be let into the case, and its filing an answer and cross-petition asking for a foreclosure of its trust deed amounted to a complete waiver of any want of jurisdiction on the part of the court either as to it or to W. H. Cramer, and the validity of the entire judgment is no longer assailable by the appellant.

This disposes of the case. The other questions discussed, and there are several of them, need not be considered. The judgment of the district court is affirmed. All the Justices concurring.

(82 Kan. 495)

HOWELL v. GARTON.

[Supreme Court of Kansas. May 7, 1910.]

(Syllabus by the Court.)

PROCESS (§ 87*) — PUBLICATION — "UNKNOWN HEIRS."

The term "unknown heirs," as used in the sections of the Code providing for service by publication in cases relating to real property and where the relief demanded is to exclude defendants from any interest, title, or estate in real property, means all kinds of heirs, includ-

ing heirs of heirs of such defendants as well as the legatees of heirs.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 87.*]

Appeal from District Court, Gray County; Gordon L. Finley, Judge.

Action by George S. Howell against James W. Garton. Judgment for plaintiff, and defendant appeals. Reversed.

Thomas A. Scates (Albert H. Watkins and E. H. Madison, of counsel), for appellant Wheeler & Switzer, for appellee.

JOHNSTON, C. J. This case involves the meaning of the term "unknown heirs" as used in the sections of the Code which provide for service by publication in cases relating to real property, and where the relief demanded is to exclude defendants from any interest, title, or estate in the real property. The contention arises over the effect to be given a judgment which purports to quiet the title to a tract of land formerly owned by Abbie A. Little. She died intestate in 1895, leaving her daughter, Hattie A. Davis, as her sole heir. Hattie died in Pennsylvania in 1903, leaving a will in which she gave all her property to her husband, James M. Davis. In 1903 the will was admitted to probate in Pennsylvania, but no record of it was made in Kansas until after the judgment referred to had been rendered, nor until September 30, 1907. On July 1, 1905, F. M. Luther, who had obtained a tax deed to the land, brought an action to quiet his title as against Abbie A. Little, if living, or, if dead, against her unknown heirs, and on September 1, 1905, a judgment as prayed for was rendered. In 1906 Luther conveyed the land to James W. Garton, who purchased without notice of the death of Mrs. Little or the existence of the will of her daughter. On August 1, 1907, James M. Davis made a quitclaim deed to the land to George S. Howell, who brought this action of ejectment on October 3, 1907. If the judgment quieting title is valid, Davis had nothing to convey, and Howell acquired no interest in the land. Instead of applying to the court to set aside the judgment and let him in to defend under section 77 of the Code of Civil Procedure (Gen. St. 1909, § 5676), he chose to treat the judgment as void. His contention is that as Hattie A. Davis, the immediate heir to Abbie Little, was dead when the action against Mrs. Little and her unknown heirs was begun, no one was brought into court, no interest was affected by the action, and, as the judgment reached no one, it was therefore open to collateral attack by Davis or his grantee. The statute applicable to service by publication in cases of this character at the time this action was brought provides, among other things, that "the plaintiff may have service by publication upon said defendants or any of them as though the de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendants or any of them were alive at the time of the commencement of such action, and may also have service upon the unknown heirs, devisees, administrators, executors and trustees of any such defendants as though the defendants were dead at the beginning of such action, and the service shall be had, proof made, and decree rendered as hereinafter set out." Laws 1905, c. 326, § 1. Does the term "unknown heirs," as used in the statute, apply to an heir of an heir or rather to any one in the line of succession from the deceased person? The word is sometimes used in its strict primary sense as including only one to whom an estate had already descended from a deceased ancestor, while in other cases it is applied to one whose ancestor is living. It is sometimes held to mean those who take only by right of blood relationship and in other cases covers adopted children and persons not heirs of the body who take by operation of law. It has been used in a limited sense to designate children alone, or, in a more comprehensive sense, to include children and grandchildren, and also husband and wife. It has been held to include legatees, and next of kin as well as other classes of those who may become entitled to the property of another upon his death, the construction in each case depending upon the intention with which the term was used in the instrument or statute, and that is to be determined largely from the context of the instrument or statute and the circumstances surrounding or inducing the execution or enactment of the same. 21 Cyc. 408. The context and purpose of an instrument or a statute in which the term is used may indicate clearly that it is used in a limited sense, or it may show plainly that it is used in a comprehensive sense, including heirs of all degrees. So it was decided that "the word heir" is not limited in its meaning to one to whom an estate of inheritance has descended from his immediate ancestor, but a person is the heir of one from whom he has inherited by several successive descents." *Castro v. Pennington*, 44 Cal. 253. In interpreting an Illinois statute which prohibited a party from testifying in a case where a party sues or defends as heir of a deceased person, it was held that the word "heirs" should be taken in its general and comprehensive sense, and that it included "the heirs of heirs ad infinitum." *Merrill et al. v. Atkin*, 59 Ill. 19. See, also, *McKinney v. Steward*, 5 Kan. 384; *Dodge v. Beeler*, 12 Kan. 524; *Ewing v. Barnes*, 156 Ill. 61, 40 N. E. 325; *Brooks v. Ivetts*, 33 Tex. 732; *Barber v. Pittsburgh, etc.*,

Railway, 166 U. S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925; *Howell v. Ackerman, etc.*, 89 Ky. 22, 11 S. W. 819, 11 Ky. Law Rep. 251; 15 A. & E. Encyc. of Law, 320.

The history and purpose of the statute indicates that the Legislature used the term "unknown heirs" in its broader and more comprehensive meaning. At first the Code provided for service by publication on unknown heirs of any deceased person without naming them. Gen. St. 1868, c. 80, § 78. Then there was a later provision that, if it could not be ascertained whether the owners of the record title to land were living or dead, service might be made as though they were alive and upon the unknown heirs of such defendants as though defendants were dead. Laws 1903, c. 385. Afterwards, and in 1905, the statute was amplified, and, as the title indicates, was intended to cover not only nonresidents of the state, but persons whose residence is unknown, whether they were within or without the state. Laws 1905, c. 326. Some modifications of these provisions were made in chapter 257 of the Laws of 1907, and that statute appears to have been substantially re-enacted in the new Code of 1909. New Civ. Code Proc. §§ 79, 80 (Gen. St. 1909, §§ 5672, 5673). The manifest purpose of these changes was to enable the parties to effectually clear up and adjust the titles to real property, and to that end facilitate the bringing into court of those claiming or who might claim an interest adverse to the occupying plaintiff. If the statute only applies to immediate heirs, it would be ineffectual in all cases where the immediate heir was dead, and plaintiff was unable to ascertain that fact. The more reasonable view is that the act was intended to cover all who were in line of inheritance, those entitled to take by succession from generation to generation, and includes the heirs of heirs. Following this liberal rule of interpretation, the term includes all who take real property by reason of the death of the owner, and it therefore fairly includes legatees as well as those who take by descent. All the property of *Hattie A. Davis* passed by her will to her husband, and, there being no children, all of her property would have passed to him if she had died intestate. The court acquired jurisdiction by the constructive service which justified it in the judgment that was rendered, and by which both he and his grantee are bound.

It follows that the judgment must be reversed, with directions to enter judgment in favor of appellant. All the Justices concurring.

(82 Kan. 538)

STATE ex rel. ATTY. GEN. v. DOLLEY et al.
(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. MANDAMUS (§ 152*)—PARTIES DEFENDANT.

In mandamus it is proper to make persons defendants from whom the performance of no duty is sought, but who might be affected by the judgment.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 293; Dec. Dig. § 152.*]

2. MANDAMUS (§ 157*)—PARTIES DEFENDANT—NOTICE—PERSONS FROM WHOM PERFORMANCE OF NO DUTY IS SOUGHT.

The character of notice to be served upon such defendants is immaterial, so that they are informed of the pendency of the proceeding.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 157.*]

3. MANDAMUS (§ 146*)—STATE AS PLAINTIFF—REFUSAL OF OFFICER TO PERFORM STATUTORY DUTY.

When the individual to be benefited requests a public officer to perform a statutory duty and is met with a refusal, the state is a proper plaintiff in mandamus proceedings to compel its performance.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 287; Dec. Dig. § 146.*]

4. STATUTES (§ 58*)—DETERMINATION OF VALIDITY—ACTUAL CONTROVERSY.

A court will undertake to pass upon the validity and effect of a statute only when necessary to the determination of an actual and concrete controversy.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 53; Dec. Dig. § 58.*]

5. ACTION (§ 8*)—FICTITIOUS ACTIONS.

Where a request is made of a public officer to perform an act under a statute, and he, although believing that the law requires its performance, refuses because of a doubt on the subject, and because he wishes the question to be quickly and finally settled by the decision of a court, a proceeding brought by the state to compel such action on his part is not fictitious.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 8.*]

(Additional Syllabus by Editorial Staff.)

6. MANDAMUS (§ 154*)—PLEADING.

The only formal pleadings in mandamus are the alternative writ and answer, but there may be others if they will serve to define the controversy.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 154.*]

7. ACTION (§ 6*)—"MOOT CASE."

A "moot case" is one which seeks to get a judgment on a pretended controversy when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, cannot have any practical legal effect upon a then existing controversy.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 40; Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 5, p. 4577.]

Mandamus by the State, on the relation of the Attorney General, against J. N. Dolley and others. Motion to strike a plea in abatement from the files. Motion denied.

F. S. Jackson, Atty. Gen., for the State.
G. H. Buckman, A. C. Mitchell, A. M. Harvey, Glead, Hunt, Palmer & Glead, J. S. Dean, B. P. Waggener, Chester I. Long, Wells & Wells, Emery & Emery, J. E. Heslin, W. L. Huggins, H. S. Ganse, J. T. Pringle, McAnany & Alden, Homer Kennett, and Cornelius Gant, for defendants.

MASON, J. The state, on the relation of the Attorney General, began proceedings in mandamus against the bank commissioner and the State Treasurer, alleging that they had denied to national banks the privilege of participating in the benefits of the act (Laws 1909, c. 61; Gen. St. 1909, §§ 537 to 552) providing for the creation of a depositors' guaranty fund, and asking an order requiring them to recognize such right. The bank commissioner filed an answer, stating that, upon the strength of an opinion of the Comptroller of the Currency to the effect that national banks could not take part in said guaranty fund, he had refused to allow them any participation therein, and asserting as a reason why he should not be required to do so that the part of the act relating to national banks is void. A large number of national and state banks were made parties defendant. Some of them filed a plea in abatement, asking that the action be dismissed on the ground that no real controversy exists between the plaintiff, represented by the Attorney General, and the defendants, against whom the writ is asked. The state moved that this plea be stricken from the files, and this motion has been argued and submitted for decision.

While strictly speaking nothing is now before the court for action excepting the motion to strike the plea in abatement from the files, various other matters were incidentally discussed at the hearing, and it seems desirable at this time so far as possible to settle all questions of practice so as to facilitate a final decision.

Doubts have been suggested concerning the propriety of making the banks defendants, and concerning the character of process to be served upon them, the matters upon which they are to be heard, and the manner of the hearing. The practice in mandamus is well settled to make persons defendants of whom the performance of no duty is asked, but who have an interest in the subject-matter. 26 Cyc. 415. "Technically in mandamus the only necessary parties are the plaintiff, who asserts the right to have an act done, and the defendant, upon whom the public duty rests to perform it. The practice is common and commendable to bring in other persons who are likely to be injuriously affected by the judgment in order that they may have an opportunity to be heard in their own behalf, and in a proper case the court will suspend proceedings until

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

this is done. *Livingston v. McCarthy*, 41 Kan. 20 [20 Pac. 478].” *State v. Railway Co.*, 31 Kan. 435, 105 Pac. 704. How such defendants shall be brought into court cannot be of any real consequence. The service of a writ of mandamus upon them seems inappropriate. A rule to show cause why a peremptory writ should not be issued may be proper, but any method of notifying them of the pendency of the action should be deemed sufficient, since they are brought in for their own protection. The plaintiff’s pleading also contains allegations regarding the conduct of these additional defendants, but as they do not constitute a cause of action, and are obviously inserted as the basis for an application for an ancillary order, and such application has not been presented to the court, they are immaterial, presenting no issue and requiring no answer.

The bank commissioner in his answer raises no issue of fact, but seeks to present a question as to the effect of the statute. The language of the writ is indefinite, but by a liberal interpretation it perhaps alleges inferentially that national banks have asked the commissioner to take some action under the bank guaranty law looking to their becoming guaranteed banks, and that he has refused. If that is the case, and if the law makes it the duty of the commissioner to perform the act demanded, a proceeding to require its performance may be brought by the state, since it has an interest in seeing that the will of the Legislature is not disregarded by public officers. *State v. Lawrence*, 80 Kan. 707, 103 Pac. 839. If the banks that have been made parties contend that upon the face of the papers no peremptory writ ought to issue, their contention can be heard without their filing any pleading. If they maintain that any of the allegations in the writ or answer are untrue, or that other facts exist that are material to the controversy, it is proper that they should file a written statement of such matters. The name by which such statement is designated is immaterial. The only formal pleadings in mandamus are the alternative writ and answer, but there can be no objection to others if they will serve to define the controversy. We think it inexpedient to have a separate trial of the questions sought to be presented by the plea in abatement. The cause has already been set for final hearing in June. If the defendant banks so desire, they may be heard then upon the pleadings already filed. If they wish to present at that time other matters, they may file a statement thereof prior to May 15th.

The claim presented by the plea in abatement is that no decision should be made involving an interpretation of the bank guaranty statute, because the proceeding is collusive. It will doubtless simplify matters for the court to express its views as to how

far the attitude of the parties toward each other is a matter for inquiry. Of course, the court cannot undertake to interpret a statute because doubts exist as to its meaning in advance of a situation having arisen requiring action thereunder. In order for judicial power to be exercised with regard to the statute, there must be an actual and concrete controversy regarding it—a definite act demanded under it on the one hand and refused on the other. But, if these conditions exist, the fact that the demand or the refusal or both may have been prompted by a purpose to make what is called a test case does not defeat jurisdiction. It is not uncommon or objectionable for an officer to refuse to act upon a doubtful construction of a statute, irrespective of his own judgment as to its true meaning, in order that the question may be speedily and finally settled in the court. An action brought for that purpose under such circumstances is not fictitious, though it may in a sense be “friendly.” *Encyc. Pl. & Pr.* 720. “A moot case is one which seeks to determine an abstract question, which does not rest upon existing facts or rights. Where a concrete case of fact or right is shown, we know of no principle or policy of law which will deprive a party of a determination simply because his motive in the assertion of such right is to secure such determination.” *Adams v. Union Railroad Co.*, 21 R. I. 140, 42 Atl. 517, 44 L. R. A. 273. “It is universally understood by the bench and bar * * * that a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter, which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. * * * When there is an actual, bona fide contest as to a legal right, an agreement to put the case, when made, by actual exercise of the right and resistance to it, in such shape that the right can be readily determined by the court, especially when the dispute concerns a matter of public moment, which should be speedily settled, has never been condemned by the courts. It is a common, everyday practice in every state of the Union. The noted *Legal Tender Cases* were made up in that way.” *Ex parte Steele* (D. C.) 162 Fed. 694, 701.

If a resolution of the directors of a national bank asking that it become a guaranteed bank under the state law has been tendered to the commissioner for his action and he has refused to receive it, a justiciable controversy has arisen, notwithstanding he may believe that the Attorney General’s interpretation of the law is correct, and may desire that the court so declare. The statute is valid, or it is invalid. It imposes an official duty or it does not. The personal

belief or wish of the officer cannot affect the matter one way or the other. If there is reasonable ground for a difference of opinion as to whether he should act, his refusal to do so until the question is judicially determined cannot be regarded as collusive or capricious. The fact that here the plaintiff has joined as defendants all persons supposed to have an interest in defeating its contention precludes any suggestion of a purpose to mislead the court into making a ruling without both sides of the question having been fairly presented. Pleadings have been filed other than those referred to, but they present nothing requiring action at this time. The plea in abatement will not be stricken from the files, since it may be regarded as in effect an answer; but it will not be treated as a preliminary matter, and the court will not try any issue it presents in advance of the final hearing. The parties filing it may at their election stand upon the matters there presented, or add anything further they may desire. The plea includes an allegation that no national bank has ever applied for admission to the benefit of the bank depositor's guaranty fund, or of the act in relation thereto, and no additional pleading is necessary to present the issue of fact in that regard.

As has already been said, defendants in a mandamus proceeding, of whom the performance of no duty is asked, are brought in that they may have opportunity to show that the act demanded would be prejudicial to their rights and ought not to be performed. In the present case the allegations of the alternative writ concerning the conduct of the defendant banks, having relation only to an interlocutory order which has not been asked, will be considered abandoned, if they so desire, to show reasons why no writ should issue against the bank commissioner. If they do not care to contest this matter, they may refrain from further

appearance herein with the assurance that they will not be held for any costs, and that no judgment will be rendered against them, unless an adjudication of the issue between the plaintiff and the bank commissioner may be regarded as of that character. All the Justices concurring.

(32 Kan. 859)

HOPPER v. LEARNED.

(Supreme Court of Kansas. May 7, 1910.)

Appeal from District Court, Stafford County; J. W. Brinkerhoff, Judge.

Action by M. G. Hopper against Wilmer M. Learned. Judgment for defendant, and plaintiff appeals. Affirmed.

Ray H. Beals, for appellant. Robert Garvin, for appellee.

PER CURIAM. The appellant asks to have the judgment reversed upon the sole ground that the verdict was against the weight of the evidence. The action grew out of a horse trade, and the evidence was conflicting.

The verdict is supported by competent and substantial testimony, and was approved by the trial court; and the judgment is therefore affirmed.

(32 Kan. 859)

STARR v. MAUPIN et al.†

(Supreme Court of Kansas. May 7, 1910.)

Appeal from District Court, Shawnee County; A. W. Dana, Judge.

Action by Susie A. Starr against A. W. Maupin and Mary L. Maupin. Judgment for defendants, and plaintiff appeals. Affirmed.

J. R. McNary and J. S. Ensminger, for appellant. D. H. Branaman, for appellees.

PER CURIAM. Giving to the evidence the strongest interpretation of which it is susceptible in the plaintiff's favor, it is legally insufficient to establish want of legal capacity. This being true, the action was barred by the statute of limitations. Likewise the charges of fraud and undue influence were not proved. Part of the rejected evidence was improper, and the remainder was sufficiently covered by other questions and answers.

Judgment affirmed.

† Rehearing denied June 17, 1910.

(82 Kan. 518)

HULSMAN v. DEAL.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

TAXATION (§ 699*)—REDEMPTION FROM TAX SALE—STATUTORY PROVISIONS.

The right of a person, given by statute, to redeem his land from a sale for taxes during the period of his minority, and for one year thereafter is not limited by the provisions of another statute, which requires that a suit to avoid a sale or conveyance for taxes, except in cases where the taxes have been paid or the land redeemed, shall be commenced within five years from the time of recording the tax deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1403; Dec. Dig. § 699.*]

Appeal from District Court, Finney County; William H. Thompson, Judge.

Action by Charles B. Hulsmán against Jennie Deal. A demurrer to the petition was sustained, and plaintiff appeals. Reversed and remanded, with directions to overrule the demurrer.

O. H. Foster, Edgar Foster, and Fred J. Evans, for appellant. Hoskinson & Hoskinson, for appellee.

BENSON, J. The question to be decided arises upon the right of a person to redeem his real estate from a sale and conveyance for taxes more than five years after the tax deed had been recorded, but within one year after attaining the age of 21 years. The appellant became the owner of the land on June 30, 1894. He was then a minor. He became 21 years of age on October 10, 1906. The appellee claims to own, and is in possession of, the land under a tax deed dated June 22, 1900, for the delinquent taxes of 1893. On September 24, 1907, the appellant tendered to the county treasurer a sufficient sum for the redemption of the lands from the tax sale and conveyance, as provided by law. Gen. St. 1909, § 9465. This tender was refused. He filed his petition October 7, 1907, alleging these facts, including other allegations necessary in an action of ejectment. The appellee, defendant in this action, demurred to the petition. The demurrer was sustained and the plaintiff appeals. The reason for the decision is thus stated in the judgment: "And the court * * * sustained said demurrer for the reason that the petition shows upon its face that the tax deed under which the defendant claims has been of record for more than five years prior to the commencement of this action, and for more than five years prior to the making of the tender pleaded by the plaintiff in this action, and because no action was commenced, or tender made, prior to the expiration of five years from the recording of the deed."

The plaintiff bases his right to redeem upon the statute (Gen. St. § 9466), providing that: "The lands of minors * * * may be redeemed at any time before such minor

becomes of age, and during one year thereafter." This case falls clearly within the terms of this statute, but it is claimed that section 141 of the tax law is a limitation upon the minor's right of redemption. This section is: "Any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of lands sold for taxes, or to defeat or avoid a sale or conveyance of lands for taxes, except in cases where the taxes have been paid or the land redeemed as provided by law, shall be commenced within five years from the time of recording the tax deed, and not thereafter." Gen. St. 1909, § 9483. While these sections must be read together, being parts of the same chapter, and relating to the same subject, full effect should be given to the provisions of each if not inconsistent or contradictory. It will be noticed that from the limitation in the last section quoted, cases are excepted where the taxes have been paid or the land redeemed as provided by law. In cases other than those excepted the five-year limitation applies. In the excepted cases it does not; therefore a minor may redeem his lands during his minority and for one year afterwards. No conflict is perceived in these provisions.

It is insisted, however, that this court has held otherwise. Cartwright v. Korman, 45 Kan. 515, 26 Pac. 48, and Goodman v. Wilson, 54 Kan. 709, 39 Pac. 704, are cited in support of this contention. In the first of these cases the question related to the redemption of the lands of an insane person and it was held that section 17 of the Civil Code (Gen. St. 1889, § 4094) did not enlarge the five-year limitation provided in the tax law. In the opinion, after quoting section 141 of the tax law (Gen. St. 1889, § 6995), it was said: "The limitation begins to run immediately upon the recording of the tax deed, and against all persons, except in such cases, and against such persons as are expressly excepted from its operation. The only exception provided is where the taxes have been paid or the lots redeemed as provided by law."

* * * It has been determined that it (section 141) is complete in itself, except so far as it is modified by other provisions of the tax law." Thus the force of the exceptions was clearly recognized. In Goodman v. Wilson, 54 Kan. 709, 39 Pac. 704, the opinion discussed the right of minors to redeem from tax sales, and decided that section 141 is not modified or limited by the code provision before referred to. The person in whose right redemption was there sought had become of age more than one year before the suit was commenced. His case was therefore not within the exception of the statute, and the time could not be extended by the two-year period for commencing actions after disability is removed, as provided in the Code. In the argument reference was made to Douglass v. Lowell, 55 Kan. 574, 40 Pac. 917, but

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 108 P.—54

In that decision effect was given to the exception in favor of minors. Language in the opinion not necessary to the decision, which it is claimed imports a different conclusion, has been, it seems, erroneously construed to limit the right of redemption expressly given to minors by the statute. The plaintiff, having tendered the amount due for taxes within the time allowed therefor, must be considered as having redeemed the land under the provisions of the statute first quoted.

Another contention of the defendant is that the plaintiff, in order to state a cause of action, ought to have alleged that the land was not necessary for the payment of the debts of his parents, through whom he derived title by inheritance. This contention is without merit.

The petition stated a cause of action. The judgment is reversed, and the cause remanded, with directions to overrule the demurrer. All the Justices concurring.

(82 Kan. 485)

READ v. LOFTUS et al.†

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 140*) — CONTRACT—MERGER OF STIPULATION IN DEED AND MORTGAGE.

Whether a stipulation in a contract for the sale and conveyance of real estate, to deliver at a future date an abstract showing good title, satisfactory to the attorney for the vendee, is merged in a warranty deed, and mortgage given for the purchase money, executed contemporaneously with the contract, is a question to be determined by an examination of the instruments, and the situation, conduct, and intention of the parties.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 140.*]

2. VENDOR AND PURCHASER (§ 140*) — CONTRACT—MERGER OF STIPULATION IN DEED AND MORTGAGE.

If the deed is accepted as performance of the conditions of the contract, it supersedes the stipulation; but, if the parties agree and intend that the stipulation is to remain in full force and effect, it will not be considered as merged in the deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 140.*]

3. VENDOR AND PURCHASER (§ 143*)—CONTRACT—STIPULATION AS TO TITLE—WAIVER.

Taking possession and improving the property is not conclusive evidence of a waiver of the stipulation of the contract as to title, especially where the improvements are made in pursuance to an express provision of the agreement.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 143.*]

4. VENDOR AND PURCHASER (§ 119*)—RESCISSION OF CONTRACT—LACHES.

Where objections to the title shown by the abstract delivered in accordance with the contract are made by the vendee's attorney in good faith, and, to obviate one of them, the vendor promises to prosecute an action to quiet the title, the continuance of possession by the vendor for a reasonable time in reliance upon such

promises, without demanding rescission, is not such proof of laches as will necessarily defeat a rescission which was demanded after a refusal to take any step to remove the objection.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 212-214; Dec. Dig. § 119.*]

5. VENDOR AND PURCHASER (§§ 119, 143*)—CONTRACT — STIPULATION AS TO TITLE — WAIVER.

The possession, so taken and held; the making of improvements; and the delay in asking for rescission, so induced by the conduct and promises of the vendor—do not, as matter of law, amount to a waiver of the stipulation relating to the title, but are proper matters to be considered in determining whether a rescission should be adjudged.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 267-270; Dec. Dig. §§ 119, 143.*]

(Additional Syllabus by Editorial Staff.)

6. VENDOR AND PURCHASER (§ 127*)—RESCISSION OF CONTRACT—MEASURE OF DAMAGES.

Upon rescission of a contract for the sale of land for failure of the vendor to perform, the purchaser, not in default, is entitled to recover the necessary expenditures properly made by him upon the faith of performance of the contract by the vendor; especially where the contract expressly provided that such expenditures should be made.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 231; Dec. Dig. § 127.*]

Appeal from District Court, Leavenworth County; J. H. Gilpatrick, Judge.

Action by William S. Read against Mary R. Loftus and another. Judgment for plaintiff, and defendants appeal. Affirmed.

This was an action brought by William S. Read against Mary R. Loftus and Thomas J. Loftus for the cancellation of a note and mortgage and the rescission of a contract under which they were given. This contract was made by letter as follows: "Leavenworth, Kansas, Mar. 19, 1906. Mrs. Mary R. Loftus and Thomas J. Loftus, Leavenworth, Kansas—Dear Sir: This will formally advise you that I will accept a warranty deed for real estate described as lots number twenty-two (22) and twenty-three (23) in block seventy-two (72), Leavenworth City, proper, and in settlement of same will deposit in the hands of the cashier of the Leavenworth National Bank five hundred dollars (\$500.00), to be paid to Mary R. Loftus on the deliverance of abstracts of title to above mentioned property, abstracts to show good title, to be satisfactory to my attorney on or before November 25, 1906. In further consideration of the delivery to me of the above mentioned deed. I will give upon said property a mortgage as security for the payment of nine thousand five hundred dollars (\$9,500), said amount to be paid in installments of five hundred dollars (\$500.00), to be paid on the first day of December and the first day of June of each year until all is paid; the first payment to be made on December 1st, 1906, provided that the above mentioned abstract of title has

† For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied June 17, 1910.

been delivered and such abstract shows good and sufficient title in you satisfactory to my attorney. It being understood that I may have the liberty to pay an additional sum of one hundred dollars (\$100.00) or any multiple thereof in advance of or at the time of any of the above mentioned installments. Unpaid amount of above mentioned principal to bear interest at the rate of five per cent. (5%) per annum until paid. Insurance for the benefit of Mary R. Loftus will be carried on said property for such an amount as is represented in obligation unpaid. I also agree to make improvements consisting of machinery, repairs on: buildings, labor and material to the extent of not less than three thousand dollars (\$3,000.00). Yours very truly, Wm. S. Read." The defendants accepted this offer by signing and indorsing the same thus: "Accepted March 19, '06. Mary R. Loftus. Thomas J. Loftus." A copy of this contract was deposited in the bank referred to therein, together with a certified check for \$500, with direction indorsed upon the agreement as follows: "I deposit herewith five hundred (\$500.00) dollars; which you are to hold and pay over to Mary R. Loftus whenever she shall have complied with the terms and conditions of the within proposition. Wm. S. Read."

From the findings of the court the following facts appear: A warranty deed and mortgage were executed about the same time that the contract was made. The intention of the parties was to leave these papers with the bank; but in the interval that elapsed before all the signatures could be obtained this was overlooked, and the papers were delivered to the respective grantees and appear upon record, but not however in pursuance of any new arrangement or understanding, nor with the intention to change or modify the conditions of the contract. An ice and cold storage plant was upon the lots described in the contract, but was out of repair with many parts missing, and it was necessary to repair, improve, and overhaul the building and machinery to put them in running order. Read immediately took possession under the contract, repaired the building, and made many improvements upon the plant, expending therefor the sum of \$4,456.49. He paid the first installment of interest, \$237.50, due September 1, 1906, on the note accompanying the mortgage, and \$190.30 for insurance, and performed the conditions of the contract on his part. A few days before November 25, 1906, he requested the defendants to submit the abstract of title for examination; but it was not submitted until about December 1, 1906, when it was handed to the plaintiff's attorney for examination. On December 7th this attorney, after examining the abstract, refused to approve the title, and submitted written objections, as follows: "(1) There are three tax deeds on the property from the city to J. C. Douglass, issued March 28, 1875, July 19, 1880, and April 20, 1882, respective-

ly. (2) There is a deed from Higginbotham to Douglass dated June 18, 1881. (3) There is unpaid a sale certificate from the city to Thos. Quinn, for special taxes for the year 1868. No deed issued on certificate. (4) Sale of lots by county to W. D. Kelley for delinquent taxes, 1883. (5) Special tax for paving and curbing Cherokee in the sum of \$119.07, not marked paid. (6) A life estate in one-sixth said lots is outstanding in Dacotah S. Ryan. (7) Mary R. Loftus was (apparently) the owner of a life estate on March 20, 1906. (8) The fee in remainder is outstanding in the heirs of the body, born and to be born of Kate V. Sheedy, Jephtha D. Ryan, Mary R. Loftus, Thomas C. Ryan, and Ethan Ryan. (9) On March 20, 1906, the following suits were (and still are) pending in the district court of Leavenworth county, which may ripen into judgment liens on said lots: Fred Woolfe & Co. v. Mary R. Loftus et al.; Walter S. Gregg v. Mary R. Loftus et al.; James B. Welch v. Mary R. Loftus et al. (10) The taxes of 1906 are unpaid."

These objections were made in good faith. Whatever title the defendants had in the premises came through the will of Mrs. Loftus' father, in which she and her brothers and sisters were devisees, and by conveyances made by the other devisees to her. The defendants promised to remove the objections, one of which was that a fee in remainder was outstanding. As the defendants contended that such was not the effect of the will, they promised to have the question determined to the satisfaction of the examining attorney by a suit to quiet title or otherwise. The defendants then took back the abstract of title, and have since retained it. Relying upon the promise to make the title satisfactory to his attorney, plaintiff continued in the possession of the plant and continued to make necessary improvements thereon, but made no further payments on the consideration. The defendants left for New York, where they remained for the greater part of the following months, during which time there were negotiations between the parties looking toward a different contract or disposition of the property, but nothing resulted. The plaintiff did not intend to waive his objections to the title or to accept any title not satisfactory to his attorney, nor did the defendants rely upon any waiver, and, although inducing the plaintiff to believe that the title would be made satisfactory, took no steps to do so, and the defects were not removed. In the fall of 1907, the defendants gave notice that they would do nothing further with respect to the title. Thereupon, on October 5, 1907, the plaintiff served upon them a written notice of his election to rescind the contract because of their failure to comply with its conditions. The rental value of the premises without the repairs and improvements made by the plaintiff from the time he began the operation of the plant until he gave notice of the rescission—a period of 17 months—is \$75 per

month; with the improvements, the rental value is \$150 per month.

Upon the foregoing facts a judgment was entered rescinding the contract and for the cancellation of the note and mortgage upon the delivery to the clerk of a conveyance of the premises to Mary R. Loftus. The court charged the plaintiff with the rent of the premises at \$75 per month, and credited him with the interest paid, and insurance, and the sum expended for repairs and improvements, and found that there was due to him \$4,109.29, which was charged as a lien upon the premises.

James F. Getty, F. D. Hutchings, and David F. Carson, for appellants. A. E. Dempsey, for appellee.

BENSON, J. (after stating the facts as above). The defendants predicate error upon the orders overruling an objection to evidence under the petition, a demurrer to the evidence, and a motion to set aside the findings of fact. It is argued that the contract was merged in the deed and mortgage, and that the only remedy, in case the title is defective or should fail, is upon the covenants of the deed; also, that the plaintiff waived any right to rescission by long-continued delay. It is further urged that the amount allowed for improvements was excessive, and that the defendants were entitled to rent of the property as improved by the expenditures with which they are charged.

The principal question is whether the provisions of the contract concerning the title were waived by the acceptance of the deed. It is urged in support of the alleged merger that the contract was superseded and extinguished by the deed, and that all its stipulations were merged therein. That this is the effect of a deed when subsequently accepted in satisfaction of the conditions of an executory contract must be conceded. This conveyance, however, was made contemporaneously with the contract, which contained provisions for the future delivery of an abstract to show a good title satisfactory to the plaintiff's attorney. No payment was made at the time; even the \$500 deposited remained in the bank to be delivered only when the abstract should be approved. The provision for an abstract to be furnished in the future, and the clause requiring an expenditure of \$3,000 for improvements, indicate that the transaction was not considered or treated by either party as finally closed by the delivery of the deed and mortgage. In addition to this, the court found that these papers were delivered contrary to the intention of the parties, and not with any intention to waive or modify the terms of the agreement.

It was held in *Hampe v. Higgins*, 74 Kan. 296, 85 Pac. 1019 (syl.), that: "A written contract for the sale of real estate is superseded and extinguished by a subsequent deed of conveyance between the same parties which covers in its provisions all of the stipulations

contained in the contract." In the opinion it was said: (page 298, 74 Kan., page 1020, 85 Pac.): "In our view the evidence furnished by the face of the two instruments and also the extrinsic circumstances shown indicate that the parties intended the deed as a complete settlement of all further controversy concerning the sale and conveyance of the land. The transaction was initiated by the contract of sale and closed with the deed." In this case the deed did not cover the stipulations contained in the contract, and the circumstances do not conclusively show, as they were held to do in that case, that the transaction was closed. On the contrary, both parties treated it as still open, and the contract as being in force.

In various cases cited in support of the alleged merger it will be observed that the doctrine rests upon the acceptance of the conveyance as a performance of the contract. Thus it is said, in 2 *Devlin on Deeds*, § 850a, that: "The rule applicable to all contracts that prior stipulations are merged in the final and formal contract executed by the parties applies, of course, to a deed based upon a contract to convey. When a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed." It was held in *Slocum v. Bracy*, 55 Minn. 249, 56 N. W. 826, 43 Am. St. Rep. 499, where this question of merger was considered, that it is competent to prove by parol that the deed was not accepted as a performance of the contract. The court said: "There would be a very clear distinction * * * between plaintiffs merely accepting the instrument as a conveyance and their accepting it as performance of defendant's contract. We therefore think that it would have been competent for plaintiffs to have proved by parol the allegation of their reply that their acceptance of the deed as performance of defendants' contract was only conditional. Such evidence would not contradict the terms of the deed, or tend to prove that it was not to be operative as a conveyance according to its terms."

It cannot be said, as a matter of law, that the contract was merged in the deed. No inconsistency appears between the contract and the deed, and the provisions of the former were not necessarily superseded by the latter. *Witbeck v. Waine*, 16 N. Y. 532; *Nothe v. Nomer*, 54 Conn. 326, 8 Atl. 124; *Close v. Zell*, 141 Pa. 390, 21 Atl. 770, 23 Am. St. Rep. 296. The court found that no merger was intended. It is insisted, however, that this finding is not supported by any evidence. The conduct of the parties was a proper matter to be considered, as well as the language of the instruments, and, in addition to this, there was the testimony of the plaintiff that it was agreed that the mortgage and deed should remain in the bank, but that carelessly or unintentionally the exchange was made, instead of leaving them there as intended. In the light of this testimony, and of all the

circumstances, we cannot say that the finding is not supported by any evidence.

The question whether the plaintiff waived the objections to the title was clearly one of fact. The mere circumstance that he took and held possession of the property is not conclusive. Possession was expressly stipulated for in the contract, and his continuance in holding it is explained by the repeated promises of the defendants to remove the objections. The nature of the remedy which they proposed, namely, a suit to quiet title, would necessarily require time, and a reasonable delay for that purpose should not be construed as a waiver until some act was done, or notice given, evincing an intention to refuse to comply with the promise. When such notice was given, the plaintiff acted promptly by serving his notice of rescission, offering to reconvey the premises, and demanding a return of the note and mortgage.

The court is not called upon to determine the validity of the objections made to the title. The parties by their contract agreed that the title should be made satisfactory to the vendee's attorney. This was not done. Objections which appear upon their face to be substantial were made, and were not removed, and a final refusal to obviate them was given. That they were made in good faith is found by the court. That such a stipulation is valid and will be enforced is not an open question in this state. *Hollingsworth v. Colthurst*, 78 Kan. 455, 96 Pac. 851, 18 L. R. A. (N. S.) 741. The vendee was not required to accept a title which he had been advised was defective, and incur the risk of litigation, expense, and loss. He had provided against such hazards by a stipulation that the title should be satisfactory to his attorney.

Again, it is urged that there should be no recovery because the appellee failed to introduce the abstract in evidence. This was unnecessary. It was in the hands of the defendants, and it was not necessary for the court to examine it for the sufficiency of the title was not in issue. It was only necessary to show that it had been examined by the attorney, and, in the absence of bad faith, his objections were sufficient.

The petition contained allegations that fraudulent representations concerning the title had been made. As there was no finding of fact supporting these allegations, it is argued that there can be no recovery. Notwithstanding these averments, the cause of action was not for fraudulent representations, but the failure to make title as provided in the contract.

Another contention of the defendants is that the evidence disclosed the fact that the vendee, before entering into the contract, consulted with an attorney concerning the condition of the title, and that he must have relied upon the advice of the attorney. It is

sufficient to say that, notwithstanding such consultation, he made these stipulations with reference to the title. Whatever advice he may have received, he had a right to secure such guarantees and make such conditions as the other party was willing to concede.

It is contended that, instead of allowing the expenditures made for improvements, the court should only have allowed the value of the improvements; but this is not the rule in such cases. Upon the rescission of such a contract, the party not in default is entitled to recover the necessary expenditures he has properly made upon the faith of the performance of the agreement by the other party. *King v. Machine Co.*, 81 Kan. 809, 106 Pac. 1071; 8 Am. & Eng. Encyc. of Law, 637, 638. Especially should this be so in a case where the contract expressly provides that he shall make such expenditures. Besides, it is said in the argument for the appellant that: "We are not controverting the amounts paid, but we are seriously controverting the question as to whether they went into repairs and improvements, or operating expenses, and we make our objections upon that ground." The amount expended for improvements and repairs was determined by the court upon competent evidence, and the finding thereon cannot now be disturbed.

Finally, it is urged that the court should have allowed rent for the property in its improved condition. Manifestly this would be true if the appellants had been charged with interest upon the expenditures, but, as they were not, they should only recover the rent of the property as it was without the improvements.

That an agreement to purchase real estate may be rescinded where the vendor refuses or is unable to convey a merchantable title, as agreed, will not be controverted. The facts found by the court bring the case within the operation of this principle. The consideration had not been paid except a little interest, the improvements made in pursuance of the agreement are upon the property of the vendor, and the rights of both parties were protected by the decree.

Finding no error in the proceedings, the judgment is affirmed. All the Justices concurring.

(82 Kan. 410)

DAVIS v. NATION, State Auditor.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

PUBLIC LANDS (§ 54*)—SCHOOL LANDS—ACTION TO ENFORCE RIGHTS—LIMITATIONS.

Section 4 of chapter 373 of the Laws of 1907, providing that no action shall be brought by any purchaser of school land or by his assignee to enforce his right to an interest therein, unless the same be brought within six months from the time the act takes effect, is not unconstitutional on the ground that it fails to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

give a reasonable time within which to begin such action.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 54.*]

Action by J. M. Davis against James M. Nation, State Auditor and register of land office, for mandamus. Writ denied.

Richard E. Bird, for plaintiff. F. S. Jackson, Atty. Gen., John Marshall and Charles D. Shukers, for defendant.

PORTER, J. This is an original proceeding in mandamus to compel the State Auditor to issue patents to certain school lands in Meade county. J. M. Davis, the plaintiff, is an assignee of the original purchasers, and has paid the full amount due on the original contracts. The auditor refuses to issue the patents, because it is claimed that the rights of the original purchasers, through whom the plaintiff claims, were forfeited for the nonpayment of interest. He sets up as a further defense that the action is barred by the limitations of the law of 1907. In our opinion the action is barred by the limitations contained in section 4 of chapter 373 of the Laws of 1907, which reads: "No action shall be brought by any purchaser of school land, or by the assignee of such purchaser, in any court of this state, to recover any tract of school land, or to enforce the purchaser's right to or interest in the same, when a forfeiture thereof has been declared, unless such action be commenced within six months after such forfeiture was declared, or, when such time has already elapsed, within six months after this act takes effect." The act took effect January 25, 1907, and this action was not commenced until more than six months thereafter. The plaintiff questions the constitutionality of the act, and claims that it infringes on his vested rights because it fails to give a reasonable time within which to begin his action. The plaintiff does not indicate what he would regard as a reasonable limitation, and cites no cases in support of his claim that six months is unreasonable. We have no hesitation in declaring that a six-month period allowed by the act, is a reasonable limitation. *Plow Co. v. Witham*, 52 Kan. 185, 192, 34 Pac. 751; *National Bank v. Clark*, 55 Kan. 219, 224, 40 Pac. 270. This is an action brought by the assignee of a purchaser of school land to enforce his interest in the same, and therefore comes within the limitation.

The only remaining question is whether a forfeiture of the school land in question had been declared. The evidence shows that there was an attempted forfeiture. The tax rolls in the Treasurer's office showed the land to be forfeited, and not subject to taxation; and the former sheriff testified that he served notices of default for nonpayment of interest, although, if a re-

turn in writing was ever made, it was not filed in the office of the county clerk. This, with the other evidence showing that patents had been issued to the purchasers, was sufficient evidence that a forfeiture had been declared. It must be observed that the question of the validity of the forfeiture proceedings is not involved. That is the question which the plaintiff is barred from litigating.

Since the action cannot be maintained because of the limitation of the act of 1907, the writ is denied. All the Justices concurring.

(82 Kan. 416)

DOTY v. MADDUX et al.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 483*)—TAX SALES—VALIDITY—IRREGULARITIES.

After the tax roll of 1888 had been delivered to a county treasurer, an assessment upon two lots for building a sidewalk in a city of the second class was certified to the county clerk, who certified it to the treasurer, who entered it upon the tax roll against each lot thus: "S. Walk 6025." Other taxes upon the property for that year were paid in due time, but each lot was sold at the tax sales of 1889, for a delinquent sidewalk tax of \$60.25, and in 1893 a tax deed was issued thereon to an assignee of the certificate who was in possession under it when this suit was brought by the owner of the lots for possession. The tax deed was void upon its face; judgment was rendered for the plaintiff for possession, but a lien was given to the defendants for all taxes paid, with interest and costs. Held, that the plaintiff, who appealed from the judgment allowing the lien for taxes, should not be relieved therefrom.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 483.*]

Appeal from District Court, Finney County; Wm. H. Thompson, Judge.

Action by Dennis D. Doty against J. W. Maddux and another. Judgment for defendants, and plaintiff appeals. Affirmed.

A. Hoskinson, R. W. Hoskinson, W. R. Hopkins, and R. J. Hopkins, for appellant. Wm. E. Hutchison and C. E. Vance, for appellees.

BENSON, J. The plaintiff, Doty, in an action of ejectment sought to recover lots 6 and 7 in block 7 in Garden City from the defendants, Maddux and Jessup, who were in possession under a tax deed. Judgment was rendered for the plaintiff, but the defendants were given a lien for taxes; the tax deed being set aside as void upon its face. The plaintiff appeals from the judgment awarding a lien for taxes paid, with interest and costs.

The land was regularly assessed for taxation for the year 1888. On December 28, 1888, payment for one-half of the taxes, \$10.97, was made, and a receipt in the usual form was given by the county treasur-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ar. On June 18, 1889, payment was made for the remaining one-half of such taxes, and the usual receipt was given. A tax deed was issued for these lots and other property, dated January 7, 1893, reciting the sale of the lots in question at the tax sales of 1889, for the unpaid taxes of 1888. The tax sale certificate upon which the deed was based recites an unpaid tax of \$60.25 on each lot for the year 1888, and that the property was bid off to a purchaser for that sum. The tax roll of 1888 contains the following entries concerning these lots:

§ 9390). The county clerk is authorized to correct errors in the description or quantity of lands on the tax roll before or after it has been delivered to the treasurer. Id. § 9329. He is also authorized to place upon the roll after its delivery to the treasurer property which is about to be removed, and which has not been assessed. Id. § 9240. In the case of a false statement or refusal to give a statement of personal property for taxation the clerk, upon due notice and proceedings taken, is authorized to charge the proper person upon the tax roll there-

Lot	Block	Subd.	Value	No. of S. D.	Total Tax	Rate	Date of Payment	No. of Receipts	Semi-Annual Payments	Penalties			Total Payments	Delinquent	No. of Sale	1889 Tax Sale to whom sold
										Dec. 21	Mar. 21	June 21				
6	7		3.50	9.8.	2.194		Dec 20, 88 June 18, 89	124 1436	1097 1097				S. Walk 6025		394	Finnup
7	"		3.50	"	2.194		" "	"	"				S. Walk 6025		395	Finnup

The register of tax receipts, under the proper headings shows the payment of the taxes of \$21.94 in semiannual payments, as entered in the tax roll. The person who was county clerk in the year 1888 testified that the tax roll of that year was in the handwriting of his deputy, except the entries "S. Walk" and "6025," and that such entries were not upon the roll when it was turned over to the treasurer. This witness also testified that sidewalk taxes were certified to him at different times in the year 1888, which he certified to the county treasurer, and that it was his custom to so certify such taxes after the tax roll had been delivered to the treasurer. The evidence also shows that the entries referred to, "S. Walk," "6025," are in the handwriting of the person who was county treasurer at that time. From the foregoing it may be fairly found that the authorities of Garden City certified sidewalk taxes upon these lots to the county clerk in the year 1888, after the tax roll of that year had been delivered to the treasurer; that the county clerk certified such taxes, to the county treasurer, who thereupon made the entries referred to, which appear in red ink; that these entries were intended to represent a sidewalk tax on each lot for 60.25; and that the lots were sold there- or as recited in the tax certificate and tax deed.

The mayor and city council had authority to make assessments for sidewalks against the lots and certify the same to the county clerk (Gen. St. 1909, §§ 1374, 1387, 9388), and the county clerk is required to make up the tax roll, attach his certificate thereto, and deliver it to the county treasurer on the 1st day of November in each year (Id.

for. Id. § 9381. He is also authorized to assess any real property which the assessor has omitted. Id. § 9328. Referring to some of these provisions, and to the section providing that taxes shall become a lien on the 1st day of November (Id. § 9391) it was said in Ritchie v. Mulvane, 39 Kan 241, 252, 17 Pac. 830, 836: "Observe the foregoing language: 'A lien for all taxes shall attach to the real property subject to the same.' No reference is here made to any assessment. This means that whenever a tax is levied, and the first day of the next November has arrived, a lien shall attach to all property subject to the tax, whether any assessment has yet been made or not. If no assessment has yet been made, the county clerk may make it afterward. Tax Law, §§ 18, 52-54, 70 (Gen. St. 1909, §§ 9231, 9265-9267, 9283). Of course the amount of the lien cannot be ascertained until some assessment or valuation of the property is made, but the county clerk can make it at any time. It will be seen that the law is careful to prevent the escape from taxation of any person. All must bear their fair share of the public burdens; and no one is permitted to escape taxation merely because of some irregularity in the assessment, or elsewhere. All must pay their taxes." No irregularity in the assessment roll or proceeding, or mere irregularities of any kind, will invalidate tax proceedings. Gen. St. 1909, § 9481. The public must not be deprived of its revenue, or the citizen escape his fair share of the public burden through such irregularities or omissions. If one parcel of property is released of its share, the amount must be added to the property of others, who are already charged with their

proper part. The failure of the county clerk to make the proper entries upon the roll at the proper time were irregularities. It was also an irregularity for the treasurer to make such entries. But these irregularities will not relieve the defendants from paying their taxes. The evidence was sufficient prima facie to show that the assessment had been made, and had been duly certified to the county clerk, and that it should have been entered on the tax roll and collected. The fact that the entry was made by the treasurer instead of the clerk could not prejudice the defendants.

Whether the sidewalk tax had been entered upon the roll before the payment of the other taxes the evidence does not show, and we may presume that it was entered afterward. Still the defendants had ample notice by the publication of delinquent sales, as well as by the improvement of their property, that the tax existed. They have no equitable claim to have the lien removed, and the burden cast upon other taxpayers.

The judgment is affirmed. All the Justices concurring.

(82 Kan. 358)

KRUSE v. CONKLIN.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 233*)—EFFECT OF FAILURE TO RECORD.

An unrecorded conveyance of real estate is good except as against a person who purchases without notice thereof and for a valuable consideration.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 563½; Dec. Dig. § 233.*]

2. VENDOR AND PURCHASER (§ 242*)—DEEDS (§ 96*)—BONA FIDE PURCHASER—BURDEN OF PROOF.

Where, after the execution of a conveyance which is not recorded, the grantor conveys the same property to another, the latter, in order to be protected by the recording act, must assume the burden of proving that he was a purchaser for a valuable consideration. Recitals in the conveyance itself of the payment of consideration are no evidence thereof as against strangers.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603-605; Dec. Dig. § 242;* Deeds, Cent. Dig. § 260; Dec. Dig. § 96.*]

3. VENDOR AND PURCHASER (§ 242*)—BONA FIDE PURCHASER—PRESUMPTION.

As soon as it appears that a valuable consideration has been paid, the presumption arises that the purchaser acted in good faith and without notice of the rights of those who claimed under the unrecorded deed. Until there is proof that he paid a valuable consideration, there is no presumption of good faith.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603-605; Dec. Dig. § 242.*]

Appeal from District Court, Kiowa County; E. H. Madison, Judge Pro Tem.

Action by Adolph Kruse against J. E. Conklin. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

This was an action in ejectment to recover the possession of 160 acres of land in Kiowa county. After issues were joined a jury was waived. The court made findings of fact which are, in substance: (1) C. L. Davidson held a mortgage on the land dated July 2, 1887, payable five years after date. (2) Soon after the execution of the mortgage the land was abandoned by the owner of the fee. (3) In 1890 the Fullington Live Stock Company included the land in a large pasture owned by it in which there were several tracts of land to which it had no title. The company leased the land from Davidson, the owner of the mortgage, and paid rent to him for several years. Afterwards it purchased the note and mortgage from him and retained possession of the land under the mortgage, paying rent to no one. The mortgage debt has never been paid. (4) On March 3, 1900, the Fullington Live Stock Company was adjudged a bankrupt, and J. E. Conklin of Wichita became the trustee of the estate and took possession of the property of the bankrupt, including the pasture in which the land in question was located. Afterwards the trustee leased the pasture to W. G. Fairchild for one year. In April, 1901, some difficulties arose between the trustee and Fairchild and J. E. Conklin, the defendant herein. J. E. Conklin, the trustee, and J. E. Conklin, the defendant, are different persons. The trustee began proceedings in the federal court to oust Fairchild and the defendant from the land. While these proceedings were pending, Conklin, the defendant, made an offer to the court to purchase all the interest of the trustee in the lands of the bankrupt for the sum of \$3,000. This offer was accepted by the court, and the trustee ordered to convey all the interest of the bankrupt in the lands by a deed which should be in substance and effect a quitclaim deed. Conklin, the trustee, was not present when the offer was made, nor was he consulted about it or advised of it at the time. (5) In pursuance with this order, W. G. Fairchild, attorney for defendant, Conklin, prepared a deed to be executed by the trustee and included therein the land in question. The trustee afterwards executed the deed as prepared by Fairchild with the description of this land included, and delivered the same to defendant, Conklin. The trustee made very little examination of the deed to ascertain its contents. (6) At the time the trustee qualified, he took possession of the note and mortgage which had been purchased by the Fullington Live Stock Company from the mortgagee and listed the same as personal property, had the same appraised as such, and in May, 1900, offered the mortgage and note for sale at public auction, in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pursuance with the court's order to sell the personal property of the bankrupt. But no sale of the note and mortgage was made on account of the lack of bidders. At the time of the execution of the deed by the trustee conveying the interest of the bankrupt in the lands of the defendant, Conklin, the note, and mortgage were in the possession of the trustee, and no demand of any kind was made on him personally for the delivery of the note and mortgage to the defendant. At the time of the preparation of the deed, some conversation occurred between the attorney for the trustee and W. G. Fairchild in which it was said that the mortgage had been mislaid, could not be found at the time; and it was agreed between the attorneys that the insertion of the description of the land in the deed would convey the title to the trustee. (7) The defendant, Conklin, has been in actual and exclusive possession of the land under his deed from the trustee from the 22d of April, 1901, until the present time. He has had the same inclosed in a large pasture with other lands, some of which are owned by him and some of which he has leased from the owners. The deed from the trustee was not recorded until the 3d day of December, 1901. (8) In May, 1901, J. E. Conklin, trustee, being in the possession of the note and mortgage, assigned and delivered the same to one Cyrus Ritchie. There is no evidence as to the actual consideration for the assignment or any evidence showing whether Ritchie had actual notice of the trustee's deed to the defendant, Conklin. Soon after the assignment to him of the note and mortgage, Ritchie assigned and delivered the same to M. P. Hocking, and there is no evidence as to the actual consideration paid by Hocking or whether he had actual notice of the trustee's deed. In July, 1901, Hocking brought an action to foreclose the mortgage against the Fullington Live Stock Company and the original mortgagors and the former owner of the fee. He obtained a judgment of foreclosure and purchased the land at sheriff's sale September 20, 1902. Whatever title Hocking took by the sheriff's deed now belongs to the plaintiff, Kruse.

As conclusions of law, the court found: (1) The Fullington Live Stock Company was a mortgagee in possession of the land in controversy after the purchase of the note and mortgage from C. L. Davidson. (2) The trustee of the estate of the Fullington Live Stock Company, after he took possession of the ranch and pastures of the said company, was a mortgagee in possession of the said land. (3) By the execution and delivery of the trustee's deed the note and mortgage were assigned to J. E. Conklin, defendant. (4) The defendant, Conklin, by failing to obtain possession of the note and mortgage from the trustee and withholding his deed on record, was guilty of negligence. (5) Cyrus Ritchie was a purchaser of the note and mortgage for value, and without notice

of the interests of defendant, Conklin. (6) The plaintiff is entitled to recover the possession of the land in controversy."

In accordance with these findings, judgment was rendered for the plaintiff, and the defendant, J. E. Conklin, appeals.

W. G. Fairchild (H. S. Lewis, of counsel), for appellant. J. W. Davis, for appellee.

PORTER, J. (after stating the facts as above). The defendant challenges the correctness of the fourth, fifth, and sixth conclusions of law. The challenge must be sustained. The fourth and fifth conclusions upon which the court predicates the judgment in substance amounts to this: Cyrus Ritchie having purchased the note and mortgage for value and without notice, he and the plaintiff, who claims under him, are protected by the recording act, and because of the failure of the defendant to record his deed the plaintiff's title is superior. But that part of the fifth conclusion of law which holds that Ritchie purchased the note and mortgage for value is not supported by the findings of fact. In the eighth finding of fact it is said: "There is no evidence as to the actual consideration for said assignment and no evidence as to whether Ritchie had actual notice of the conveyance to Conklin, defendant." The court's error was in holding that, in the absence of any evidence to the contrary, Ritchie must be presumed to have purchased for value and without notice. While there is some conflict in the authorities, the rule appears to be settled by the better reasoning, as well as the weight of authority, that the burden of proof as to the payment of a valuable consideration rests upon the subsequent purchaser. *Coon v. Browning*, 10 Kan. 85; *Morris v. Daniels*, 35 Ohio St. 406; *Roseman et al. v. Miller*, 84 Ill. 297; *J. D. and D. Halstead v. President, Directors & Company of Bank of Kentucky*, 4 J. J. Marsh. (Ky.) 554; *Lake v. Hancock, Use of Payne*, 38 Fla. 53, 20 South. 811, 56 Am. St. Rep. 159; *Nickerson v. Wells-Stone Mercantile Co.*, 71 Minn. 230, 73 N. W. 959, 74 N. W. 891; 23 A. & E. Enc. of L. 522, 523; 24 A. & E. Enc. of L. 140.

Although the language of our recording act has been changed since the decision in *Coon v. Browning*, supra, the present statute has exactly the same force and effect as the former. This, in effect, was held in *Holden v. Garrett*, 23 Kan. 98. The reason of the rule that the burden of proof as to the payment of a valuable consideration rests upon a subsequent purchaser is that, while the recital in a deed that the consideration has been paid is prima facie evidence as between the parties, it is no evidence against a stranger. *King v. Mead*, 60 Kan. 539, 57 Pac. 113; *Doty v. Bitner* (decided at this sitting), 108 Pac. 858. Other reasons given for the rule are that the knowledge and means of proving the consideration are more reasonably and naturally in the possession of the grantee and

the difficulty which ordinarily arises where an attempt is made to prove the negative rather than the affirmative of a proposition.

As to notice, it will be observed that the rule is equally well established that the burden is on the one who claims under the prior unrecorded deed. At least, this is true as soon as it is established that the subsequent purchaser parted with value. Many of the courts take the view that the burden of proof as to the good faith of the subsequent purchaser shifts as soon as the last purchaser has shown that he paid a valuable consideration. *Morris v. Daniels*, supra; *Iron Co. v. Iron Co. et al.*, 105 Iowa, 624, 75 N. W. 499, 67 Am. St. Rep. 319; 23 A. & E. Enc. of L. 523, and cases cited in note.

As soon as it appears that a valuable consideration has been paid, the presumption arises that the purchaser acted in good faith and without notice of the rights of the parties who claimed under the unrecorded deed. In *Morris v. Daniels*, supra, it is said: "The rule in such case is entirely analogous to that which obtains in relation to commercial paper, and rests on the same principle. The indorsee of negotiable paper before due must prove the payment of a valuable consideration as soon as it is shown that the instrument was made without consideration, or was obtained by fraud."

In the present case the court assumes, in the absence of evidence to the contrary, that the subsequent purchaser paid value and took the title to the note and mortgage without notice of the defendant's interests. This was error. Until there was proof that the purchaser paid a valuable consideration, there was no presumption of good faith. Of course, before the subsequent purchaser can take advantage of the failure of the prior purchaser to record his deed, he must be himself a purchaser for value and without notice. *Grocer Co. v. Alleman*, 81 Kan. 543, 106 Pac. 460; *Morris v. Wicks*, 81 Kan. 790, 106 Pac. 1048; *Doty v. Bitner*, supra.

From the findings of fact it appears that the bankruptcy court ordered the note and mortgage sold as personal property at public sale in May, 1900, and that it was offered for sale at that time in pursuance of the court's order, but no sale of it made by reason of lack of bidders. It does not appear by what authority the trustee proceeded to sell the same more than a year afterwards at private sale, and the question of his authority to sell it when he did may have a bearing in determining the good faith of the plaintiff in the transaction.

The whole case turns upon this proposition, and, since there was no evidence to support the conclusion of law that the plaintiff purchased for a valuable consideration and without notice, the judgment must be reversed, and a new trial ordered. All the Justices concurring.

(82 Kan. 551)

DOTY v. BITNER.

(Supreme Court of Kansas. May 7, 1910.)

1. TAXATION (§ 762*)—TAX DEED—SALE CERTIFICATE—REQUISITES.

A tax deed, stating as a consideration for the assignment of a certificate what was probably the amount paid at the tax sale, was defective.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 762.*]

2. VENDOR AND PURCHASER (§ 236*)—BONA FIDE PURCHASER—CONSIDERATION—UNRECORDED DEED.

Where plaintiff in ejectment claimed under a quitclaim deed from one who had in fact parted with the title, he could take no advantage of the defendant's failure to record an earlier deed from the same grantor unless he was a purchaser for a valuable consideration.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 570; Dec. Dig. § 236.*]

3. DEEDS (§ 96*)—EVIDENCE—RECITALS IN DEED.

A recital in a deed that it was made for \$1 and other valuable considerations was not evidence of the consideration as against a stranger.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 256-260; Dec. Dig. § 96.*]

Appeal from District Court, Stanton County; William H. Thompson, Judge.

Ejectment by Dennis D. Doty against John W. Bitner. Judgment for defendant, and plaintiff appeals. Affirmed.

R. W. Hoskinson and Albert H. Hoskinson, for appellant. G. Porter Craddock, William Easton Hutchison, and C. E. Vance, for appellee.

PER CURIAM. The defendant in ejectment relied upon a tax deed over five years old and an unrecorded conveyance from the former owner. The plaintiff relied upon a subsequent quitclaim deed from the same grantor. Judgment was rendered for the defendant, and the plaintiff appeals.

The tax deed was defective, particularly in stating as the consideration for the assignment of the certificate what was probably the amount paid at the tax sale. It is somewhat like the deed involved in *Van Buskirk v. Lawrence*, 82 Kan. 76, 107 Pac. 538; but whether sufficiently so to make that case decisive of this need not be determined. The plaintiff claimed under a quitclaim deed from one who had in fact parted with the title. He could take no advantage of the defendant's failure to record the earlier deed from the same grantor unless he was a purchaser for a valuable consideration. *Grocer Co. v. Alleman*, 81 Kan. 543, 106 Pac. 460; *Morris v. Wicks*, 81 Kan. 790, 106 Pac. 1048. And the burden of proof in this respect rested on the plaintiff. *Kruse v. Conklin* (decided at this sitting), 82 Kan. —, 108 Pac. 856. The conveyance to him recited that it was made for \$1 and other valuable considerations;

but the recital was not evidence against a stranger. *King v. Mead*, 60 Kan. 539, 57 Pac. 113. Having failed to show any injury resulting to himself from the omission, he had no standing to complain of the defendant's failure to record the deed from their common grantor.

The judgment is affirmed.

(92 Kan. 468)

WAGNER v. BEADLE et al.

(Supreme Court of Kansas. May 7, 1910.)

(Syllabus by the Court.)

1. JUDGMENT (§ 443*)—VACATION—"FRAUD."

The "fraud" for which a judgment may be set aside must be actual fraud, involving intentional wrong, as distinguished from legal or constructive fraud.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 443.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2943-2954; vol. 8, p. 7666.]

2. JUDGMENT (§ 416*)—VACATION—GROUND.

Assuming, but by no means deciding, that the rule forbidding a judgment to be set aside for fraud in a matter thereby adjudicated does not apply where the defendant had no actual notice of the pendency of the action, no ground for its vacation is established by a showing that it was based on a claim insufficient in law, but admitting of assertion in good faith.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 416.*]

3. TAXATION (§ 805*)—QUIETING TITLE—ACTION—TIME—SETTING ASIDE—GROUNDS.

One against whom a decree quieting title has been rendered upon publication service and without actual notice cannot, after the lapse of three years, have the judgment set aside as fraudulent, merely by showing that the plaintiff's title was based solely upon a tax deed which showed upon its face that it was not effective as a conveyance.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 805.*]

Appeal from District Court, Kearny County; Wm. H. Thompson, Judge.

Action by Charles H. Wagner against J. G. Beadle and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Lee Monroe and George A. Kline, for appellant. Foster, Evans & Foster, for appellees.

MASON, J. On April 18, 1908, F. C. Puckett began an action to quiet title against Charles H. Wagner, upon whom service was made by publication. The petition was in the statutory form, alleging merely title and possession in the plaintiff and an adverse claim by the defendant. Judgment by default was rendered June 23, 1903. On April 28, 1909, Wagner began an action (against J. G. Beadle, a purchaser from Puckett) to set aside the judgment on the ground that it had been obtained by fraud. He was denied relief, and appeals. The facts upon which he relies for a recovery, as developed by the evidence, are that he knew nothing of the judgment until more than three years

after its rendition, and that Puckett had no title except under a tax deed, issued November 5, 1902, which was so defective that the five years' statute of limitation could not be invoked in its behalf. His argument is that, as the deed showed on its face that it did not convey a good title, Puckett necessarily knew that he was not entitled to a decree against Wagner, and was guilty of fraud and imposition upon the court in asking and obtaining one.

Whether the tax deed conveyed a title was the very question involved in the action brought by Puckett. If Wagner had had actual notice of the proceeding, he could not avail himself of any false representation in that regard, under the familiar rule that the fraud for which a judgment may be set aside must be external to the matter adjudicated. *Plaster Co. v. Blue Rapids Township*, 81 Kan. 730, 106 Pac. 1079. But he maintains that that rule applies only where the defendant knew of the pendency of the suit, and so had a real opportunity to interpose a defense. This contention is supported by what is said in *Dunlap v. Steere*, 92 Cal. 844, 28 Pac. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143, where, however, the constructive service was based on a willfully false affidavit. That case quotes a statement to the same effect from the opinion in *Irvine v. Leyh*, 102 Mo. 200, 14 S. W. 715, 16 S. W. 10; but the view there expressed seems in fact to have been that of but a minority of the court. *Ruhe v. Buck*, 124 Mo. 178, 203, 27 S. W. 412, 25 L. R. A. 178, 4 Am. St. Rep. 439; *Irvine v. Leyh*, 124 Mo. 361, 27 S. W. 512. Other cases cited by the California court, including *Adams v. Secor*, 6 Kan. 542, tend to justify its conclusion. *Schroer v. Pettibone*, 163 Ill. 42, 45 N. E. 207, has the same tendency. If a defendant who knows nothing of an action until after judgment has been rendered is barred from challenging its good faith, injustice may often result; but if, under such circumstances, he may question the truth of the petition, a decree rendered upon constructive service must always lack finality. The statute (Gen. St. 1909, § 5676 [Code Civ. Proc. § 83]) guards against the practical ill effects of treating such a decree as an actual adjudication, by preventing it from becoming absolute until the expiration of three years. But we need not now determine whether one who has had no actual notice of the pendency of an action against him may attack the judgment for fraud in a matter directly involved therein. Assuming such to be the case, the appellant can derive no benefit from the principle, for he has failed to bring himself within its operation. The fraud for which a judgment may be set aside by action must be of the same kind referred to in the statute (Gen. St. 1909, § 6191, subd. 4 [Code Civ. Proc. §

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

596, subd. 4)), permitting such relief on motion, of which it is said in *Laithe v. McDonald*, 7 Kan. 254: "The word 'fraud' in this statute is used in its common, direct sense. It means 'fraud in fact,' not 'fraud in law.' It embraces only intentional wrong—those acts done by the successful party with a knowledge of their criminality, and with the purpose of thereby depriving his adversary of some right." Page 264.

Puckett's tax deed, as has been said, was upon its face ineffective as a conveyance of title. But it does not follow that he knew this. Indeed, if he had been aware of the requirements of the law in that regard, it may fairly be supposed that he would not have accepted the deed, or that he would have surrendered it and asked for a better one. The presumption that every one knows the law does not extend so far as to make one guilty of fraud who asserts that to be the law which a court of last resort has declared to be otherwise. Wagner had for six years failed to pay taxes on his land. If the county officers had complied with the statutes, his title would have been annulled, and a deed would have been executed cutting off his interest absolutely. The right to the property which he still retained resulted solely from technical defects in the proceedings for the enforcement of his obligation to pay taxes thereon. He cannot maintain that a denial of his title necessarily involved bad faith. Puckett paid the taxes, and, if the statutes had been pursued, would have become the owner of the land. He took the deed that was furnished him and began an action to quiet title. His assertion in his petition that he owned the land, although untrue as a legal proposition, was not a fraud in itself, nor was it evidence of a fraudulent purpose. After the judgment had been rendered, Wagner had a right to have it reopened upon a showing that he had received no actual notice of the action, and that he had a valid defense, provided he made application therefor within three years. His present action is in effect an application of that character, and to allow a recovery upon it would be to permit him to have the judgment vacated after three years upon the very grounds which the statute requires to be presented before the expiration of that period.

The judgment is affirmed. All the Justices concurring.

(32 Kan. 539)

SMITH et al. v. UNITED STATES SUGAR & LAND CO. et al.

(Supreme Court of Kansas. May 7, 1910.)

1. TAXATION (§ 761*)—TAX DEED—VALIDITY.

A tax deed reciting a sale in bulk of three separate tracts for a gross consideration is void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1510-1513; Dec. Dig. § 761.*]

2. PROCESS (§ 96*)—SERVICE BY PUBLICATION—AFFIDAVIT.

The omission of an allegation in an affidavit for service by publication that service could not be had "by due diligence" is immaterial.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 118; Dec. Dig. § 96.*]

Appeal from District Court, Kearney County; William H. Thompson, Judge.

Action by W. B. Smith and others against the United States Sugar & Land Company and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

E. R. Thorpe, for appellants. Lee Monroe, Geo. A. Kline, William Easton Hutchison, and C. E. Vance, for appellees.

PORTER, J. The court rightly held the tax deed void. It recites a sale in bulk of three separate tracts of land for a gross consideration. *Worden v. Cole*, 74 Kan. 226, 86 Pac. 464, and cases cited. The judgment quieting title in the plaintiffs was not void. The affidavit for service by publication was a sufficient compliance with the statute; it states that the defendants are foreign corporations, and that personal service cannot be had upon them within the state of Kansas. All the other averments are mere surplusage. The omission of an allegation that such service could not be had "by due diligence" has been held immaterial in a similar case. *Washburn v. Buchanan*, 52 Kan. 417, 34 Pac. 1049. The United States Sugar & Land Company is admitted to be a purchaser in good faith relying upon the judgment quieting title. This admission means what it says, and, therefore, the fact that the immediate grantor of the company held by quitclaim title only does not remove the company from the protection of section 77 of the old Code. It is useless to say that the quitclaim in its chain of title was notice of defects in the record title in the face of the admission that the company purchased in good faith relying upon the judgment. Besides, an examination of the record of the proceedings would not have disclosed that the judgment was void on the ground that the tax deed upon which it rested was void on its face. *Wagner v. Beadle* (No. 16,525, just decided), 108 Pac. 859. As the vacation of the judgment could not affect the title of the sugar company to the land, it was proper for the court to give judgment in favor of the investment company for the value of the land, less the lien for taxes under the void deed. The judgment is affirmed.

(32 Kan. 590)

WALL v. CULP.

(Supreme Court of Kansas. May 7, 1910.)

Appeal from District Court, Shawnee County; A. W. Dana, Judge.

Action by James Wall against C. H. Gulp.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Judgment for plaintiff, and defendant appeals. Motion for restraining order denied.

A. B. Quinton, for appellant. W. E. Atchison and Hazen & Gaw, for appellee.

PER CURIAM. The application for a restraining order was not made until the second case had been tried in the city court, and before it had reached the district court. It may be assumed that the district court will refuse to proceed with the trial of the second case until the first case involving the same question is determined in the Supreme Court. Until it appears the district court is ignoring the appeal, and is proceeding to a trial of the second case, a restraining order should not be granted. All the Justices concurring.

(56 Or. 283)

STATE v. WARNER VALLEY STOCK CO.
et al.

(Supreme Court of Oregon. May 17, 1910.)

1. LIMITATION OF ACTIONS (§ 11*)—LIMITATION AS AGAINST STATE.

The statute of limitations (B. & C. Comp. §§ 3-26) cannot apply to the state except by virtue of section 13, which provided that the limitations prescribed in such title shall so apply, and which has been repealed by the amendment of 1903 (Laws 1903, p. 18).

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35-36; Dec. Dig. § 11.*]

2. LIMITATION OF ACTIONS (§ 11*)—LIMITATIONS AS AGAINST STATE.

The statute of limitations (B. & C. Comp. §§ 3-26) applies only to actions, and section 392, providing as to suits in equity that they shall only be commenced within the time limited to commence actions, does not make the statute apply to suits by the state, and neither does section 13 apply to suits, and hence the state is not barred by limitation as to a suit in equity.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35-36; Dec. Dig. § 11.*]

3. LIMITATION OF ACTIONS (§ 11*)—CANCELLATION OF PATENTS—ACTION BY STATE.

The clause of B. & C. Comp. § 392, providing no suit shall be maintained to set aside, cancel, or annul a patent to land issued by the United States or the state, unless commenced within 10 years, refers to persons claiming land wrongfully patented to another by the United States or the state; and, to make it apply to the state, the statute must expressly so provide.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35-36; Dec. Dig. § 11.*]

4. QUIETING TITLE (§ 12*)—RIGHT TO SUBPOSSESSION AS CONDITION PRECEDENT.

Plaintiff need not be in possession to maintain suit to cancel deeds, as the relief sought is the subject of the court's general equity powers, which existed prior to and independent of B. & C. Comp. § 516, permitting one claiming an interest in land not in the actual possession of another to sue in equity one claiming an adverse interest therein.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 8-12, 44, 45; Dec. Dig. § 1.*]

5. QUIETING TITLE (§ 4*)—EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW—POSSESSION OF PLAINTIFF—EFFECT.

If plaintiff is out of possession, and his remedy by ejectment is adequate, equity will not entertain jurisdiction to remove a cloud.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 6; Dec. Dig. § 4.*]

6. EQUITY (§ 43*)—GROUNDS OF JURISDICTION—INADEQUATE REMEDY AT LAW.

If the relief is such that equity alone can grant it, and the remedy at law is inadequate, that is sufficient to give jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 121-140, 164-166; Dec. Dig. § 43.*]

7. CANCELLATION OF INSTRUMENTS (§ 4*)—SUIT THEREFOR—JURISDICTION OF EQUITY.

That a deed, valid on its face, is void does not take a suit to cancel it out of the jurisdiction of equity; but, as the invalidity can only be made apparent by extrinsic evidence, it is the duty of equity to sweep it away, and equity jurisdiction will be exercised to cancel a void deed, except where its invalidity is apparent on its face.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 1; Dec. Dig. § 4.*]

On motion for rehearing. Motion denied. For former opinion, see 106 Pac. 780.

A. M. Crawford, Atty. Gen., and I. H. Van Winkle, Asst. Atty. Gen., for the State. Covert & Stapleton and Carey & Kerr, for respondent. William D. Fenton, amicus curiæ.

BAKIN, J. By this motion counsel for defendant again urge that the statute of limitations bars this suit, and question our construction of section 392, B. & C. Comp. As supplementary to what is said in the opinion, we may add that there can be no doubt that our statute of limitations (sections 3-26, B. & C. Comp.) can have no application to the state, except by virtue of the provision of section 13, which has been repealed by the amendment of 1903 (Laws 1903, p. 18), and provides that the limitations prescribed in this title shall apply to the state. It is a common-law maxim "Nullum tempus occurrit regi." 1 Wood on Limitations, § 52, states that: "Except the statute otherwise expressly provides, it [the statute of limitations] cannot be set up as a bar to any right or claim of the state." Those sections of the Code only apply to actions, and section 392 provides that suits shall only be commenced within the time limited to commence actions, as provided in chapter 2, tit. 1, of this Code (sections 3-26). This does not make the statute of limitations apply to suits by the state, nor does section 13 apply to suits. And the state is not barred. The clause of section 392 of the Code, which provides that no suit shall be maintained to set aside, cancel, or annul a patent to land issued by the United States or this state, unless commenced within 10 years, refers to persons claiming land wrongfully patented to another by the United States or this state. To make it apply to the state the statute must expressly so provide.

Again, defendant urges that the suit cannot be maintained unless plaintiff is in possession of the land. This contention is fully answered in the opinion, where we hold that the relief sought is the subject of general equity powers of the court, which existed prior to and independent of section 516, B. & C. Comp., authorizing suits to quiet title. If

plaintiff is out of possession and his remedy by ejectment is adequate, then equity will not entertain jurisdiction to remove a cloud, but there are many *quia timet* actions in which the remedy at law is not adequate, and of which equity will entertain jurisdiction whether plaintiff is in or out of possession. If the relief is such that equity alone can grant, and the remedy at law is inadequate, that is sufficient to give jurisdiction. This principle is recognized in *O'Hara v. Parker*, 27 Or. 158, 168, 39 Pac. 1004, 1006, where *Pomeroy* is quoted and approved, to the effect that: "Where * * * a party out of possession has an equitable title, or where he holds the legal title under such circumstances that the law cannot furnish him full and complete relief, his resort to equity to have a cloud removed ought not to be questioned." In *Hoopes v. De Vaughn*, 43 W. Va. 447, 452, 27 S. E. 251, 253, it is held that: "A suit in equity to annul a forged deed, * * * brought by the legal owner * * * while out of possession of the land, is not taken out of equitable jurisdiction by the fact that the deed is void." To the same effect are *De Camp v. Carnahan*, 26 W. Va. 839, and *Bunce v. Gallagher*, 4 Fed. Cas. No. 2,133. In the latter case it is held that it is not enough that there is a remedy at law; it must be plain and adequate. The fact that the deed is void does not take it out of the jurisdiction of equity. As the invalidity of the deed does not appear on its face, but can only be made apparent by extrinsic evidence, it is the duty of equity to sweep it away. And the question of possession has no legal relation to the object now sought to be attained. *Story's Eq. Jur.* § 700; 17 *Ency. Pl. & Pr.* 284. In *Booth v. Willey*, 102 Ill. 84, it is held that the rule that a bill to quiet title and remove a cloud upon a party's title lies only when the complainant is in possession of the land applies only when the object of the bill is purely to remove a cloud from the title, and not where the primary relief sought is upon other and well-established grounds. The rule has no application when a deed is sought to be set aside upon the ground of fraud. In *Pier v. City of Fond du Lac, Imp.*, 38 Wis. 470, 481, it is said: "In those actions *quia timet*, which may be brought independently of the statute, we find no authority for holding that possession by the plaintiff is essential to the cause of action; and, unless an averment of such possession is necessary to show that the plaintiff has no adequate remedy at law, no valid reason is perceived why it should be required." In 4 *Pomeroy Eq. Jr.* § 1377, it is said a doubt was formerly entertained as to whether a court of equity ought to exercise its jurisdiction to order instruments, absolutely void at law and not merely voidable, to be delivered up and canceled, since the legal remedy of a party was adequate. But it is now well settled that jurisdiction will be exercised in such cases, except where the invalidity of the instru-

ment is apparent on its face; and in a note to section 1399 he says that when the interest to be protected is equitable, the jurisdiction should be exercised whether the plaintiff is in or out of possession; for under those circumstances legal remedies are not possible. In *Kennedy v. Northup*, 15 Ill. 148, 152, the bill was filed for the purpose of setting aside certain deeds alleged to be fraudulently obtained. It was objected that defendant was in possession, and that therefore plaintiff could not maintain the suit. The court said: "We think the complainant has a right to have the defendant's title set aside, * * * although it may be true that the fraud, if proved, might defeat that title in a court of law, yet the courts of equity have ever claimed to possess superior facilities for investigating such questions to the courts of law, and certainly the relief which they can give is, in many cases, more satisfactory. When the fraud is once established, they can cut up the fraudulent conveyance or contract by the very roots, and leave the party in as secure a position as if it had never existed." As said in *Bunce v. Gallagher*, *supra*, there is no question of title involved in this suit, except that involved in whether the deeds are void; their invalidity does not appear on their face, but can only be made to appear by extrinsic evidence, and the question of possession has no legal relation to the object now sought to be attained.

Again counsel urge that, in ruling upon the demurrers, the court has taken into consideration facts disclosed on the trial as to the deed of date June 23, 1899, but the facts disclosing the invalidity of the deeds are set out in the complaint, *viz.*, that H. C. Owen received no recognition from the board until he acquired the rights of Beekman and others under application No. 30, when he filed his own application of date March 12, 1884, to which was attached application No. 30, upon which certificate No. 144 is based, and recites that it is issued to H. C. Owen, successor to C. C. Beekman and others, and this precludes any inference that certificate No. 144 may have been issued upon applications for more than 320 acres each. It is expressly alleged that the deeds were issued under and in accordance with certificate of sale No. 144, and the decision here is not in conflict with the opinion in *Warner v. Morrow*, 48 Or. 258, 86 Pac. 369.

In remanding the case to the lower court, we had in mind that all parties would prefer to have the whole case await the final decree as to all the deeds. And the proceedings in the trial court are subject to the control of that court. As to the deeds of date August 21, 1891, and the one of March 3, 1893, no doubt the defendant is entitled to have leave to answer. As to the deed of date January 18, 1883, it is for the lower court to determine whether the plaintiff should be allowed to amend; and, as to the deed of date June 23, 1899, findings are made by this court in

favor of plaintiff. But since plaintiff, by the complaint, offers to reimburse defendant Warner Valley Stock Company, for all sums of money paid by it and its predecessors in interest to the state upon the attempted purchase, which in equity and good conscience it ought to do, an accounting must be had thereon, and the decree rendered accordingly.

The motion for a rehearing is denied.

(157 Cal. 649)

CHORMICLE v. SOUTHWEST WAREHOUSE CO., Inc. (L. A. 2388.)

(Supreme Court of California. April 23, 1910.
Rehearing Denied May 23, 1910.)

1. SALES (§ 447*)—SPECIAL FINDINGS—CONFLICTING FINDINGS.

In an action for damages by breach of an oral warranty that barley sold was of a certain kind, the jury found in answer to special interrogatories that defendant's agent, S., was absent in another city when the oral sale was made, but that the sale was made by him, and that J., another agent, did not make the sale, but received the price, but did not warrant the barley. *Held*, that the findings were conflicting.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 447.*]

2. TRIAL (§ 350*)—SPECIAL INTERROGATORIES—QUESTIONS SUBMITTED.

Where, in an action for damages by breach of an oral warranty made when barley was sold, that it was of a certain kind, the pleadings admitted the sale, but did not contain an admission as to which of defendant's agents made it, a special interrogatory as to who made it was proper, and the finding thereon is binding.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 350.*]

3. SALES (§ 447*)—ACTION—FINDINGS—FINDINGS INCONSISTENT WITH GENERAL VERDICT.

In an action for damages by breach of an oral warranty on the sale of barley that it was of a certain kind, a finding, implied from a general verdict for plaintiff, that a warranty was made, was overcome by special findings that the person whom plaintiff claimed made the warranty was not at the place of sale when it was made.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 447.*]

Department 2. Appeal from Superior Court, Orange County; F. E. Densmore, Judge.

Action by William H. Chormicle against the Southwest Warehouse Company, Incorporated. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Percy R. Wilson and W. W. Middlecoff, for appellant. J. L. Murphey and Horace C. Head, for respondent.

HENSHAW, J. This action was brought by plaintiff, claiming in his own right and as the assignee of two others, against the defendant corporation for damages for breach of warranty which plaintiff claims defendant made to the effect that certain seed barley purchased by plaintiff and his assignors from

defendant was bearded barley, when, in fact, it was beardless barley. It is alleged that plaintiff planted the seed, but had no crop, and that the sole reason for the failure of the crop was that the seed was of the beardless variety, instead of the bearded variety, which latter would have yielded good returns. Defendant for answer admitted the sale of the barley, but denied the warranty. The only evidence of warranty was the testimony of plaintiff and his son that Harry Spencer, defendant's warehouse foreman, in a conversation represented and stated to plaintiff that the seed barley was bearded barley; that this conversation took place on December 7, 1906, at defendant's warehouse at Irvine at the time when the grain was bought and paid for. The case was tried before a jury, which rendered a general verdict in favor of plaintiff for \$2,000. It also returned certain special verdicts and findings of fact. By reason of the irreconcilable conflict and inconsistency between these special verdicts and findings and the general verdict, the judgment must be reversed.

The evidence of the Chormicles, father and son, was to the effect that they with Elmer Porter rented the land which was to be sowed to barley; that on December 7, 1906, they bought 15 tons of barley for which a check was given to Mr. Spencer whom they identified in the courtroom. The receipt for their payment was made out by J. C. Jenkins, who was present at the time, but their conversation was with the foreman, Spencer, who made warranty as to the kind and quality of the seed grain. Elmer Porter, who accompanied the Chormicles, testified that he took no part in the conversation, but saw the plaintiff talking with Jenkins and probably with some other person, upon December 7th, the day when the sale was made, the check in payment dated, and the receipt signed by Jenkins given. Spencer and Jenkins testified that Spencer was not at the warehouse upon that day, and, in answer to special interrogatories, the jury found that Spencer was absent from defendant's warehouse and in the city of Santa Ana on December 7, 1906, "when plaintiff and his associates were at said warehouse and purchased said seed barley"; that Jenkins did not make the sale of the seed barley, but took the check and gave the receipt for the same; that the sale of the barley was made by Spencer; that Jenkins did not warrant that the seed barley was bearded barley.

The result of these special findings is inextricable confusion. The jury finds that Jenkins made no warranty and did not sell the barley. It finds that Spencer sold the barley, but it finds that Spencer was not at the warehouse where the sale took place upon the day when it finds that the sale did take place. There is no suggestion in the evidence that the sale was upon any other

day or that representations were made at any time prior to the time of the sale. If Spencer was in Santa Ana, miles away from the warehouse on the day of the sale and at the time of the sale which, it will be remembered was orally effected (according to the testimony of the plaintiff) with Spencer at the warehouse, certainly Spencer could not have made the sale, though the special verdict upon this point by the jury is that he did. Saving for these special findings in support of the judgment, it would be permissible to conclude that the plaintiff mistook Jenkins for Spencer, and that the sale was actually consummated with Jenkins who took the check and gave the receipt, but we are forbidden to indulge in this construction, not because plaintiff's testimony positively identifies Spencer as the person with whom the sale was made, but because the jury itself specifically finds in accordance with that testimony that Jenkins did not make the sale and that Spencer did. The pleadings admit the sale, but we cannot for this reason disregard the special finding that defendant's sale was made by Spencer, since the admissions of the pleadings do not declare who the particular agent of the defendant was through whom the sale was effected, and a special finding upon this matter was therefore pertinent and proper. Moreover, there is no special verdict to the effect that the warranty was ever made by any one. A finding to this effect is embraced in the general verdict, but the special verdicts are destructive of this finding, in that from them it appears that no such warranty could have been given, since Jenkins did not give it, and Spencer, who plaintiff says gave it, was not present at the time of the sale, which was the time when the warranty was given. By reason of this conflict and inconsistency between the general verdict and the special verdicts, it is impossible for this court upon the record to do other than decree that the judgment appealed from be reversed and the cause remanded for a new trial.

It is ordered accordingly.

We concur: LORIGAN, J.; MELVIN, J.

(157 Cal. 652)

STANTON v. HOTCHKISS. (S. F. 5,296.)
(Supreme Court of California. April 27, 1910.)

1. TAXATION (§ 788*)—TAX DEEDS—EFFECT AS EVIDENCE.

Tax deeds, if valid, are primary evidence of the regularity of the assessment upon which they are founded, equalization as required by law, levy of tax in accordance with law, non-payment of tax, regular sales for such nonpayment, nonredemption from such sales, and that the person who executed the deed was the proper officer, under the express provisions of Pol. Code, § 3786, and conclusive evidence (except as against actual fraud) of the regularity of all other proceedings under the express provisions of section 3787.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555-1569; Dec. Dig. § 788.*]

2. TAXATION (§ 779*)—TAX DEEDS—EFFECT.

Valid tax deeds made to the state after failure to redeem, convey the absolute title to the property described therein, under the express provisions of Pol. Code, § 3787.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1547; Dec. Dig. § 779.*]

3. EVIDENCE (§ 23*)—JUDICIAL NOTICE—GOVERNMENT SURVEYS—MERIDIANS.

Courts will take judicial notice of government surveys of the public lands, and that the meridian of Mt. Diablo is the only meridian for the townships and ranges in Fresno county.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 30; Dec. Dig. § 23.*]

4. TAXATION (§ 764*)—TAX DEEDS—SUFFICIENCY OF DESCRIPTION OF PROPERTY.

A description of land in a tax deed as "lying and being within said county of Fresno, state of California, and described thus: 'E. 1 of N. W. 1, Sec. 23, Twp. 16 S. R. 15 E.,' is sufficient in view of the fact that there is only one meridian in that county, the description being clearly one by government subdivision, 'E. 1' and 'N. W. 1' plainly meaning 'E. 1/2' and 'N. W. 1/4.'"

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 764.*]

5. TAXATION (§ 764*)—TAX DEEDS—SUFFICIENCY OF DESCRIPTION OF PROPERTY.

A description in a tax deed of land "situate, lying and being within the said County of Fresno, State of California, and described thus W. 1/2 of N. W. 1/4 of Sec. 23-16-15," was sufficient, being a description by government subdivision, the term "16" denoting township and "15" range, it appearing that in the county named there is only one meridian for the townships and ranges, and that all townships are "south" and all ranges "east" of the base and meridian.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 764.*]

6. TAXATION (§ 688*)—CERTIFICATE OF SALE—INCORRECT DATE—CURATIVE ACT.

St. 1903, c. 59, declaring that all certificates of tax sales which failed to recite the correct date, or any date, when the right of redemption shall expire, or had expired, or recited an incorrect date when the state would be entitled to a deed, were thereby confirmed and legalized, cured the error in a previous certificate of sale to the state which incorrectly stated the date of expiration of time for redemption.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1390; Dec. Dig. § 688.*]

7. TAXATION (§ 656*)—CERTIFICATE OF SALE—TIME.

Where the first publications of notice of tax sales were made on June 3d, and the sale was had on June 24th, there was a sufficient compliance with Pol. Code, § 3787, providing that a tax sale must not be less than 21 nor more than 28 days from the time of the first publication of the notice required thereby.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1347; Dec. Dig. § 656.*]

Department 1. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by P. A. Stanton against W. J. Hotchkiss. Judgment for defendant, and plaintiff appeals from an order denying a new trial. Affirmed.

A. M. Drew and J. R. Webb, for appellant. Stanton L. Carter and Carter & Carter, for respondent.

ANGELLOTTI, J. This is an appeal from an order denying plaintiff's motion for a new trial in an action brought to quiet his title to a parcel of land in Fresno county, being, as described in the complaint, the N. W. $\frac{1}{4}$ of section 23, township 16 S., range 15 E., Mt. Diablo base and meridian. The judgment was in favor of defendant, decreeing that defendant was the owner in fee of all of said land, and that plaintiff has no interest therein.

It was stipulated on the trial that plaintiff was the owner of said property, except in so far as his title thereto had been divested by certain purported sales and conveyances of the same to the state of California by the tax collector of Fresno county for delinquent taxes, and that, if the state had acquired the title by reason of said sales and conveyances, the same had since vested by mesne conveyances in defendant. The case was thus made to depend upon the validity of two purported conveyances by the tax collector of Fresno county to the state of California, one claimed to be for the W. $\frac{1}{2}$ of said N. W. $\frac{1}{4}$, and the other claimed to be for the E. $\frac{1}{2}$ of said N. W. $\frac{1}{4}$. These conveyances were received in evidence over the objection of plaintiff, and except for the stipulation already referred to, constituted all of the evidence given on the trial. If valid, these deeds constituted primary evidence of the regularity of the assessment upon which they were founded, equalization as required by law, levy of tax in accordance with law, nonpayment of tax, regular sales for such nonpayment, nonredemption from such sales, and that the person who executed the deed was the proper officer (Pol. Code, § 3786), and conclusive evidence of the regularity of all other proceedings, and conveyed to the state the absolute title to the property described therein (Pol. Code, § 3787).

The principal objection by plaintiff to these deeds is that they do not sufficiently describe the property attempted to be conveyed. As to the deed of the E. $\frac{1}{2}$ of said N. W. $\frac{1}{4}$ this objection does not appear to be insisted upon in the briefs. The description was: "lying and being within said county of Fresno, state of California, and described thus: E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ Sec. 23, Twp. 16 S. R., 15 E." Our courts take judicial notice of government surveys of the public lands (Rogers v. Cady, 104 Cal. 288, 291, 38 Pac. 81, 43 Am. St. Rep. 100), and also that the meridian of Mt. Diablo is the only meridian for the townships and ranges in the county named in the description, Fresno county (Harrington v. Goldsmith, 136 Cal. 168, 68 Pac. 594. Bank of Lemoore v. Fulgham, 151 Cal. 238, 90 Pac. 936). The description set forth in this deed was plainly one by government subdivision. "E. $\frac{1}{2}$ " and "N. W. $\frac{1}{4}$ " plainly meant "east one-half" and "northwest one-quarter," and the other abbreviations were ab-

breviations in common use susceptible of but one meaning. Thus we have clearly designated the east one-half of the parcel described in the complaint.

The description in the deed of the west one-half is somewhat more meager, but under the circumstances we think sufficient. It was "situate, lying and being within the said county of Fresno, State of California, and described thus W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of Sec. 23-16-15." If this denotes a description by government subdivision, it is clearly sufficient. We know that it is an invariable rule to immediately follow the number of the section with the description of the township, and the description of the township with the description of the range. As said in regard to the former description, we must take judicial notice that the meridian of Mt. Diablo is the only meridian for townships and ranges in Fresno county. It is not denied by plaintiff that in Fresno county all townships are "south" and all ranges "east" of Mt. Diablo base and meridian. If that be the fact, we must likewise take judicial notice thereof. If it can be held that "16" denotes the township and "15" the range, we would thus have a sufficient description. We are of the opinion that the description can reasonably be taken in no other way than as one by government subdivision, and that the terms "16" and "15" clearly indicate respectively township and range. A case in point is that of *McChesney v. City of Chicago*, 173 Ill. 75, 50 N. E. 191, involving the question of the sufficiency of a description in an assessment proceeding, exactly like the one under consideration. It was "Sec. 23, 38, 14." The claim was that it could not be told what the figures "38, 14" mean or refer to. The court said: "There can be no doubt that the abbreviation 'Sec.' means 'section.' This being so, the figures which follow the designation of the section clearly refer to the township and range, as if the word 'township' was inserted before '38,' and the word 'range' before '14.' The court will take judicial notice of the meaning of such abbreviations as are here used." While we are not to be understood as commending such strenuous efforts at abbreviations in descriptions as were apparently made in this matter, we believe that the description sufficiently identified the property, and that the deed cannot be held ineffectual on the ground of want of proper description. The cases cited by learned counsel for plaintiff are not in point, for, as we view the description, it was, in the light of facts of which the courts must take judicial notice, certain and definite and sufficient in itself to identify the land.

It is claimed that the certificates of sale to the state specified the wrong date on which the state would be entitled to a deed; section 3776 of the Political Code prescribing that such certificate shall specify, among

other things, when the state will be entitled to a deed, and that the deeds to the state failed to state the correct time when the right of redemption had expired as required by section 3785 of the Political Code. The certificate as to the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, as recited in the deed, stated the day of sale, June 24, 1898, and that, unless the property was redeemed within five years from the date of sale, the purchaser would be entitled to a deed thereof on the 24th day of June, 1903. The deed recited that the time for redeeming said property expired on the 24th day of June, 1903. It is conceded by counsel for defendant that the date when the purchaser would be entitled to a deed was incorrectly stated by one day in the certificate. So assuming, the error in the certificate in this regard was cured by the curative act thereafter enacted. St. 1903, p. 63. See *Bank of Lemoore v. Fulgham*, 151 Cal. 234, 239, 90 Pac. 936; *Baird v. Monroe*, 150 Cal. 560, 89 Pac. 352. The recital in the deed made June 25, 1903, which was subsequent to the enactment of the curative act, was correct. June 24, 1903, was certainly the last day on which redemption could be effected within five years from the date of sale. While in the matter of the certificate and deed of the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ the dates are different, the difference is not such as to affect the question and what we have said in regard to the other deed is equally applicable.

We do not think that it is established by allegations of the complaint undenied by the answer that the first installment of taxes for the year 1898 on the E. $\frac{1}{2}$ of said N. W. $\frac{1}{4}$ was paid, or that the sale by the tax collector was for the second installment only. The record shows no evidence or stipulation to this effect. Hence it cannot be held that it has been shown that there was any error in the deed in its statement regarding nonpayment of the taxes. Both deeds sufficiently recite that the property was sold for delinquent taxes.

Section 3767 of the Political Code provides that the tax sale "must not be less than twenty-one nor more than twenty-eight days from the time of the first publication" of the notice required thereby. In the case of the W. $\frac{1}{2}$ of such N. W. $\frac{1}{4}$, the first publication was on June 3, 1898, and the day fixed in the notice for the sale was June 24, 1898, the sale being made at that time. So, in the case of the E. $\frac{1}{2}$, the first publication was on June 3, 1899, and the day fixed for the sale June 24, 1899. This was a sufficient compliance with the statute in each case. *Bank of Lemoore v. Fulgham*, 151 Cal. 238, 90 Pac. 936.

There is no other point requiring notice. The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

(157 Cal. 667)

DAVIS et al. v. MARTIN et al. (Sac. 1,724.)
(Supreme Court of California. April 28, 1910.
Rehearing Denied May 26, 1910.)

1. APPEAL AND ERROR (§ 931*)—REVIEW—FINDINGS—PRESUMPTIONS.

The court on appeal must reconcile the findings, if possible, and must, if reasonable, give them such an interpretation as will support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3769; Dec. Dig. § 931.*]

2. WATERS AND WATER COURSES (§ 40*)—RIPARIAN RIGHTS—RIGHTS OF APPROPRIATOR.

Riparian rights which attach to land abutting on a stream are paramount to the rights of any appropriator.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 40.*]

3. WATERS AND WATER COURSES (§ 138*)—APPROPRIATION OF WATER—PRESCRIPTION.

Defendant owned a ranch bordering on a stream and used the waters thereof for irrigation by a ditch to carry the waters to portions of the ranch adjoining the ranch of a third person, who by the consent of defendant extended the ditch to his ranch and used a part of the water. Plaintiff, owning an adjacent ranch, extended the ditch to his lands, and used the waters with the consent of defendant. Defendant had complete control of the waters and of the ditch so far as it extended over his ranch, and plaintiff never used the waters under a claim of right. Held, that plaintiff did not acquire any right to the waters by prescription, notwithstanding a special finding that the waters were used by the interference of plaintiff.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 150, 151; Dec. Dig. § 138.*]

4. ADVERSE POSSESSION (§ 60*)—HOSTILE POSSESSION—NECESSITY.

No length of time of use by permission will gain a title or right by prescription.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 282-314; Dec. Dig. § 60.*]

5. WATERS AND WATER COURSES (§ 157*)—ACQUISITION OF RIGHT TO USE WATERS—ESTOPPEL.

An owner of land bordering on a stream, who, by means of ditches, used the waters thereof for irrigation and allowed the waters to run through his own ditch across his land and permitted his neighbors to make use of it as they desired, but who did not by any act give his neighbors reason to believe that such permission was to be permanently continued, or that it would be recognized as a right, was not estopped from denying that his neighbors had any right to the ditch or waters.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 185; Dec. Dig. § 157.*]

6. TRIAL (§ 370*)—SUBMISSION OF ISSUES TO JURY.

Error cannot be predicated on the refusal of the court in a suit in equity to submit to the jury requested interrogatories, the jury being merely advisory, and the questions to be submitted within the discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 881; Dec. Dig. § 370.*]

Department 1. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge. Action by Henry L. Davis and others against Ann Martin and others. From a

judgment for defendants, plaintiffs appeal. Affirmed.

Jas. F. Farraher and A. L. Shinn, for appellants. Gillis & Gillis, R. S. Taylor, and Jas. R. Tapscott, for respondents.

SHAW, J. The controversy in this action involves the respective rights of the parties to the use of the waters of a stream known as "Martin Creek," which rises in the eastern part of the lands of the defendants Ann Martin and Brice M. Martin known as the "Martin Ranch," and flows westerly through said ranch to the Little Shasta river, having a maximum flow, during the irrigating season, of 300 miner's inches measured under a 4-inch pressure.

The plaintiff H. L. Davis is the owner of a tract of land containing something over 700 acres, situated about a mile south of the Martin ranch. The plaintiffs J. E. Beaudroit, Jennie Beaudroit, and Louisa Beaudroit own a tract of land adjoining that of Davis, containing about 380 acres. The defendants Churchill Company and Milton F. Martin own a large tract of land immediately south of and adjoining the Martin ranch aforesaid, and known as the "Walbridge Ranch." In 1852 R. M. Martin, the predecessor in interest of Ann Martin and Brice M. Martin, settled upon the lands known as the Martin ranch, and from and after the year 1856 he and his successors used the waters of the stream for the irrigation of said lands. For that purpose they constructed a ditch to carry the waters of the stream southerly therefrom to portions of the Martin ranch adjoining the said Walbridge ranch. Prior to 1859, by consent of the owners of the Martin ranch, the owners of the Walbridge ranch extended the ditch to said Walbridge ranch, and thereafter, with the consent and permission of the owners of the Martin ranch, they used a portion of the waters of said stream for the irrigation of portions of the said Walbridge ranch. In 1859, the owners of the Davis and Beaudroit ranches aforesaid extended the ditch from its termination on the Walbridge ranch southerly to the lands owned by them, and thereafter, at times when it was not used on either the Martin ranch or Walbridge ranch, they used some of the waters of said stream, usually one-fourth thereof, for the irrigation of their lands, obtaining it through and by means of said ditch, with the consent and permission of the owners of the Martin ranch. The plaintiffs Davis and the Beaudroits now claim a right by appropriation to a part of the waters of said stream, and the right to maintain the said ditch from the point of diversion upon the stream to their lands for the purpose of carrying to said land their portion of the waters of said stream. Defendants Ann Martin and Brice M. Martin deny this right and assert that Davis and the Beaudroits have no right or interest in the water. The owners of the Walbridge

ranch seem to stand indifferent between the other two parties. Whatever claim they may have in and to the waters of the stream is derived from the owners of the Martin ranch, and between these two there is no controversy.

Although the action was equitable in its nature, the court called a jury, and submitted certain issues of fact, in the form of questions, which were answered by the jury, and adopted as part of the findings of the court. It was found that the ditch leading from the stream was extended from the Walbridge ranch to the lands of the plaintiffs about the year 1860, with the knowledge and consent of the owners of the Martin ranch, and that thereafter until the present action was begun, whenever the water could be obtained from the Martins, the ditch was used by the plaintiffs in common with the owners of the Walbridge ranch, but that the plaintiffs did not purchase or otherwise obtain any right from the defendants or their predecessors to enter upon the ditch, or to extend the same. It was further found that the use of the water of the said stream by the plaintiffs was with the consent and permission of the owners of the Martin ranch, and that during all this time the defendants Ann Martin and Brice M. Martin, and their predecessors in interest, owners of the Martin ranch, had complete control of the ranch, of the water of the stream, and of the ditch so far as it extended over said ranch, and used the same in common with plaintiffs, but that the plaintiffs did not make use of the waters of the stream under a claim of right. On these findings, judgment was given in favor of the defendants.

In addition to the facts above found, the court adopted a question put to the jury and an answer thereto, which are as follows: "32. To what extent, if any, have the plaintiffs, or their successors in interest, by act or word or otherwise, recognized or conceded the right of R. M. Martin and his successor in interest to use the waters of said Martin creek, in excess of 90 inches thereof, measured under a 4-inch pressure, on the Martin premises, and about 80 inches, measured under a 4-inch pressure, on the Walbridge premises? Answer. It was used by the consent of the Martins and by the interference of the plaintiffs." Plaintiffs claim that by this answer an adverse use was established sufficient to give them title to the waters in excess of the amounts mentioned. We do not think it has this effect. Findings are to be reconciled if possible, and they are to be given that interpretation which will support the judgment if such interpretation is reasonable. It is somewhat difficult to understand exactly what was meant by this question and answer. But it is clear that it cannot be construed as a contradiction of the other findings to the effect that the use of the water was by the consent and permission of the owners of the Martin ranch.

Upon these facts judgment was rightfully given against the plaintiffs. The Martin ranch abutted upon the stream and the riparian rights attaching to said lands by reason of this contiguity were paramount to the rights of any appropriator. Being the owners of the land bordering its banks, they could control its flow and prevent others from diverting it at any point on their lands. There was no evidence or finding that the plaintiffs ever obtained by purchase or grant from the owners of the Martin ranch any right whatever either to maintain the ditch over that ranch, or to use the water of the stream. They could not obtain it in any other way except by prescription or possibly by way of estoppel. No length of time of use by permission will gain a title or right by prescription. The facts are insufficient to constitute an estoppel, either as to the ditch or the water. In *Stoner v. Zucker*, 148 Cal. 516, 83 Pac. 808, 113 Am. St. Rep. 301, Zucker's right to the water was not disputed. He had constructed a ditch to carry it through the land of Stoner, under a parol license from Stoner, at an expense of more than \$7,000. The revocation of the license would cause Zucker to lose the use of the ditch. It was held that, after such expenditure upon the faith of a license which from its very nature was to be continuous in use it could not be revoked by the owner of the land over which the ditch passed. In this case the plaintiffs did not construct any ditch over the lands of the defendants. There was no license to make such ditch, and no license to use the water that was of a continuing nature. The finding is that the water was used by permission. The evidence tends to show that R. M. Martin, the owner of the Martin ranch, was a man of generous nature, and that at times when he did not find it necessary or convenient to use the water of the stream, he freely allowed it to run through his ditch across his land and permitted his neighbors, including the plaintiffs, to make use of it as they desired. There is no evidence that he ever promised that he would continue to allow this use, or that he would allow them to use it at all when the water was required on his own land. It does not appear that the plaintiffs were, by any act of the owners of the Martin ranch, given reason to believe that this permission was to be permanently continued, or to believe that it was or would be recognized as a right. There was some evidence tending to show that the plaintiffs and their predecessors always succeeded in obtaining some water from the creek whenever they desired it. It appears however, that application therefor was always made to the owners of the Martin ranch when they were using the water at the time, that sometimes the plaintiffs were refused any part of the water, and from all the evidence it is a fair inference that the plaintiffs and their

predecessor always recognized the superior right of the Martins to the water and yielded to their wishes. In addition to this there is direct evidence that for many years immediately preceding the action the owners of the Martin ranch had exercised complete control over the diversion of the water from the stream, and that the only part thereof which the plaintiffs succeeded in obtaining for use on their land was such waste waters as the owners of the Martin ranch allowed to pass through the ditch beyond their boundaries.

The plaintiffs complain that the court refused to put to the jury certain interrogatories requested by the plaintiffs. No error can be predicated upon such a ruling in a case of this character. It was a suit in equity, and the jury was merely advisory. It was within the sound discretion of the court to put to the jury such questions as it saw fit. It was neither compelled to call a jury at the demand of the plaintiffs, nor to put to them any questions of fact for their determination. We find no prejudicial error in the record.

The judgment and order denying a new trial are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(12 Cal. A. 773)

PEOPLE v. BARTLEY. (Cr. 147.)

(Court of Appeal, Second District, California, March 9, 1910.)

1. CRIMINAL LAW (§ 1023*)—APPEAL—JUDGMENTS APPEALABLE—ORDER DENYING PROBATION.

The granting or denial of a petition for probation by one convicted of crime is entirely within the trial court's discretion, and an order denying probation is not appealable.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1023.*]

2. INDICTMENT AND INFORMATION (§ 111*)—ALLEGATIONS—PLEADING EXCEPTIONS—CAPACITY TO COMMIT CRIME—NECESSITY OF SHOWING.

The information need not negative the exception contained in Pen. Code, § 26, excepting children under 14 years old from the class of persons capable of committing crimes; the information on its face not preventing the application of the presumption that one intends the ordinary consequences of his voluntary act, as provided by Code Civ. Proc. § 1963.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295-298; Dec. Dig. § 111.*]

3. CRIMINAL LAW (§ 1144*)—EVIDENCE—PRESUMPTIONS—DISCHARGE OF FINAL DUTY.

The presumption that the trial court did its duty in sentencing one convicted of burglary to state's prison would negative any inference in the record, which referred to accused both as a "boy" and a "man," that accused was not over 14 years old, so as to be incapable of committing crime.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1144.*]

4. BURGLARY (§ 19*)—INFORMATION—ALLEGATIONS—INTENT—SUFFICIENCY.

An information, alleging that accused feloniously and burglariously entered a building,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

with the intent then and there to commit the crime of larceny, sufficiently alleged the intent of accused to commit the offense charged.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 40-47; Dec. Dig. § 19.*]

5. CRIMINAL LAW (§ 603*)—CONTINUANCE—SUFFICIENCY OF APPLICATION.

Where accused's motion for continuance was not supported by affidavit, and his counsel expressed a willingness to proceed without the witness to procure whom the continuance was asked, upon the district attorney's statement that such person was a fugitive from justice, the motion was properly denied.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 603.*]

6. CRIMINAL LAW (§ 1159*)—APPEAL—FINDINGS—CONCLUSIVENESS.

A jury finding upon substantially conflicting evidence cannot be disturbed on appeal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

7. WITNESSES (§ 388*)—IMPEACHMENT—FOUNDATION.

The rule that a witness must be shown a particular thing or statement of his claimed to be in the record, before acquiring his assent thereto, is not applicable, where the witness is asked whether he made a certain statement during a long examination by a question assuming that he did not make it, as a negative answer would avoid the necessity of producing the record; but, where the question assumes that the language stated therein was the testimony of the witness at the preliminary examination for the purpose of having him assent thereto, the witness should be permitted to see the transcript, or have his testimony on the preliminary examination read him from the record, and that course was properly pursued where the question to the witness was, "I believe you said in your direct examination before the committing magistrate that you went out and looked around?"

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1233-1242; Dec. Dig. § 388.*]

8. CRIMINAL LAW (§ 698*)—TRIAL—DUTY OF COURT.

It is the trial court's duty to see that the trial is conducted according to the rules of evidence and law, whether an objection is taken or not; so that the trial court properly called counsel's attention to the fact that certain questions evaded a former ruling of the court, though no objection was made to such question.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1652; Dec. Dig. § 698.*]

9. WITNESSES (§ 358*)—IMPEACHMENT OF REPUTATION.

One testifying to the general reputation of accused may be cross-examined as to his knowledge of particular instances and statements relating to particular acts of accused testified to by witness so as to discredit his opinion.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1159; Dec. Dig. § 358.*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Charles Bartley was convicted of burglary, and, from the judgment of conviction and an order denying a petition for probation, he appeals. Affirmed.

Jesse P. Osborne, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Information for burglary. Verdict of guilty and sentence of five years in the state prison. There is an appeal from the judgment and also from an order denying defendant's petition for probation. The latter order rests entirely within the discretion of the trial court and is not made appealable by the statute.

The information, after stating the name, place, and date of the offense, charges that defendant did "willfully, unlawfully, feloniously, and burglariously enter a building located at No. 15 East Haley street in the city of Santa Barbara, which said building then and there belonged to one Frank Loustalot, and was then and there used by the said Frank Loustalot as a saloon and barroom, with the intent then and there to commit the crime of larceny," etc. In support of the demurrer to this information, it is urged that it is insufficient, in that it nowhere alleges that the person charged was a competent person or one capable of committing a crime; and that the intent alleged by the information is the intent of the owner of the building, and not the intent of the person charged with the offense. The first objection appears to be based upon the theory that, the defendant having been characterized as "a boy" by some of the witnesses at the trial, the information should have contained some allegation negating the inference that he lacked capacity to commit crime. Section 26 of the Penal Code says: "All persons are capable of committing crimes, except" certain enumerated classes, among which are: "(1) Children under the age of fourteen," etc. It is not necessary to negative this exception in the information any more than it is each of the other seven classes of persons mentioned who, upon their want of capacity being shown, would be held not responsible for offenses committed by them. It is always presumed that a person intends the ordinary consequences of his voluntary act (Code Civ. Proc. § 1963), and upon the face of this information there is nothing to prevent the application of this presumption.

If the evidence could be considered in this connection, we would still be called upon to say that there is nothing in the record to show that the "boy" is a child under the age of 14 years. His age does not appear, and, while some witnesses speak of him as a boy, he is also mentioned as a man. And the presumption that the trial court did its duty in sending him to state's prison would negative any inference from the record that he was not over 14 years of age.

There is nothing in the other point raised on the demurrer to the complaint; the intent is sufficiently clear.

The record gives no support to appellant's objection to the trial court's ruling denying his motion for a continuance. No showing by affidavit was made, and upon the state-

ment by the district attorney that the witness, to procure whose attendance the continuance was sought, was a fugitive from justice, counsel for defendant expressed his willingness to proceed without the witness. The record does not sustain the contention of appellant that the court would not permit him to file an affidavit making a showing in this regard.

The verdict is fully supported by the evidence in the record. It is unnecessary to state either the facts or a summary of them. Every element of burglary in the first degree was established. If the use of the term "boy" by counsel and some of the witnesses could be considered as evidence tending to show that defendant had not reached the age at which he could be held legally responsible for crime, the use of the term "man" would be equally available to show the contrary, and thus there would be a substantial conflict upon this issue, which the verdict of the jury has settled, against appellant's contention, beyond disturbance by this court.

The rulings of the court upon the admission of evidence which are complained of were not erroneous. The proper practice when cross-examining a witness by asking him what his testimony was upon a former trial of the cause, or at the preliminary examination upon a felony charge, is well established. Where an attempt is made to put into the witness' mouth language which is stated to be his testimony given at the preliminary examination for the purpose of having him assent thereto, it is only fair and just to the witness that he should be permitted to see the transcript, or have the testimony read to him from the record, if there be such a record at hand, and the court properly required this to be done in this case. The distinction between the question presented here and that passed upon by the Supreme Court in *People v. Hart*, 153 Cal. 261, 94 Pac. 1042, is clear and evident. The questions to which objections of the people were sustained in that case were distinguished by the court as merely preliminary, but they were also of such a character that they could not have been effectively and conveniently asked by reading the record of the testimony of the witness given at the preliminary examination. In the case before us the question is: "Now, Mr. Brusatori, I believe you said in your direct examination before the committing magistrate that you went out and looked around?" In the *Hart* Case, after the witness had testified on direct examination that a certain statement had been made, he was asked on cross-examination: "You did not make this statement on the preliminary examination, did you?" An objection to this being sustained, he was asked: "Why did you not make this statement on the preliminary examination?" And again: "In your testimony on the preliminary examination did you then and there tell all you knew about the case?" The rule requiring that a

witness must be shown a particular thing claimed to be in the record before assenting to its presence cannot, for reasons of convenience, be applied where the witness is called upon to remember whether or not he made a particular statement during the course of a lengthy examination, which makes a voluminous record, which statement the question assumes not to be in the record. In the latter instance a negative answer, that desired and expected by the cross-examiner, would avoid the necessity of introducing the entire record for the purpose of showing that no such testimony had been given by the witness on the former occasion. This rule in relation to the establishing of a negative is well recognized. The ruling of the court upon this matter might well have been assumed to be acquiesced in by appellant, were it not for the preservation of the objection by the amendment to section 647, Code Civ. Proc., made in 1909 (St. 1909, c. 355). This view is strengthened by the pursuit of the information sought to be elicited by the question by the adoption of the course suggested by the court, which rendered the ruling without prejudice.

It was not improper for the trial judge to call the attention of counsel for defendant to the fact that his questions were an evasion of a former ruling of the court where the district attorney made no objection. It is the duty of a judge to see that a trial is conducted in accordance with the rules of evidence and law as these appear to him, whether counsel object or not. The trial of a cause is not to be conducted as if it were the playing of a game by the parties and their attorneys, at which the judge sits to arbitrate disputed questions of law or practice only when called upon by one or the other or both of the parties, but as an administration of the law for the purpose of securing a hearing on the merits of the cause, and it is the duty of the judge trying the cause to assume the directing hand whenever this end is not being accomplished, assuming to act, however, only within his constitutional province of stating the testimony and declaring the law. There was no intimation in the conduct of the judge in this cause that could in any manner have conveyed to the jury that he had an opinion as to the guilt or innocence of the defendant.

We see nothing in the other assignments of error, in relation to the admission and rejection of evidence, prejudicial to the defendant. The examination of the witnesses by the district attorney assigned as misconduct was within the scope of proper examination in the case of the sheriff, and of proper cross-examination in the case of the witness McCaughey. A witness who testifies to the general reputation of a defendant may be asked on cross-examination as to his or her knowledge of particular instances and statements made by the witness relating to particular acts of the defendant tending to

discredit the opinion given. Where such questions are asked in good faith by a district attorney, there is no misconduct, and such was the case here.

There being no prejudicial error in the record, the judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(13 Cal. A. 22)

HUGHES MFG. & LUMBER CO. v. WILCOX. (Civ. 764.)

(Court of Appeal, Second District, California. March 10, 1910. Rehearing Denied April 4, 1910; Denied by Supreme Court, May 9, 1910.)

1. CORPORATIONS (§ 76*)—STOCKHOLDERS—CONTRACT—ACCEPTANCE.

Any agreement showing an intention to become a stockholder in a corporation is sufficient, though there is no formal agreement; and, where a number of persons already stockholders agree among themselves in writing to take up the unissued stock of a corporation, pursuant to a proposal of the board of directors to issue the stock to them on certain terms, the delivery of the agreement to the secretary of the corporation constituted an acceptance of the proposal of the board, so as to make such persons stockholders as to the unissued stock.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 76.*]

2. CORPORATIONS (§ 76*)—SUBSCRIPTION FOR STOCK—MODIFICATION.

Where certain stockholders agreed to take up the unissued stock of a corporation, under an agreement by which they were to receive corporate bonds as a bonus, a subsequent resolution of such stockholders to receive corporate notes instead of the bonds was a modification of the subscription agreement by consent.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 76.*]

3. CORPORATIONS (§ 94*)—STOCKHOLDERS—EXISTENCE OF RELATION.

Payment for corporate stock and the voluntary acceptance of bonus notes of the corporation, which were given to induce the subscription, made the persons paying therefor and accepting the notes stockholders, though no stock certificates were issued.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 435; Dec. Dig. § 94.*]

4. CORPORATIONS (§ 81*)—SUBSCRIPTION FOR STOCK—WAIVER OF PROVISIONS.

Even if an agreement between the directors of a corporation and certain persons for the issuance of bonus bonds to induce such persons to purchase stock was a condition precedent to the enforcement of the agreement to take the stock, the voluntary acceptance of corporate notes in lieu of the bonds waived such condition.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 81.*]

CORPORATIONS (§ 243*)—LIABILITY OF STOCKHOLDERS—STATUTORY LIABILITY—"OWNER"—"STOCKHOLDER."

Const. art. 12, § 3, and Civ. Code, § 322, make each stockholder of a corporation individually liable for such proportion of its debts incurred while he was a stockholder as the shares owned by him bear to the whole of the subscribed shares of the corporation, and the Code section also provides that the term "stockholder" as used therein applies, not only to such as appear by the corporate books to be such,

but to every equitable owner of stock though it is on the books in another's name. Const. art. 12, § 14, requires books to be kept by the corporation wherein shall be recorded the amount of the capital stock subscribed, the names of the owners, and the amount of stock owned by each. *Held*, that the stockholders were not bound to see that not only their own names, but also the names of all other stockholders, were entered on the books as such, and that it would not be presumed that the corporation had entered the names of all stockholders on its books, so as to prevent a stockholder from showing other subscriptions than those shown by the corporate books, when sued on his statutory liability under section 322, so as to reduce the amount of such liability; the terms "owner" and "stockholder" in the statute including the real owner, though his name does not appear on the corporate books as owner.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 243.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5134-5151; vol. 8, p. 7744; vol. 7, pp. 6667, 6668; vol. 8, p. 7804.]

6. CORPORATIONS (§ 243*)—STATUTORY LIABILITY—LIABILITY OF ONE NOT OWNER—GROUNDS OF LIABILITY—ESTOPPEL.

The statutory liability of one not the real owner of stock, but who appears on the corporate books as an owner, is based upon his estoppel to deny ownership.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 243.*]

7. CORPORATIONS (§ 94*)—STOCKHOLDERS—ISSUE OF CERTIFICATES—NECESSITY.

The issuance of certificates of stock is not necessary to make one a stockholder in a corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 435; Dec. Dig. § 94.*]

8. EVIDENCE (§ 157*)—PAROL EVIDENCE—CORPORATE RECORDS—PROCEEDINGS—ABSENCE OF MINUTES.

The minutes of the proceedings of the board of directors of a corporation are at most prima facie evidence thereof, and such proceedings may be shown by parol evidence in absence of minute entries.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 157.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by the Hughes Manufacturing & Lumber Company against Fred E. Wilcox. From a judgment for defendant, plaintiff appeals. Affirmed.

W. G. Van Pelt and Gray, Barker, Bowen, Allen, Van Dyke & Jutten, for appellant. W. S. Wright, for respondent.

SHAW, J. This is an action to enforce defendant's statutory liability as a stockholder of the Brand Manufacturing Company, a corporation, for the value of certain lumber and building materials sold and delivered to said corporation by plaintiff. The only point in controversy is the extent of defendant's liability. Plaintiff contends that at the time of the transaction had with the Brand Manufacturing Company only 530 shares of its authorized capital stock of \$100,000 had been issued or sold, of which number defendant was the owner of 105 shares of the par val-

ue of \$100 each, thus fixing the defendant's statutory liability at $105/530$ of the amount due plaintiff from the corporation. On the other hand, defendant contends that at the time the corporation became indebted to plaintiff the outstanding and subscribed capital stock consisted of 1,000 shares of the par value of \$100 each, of which he owned 135 shares, thus making the amount for which he was liable $135/1000$ of such indebtedness, instead of $105/530$, as contended for by plaintiff. The court rendered judgment in accordance with the contention of defendant, from which plaintiff appeals.

The case was tried upon an agreed statement of facts, from which it appears the authorized capital of the corporation was \$100,000, divided into 1,000 shares of the par value of \$100 each, and that at the time the indebtedness was created, to wit, January 1, 1907, the journal, ledger, and stock book of the corporation showed that certificates for 530 shares of such stock, and no more, had been issued, and that defendant, as shown by said books, was the owner and holder of 105 shares thereof, and no more; that the minute book of the Brand Manufacturing Company disclosed that during the summer of 1906 the board of directors discussed plans for disposing of the unissued stock of the corporation, and at a meeting of the board held on August 29, 1906, decided that all the treasury stock should be sold, and offered the same for sale to its stockholders. On December 5, 1906, at a meeting of the board of directors, it was proposed to create a bonded indebtedness of \$50,000, out of which there should be issued to the subscribers for the 470 shares of the unissued stock of the corporation bonds in an amount equal to the par value of the stock for which they subscribed; that thereupon, on December 8, 1906, defendant and others agreed among themselves in writing to take the entire amount of unissued treasury stock of 470 shares upon the terms and conditions of said proposal, each subscribing for the number of shares set opposite his respective name; defendant subscribing for 30 shares of the stock. This agreement was delivered to the secretary of the company, and at a meeting held on December 8th the board of directors agreed that the subscribers, on paying the money under their subscriptions, should receive interim notes from the company to hold until the bonds could be finally printed and delivered, but no minute entry of this agreement appears in the minute book. Defendant subscribed for 30 shares of the stock, and he and the other signers of the agreement in due course paid the amount of their respective subscriptions, covering the entire 470 shares of stock, and part of them, including defendant, received the interim notes referred to covering the amount of their respective subscriptions, but no certificates of stock were ever issued. On May

14, 1907, at a meeting of the board of directors, it was resolved that the company go into liquidation, and at a subsequent meeting of the stockholders of the company, held on May 24, 1907, at which all of the subscribers of the 470 shares of stock, together with two-thirds of the old stockholders, were present, it was resolved by said stockholders that, instead of issuing the bonds authorized by the board of directors at the meeting held on December 5, 1906, the president and secretary be authorized and directed to issue the company's notes payable on demand to such stockholders as had not already received notes to cover cash advanced by them to the company upon subscriptions for stock for which they had expected the company's bonds, the said notes to be dated as of even date with the dates on which such subscribers had paid in the amounts of their subscriptions to the stock of said company, which notes were issued and delivered in accordance with such resolution; and it was further unanimously resolved that said meeting ratify and confirm all the acts of the board of directors done subsequent to the last stockholders' meeting. Subsequently, the company was by its creditors thrown into bankruptcy, which proceedings are still pending.

Appellant contends that the corporation was not a party to the agreement signed by defendant and others, who "agreed together to join in taking up the treasury stock of the corporation," upon the understanding that they should have a bonus in 7 per cent. bonds of the corporation. Delivery to the secretary of the company of the agreement whereby the subscribers agreed to take the 470 shares of stock constituted an acceptance of the proposal made by the board of directors. The substitution of notes of the corporation, which the subscribers accepted in lieu of bonds, was to such extent a modification of the agreement by consent. As thus modified, the contract was fully executed. No formal contract is required to constitute one a stockholder in a corporation. "Any agreement by which a person shows an intention to become a stockholder is sufficient." Cook on Corporations, § 52. In this case, disregarding the agreement, payment for the stock and voluntary acceptance of the bonus agreed upon in the form of notes executed and delivered by the corporation was clearly sufficient, in the absence of other objection, to constitute defendant and his associates owners of the shares of stock to the extent of their respective subscriptions. Conceding the subscription to have been conditional upon the issuance of the bonds, as claimed by appellant, and that without complying with the condition the corporation could not have enforced the contract, nevertheless, this condition was waived by the voluntary acceptance of the notes in lieu of the proposed bonds.

No entry appears in the books of the corporation showing defendant to be the holder of these 30 shares of stock, for which he had subscribed and paid the purchase price thereof. Appellant contends that by reason of this fact defendant cannot as regards these shares be deemed a stockholder in the company; in other words, that we must indulge in the conclusive presumption that the corporation complied with the provisions of section 14, art. 12, of the Constitution, which requires that books be kept by the corporation wherein "shall be recorded the amount of capital stock subscribed and by whom," together with "the names of the owners of its capital stock and the amount owned by them respectively," and that the statutory liability of a stockholder must be based upon the ownership and amount of capital stock subscribed as appears from the entries in the books. We find no authority in support of this position. It is contrary to section 3, art. 12, of the Constitution, and in direct conflict with the provisions of section 322, Civ. Code, which provides: "Each stockholder of a corporation is individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. * * * The term stockholder, as used in this section, applies not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another." Neither section 3, art. 12, nor said section 322, limits the ownership of shares of stock to one whose name appears upon the books of the corporation as the owner thereof. The Constitution (section 14, art. 12) imposes upon a corporation the duty of entering in books kept for that purpose the amount of its subscribed capital stock, by whom subscribed, the names of the owners of its stock, and number of shares owned by them, respectively. Failure to perform such duty by the corporation, however, cannot be imputed to the owner of the stock, who has a right to assume that the proper book entries are made. No duty devolves upon the purchaser of stock to see that, not only his name, but the names of all other purchasers, together with the number of shares owned by them, respectively, are entered in the corporate books. Hence, in the absence of facts constituting an estoppel—and none appears here—his liability is unaffected by such neglect of duty on the part of the corporation. The term "stockholder" or "owner," as used in the statute, is not confined to one who appears upon the books of the corporation as such, but to the real owner, notwithstanding the fact that the stock as shown by the books appears in the name of another. While the latter, though not the owner may be required to re-

spond to a creditor of the corporation, such liability is based, not upon ownership, but upon grounds of estoppel to deny ownership. *O'Connor v. Witherly*, 111 Cal. 523, 44 Pac. 227; *Baines v. Babcock*, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158; *Abbott v. Jack*, 136 Cal. 510, 69 Pac. 257; *Hurlburt v. Arthur*, 140 Cal. 103, 73 Pac. 734, 98 Am. St. Rep. 17. To hold that a creditor of a corporation cannot recover from an owner of stock upon a statutory liability because the corporation has neglected to make the proper book entries of his holdings, showing him to be a stockholder, would nullify the provisions of both the Constitution and statute. This being true, then, in the absence of acts constituting an estoppel, the converse of the rule must likewise be true, namely, that where the corporate books fail to disclose an increased subscription of stock, by reason of which increase (whether his own subscription or that of another, or both) the stockholder's liability, as in the case at bar, is less than it would otherwise be, he is entitled to establish such fact and insist upon his statutory liability being fixed upon such basis.

Appellant has cited a number of cases in support of its contention. An examination of these cases will disclose the fact that the creditor was pursuing one whose name appeared upon the books of the corporation as a stockholder, but who denied liability upon the ground that he was not the owner of the stock, and where recovery was had it was based upon grounds of estoppel. See cases above cited. And where recovery was denied against one who was not in fact the owner, but appeared upon the books to be a stockholder, it was due to a finding that he was not guilty of acts, either of omission or commission, which would, as against the creditor of the corporation, estop him from denying ownership. *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248; *Shattuck v. Gillelen*, 154 Cal. 779, 99 Pac. 348.

The fact that no stock was issued to defendant and the other subscribers is immaterial. Issuance of the certificates of stock is not necessary to constitute one a stockholder or owner of shares in a corporation. *Garretson v. Crude Oil Co.*, 146 Cal. 188, 79 Pac. 838; *California S. Hotel Co. v. Callender*, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99; *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 452, 40 Pac. 542. It is likewise immaterial that the minutes failed to disclose the action of the board taken in regard to certain matters. At most, the minutes of the proceedings of the board of directors are *prima facie* evidence only of its acts. In the absence of minute entry of its proceedings they may be proved by parol evidence. The agreed statement of facts upon which the case was submitted shows the amount of the subscribed capital stock of the corporation to have been \$100,000 divided into 1,000 shares of

the par value of \$100 each, of which defendant was the owner of 135 shares.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

(13 Cal. A. 29)

BROWN v. CALDWELL et al. (Civ. 775.)
(Court of Appeal, Second District, California.
March 10, 1910.)

1. JUDGMENT (§ 279*)—JUDGMENT ROLL—CONTENTS—NOTICE OF APPEARANCE.

The notice of appearance which defendant may give to plaintiff or which his attorney may give, as authorized by Code Civ. Proc. § 1014, is no part of the judgment roll defined by section 670.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 546-551; Dec. Dig. § 279.*]

2. APPEAL AND ERROR (§ 664*)—RECORD—JUDGMENT ROLL.

The failure to serve a defendant with a summons and the absence of an answer, demurrer, or other appearance on his part, all of which appears from the judgment roll, is not inconsistent with the recital in the judgment that he appeared in one of the other modes authorized by law, evidence of which is no part of the judgment roll, and on appeal by defendant on the judgment roll alone the recital in the judgment must be taken as at least *prima facie* true, so that the judgment will not be reversed for want of jurisdiction over the person of defendant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 664.*]

3. APPEAL AND ERROR (§ 934*)—RECORD—PRESUMPTIONS.

All presumptions on appeal are in favor of the correctness of the judgment, and, where a recital in the judgment on appeal on the judgment roll alone finds support in other portions of the record which under any condition of facts could exist, it will be presumed, in the absence of any contradictory showing, that such condition of facts existed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781; Dec. Dig. § 934.*]

4. APPEAL AND ERROR (§ 907*)—RECORD—PRESUMPTIONS.

Where the trial court found that defendant appeared by attorney, the court on appeal on the judgment roll alone must presume, in the absence of a contrary showing, that the evidence supported the finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

5. JUDGMENT (§ 120*)—DEFAULT JUDGMENT—APPEARANCE OF DEFENDANT.

Where the court obtained jurisdiction of the person of defendant by reason of his appearance, no formal entry of his default was necessary to enable it to render judgment against him.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 210; Dec. Dig. § 120.*]

6. JUDGMENT (§ 118*)—DEFAULT JUDGMENT—EXTENT OF RELIEF.

Under Code Civ. Proc. § 580, providing that the relief granted to plaintiff, where there is no answer, cannot exceed that which he shall have demanded in his complaint, a recovery against a defendant who appears by attorney,

but who does not answer, cannot exceed the sum prayed for in the complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 234; Dec. Dig. § 118.*]

7. JUDGMENT (§ 118*)—DEFAULT JUDGMENT—EXTENT OF RELIEF.

Where a defendant by his answer raises no issue as to the sum claimed to be due and unpaid in an action on a note, the recovery cannot exceed the sum prayed for in the complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 234; Dec. Dig. § 118.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by John Brown against H. J. Caldwell and another. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Watkins & Blodget, for appellants. T. M. Stewart and Hester, Merrill & Craig, for respondent.

SHAW, J. Action to recover from defendants on their joint and several promissory note. The appeal is from a judgment rendered against both defendants, and is prosecuted upon the judgment roll alone.

On behalf of appellant Tungate, it is contended that the judgment as to him should be reversed for the reason that it does not appear that any summons was ever issued or served upon him; nor does the judgment roll disclose any answer, demurrer, or other appearance filed on his part. The judgment, however, recites that defendant Tungate appeared by Watkins & Blodget, as attorneys for himself and his codefendant, Caldwell. Section 1014, Code Civ. Proc., provides that "a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." While under the provisions of section 670, Code Civ. Proc., his answer or demurrer is made a part of the judgment roll, the notice of appearance which he may give to plaintiff, or which his attorney is authorized to give under the provisions of section 1014, *supra*, constitutes no part of such roll; hence, failure to serve Tungate with a summons, and the absence of an answer, demurrer, or other appearance on his part, all of which appears from the judgment roll, is not inconsistent with the fact recited in the judgment that he did appear in one of the other modes authorized by law, evidence of which, under the statute, constitutes no part of the judgment roll. "The Code does not require such appearance to be made part of the judgment roll; and as appellant appeals upon the judgment roll alone, which shows nothing contradictory of or inconsistent with said recital (which was that defendant regularly appeared in said action by — an attorney of the court), it must be taken as at least *prima facie* true." *Lyons v. Roach*, 84 Cal. 29, 23 Pac. 1026. In the case of *Sichler v*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Look, 93 Cal. 606, 29 Pac. 221, the court, in discussing a like question, says: "The recitals in a judgment are the court's record of its own acts, and although upon a direct appeal the jurisdiction of the court is not to be established by its mere assertion in the judgment that it had acquired jurisdiction, yet if such recital finds support in other portions of the record, which under any condition of facts could exist, it will be presumed, in the absence of any contradictory showing, that such condition of facts existed." All presumptions are in favor of the correctness of the judgment. *Parker v. Altschul*, 60 Cal. 380. While defendant claims the recital of appearance is not sustained by the facts, he offers nothing in contradiction of the fact so recited, other than the judgment roll, which, as we have seen, is insufficient for the reason that the Code does not require the fact of defendant's appearance to be shown in such roll. Since the court has found that he did appear by attorney, we must presume, in the absence of a contrary showing, that the evidence presented to the court fully supports such finding. See, also, *In re Elchhoff*, 101 Cal. 600, 36 Pac. 11. In the case of *Weeks v. Gold Mining Co.*, 73 Cal. 599, 15 Pac. 302, and other cases cited by appellant, the judgment attacked did not contain a recital of appearance by defendant, but recitals of facts required to be shown by the judgment roll, which recitals were contradicted by the facts thus shown.

If the judgment against Tungate was in fact rendered without jurisdiction of the person, he is, of course, entitled to relief therefrom, but not in this proceeding nor upon the record before us.

The court having obtained jurisdiction of the person of defendant by reason of his appearance, no formal entry of his default was necessary to enable it to render judgment against him. *Drake v. Duenick*, 45 Cal. 455; *Hibernia S. & L. Soc. v. Matthal*, 116 Cal. 424, 48 Pac. 370.

On behalf of appellant Caldwell, it is claimed that, as the judgment is against both himself and Tungate, it must, if reversed as to the latter, fail also as to him. The foregoing views render it unnecessary to discuss his rights from such standpoint.

The note sued upon was for the sum of \$1,000, bearing interest at the rate of 10 per cent. per annum from date, payable semi-annually, and dated February 1, 1907. The complaint alleges: "That said promissory note has not been paid, nor any part thereof, or the interest thereon, save and excepting the sum of \$50; that there is now due, owing, and unpaid to the said plaintiff on said promissory note the whole of the principal sum of \$1,000, United States gold coin, together with interest thereon at the rate of 10 per cent. per annum from April 1, 1908."

The prayer of the complaint follows this allegation, praying for judgment for \$1,000 and interest at 10 per cent. per annum from April 1, 1908. No issue was raised by either defendant as to the amount alleged to be due. In no event could recovery against Tungate exceed the sum prayed for in the complaint. Section 580, Code Civ. Proc. The allegation of the complaint as to the amount unpaid on the note is somewhat ambiguous. Construing it most strongly against the pleader, the sum alleged to be unpaid upon the note is \$1,000, with interest from April 1, 1908, for which plaintiff prays judgment. Since defendant by his answer raised no issue as to the sum claimed to be due and unpaid, we think the rule applicable to one not answering is likewise applicable to one admitting such allegation. The court, however, in rendering judgment, computed interest from August 1, 1907, instead of from April 1, 1908. To the extent of the interest accruing prior to April 1, 1908, amounting to \$73.53, the judgment is erroneous.

It is therefore ordered that upon the going down of the remittitur the trial court modify the judgment by deducting therefrom as of the date of its rendition, the sum of \$73.53, and as thus modified the judgment is affirmed. It is further ordered that appellants recover costs of this appeal.

We concur: ALLEN, P. J.; TAGGART, J.

(13 Cal. A. 53)

FOSTER v. BEAU DE ZART. (Civ. 766.)

(Court of Appeal, Second District, California.
March 16, 1910.)

1. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS.

A finding of fact by the court supported by some evidence will be sustained on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

2. BILLS AND NOTES (§ 92*)—CONSIDERATION—GAMING CONTRACTS.

Plaintiff having in good faith advanced money to defendant with which to complete a contract for purchase of stock with a third person, his recovery on a note given for the loan secured by the stock could not be defeated on the ground that the consideration therefor was a gaming contract simply because plaintiff had a general knowledge that the contract between defendant and the third person was for a sale upon margin.

[Ed. Note.—For other cases, see *Bills and Notes*, Dec. Dig. § 92.*]

3. BILLS AND NOTES (§ 397*)—DEMAND NOTES—NECESSITY FOR DEMAND BEFORE BRINGING SUIT.

Demand of payment of a note payable on demand before suing thereon is not required where it appears that it would have been unavailing, and hence would not be required where the maker before suit refused payment and demanded return of the stock deposited as col-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lateral with the note, together with payments made.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1029-1044; Dec. Dig. § 397.*]

4. BILLS AND NOTES (§ 530*)—DEMAND NOTES—INTEREST.

In an action on a demand note, interest was properly allowed where plaintiff recovered.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1941-1944; Dec. Dig. § 530.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

Action by E. K. Foster against Fred W. Beau de Zart. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Jones & Weller, for appellant. H. C. Mill-sap, for respondent.

ALLEN, P. J. The action was one to recover the unpaid balance upon a promissory note executed by defendant to plaintiff. Defendant, admitting the execution of the note, alleged that there was no consideration therefor, and that the same was executed by defendant to plaintiff to secure certain margins on stocks. By way of cross-complaint defendant set up the purchase from plaintiff by defendant of 34,000 shares of mining stock on a margin, and that, pursuant to an agreement that it would be necessary for defendant to pay additional margins from time to time, the note set out in the complaint was executed and 63,500 shares of mining stock were deposited with plaintiff as collateral thereto, that plaintiff keeps and retains said stock, notwithstanding the invalidity of the note and of the transaction and refuses to surrender the same upon demand, and he prays judgment for the value of such stock. In various other separate counts of the cross-complaint defendant sets up the payment by him to plaintiff of various sums by way of margins upon the stock transaction between them, and asks for judgment for the amount of such margin payments. Issue is tendered by the plaintiff on all the matters set out in the cross-complaint.

Upon the trial the court found that the note was executed for a valuable consideration; that it was not executed or delivered to secure the payment of any margin or margins on stock, but, on the contrary, was executed in consideration of money loaned; that no sums by way of margin or margins were ever paid by defendant to plaintiff; that no stock or stocks were deposited as security by defendant for any margin or margins; that, while the stock set forth was delivered by defendant to plaintiff as collateral security for the note, plaintiff under the terms of the note, before commencement of the action, sold the stock so hypothecated as security; and that the sum remaining as the proceeds of said sale after payment of costs of sale was

\$1,365.25 and no more, which amount was duly credited upon said note; that the price at which such stock was sold was the highest market value of said stock on said date; that the stock mentioned in the cross-complaint had not been converted by plaintiff; and that a balance of \$1,771.30 remained unpaid upon said note, for which sum, with attorney's fees amounting to \$171.80, judgment was rendered. Defendant moved for a new trial, which was denied, and this appeal is prosecuted from the judgment and an order denying a new trial.

It appears from the statement that defendant had bought from one Blagge, a broker, on margin certain shares of stock and had paid to Blagge certain sums by way of margin upon such purchase, and that the amount of \$2,957.55 remained unpaid on account of the stock purchased. Plaintiff testifies that he knew nothing of the details of the purchase, but did know in a general way that the stock had been purchased upon margins and had seen a memorandum showing the various amounts paid to Blagge; that defendant represented to plaintiff that it would be necessary for him to have the amount mentioned in the note, which was then owing to Blagge, in order to take up the stock. Plaintiff agreed with defendant that if he would deposit the stock so purchased, with certain other stock as collateral, he would advance the amount of money necessary to take up the stock from Blagge. Pursuant to this, plaintiff did advance the amount of money mentioned in the promissory note, the stock was taken up, and the transaction with Blagge closed. Plaintiff actually paid out the sum mentioned in the note on account of the delivery of the stock to him; plaintiff testifying that the whole transaction was in good faith and a bona fide loan of the amount mentioned in the promissory note to defendant to enable him thus to complete the purchase of the stock so originally purchased upon margin. From this it is claimed by appellant that the contract between plaintiff and defendant was founded on an illegal consideration, that it was a gambling contract, and no recovery can be had under it, and in this connection he attacks the testimony of plaintiff, which is uncontradicted, as being insufficient to support the finding of the court. As to this last proposition, it is sufficient to say that there is some testimony in the record warranting the finding of the court, and the same will therefore be sustained. We are not of the opinion that, under the facts disclosed, the transaction between plaintiff and defendant is prohibited by statute, or that the same may be regarded as a gambling contract. Plaintiff having in good faith advanced to defendant money with which to complete the contract for the purchase of the stock, recovery of such advancement could not be defeated simply for the reason that plaintiff had a gen-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

eral knowledge of the marginal character of the contract as between defendant and the broker. There is nothing in the record indicating any irregularity or invalidity of the contract entered into between plaintiff and defendant.

The note set out in the complaint was payable on demand, and it is claimed that there is no evidence in the record showing a demand before suit was brought. There is evidence in the record, however, tending to show that, before the suit was brought, Beau de Zart refused payment of the note and demanded a return of the stock with the money he had paid on it. Demand is not required when it appears that it would have been unavailing. In addition to this, plaintiff testifies that he did make a demand.

There is in the record a point sought to be made with relation to the regularity of an assignment of the note by plaintiff to one Waggy and by Waggy back to plaintiff. There is sufficient in the record to warrant the finding of the court that such assignments were made, and that plaintiff was the holder and owner of the note at the time suit was brought.

There was no error in the court rendering judgment for interest. *O'Neill v. Magner*, 81 Cal. 631, 22 Pac. 876, 15 Am. St. Rep. 88.

We see no prejudicial error in the record, and the judgment and order are affirmed.

We concur: TAGGART, J.; SHAW, J.

(13 Cal. A. 56)

AYDELOTTE v. BLOOM. (Civ. 708.)

(Court of Appeal, First District, California.
March 17, 1910.)

1. APPEAL AND ERROR (§ 1002*)—VERDICT—CONFLICTING EVIDENCE—REVIEW.

A verdict based on conflicting evidence will not be interfered with on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3935; Dec. Dig. § 1002.*]

2. ATTORNEY AND CLIENT (§ 165*)—ACTION FOR FEES—ISSUES AND PROOF.

Where, in an action for attorney's services, plaintiff furnished a bill of particulars including various items of disbursements and one item detailing various services rendered and making one lump charge for all the services, no further bill of particulars having been called for, evidence as to the amount of a reasonable retaining fee and the reasonable value of the services was competent, though no charge for retainer was pleaded.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 366; Dec. Dig. § 165.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by William M. Aydelotte against I. T. Bloom. From a judgment denying defendant's motion for a new trial, he appeals. Affirmed.

Hugh R. Ostrom, for appellant. Wm. M. Aydelotte, in pro. per. (A. H. Jarman, of counsel), for respondent.

KERRIGAN, J. This is an action to recover the reasonable value of services rendered as an attorney at law. The case was tried with a jury, and in accordance with its verdict a judgment was entered in favor of the plaintiff and against the defendant for the sum of \$600. This appeal is from an order denying defendant's motion for a new trial.

The evidence upon both sides presented has been read and considered. Very briefly, the facts are as follows: The plaintiff testified that he rendered the defendant certain services as an attorney at law; that the reasonable compensation for such services was \$1,000. He rendered a bill, however, for \$750, and sued for this amount. His testimony as to the services rendered and as to their value was corroborated. The defendant did not dispute that the plaintiff had rendered the services, but claimed that they were performed, not as an attorney at law, but as an expert bookkeeper, and that they were not so extensive as claimed by plaintiff, and that the reasonable value of the same was \$265, and introduced evidence to that effect.

It thus appears that there is a conflict in the evidence; and, as there is evidence to sustain the verdict of the jury, this court, as has been repeatedly held, will not interfere. *Berger v. Horlock*, 10 Cal. App. 352, 101 Pac. 918; *Ernest v. McCauley*, 155 Cal. 739, 102 Pac. 924. In the case of *Long v. Saufley*, 89 Cal. 437, 26 Pac. 902, it was said: "This court has repeatedly held that the decision of the trial court upon conflicting evidence is conclusive, and that, when that court upon a motion for a new trial has refused to set aside such decision, this court will not reverse or even review its action."

One of plaintiff's witnesses, an attorney at law, in testifying as to what in his opinion plaintiff's services were reasonably worth, said: "I should say he should be entitled to a retainer of \$500, and his services should be worth in addition to that from \$700 or \$750 to \$1,000. I should say that he should have \$1,250 for those services including the retainer." Defendant objected to that part of the answer referring to the retainer, and now claims that, as the plaintiff did not sue for or demand a retainer, the testimony was erroneously admitted. It is true that the plaintiff does not in his complaint in terms mention a retaining fee, but merely alleges that the amount sought to be recovered is the reasonable value of the services rendered; but it has been decided that upon such an allegation an attorney may in proving such value include therein the amount of a reasonable retaining fee. *Knight v. Russ*, 77 Cal. 410, 19 Pac. 696; *Roche v. Baldwin*, 143 Cal. 186, 76 Pac. 956. In the former

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

case the court said: "When an action is brought to recover the value of an attorney's services, the retainer, it not having been paid, constitutes a part of the plaintiff's cause of action; but it is not necessary to set forth the items of the account in the complaint. It is sufficient to state the facts constituting the cause of action in ordinary and concise language, and if the defendant desires further particulars he may call for them, and they must be given to him within a reasonable time. Code Civ. Proc. §§ 428, 454. At the trial, if an issue has been tendered as to the value of the services, their value must be proved, and that will include the value of the retainer." In the case at bar, on the demand of defendant, a bill of particulars was furnished, which included various items of disbursements, and one item detailing the various services rendered, and making one lumping charge for the whole of those services. No further bill of particulars was called for. It was in proving the value of the services detailed in this last-mentioned item that the testimony was received as to the amount of a reasonable retaining fee; and we think, under the authority of the two cases last cited, that the evidence was properly received.

The order appealed from is affirmed.

We concur: COOPER, P. J.; HALL, J.

(13 Cal. A. 59)

FRANK CO. v. LEOPOLD & FERRON CO.
(Civ. 750.)

(Court of Appeal, First District, California.
March 17, 1910.)

1. APPEAL AND ERROR (§ 934*)—PRESUMPTIONS—VALIDITY OF ORDER OF COURT.

Where the record on appeal does not disclose when a default judgment was entered, it will be assumed as against appellant, on whom the burden of showing error lies, and who contends that a motion to vacate the judgment came too late to permit the use of proof aliunde, the judgment roll to show its invalidity for want of jurisdiction over defendant, in that the motion was made more than six months after the judgment was taken, and in support of the order of the court granting the motion, that the entry was within six months preceding the notice of motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3778; Dec. Dig. § 934.*]

2. JUDGMENT (§ 153*) — VACATION — VOID JUDGMENT—TIME.

The right to have a void judgment vacated exists independent of statute, and, while a motion to vacate a void judgment, the invalidity of which must be shown by extrinsic proof, must be made within a reasonable time, a judgment appearing to be void upon its face—that is, by inspection of the judgment roll—may be vacated upon motion at any time.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 300; Dec. Dig. § 153.*]

3. JUDGMENT (§ 153*)—VACATION—REASONABLE TIME.

A motion to vacate a default judgment, void in fact, but not so appearing on the record, made six months and one day after rendition of the judgment, was made within a reasonable time.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 300; Dec. Dig. § 153.*]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by the Frank Company against the Leopold & Ferron Company. From an order vacating a default judgment against defendant, plaintiff appeals. Affirmed.

Will M. Beggs, for appellant. Campbell, Metson, Drew, Oatman & Mackenzie, for respondent.

HALL, J. This is an appeal from an order vacating and setting aside a default judgment entered against defendant as damages for an unlawful and malicious attachment.

The action is purely a personal one, and was brought in October, 1906. The defendant is a foreign corporation, organized and existing under the laws of the state of Illinois. It had never filed in the office of the Secretary of State of this state a copy of its articles of incorporation, or a designation of an agent upon whom process might be served, as is required by the statute of this state of all foreign corporations doing business in the state. Civ. Code, §§ 408, 405. Service of summons was made upon defendant by serving a copy of the summons and complaint upon the Secretary of State.

Upon the 16th day of November, 1906, a judgment upon default against defendant for the sum of \$25,000 was signed by the judge of the court and filed with the clerk. On the 17th day of May, 1907, just six months and one day after the rendition of the judgment, the defendant specially appeared in the action for the purpose of its motion only, and gave and filed a notice of motion to vacate and set aside said judgment upon the ground that the court never obtained jurisdiction of the defendant, in that no service of summons, as required by law, had been made on defendant, and that it had never appeared in said action or submitted itself to the jurisdiction of the court. Upon the hearing the court granted the motion, and it is from this order that the plaintiff has appealed. At the hearing the court allowed defendant to read in evidence an affidavit served with the notice and other affidavits replying to affidavits read by plaintiff. From the affidavits read by defendant it appears that defendant was not at the time of bringing the action, and had not for over a year prior thereto, or since, been engaged in business in the state of California, nor had it at that time, nor for over a year prior thereto, nor since, any officer, managing or business agent, cashier, or secretary, officer, representative, or agent in

said state of California. In other words, the facts disclosed by these affidavits show that service of summons on this defendant could not be had in this action by service of such summons on the Secretary of State, and in consequence the judgment is void. We do not understand that this is disputed by appellant. Its contention is that the motion came too late to permit the use of proof allunde the judgment roll to show its invalidity for want of jurisdiction over the defendant, in that the motion was made more than six months after the judgment was taken. The record does not disclose when the judgment was entered other than the notice of the motion recited that the judgment was entered on the 17th day of November, 1906; but, if the date of its entry be important, we would assume as against an appellant, upon whom the burden of showing error lies, and in support of the order of the trial court, that the entry was within six months preceding the notice of motion.

The fallacy of appellant's position lies in the assumption that the time within which a motion to set aside a judgment void in fact, but not so appearing upon the judgment roll, is limited by section 473, Code Civ. Proc. This motion is not made under this section at all. The right to have a void judgment vacated and set aside exists independent of and outside of any statutory provision. *Waller v. Weston*, 125 Cal. 201, 57 Pac. 892; *Norton v. Atchison, etc.*, R. R. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198; *Mott Iron Works v. West Coast Plumbing Co.*, 113 Cal. 341, 45 Pac. 683. Where the judgment appears to be void upon its face—that is, by inspection of the judgment roll—it may be vacated upon motion at any time; but, where its invalidity must be shown by extrinsic proof, it is well settled that such motion can only be entertained when made within a reasonable time. In this connection appellant insists that it has been settled in this state by authoritative decisions that such reasonable time cannot exceed the maximum time allowed for the motions authorized by section 473, Code Civ. Proc., and that the time allowed by that section cannot exceed six months from the rendition of the judgment as contradistinguished from the entry thereof.

We have examined all the cases cited by appellant as well as all those cited by respondent upon this point, and we are of the opinion that the result of the decisions is that a motion to vacate a void judgment, not appearing to be such upon its face, must be made within a reasonable time. So much has been authoritatively settled. But in none of the cases has it been decided whether the time shall run from the rendition of the judgment or from the entry thereof. In none of the cases has it been necessary to fix precisely what is a reasonable time. It being established that the motion may be made within a reasonable time, it would seem to follow

on principle that what is a reasonable time, in the absence of a statutory limitation, should be largely left to the determination of the trial court. We have just said that in none of these cases has it been necessary to fix precisely what is a reasonable time for such a motion as this. *Norton v. Atchison, etc.*, R. R. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198, may be considered a leading case in this state upon the right to vacate a judgment, void in fact, but not so appearing upon the record by motion. The right to vacate such a judgment upon motion at all was attacked, and it was held that the right existed, but must be exercised within a reasonable time. It was there said: "Under our present system, terms of court are abolished, and a motion to set aside a judgment would have to be made within a reasonable time, and perhaps, following the analogy of section 473, six months might be considered the extent of a reasonable time for the motion; but, however that may be, there is no question in the case at bar as to reasonable time because the motion was made within 10 days after the judgment. * * * We hold, therefore, that, when a nonresident has not been personally served within the state, the court has power, within a reasonable time, when it finds that it has been deceived by a false return of such service within the state, to quash the service of summons and vacate the judgment. This is as broad a statement of the rule as the facts of this case require." It is thus apparent that it was only decided in that case as to the time of such motion that it must be made within a reasonable time, and that 10 days was such reasonable time. The suggestion that the time fixed by section 473, Code Civ. Proc., should be adopted, cannot mean anything more than that approximately such time should not be exceeded, in view of the fact that it is laid down authoritatively that such motion may be made within a reasonable time, and in view of the rule that what is a reasonable time, in the absence of a statutory limitation, is a question largely within the discretion of the trial court.

In *People v. Temple*, 103 Cal. 453, 37 Pac. 415, cited by appellant, the motion was made more than 12 years after the judgment was entered, and it was held that it came too late. It was there said "that a judgment which is in fact void for want of jurisdiction over the person of the defendant, but where its invalidity does not appear from the judgment roll, may be set aside upon motion within a reasonable time after its entry." (*Italics are ours.*) The court further said: "And what is a reasonable time within which a motion may be made to set aside a judgment, not void upon its face, must depend somewhat upon the circumstances of each particular case, and is not definitely determined further than that it will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure." This reference to what has been

"determined," so far as we are advised has no greater justification than the suggestion concerning the effect of section 473 in Norton v. Atchison, etc., R. R. Co., supra. No such point was there definitely determined or determined at all. Whether or not the exact time limited for motions under section 473, Code Civ. Proc., was the maximum limit for a motion to vacate a judgment void dehors the record, was not involved in the Temple Case. The gist of the decision is contained in the concluding paragraph, which is: "The judgment was not void upon its face, and could not, upon that ground, be set aside on motion. The motion was made more than 12 years after the judgment was entered, and was not within a reasonable time. The court had no power, therefore, to grant the motion, and its action in doing so must be held void and of no effect." (Italics are ours.) When this case is carefully read in the light of its facts, it will be seen to only authoritatively decide that such a motion as was there involved must be made within a reasonable time, and that 12 years after the entry of judgment is not a reasonable time.

People v. Harrison, 107 Cal. 541, 40 Pac. 956, cited by appellant, involved rights of conflicting purchasers of state lands. Incidental reference is made to an order vacating a judgment not void upon the record, made three years after the rendition of the judgment, and the Temple Case is cited as determining that such a motion must be made within six months after the rendition of the judgment. But all that was said on this subject is obiter, as the case was decided upon another point and in favor of the party relying on the order. People v. Norris, 144 Cal. 422, 77 Pac. 998, also cited by appellant, decides that on a motion made six years after judgment evidence dehors the record cannot be used to prove the invalidity of the judgment. On the other hand, there are expressions in cases to the effect that the time runs from the entry of the judgment. But in none of the cases was any point being made as to whether or not the time should be counted from the rendition or entry of the judgment. So, too, in none of the cases cited on either side was it important for the court to fix accurately what should be the maximum limit for a reasonable time within which a motion to vacate a judgment, void in fact, but not so appearing on the record, must be made. In no case did the time involved approximate near to six months, either from the rendition or entry of the judgment. The fundamental rule recognized in all the cases is that such motion must be made within a reasonable time. That is as much as has been authoritatively decided. The section of the Code relied on by appellant does not deal with the matter of vacating void judgments at all. In the state of the authorities on the subject we are not prepared to say that a

motion made six months and one day after the rendition of a judgment, void in fact, is not made within a reasonable time, or that the court had no power under such circumstances to vacate such judgment upon proof dehors the record that the court never obtained jurisdiction over the person of the defendant.

The order is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

(12 Cal. A. 786)

LOUD v. COLLINS et al. (Civ. 747.)

(Court of Appeal, Second District, California.
March 10, 1910.)

1. LIMITATION OF ACTIONS (§ 197*)—ACTION ON NOTE—FINDINGS—EVIDENCE—SUFFICIENCY.

In an action upon a note, evidence held to support a finding that the note was executed out of the state, so that the cause of action was barred by Code Civ. Proc. § 339, subd. 1, which provides that actions upon written instruments executed out of the state must be begun within two years.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 197.*]

2. CONTRACTS (§ 145*)—DELIVERY—EXECUTION.

Under Civ. Code, § 1626, providing that a contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent, the place where a contract was written, signed, or dated does not necessarily fix or determine the place where it was executed; delivery being the final act essential to its consummation as an obligation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 728; Dec. Dig. § 145.*]

3. EVIDENCE (§ 413*)—CONTRACTS (§ 145*)—PLACE OF DELIVERY—PAROL EVIDENCE.

The place of delivery of a written contract is the place of execution, and, in the absence of an estoppel, this fact may be established by parol evidence, notwithstanding another venue is designated in the date line; such designation being only prima facie evidence of the fact.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 413;* Contracts, Cent. Dig. § 728; Dec. Dig. § 145.*]

4. BILLS AND NOTES (§ 127*)—PLACE OF EXECUTION—DEPOSITING IN POST OFFICE—FOREIGN STATE.

Under Civ. Code, § 1626, providing that a contract in writing takes effect upon its delivery, where a note was sent by mail to another state by two of the makers, with the knowledge of the payee, so that another, whom the payee insisted should sign the note, could affix his signature, and the note was so signed and mailed to the payee, and received by him in due time, the note was delivered and executed in the other state.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 282; Dec. Dig. § 127.*]

5. EVIDENCE (§ 85*)—PRESUMPTIONS—KNOWLEDGE OF THE LAW.

Where a note was sent by mail to another state by two of the signers in order to obtain the signature of a third person whom the payee insisted should also sign, and the third person signed the note and mailed it to the payee, who

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

received it in due course, the payee is presumed to have knowledge that the place of execution of the note was in the other state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 85; Dec. Dig. § 65.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by A. S. Loud against James R. Collins and John W. Kemp and another. Judgment for plaintiff against Collins and for defendants, Kemp and another, and plaintiff appeals. Affirmed.

H. S. Rollins, for appellant. Frank G. Finlayson, Elon G. Galusha, and W. A. Alderson, for respondents.

SHAW, J. This is an action to recover \$1,300 and interest at the rate of 5 per cent. per month, compounded monthly, alleged to be due and unpaid upon a promissory note dated, "Los Angeles, Cal., January 17, 1903," made payable generally to Watson & Co., by whom it was transferred for collection to plaintiff. Judgment went against defendant Collins by default. Defendants Kemp and Alderson answered, alleging, among other defenses, that the action was barred by section 339, subd. 1, Code Civ. Proc. Among other things, the court found: "The note sued on in this case and set out in the complaint was not executed until it was deposited by the defendant Alderson in the post office in Chicago, in an envelope directed to John W. Watson, and was therefore executed out of the state of California, and in the state of Illinois, and is barred by section 339, subdivision 1, of the Code of Civil Procedure of the state of California." Judgment followed in favor of defendants Kemp and Alderson. From this judgment, and an order denying his motion for a new trial, plaintiff appeals.

Appellant's contention for a reversal is based solely upon the ground that this finding of the court is unsupported by the evidence; his claim being that the note was executed in this state. Section 339, subd. 1, Code Civ. Proc., prescribes the time for the commencement of actions founded upon instruments of writing executed out of the state to be within two years. The complaint herein was filed a few days prior to the expiration of four years after the note matured. If, therefore, it was executed out of the state, as claimed by respondents, then, clearly, the cause of action thereon was barred. *Higgins v. Graham*, 143 Cal. 131, 76 Pac. 898.

While there is some conflict in the evidence, it clearly tends to show the following facts: Collins desired to borrow \$1,100, and he and Kemp went to the office of Watson & Co., whose calling was that of lending money, and applied for the loan. As security for the payment of same, Collins proposed to assign to Watson an interest in a certain oil venture,

which he held with Alderson, and also have Alderson, who resided in Chicago, sign the note. Watson declined to make the loan upon the security then offered, but during the negotiations proposed to loan the money upon a note signed by all three of the defendants, provided he received an assignment of an interest equal to the sum of \$500 in the oil venture, and, in addition to this and the interest reserved in the note, received also a bonus of \$200. Collins and Kemp assented to this proposition, and in accordance with this agreement Collins and Kemp, at Los Angeles, Cal., signed and delivered to Watson a note identical in form with the one set out in the complaint, and Collins attached his signature to an instrument whereby he assigned to Watson the said interest in the oil venture, which, however, it seems, had to be approved or accepted by Alderson. At the same time with the making and delivery of this note so executed by Collins and Kemp, they also signed the note upon which this action is based, and this last-mentioned note, together with the assignment of the oil interest, and letters written by Collins and Kemp to Alderson, requesting him to sign the note and return same to Watson, were, with an envelope addressed, "John W. Watson, 322 Los Angeles Trust Building, Los Angeles, Cal.," all inclosed in an envelope which was addressed to Alderson at Chicago and by Watson deposited in the United States post office at Los Angeles. At the same time Watson paid to Kemp for Collins the sum of \$1,100, the amount agreed to be advanced on the \$1,300 note. Alderson received the note and other papers so forwarded to him through the United States mail, and, after signing his name to the note, inclosed it in the self-addressed envelope to John W. Watson, which had been sent to him for such purpose, and deposited it in the post office at Chicago, all in accordance with the understanding and agreement had between Collins, Kemp, and Watson. Watson received it in due course of mail, and thereupon delivered to Collins and Kemp the note which they alone had signed, as above stated. Says Mr. Kemp in his testimony: "The agreement with Mr. Watson and Mr. Collins was that Mr. Collins should sign the note, that I should sign the note, and that it should be sent to Mr. Alderson in Chicago to be signed by him and then returned to Mr. Watson." In our opinion, this evidence fully sustains the finding.

The place where the contract was written, signed, or dated does not necessarily fix or determine the place where it was executed. Delivery of the instrument is the final act essential to its consummation as an obligation. Civ. Code, § 1626; *Barrett v. Dodge*, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777. The place of delivery is the place of execution, and, in the absence of matters constituting an estoppel, this fact may be established by parol

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

evidence, notwithstanding a venue other than that shown to exist is designated in the date line of the instrument. Such designation is prima facie evidence only of the fact when disputed. *Wells, Fargo & Co. v. Vansickle* (C. C.) 64 Fed. 944. It is, therefore, immaterial that Kemp and Collins signed the note in this state.

The general rule is that depositing a note in the post office addressed to the payee with his assent is a sufficient delivery thereof. *Daniel on Negotiable Instruments*, § 67; *Bartlett v. Dodge*, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777; *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 Pac. 926; *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 74 Pac. 855, 65 L. R. A. 90. Appellant concedes this proposition, but insists that it should be limited to those transactions directly conducted by the parties through the medium of the post office; that is, where one party makes the proposal, and the other accepts by signing and transmitting the contract. Accepting his view, the facts do not bring this case within the exception for which he contends. Watson proposed to lend the money in consideration that each of the parties should obligate himself by written contract to repay the same with the agreed interest. The fact that he did not directly communicate this proposal to Alderson is immaterial. It was sufficient that it was communicated to him, as intended by Watson, through Kemp and Collins, as a proposition made by Watson to all three defendants, and which, in order to constitute a contract, must be accepted by all three. While Watson himself did not write the letters to Alderson, submitting his proposal, the action taken by Kemp and Collins in submitting it was with his knowledge and consent. It was clearly his intention, implied from his acts, that if his offer, which had been agreed to by Collins and Kemp, was accepted by their codefendant Alderson, the latter, at Chicago, Ill., should attach his signature to the note theretofore signed by Kemp and Collins, but not delivered, and inclose the same in the self-addressed envelope sent with the note for such purpose, and deposit it in the United States post office at Chicago, Ill. Upon receipt of the note Alderson signed it—however reluctantly, or by what inducements prompted so to do, is immaterial—and inclosed it in the envelope and mailed it to Watson, by whom it was received in due course. With full knowledge of all the facts and circumstances connected with the signing and delivery of the note, Watson accepted it in lieu of the note of Kemp and Collins which he held pending the action of Alderson in joining with his codefendants in accepting the offer made by him. Under these circumstances, the deposit of the note in the post office at Chicago, Ill., constituted the delivery thereof to Watson in the state of Illinois. The note was executed out of this state, of

which fact plaintiff's assignor must be deemed to have had full knowledge.

Judgment and order affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

(13 Cal. A. 65)

**CALIFORNIA PINE BOX & LUMBER CO.
v. MOGAN, Judge. (Civ. 795.)**

(Court of Appeal, First District, California.
March 17, 1910. Rehearing Denied by
Supreme Court May 18, 1910.)

1. APPEARANCE (§ 24*) — GENERAL APPEARANCE—WAIVER.

A general appearance by a defendant waives all question as to service of process and is equivalent to personal service.

[Ed. Note.—For other cases, see *Appearance*, Cent. Dig. § 118; Dec. Dig. § 24.*]

2. APPEARANCE (§ 8*) — ACTS CONSTITUTING "APPEARANCE."

An "appearance" is generally defined as the formal proceeding by which a defendant submits himself to the jurisdiction of the court, and under Code Civ. Proc. § 1014, a defendant appears when he answers, demurs, or gives plaintiff written notice of his appearance, or when an attorney gives notice of an appearance for him.

[Ed. Note.—For other cases, see *Appearance*, Cent. Dig. §§ 26, 27; Dec. Dig. § 8.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 449-451.]

3. CORPORATIONS (§ 669*)—FOREIGN CORPORATION — GENERAL APPEARANCE — ACTS CONSTITUTING.

A summons, in an action against a foreign corporation having no place of business in the state or agent therein, was served on its president temporarily in the state. Thereafter an attorney wrote to plaintiff's attorney inclosing a stipulation extending the time to answer. Plaintiff's attorney signed and returned the stipulation. Subsequently the attorney made an affidavit entitled in the court and cause to procure an order of court giving the corporation further time in which to answer. The court granted further time. *Held*, that the corporation appeared generally in the action.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2641; Dec. Dig. § 669.*]

4. MANDAMUS (§ 28*)—SUBJECTS OF RELIEF—MATTERS OF DISCRETION.

Where the facts are undisputed, and the law establishes the right of a party to an order or to relief which the court refuses, mandamus lies to compel action, and while in many cases the discretion exercised by the trial court is conclusive, especially where the evidence is conflicting, mandamus lies to control judicial action involving discretion when the discretion has been abused.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 64; Dec. Dig. § 28.*]

5. MANDAMUS (§ 51*)—SUBJECTS OF RELIEF—MATTERS OF DISCRETION.

Where the time within which a defendant, appearing generally in an action, may answer or demur, has expired, and no answer or demurrer has been interposed, the trial court must enter his default, and the refusal so to do is a refusal to perform a duty, and mandamus lies to compel performance thereof.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 98; Dec. Dig. § 51.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. MANDAMUS (§ 51*)—ADEQUACY OF OTHER REMEDY.

Where the court set aside the service of summons after defendant had appeared generally and then refused to enter the default of defendant, who did not answer or demur within the time fixed therefor, plaintiff has no adequate remedy at law, and mandamus lies to compel the trial court to enter the default of defendant.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 98; Dec. Dig. § 51.*]

Application for a writ of mandate by the California Pine Box & Lumber Company against E. P. Mogan, Judge of the Superior Court in and for the City and County of San Francisco, Department 7 Thereof, to compel the making of an order directing the clerk of the court to enter a default in an action. Writ issued.

Joseph C. Meyerstein, for petitioner. W. T. Phipps and Percy E. Towne, for respondent.

COOPER, P. J. This is an application for a writ of mandate to compel the superior court of the city and county of San Francisco and Hon. E. P. Mogan, one of the judges thereof, to make an order, directing the clerk of said court in the department presided over by such judge to enter the default of the defendant in an action pending in said court, entitled "California Pine Box & Lumber Co., a Corporation, Plaintiff, v. Des Moines Casket Company, a Corporation, Defendant."

The facts of the case are substantially as follows: In October, 1909, the petitioner commenced an action in said court against said Des Moines Casket Company, as defendant, to recover upon an alleged express contract for goods sold and delivered by the plaintiff therein to said defendant. The defendant was a foreign corporation, existing and doing business under the laws of the state of Iowa, and had no place of business in the state of California, and no agent upon whom summons could be served. A summons was duly issued and attempted to be served by personally delivering the same to one Antes, the president of said defendant, who was then temporarily in the state of California on business, but not engaged in any business in connection with the said corporation. After the summons had been left with said Antes, and on November 1, 1909, W. T. Phipps, an attorney at law, wrote to the plaintiff's attorneys in said action inclosing a stipulation, and requesting that it be signed, which letter is as follows: "In the two cases, one of the California Pine Box & Lumber Company v. Des Moines Casket Company, and the other California Pine Box & Lumber Company v. Wichita Casket Company, in which you are attorneys for plaintiff, I wish you to give me the inclosed stipulation extending time for answer. The president of these two companies has not yet got back from his recent trip

to this coast, and I want a report from him before I can put in an answer. If this extension is granted I hope to avoid the necessity of putting in any demurrer, and I think time will be saved by granting it. Yours respectfully, W. T. Phipps." In answer to this letter, the attorneys for the plaintiff signed and inclosed a stipulation in said cause, which is as follows: "It is hereby stipulated that the time for answering in the above case shall be and is hereby extended to and including the 20th day of November, 1909. This stipulation shall be effective without being filed. J. C. Meyerstein and J. V. B. Filippini, Attorneys for plaintiff." Afterwards, on the 17th day of November, 1909, said Phipps made an affidavit, in which he stated and set forth that he was attorney for the defendant in said action; that the summons was served upon the president of the defendant while he was temporarily traveling in the state of California; that said president had returned to the state of Iowa, and was the only person in position to furnish affiant "with the necessary data from which to prepare and file the answer in the above-entitled matter." The affidavit further stated: "That said president of said defendant has not as yet had sufficient time in which to furnish affiant with said data, and it is therefore necessary that affiant, for the benefit of said defendant, get an extension of time herein for answering or demurring to said complaint. That defendant's time for answering or demurring will, unless extended, expire on November 20, 1909. Wherefore affiant prays that said court make an order extending the time for answer or demurrer herein, to and including December 20, 1909." Upon the above affidavit being so filed in said court by said attorney for the defendant, and at his request, the court and the said judge thereof made an order extending the time for said defendant to demur or answer to and including the 20th day of December, 1909, and no other or further extension of time has been granted by stipulation or otherwise. After the attorney for said defendant had so procured the stipulation as aforesaid, and filed the affidavit as hereinbefore stated, on which he procured the order of court giving him to and including December 20, 1909, in which to answer or demur, and on December 3, 1909, he made a motion in said court in said cause for an order setting aside the attempting service of summons therein, upon the ground that it had not been served upon any person upon whom service could be legally made under the laws of California. The said court thereafter, on the 7th day of December, 1909, made an order granting said motion and setting aside and quashing the said service of summons. The defendant in said action has filed no pleading or demurrer therein. Thereafter upon due notice petitioner, on the 7th day of January, 1910, made a motion for an order

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

directing the clerk of the said court to enter the default of the said defendant, and the court thereupon made an order denying said motion, and refusing to order the clerk of said court to enter the default of said defendant, holding that it had no jurisdiction of defendant. Thereafter, on the 10th day of February, 1910, the petitioner applied to the clerk of said court for entry of default against defendant, and the clerk, in view of the order so made by the court, refused to enter the same.

The first question for determination here is as to whether or not the defendant, by reason of the facts above set forth, appeared in the action. The judge of the superior court concluded that the defendant had not appeared, and that the court had no jurisdiction of it, and no doubt based its order denying the motion for entry of default upon this ground. The question as to the service of the summons and the order setting aside the same may be eliminated, for the reason that, if the facts appearing of record show an appearance as a matter of law, it was the duty of the court to order the entry of default. It is elementary that a general appearance by a defendant waives all question as to the service of process, and is equivalent to personal service. An "appearance" is generally defined as the formal proceeding by which a defendant submits himself to the jurisdiction of the court. Our Code provides (Code Civ. Proc. § 1014) that a "defendant appears in an action when he answers, demurs or gives the plaintiff written notice of his appearance, or when an attorney gives notice of an appearance for him." In this case the question is: Did Phipps give petitioner notice of appearance for the defendant? In our opinion he did. When he wrote to plaintiff's attorneys and procured a stipulation giving more time to answer or demur, he gave written notice of his appearance. He stated that he hoped to avoid the necessity of putting in a demurrer, and that time would be saved by the stipulation. This was written information to the plaintiff's attorneys giving them notice that Phipps was the attorney for the defendant. Plaintiff's attorneys acted upon the notice when they signed and returned the desired stipulation. Defendant's attorney then made an affidavit, entitled in the court and cause, for the purpose of procuring the affirmative action of the court in giving it further time. This affidavit was filed, and the court made an order granting the further time. There was nothing in the letter, stipulation, affidavit, or order made by the court as to a special appearance. The court could not have granted the defendant an extension of time in which to plead unless the defendant was before the court. In our opinion the defendant appeared in said action, and comes within the reason and principle of the ruling in *Cooper v. Gordon*, 125 Cal. 296, 57 Pac. 1006, and *Roth v. Superior Court*, 147 Cal. 604, 82 Pac. 246.

The next question is as to whether or not the writ of mandate will lie to compel the court to make a particular order. It is conceded that the writ will not lie to control the discretion of the court where the facts are such that the court may use its discretion. In many cases the discretion exercised by the trial court is conclusive, particularly where the evidence is conflicting; but the rule is now more liberally extended in regard to the writ of mandate and its use to control judicial action, and even judicial discretion when such discretion has been abused. Where the facts are undisputed, and the law establishes the right of a party to an order or to the relief which the court has refused, the writ will lie. Now in this case it is the law that when defendant's time for answering or demurring expired, plaintiff was entitled to have its default entered. It was the duty of the court under the law to order the entry of such default, and the denial of the order is a refusal to perform a duty.

In *Wood on Mandamus*, p. 48, it is stated: "The rule is that a mandamus will issue to an inferior court to compel the performance of an official duty, to which a party is clearly entitled and which is refused to him, when no other effectual remedy exists, and to compel a judicial officer to perform an act which it is his imperative duty to perform, and with reference to the manner of the performance of which he has no reasonable discretion."

In *Temple v. Superior Court*, 70 Cal. 211, 11 Pac. 699, the petitioner sought a writ of mandate to compel the superior court to hear a contempt proceeding which it had refused to do, and the Supreme Court said: "Under such circumstances the court cannot, by holding without reason that it has no jurisdiction of the proceeding, divest itself of jurisdiction, and avoid the duty of hearing and determining it."

In *Johnston v. Superior Court*, 105 Cal. 666, 39 Pac. 36, the superior court, being satisfied that due notice to creditors had not been given, ordered additional notice to be given, and refused to make an order that due notice to creditors had been given. Upon application for a writ of mandate to compel the court to make its decree, showing that due notice had been given, the facts were reviewed, and a writ of mandate was issued, directing the court to make such decree.

In *Hensley v. Superior Court*, 111 Cal. 541, 44 Pac. 232, it appeared that the court had refused to make an order or decree of due notice to creditors upon the ground that the order of notice to creditors was not in conformity with the law. The Supreme Court held that it was, and directed the writ to issue, and in the opinion said: "Where as here the law affixes a right to specific relief from certain facts, and there is no question made as to the existence of such facts, the court has no discretion to refuse the relief. In such a case the limit of the discretionary power of the court has been reached, and

nothing but a clear duty remains; and if the relief is refused, and there is, as in this instance, no appeal or other plain, speedy, and adequate remedy, mandamus will lie to compel it."

For a very clear discussion of the law on this subject, see the opinion of the Supreme Court in the late case of *Inglis v. Hopplin et al.*, 105 Pac. 582 (November 19, 1900). It was there said by Mr. Justice Henshaw in his usual clear style: "While of course it is the general rule that mandamus will not lie to control the discretion of a court or officer, meaning by that that it will not lie to force the exercise of discretion in a particular manner, the above cases abundantly show that mandamus will lie to correct abuses of discretion, and will lie to force a particular action by the inferior tribunal or officer, when the law clearly establishes the petitioner's right to such action."

It cannot be said that petitioner in this case has a plain, speedy, and adequate remedy in the ordinary course of law. He cannot appeal, as there is no judgment or order from which an appeal will lie. Under the ruling of the superior court he cannot proceed, although the defendant has appeared and submitted itself to the jurisdiction of the court. The court, having jurisdiction, holds that it has not, and refuses further relief in the cause.

What we have said in this opinion is not to be understood as precluding the court from hearing an application by the defendant to be relieved of the default upon a proper showing.

Let the writ issue as prayed.

We concur: HALL, J.; KERRIGAN, J.

(13 Cal. A. 72)

SACCHI v. BAYSIDE LUMBER CO.
(Civ. 654.)

(Court of Appeal, Third District, California.
March 21, 1910. Rehearing Denied by
Supreme Court May 19, 1910.)

1. LANDLORD AND TENANT (§ 142*)—INJURIES TO DEMISED PREMISES—EVIDENCE.

In an action by a tenant against a third person for injuries to the demised premises by obstructing a stream, and causing an overflow, evidence *held* to support a verdict for plaintiff.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 514; Dec. Dig. § 142.*]

2. WATERS AND WATER COURSES (§ 179*)—INJURIES FROM FLOWAGE—PROXIMATE CAUSE—QUESTION FOR JURY.

In an action for injury to land caused by an overflow due to the obstruction of a stream, the question whether the overflow was caused by the acts of the defendant in loosening lodged refuse, or by the operators of a quarry by throwing debris into the stream, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 258; Dec. Dig. § 179.*]

3. MASTER AND SERVANT (§ 332*)—INDEPENDENT CONTRACTORS—QUESTION FOR JURY.

In an action by a tenant for injury to the demised premises caused by the obstruction of a stream, the question whether the operator of a quarry on the bank of the stream and a person engaged in removing a log jam from the stream, both of whom were employed by defendant, were independent contractors so as to relieve defendant from liability for their acts in obstructing the stream, *held*, under the evidence, a question for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1276; Dec. Dig. § 332.*]

4. MASTER AND SERVANT (§ 318*)—INDEPENDENT CONTRACTOR—SUPERVISION OF WORK BY MASTER.

That a person employed to do particular acts receives a specified compensation for his services, not in the nature of wages, does not make him an independent contractor where his work is performed under the direct superintendence of the employer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1257, 1258; Dec. Dig. § 318.*]

5. WATERS AND WATER COURSES (§ 171*)—INJURIES FROM OVERFLOW OF LAND—PROXIMATE CAUSE OF INJURY.

Where a jam had existed in a stream for a number of years, but had not obstructed the flow of the water, and a lumber company removed logs from the jam to obtain material for shingle bolts, as a result of which portions of the jam floated down the stream and made a jam at a lower point causing plaintiff's land to overflow, the lumber company's act in loosening the jam was the proximate cause of the injury.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 216-221; Dec. Dig. § 171.*]

6. APPEAL AND ERROR (§ 842*)—REVIEW—QUESTIONS OF FACT.

In an action by a tenant against a lumber company for injury to the demised premises by an overflow caused by the obstruction of a stream, whether the act of the lumber company in loosening a log jam so that portions of it floated down the stream and formed the obstruction was the proximate cause of the injury was a question of fact, the determination of which by the jury was conclusive on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3316-3330; Dec. Dig. § 842.*]

7. LANDLORD AND TENANT (§ 142*)—INJURY TO DEMISED PREMISES—DAMAGES—EVIDENCE.

In an action by a tenant engaged in the dairy business, for injury to the demised premises, caused by the overflow of a stream, evidence as to what the land produced the year previous to the year in which the damage was sustained, was admissible as tending to show the adaptability of the land to cultivation of the crops customarily grown thereon, and its capacity for producing such crops in such quantity as was essential to the dairy business.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 514, 515; Dec. Dig. § 142.*]

8. LANDLORD AND TENANT (§ 142*)—INJURY TO DEMISED PREMISES—DAMAGES—EVIDENCE.

In such case, it was proper to show the diminished value of the leasehold during the remainder of the term, and, to that end, prove the rental value of the damaged land per acre

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and the cost of restoring it to the condition in which it was at the time it was submerged.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 514, 515; Dec. Dig. § 142.*]

9. LANDLORD AND TENANT (§ 142*)—INJURY TO DEMISED PREMISES—DAMAGES—EVIDENCE.

In such case, evidence as to the number of dairy cows kept by plaintiff, and the quantity of butter fat produced the same year, and the cost of maintaining his cows on other land which he was compelled to rent for that purpose after the flood was admissible.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 514, 515; Dec. Dig. § 142.*]

10. WATERS AND WATER COURSES (§ 179*)—INJURY FROM FLOWAGE—INSTRUCTIONS.

In an action against a lumber company for injury to land resulting from an overflow caused by the act of defendant in loosening a jam of refuse which had existed for years, but had not interfered with the flow of the water, such loosening causing debris to float down the stream and obstruct it at a point opposite plaintiff's land, it was not error to refuse an instruction requested by defendant on the theory that the injury was caused by an act of God.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 257; Dec. Dig. § 179.*]

11. LANDLORD AND TENANT (§ 142*)—INJURIES TO DEMISED PREMISES—ELEMENTS OF DAMAGE.

In an action by a tenant against a lumber company for injuries to the demised premises, caused by an overflow of a stream, plaintiff was entitled to recover, as an element of his damage, for the destruction of bridges built across a slough to permit his cattle to pass from one field to another, though the bridges were imbedded in the soil, and he testified that he intended to leave them there at the termination of his lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 515; Dec. Dig. § 142.*]

12. WATERS AND WATER COURSES (§ 179*)—INJURY FROM FLOWAGE—INSTRUCTIONS.

An instruction requested by defendant that if the jam endangered a trestle of a bridge owned by defendant, defendant had the right to remove the jam, was properly refused as too general and indefinite, since it omitted the necessary qualification that defendant, in removing the jam, was bound to do so with reference to the rights of lower riparian owners.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 257; Dec. Dig. § 179.*]

Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by Charles E. Sacchi against the Bayside Lumber Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Denver Sevier, for appellant. Geo. D. Murray and Gregor & Connick, for respondent.

HART, J. This is an action for damages for injuries alleged to have been inflicted upon the leasehold of plaintiff through the negligence of the defendant. The complaint asked for damages in the sum of \$5,200, but the jury by whom the cause was tried assessed the damages at the sum of \$3,500, for which

amount the court subsequently caused judgment to be entered in favor of plaintiff. This appeal is from the judgment so entered and the order denying defendant's motion for a new trial. The injuries alleged to have been sustained to plaintiff's property were the result of the overflow upon his land of the water from Jacoby creek, in Humboldt county, and it is charged that said overflow and the consequent submerging and damaging of plaintiff's land was caused by the negligent acts of the defendant.

The defendant is a corporation, and the purpose for which it was organized as such was to carry on and conduct the logging and lumbering business, in which, for many years prior to the institution of this action, it and its predecessor, the Bayside Mill & Lumber Company, were engaged on Jacoby creek, in Humboldt county.

The plaintiff, at the time the injuries complained of were sustained, and for some years prior thereto, was the lessee and in the possession of something over 300 acres of land bordering on said Jacoby creek, and through and over the southwesterly portion of which the channel of said creek passed. Said creek is described in the complaint as "a natural water course in said Humboldt county, about 12 miles in length, and flowing in a northwesterly direction and emptying into the northern portion of Humboldt Bay * * * ; that said Jacoby creek is a stream amply sufficient in width, size, and flow of water to carry and bear along and float in its waters to said Humboldt Bay, while flowing along from its source to said Humboldt Bay, all natural debris, refuse, and drift, if unrestrained, which would naturally float or fall into and be carried along by the waters thereof and the natural current of said Jacoby creek." The complaint further states that, for more than a year prior to the time at which the alleged injuries were inflicted upon plaintiff's leasehold, the said land of plaintiff was "protected by a good and substantial dike and embankment theretofore constructed and built on and along said bank by said plaintiff and his said lessors, and that, at the said time of said hereinafter mentioned overflow of said Jacoby creek, and for a year or more prior thereto, said dike and embankment was of sufficient width, height, and strength to fully protect, and the same would have fully protected and did fully protect, said land leased to said plaintiff as aforesaid from and against any encroachment of or overflow by the salt tidewaters of said Humboldt Bay and the waters of said Jacoby creek in the natural rise and fall and flow of said waters of said Humboldt Bay and of said Jacoby creek." Said land so under lease to plaintiff, it is alleged, was prior to and at the time of the infliction of the damage complained of, improved and valuable farming and dairy land "and prior thereto

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

had been properly seeded to tame grasses by said plaintiff, and was then valuable grazing land and producing an abundant stand of tame grasses for pasturing purposes and was then used by said plaintiff as dairy and grazing land."

It is averred that, for more than six years prior to the 27th day of January, 1905, the predecessor of defendant, Bayside Mill & Lumber Company, a corporation, was the owner and in the possession of a large tract of land situated on both sides of Jacoby creek, "and lying along said creek up said creek from and above" the land leased to plaintiff; that said corporation was for many years engaged in cutting and logging the timber standing on its said tract of land and removing the same therefrom; that, "while said timber was being so cut and removed from said tract of land and by reason thereof, great quantities of debris and refuse logs, timber, and material were worked up from said timber so cut, logged, and removed as aforesaid, and remained and were left upon said tract of land and thereby accumulated thereon and were placed in and left upon, along and adjacent to the banks of said Jacoby creek and in such manner that said debris and refuse logs, timber, and material, placed in and left upon, along, and adjacent to said banks of Jacoby creek as aforesaid, would be and were, prior to the 2d day of January, 1905, in large and excessive quantities carried and floated by the elements and the natural flow and current of said Jacoby creek into the waters of said Jacoby creek."

It is further shown by the complaint that said corporation, in order to restrain and keep said debris, drift, refuse logs and timber, etc., from being carried further down said creek, and to thereby prevent the bed of said creek from being filled therewith, and the water therein from running over and inundating the lands of lower riparian owners, caused to be formed out of said natural debris, drift, logs, etc., "an immense and compact jam and obstruction in and across said Jacoby creek and which extended up, in and along said Jacoby creek for a distance of 400 yards or thereabouts and completely filled and obstructed said Jacoby creek for said distance from bank to bank, and, as so detained and restrained by said Bayside Mill & Lumber Company, * * * said jam and obstruction was then and there so compact in character and so fastened and secured by said Bayside Mill & Lumber Company, * * * that said debris and refuse logs, timber, and material and natural debris contributing and forming the same would not be, and no part thereof would be, thereafter carried downstream by the current and waters of said Jacoby creek, and that said jam and obstruction, if not disturbed or interfered with or loosened or opened up by any person, would thereafter permanently remain intact and in the same place and condition as the same was then in." The complaint discloses that, on

the 27th day of January, 1905, the defendant became the owner of all the property and rights of the Bayside Mill & Lumber Company heretofore mentioned, and thereafter, as stated, continued to carry on and conduct the logging and lumbering business on said Jacoby creek.

It is charged that the defendant, after succeeding to the business of said Bayside Mill & Lumber Company, negligently caused the "big jam" to be so disturbed and loosened as that the drift, debris, refuse logs, and other materials of which it was composed floated lower down the creek and formed other jams at different points, one of which being opposite the dike erected on plaintiff's land for its protection against overflow from said creek. It is declared that these latter jams became compact in form, and in that condition would not have interfered with the natural capacity of the creek to carry to the Humboldt Bay all the waters, debris, etc., naturally flowing therein, but that defendant carelessly and negligently caused said jams to be loosened, with the result that said debris and refuse logs, timber, and material and drift were forced further down the stream, forming, at a point where said creek passes through the southwesterly portion of plaintiff's land, an immense jam and an obstruction to the free and natural passage of the waters of said creek. This last-mentioned jam, it is averred, caused the waters of said creek to be restrained from their natural flow and impounded, so that when the winter rains of 1906-07 came, said obstruction or jam caused the waters of said creek to "back up in great and unnatural volume and rise to a great and unnatural height and break through and destroy said dike and embankment and overflow the banks of said Jacoby creek," and overflow and submerge a large portion of plaintiff's land, thereby destroying said land for pasturage and dairy business purposes for which plaintiff had leased and to which he had put the use of said land. The complaint further charges that the defendant had maintained railroad trestles at several different points across Jacoby creek and that "said trestles obstructed the otherwise free passage of all kinds of drift while being carried downstream in said Jacoby creek by the current thereof." The answer specifically denies all the important and essential averments of the complaint. The appellant contends that the evidence is insufficient to justify the verdict, and that the court erred in its rulings receiving and excluding certain evidence and in giving, refusing and modifying certain instructions.

1. That the evidence conclusively shows that in the month of January, 1907, the high waters of Jacoby creek "backed up" and broke through the embankment or dike which had been constructed and maintained on plaintiff's leasehold, and that by reason thereof a large portion of plaintiff's land was inundated and seriously damaged, is not, and,

manifestly, could not be, confuted by the defendant. It is the contention of the appellant, however, that the defendant was in no manner or degree responsible for the breaking of the plaintiff's dike by the high waters of Jacoby creek and the consequent submerging and damaging of plaintiff's land. The facts developed by the evidence may be epitomized as follows:

The plaintiff, by an instrument in writing, leased the land involved here for the term of six years, beginning with the 1st day of November, 1904. By the terms of said lease, he agreed to pay for the use of said land the sum of \$1,800 per year for the first two years of said term and \$2,000 per year for the remaining four years. It was stipulated that said rent should be paid to the lessors in monthly installments equal to one-twelfth of the annual rent on the first of each and every month during the term. It was further covenanted on the part of the plaintiff that he would "keep all buildings, fences, dikes, floodgates, etc., in good repair during the continuance of said lease." The land leased by plaintiff was reclaimed tide and marsh lands, and on it were a number of sloughs across which small bridges had been erected and maintained by plaintiff to enable the dairy stock to pass from one part of the land to another. The plaintiff conducted a dairy business on said land, having leased it expressly for that purpose. The evidence shows that the land damaged was capable of feeding and accommodating about 30 head of cows. This number of cows, it was shown, was in fact kept on the land up to the time that it was overflowed by the waters from the creek. The "big jam," to which reference has been made, was the result of the gradual accumulation for many years of logs, timber, debris, drift, etc., and was in existence before and at the time the defendant acquired the property and rights of the Bayside Mill & Lumber Company. In the years 1895 and 1896, one Monahan caused a boom to be placed across the creek at the point where said "big jam" was located, for the purpose of restraining said jam, or preventing it from becoming loosened and floating down the stream. The boom was fastened by a wire rope. The jam remained in this condition for many years and until after the defendant became the owner of the logging and lumbering business of its predecessor. According to the testimony, had said jam remained in this condition—that is, in compact form and so restrained as to have prevented it from floating down with the current during the high waters of the winter—it could have produced no harm. In the year 1905 the defendant entered into a contract with one De Lucca, by the terms of which the latter agreed to, and in pursuance of said contract did, cut up and convert into shingle bolts the timber suitable for that purpose of which said "big jam" was largely constituted. The result of thus handling said

timber was to so loosen the jam as to cause the remaining materials of which it was partly formed to float down the stream. The complaint charges and the proof shows that other jams were formed in the creek from the materials which came from the "big jam" and floated down the creek. In January, 1906, the plaintiff served upon the superintendent of defendant a written notice, calling his attention to the probable damage which would result to plaintiff's land if the defendant did not take proper care of the tree tops and timber refuse from its logging operations and prevent the same from being carried into Jacoby creek.

As alleged in the complaint, the evidence discloses that an immense jam was formed near plaintiff's land from the refuse and other materials of which the "big jam" was originally in part formed, and, additionally, as the result generally of the logging operations of defendant. There was also formed a jam around one of the railroad trestles of defendant. It was these last-mentioned jams which finally, through the rise of the waters of Jacoby creek from the rains of the winter of 1906-1907, which were directly responsible for the gathering of the water in said creek opposite plaintiff's dike in such a large and unusual volume as that said creek was incapable of accommodating and carrying off the same in and through its natural channel. The result was, as the complaint alleges, that said water "backed up" and broke through plaintiff's dike, flooding approximately 80 acres of his land, forming a new channel of said creek through a portion of said land, and practically destroying for the purposes for which plaintiff had leased it that portion so flooded and inundated.

The immediate effect of the submergence of plaintiff's land in the manner thus described was, according to the testimony, to leave a large portion thereof covered with refuse, debris, drift, gravel, sediment, and salt tidewater. Some of the witnesses testified that about seven acres were covered with gravel, from 3 inches, in some places, to over 2 feet deep, in other places; that about 16 acres were covered with sediment of sufficient depth to kill the vegetation growing thereon at the time, and that approximately 60 acres were covered with salt tidewater, the effect of which was to destroy the grass then growing thereon. It was shown that the land inundated could not be restored to its original condition, or to a condition in which it could be utilized for dairying purposes under two years. There were remaining, at the time of the flood, two years of the term stipulated for in the lease, so that that portion of the leasehold affected by the overflow was completely destroyed, so far as plaintiff's rights under the lease were concerned. The evidence shows that De Lucca cut the timber of which the "big jam" was largely formed and transformed the same into shingle bolts under a contract with defendant.

On behalf of the defense, one Newell testified that for many years prior to the flooding of plaintiff's land, he was engaged in the logging business on Jacoby creek. It appears that he had a contract with the defendant by which he did all the logging for that corporation. He testified that the bank of said creek was very steep at the points where he carried on the logging and that refuse from the logging operations was naturally carried and precipitated into the bed of the creek by the winter rains and high water. The object of this testimony was, undoubtedly, to show that the overflow of plaintiff's land was caused primarily by the refuse from the logging operations prosecuted by Newell under his contract with defendant as an independent contractor, and not, as alleged and contended by plaintiff, by the formation and disturbance of the jams in the manner described in the complaint.

It further appears, from evidence produced by the defendant, that, for many years, a large rock quarry was operated by certain parties on land bordering upon Jacoby creek. The obvious purpose of this testimony was to show, if it could be done to the satisfaction of the jury, that the bed of the creek was filled with débris or rocks and other refuse as the result of the operation of said quarry, and that thus the channel of the creek was so filled up as to interrupt and greatly interfere with the natural flow or passage of the waters of said creek; that the "backing up" of the water and the consequent flooding of plaintiff's land was primarily and proximately occasioned by the operations of said rock quarry, and not due to any act or acts of the defendant. We have thus briefly stated the facts brought out by the evidence introduced by the plaintiff, and have referred to some of the evidence presented by the defendant involving the defenses upon which it appeared to have relied against the claims of the complaint.

Appellant points out a large number of particulars in which it insists that the verdict is not justified by the evidence. These we shall not give specific examination. We have satisfied ourselves, from a painstaking examination of the whole record, that the jury were fully warranted in returning the verdict upon which the judgment is founded. The questions whether the damage was caused by the operations of the rock quarry or by the logging operations conducted by Newell were for the jury to determine. The verdict is, of course, indubitable evidence that the jury were satisfied from the proofs that the damage was the direct result of the negligence of the defendant.

So it is true as to the question whether De Lucca and Newell were independent contractors. While it is true that both De Lucca and Newell performed the work assigned to them under contracts by which they were to receive a certain specific compensation for such services, not in the nature of wages,

each, nevertheless, prosecuted his work in conformity with the general directions of the defendant. The work in which De Lucca engaged was, in fact, done under the direct superintendence of one Monahan, an employé of defendant. Moreover, the court submitted for the jury's decision the questions whether Newell and De Lucca were independent contractors, and, if so, whether the performance of the work done by them for defendant in the ordinary mode of doing such work would and did necessarily and naturally result in producing the defect or condition which caused the injury. The jury, therefore, passed upon these questions, and, as the verdict shows, against the theory advanced and contended for by the defendant.

It is scarcely necessary to remark that it is plainly manifest that the necessary and natural result of the removal from the "big jam" of the large quantity of timber out of which from 140 to 150 cords of shingle bolts were manufactured by De Lucca would be the disturbance of said jam so that the remainder of the materials of which it consisted would not remain in their original position, but would, upon the first heavy rains and consequent rising of the waters of the creek, naturally flow down the stream with the current. And, in this connection, it may well be observed that such result must necessarily have been known to and anticipated by defendant or its officers.

Appellant advances the further proposition that, in removing the jam which had formed about one of its railroad trestles, it only did what was absolutely necessary to be done in order to protect its property from destruction. This question, too, was submitted to the jury by the court, and upon that as well as upon all the questions of fact submitted for determination the jury's verdict is conclusive.

2. Many errors are imputed to the rulings of the court in admitting and rejecting certain evidence. Most of these involve questions bearing upon the elements which the court permitted to be shown as forming the basis upon which the amount of damages should be determined. The following may be given as examples of the rulings to which we refer: Permitting proof of the kind and character of the crop grown on the damaged land in the year immediately preceding that in which the damage was sustained; proof of the number of cows plaintiff had and which grazed on said land the previous year; proof of what plaintiff did with his cows after the flood—that is, that he was compelled by reason of the flood to rent other land on which to keep and feed said cows; proof of the cost of floodgates destroyed; proof of steps taken and work necessary to divert the waters of the creek to its old or original channel; that plaintiff had to buy feed for his cows subsequently to the flood; the number of pounds of butter fat obtained from said cows in the years 1906 and 1907; the number of cows he had on the land in 1907; the amount of

rent he was required to pay for the use of other lands after the flood; the effect of the gravel left on the ground by the flood; the rental value of the flooded land; the cost per acre "to place the land back into the same condition it was before the sediment was on, and to seed it to clover or rye grass"; the value of the crop raised on the land in 1903, the year immediately preceding that of the flood, etc., etc. The testimony shows, as the complaint alleges, that the flooded and damaged land was under a state of cultivation at the time of the overflow, and that it had formerly produced a sufficient quantity of grasses for the proper sustenance of the dairy cattle kept by plaintiff on said land. We perceive nothing in the testimony upon the question of damages allowed by the court over the objections of the defendant which was not competent and relevant.

Evidence of what the land produced the year previous to the year in which the damage was sustained was proper as tending to show the adaptability of the land to the cultivation of the crops customarily grown thereon and its capacity for producing such crops in such quantity as was essential to the dairy business. It will not be denied, we suppose, that it was proper to show the diminished value of the leasehold during the remainder of the term by reason of the damage to the land, and to that end prove the rental value of the damaged land per acre and likewise the cost of restoring the land to the condition in which it was at the time it was submerged. In short, all this testimony, as well as that relating to the number of dairy cows kept by plaintiff and the quantity of butter fat produced the previous year and the cost of maintaining his cows on other land which he was compelled to rent for that purpose after the flood, competently furnished as fair a foundation as can be shown or approximately laid in such cases upon which the jury might be enabled to reach an intelligent, just, and satisfactory conclusion as to the probable extent of the actual damage suffered by the plaintiff and thus to arrive at a just and reasonable assessment of damages.

Appellant declares that much of this testimony is too remote and speculative; but it is always permissible, in cases of alleged tortious injury to land, in order to reach a reasonably fair and equitable estimation of damages, to prove that it is peculiarly adapted to the production of a particular kind of crop, and what it is capable, under ordinary circumstances, of growing, both as to quality and quantity. Therefore, it is proper to show what the land has ordinarily produced within a reasonable time in the past as bearing upon what it might reasonably be expected to have produced when destroyed, when, as here, such destruction has taken place before the maturity of the crop and what it is probable that it might yield (in this case) during the remainder of the unexpired term of the lease. This,

too, together with evidence of what has been the ordinary yield of butter and other products from the dairy, would serve as a reasonable criterion by which the future profits might reasonably be expected to be. And it is always permissible to prove and recover "prospective profits," where it is shown that such profits would naturally and directly flow from a business which had been damaged had such business not been destroyed or impaired by the damage so as to obstruct its prosecution in the usual and ordinary way in which it had always been conducted. *Hawthorne v. Siegel*, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291; *Giacomini v. Bulkeley*, 51 Cal. 260; *Shoemaker v. Aker*, 116 Cal. 240, 48 Pac. 62; *Barnes v. Berendes*, 139 Cal. 32, 69 Pac. 491, 72 Pac. 406. In other words, the damages which, in the ordinary course of things, would be likely to result from a wrongful or tortious injury to property, must be taken as the basis or measure of the compensation to which the complaining party would be entitled for the injury so inflicted. Civ. Code, § 3300.

That evidence of the diminished value of the leasehold by reason of the injury thereto was competent, is a proposition so obvious that authorities need not be cited in its support, although many may be found in which the doctrine is asserted and applied. *Ellis v. Tone*, 58 Cal. 289; *Ft. Worth & N. O. R. Co. v. Wallace*, 74 Tex. 581, 12 S. W. 227; *Ridley v. Seaboard & R. R. Co.*, 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708; *Ft. Worth & D. C. Ry. Co. v. Hogsett*, 67 Tex. 685, 4 S. W. 365; *Pennsylvania Co. v. Hunsley*, 23 Ind. App. 37, 54 N. E. 1071; *Fremont Ry. Co. v. Harlin*, 50 Neb. 698, 70 N. W. 263, 36 L. R. A. 417, 61 Am. St. Rep. 578; *Baltimore & O. S. W. R. Co. et al. v. Quillen*, 34 Ind. App. 330, 72 N. E. 661, 107 Am. St. Rep. 183; *Wichita Gas & Elec. Light & Power Co. v. Wright*, 9 Kan. App. 730, 59 Pac. 1085. Some other rulings than those to which we have devoted some special attention are complained of, but they were, in our opinion, without prejudice, assuming that they were erroneous.

3. Appellant challenges the correctness of the action of the court in refusing to give certain instructions requested by it, and in modifying certain other instructions proposed by it, and, as so modified, submitting the same to the jury. We shall notice only a few of these assignments in detail. But we may here say that we have given the entire charge of the court careful consideration, and that therein, in our judgment, every principle applicable to the issues raised by the pleadings and developed by the proofs was correctly declared and explained to the jury by the court in singularly clear language. It may be added that in all instances where instructions, containing correct and pertinent declarations of principles of law, were proposed by defendant and disallowed, the court in other instructions submitted to the jury

such principles; and where instructions proposed by defendant were modified, it was either because the principle involved in the part modified was not applicable or not correctly stated, or was announced in some other of the given instructions.

There was no evidence justifying the giving of instruction No. 6, requested by defendant, wherein it was proposed to tell the jury that if they found that the injuries to plaintiff's property were caused by the "act of God" the defendant would not be liable.

Instruction 15, requested by defendant and disallowed by the court, was properly refused. It would have declared to the jury that, if the bridges referred to in the complaint as spanning some small sloughs on plaintiff's leasehold were "imbedded in the real estate and was considered by plaintiff as a part thereof not to be removed," then such bridges must be considered by them as part of the realty, and that plaintiff could not recover for their destruction. As we have seen, the plaintiff built these bridges for the purpose of permitting his cattle to pass from one field to another, and, while he testified that they were built with the intention that they should remain permanently on the land, it is no defense to a recovery for their loss or destruction to say that they became and were a permanent part of the realty. By the terms of his lease it was his duty to keep the bridges and other fixtures on the premises in repair. But the bridges were an essential and necessary part of plaintiff's leasehold, and as well could it be maintained that he could not recover for the crops growing on the land and destroyed by the water.

The several instructions expounding the principle that a person may take such steps as may be reasonably necessary to protect his own property from injury or destruction, where he exercised ordinary care in so doing, were properly refused. There was, as seen, some evidence that the defendant had removed a jam which had formed around one of its railroad trestles, and, as to this jam and the act of the defendant in removing it, the court instructed the jury that, in order to protect said trestle or any other of its property from destruction or injury, the defendant had the right to remove said jam, if it did so in view of "the rights of others below" and by the exercise of ordinary care. The rejected instructions were entirely too general and indefinite and would perhaps have tended to mislead the jury into the belief that the defendant caused the "big jam" to be disturbed in order to protect its property, when the truth is the disturbance of the "big jam" was for the sole purpose, as seen, of enabling the defendant to profitably utilize a quantity of the timber of which said jam was composed. Had said jam been allowed to remain intact, it is probable that the high waters of Jacoby creek brought about by the rains of

the winter of 1906-1907 could have been easily carried through its natural channel to Humboldt Bay and thus the injury to plaintiff's leasehold avoided.

Some complaint is made of the verdict, the claim being that it is so excessive or far beyond a reasonable admeasurement of damages under the circumstances as revealed by the evidence, that the same must have been given under the influence of passion or prejudice. Section 657, subd. 5, Code Civ. Proc. We cannot say, from the face of the record, that this contention has any merit. It appears to us that the evidence amply justifies the amount of damages awarded. In any event, there is nothing in the record which would warrant this court in substituting its judgment upon that proposition for that of the jury and of the trial judge, to whom the question was no doubt fully presented on the motion for a new trial.

The judgment and order appealed from are, for the reasons herein expressed, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(12 Cal. A. 4)

WESTERN LUMBER & MILL CO. v. MERCHANTS' AMUSEMENT CO. et al.
PACIFIC ORNAMENTAL DECORATING CO. v. SAME. (Civ. 749.)

(Court of Appeal, Second District, California, March 10, 1910. Rehearing Denied April 4, 1910; Denied by Supreme Court May 9, 1910.)

1. APPEAL AND ERROR (§§ 911, 934*)—PRESUMPTIONS—JURISDICTION OF TRIAL COURT.

Where the record on appeal is silent on the subject, it will be presumed that the court had jurisdiction of the subject-matter and of the person of defendant before rendering judgment, and, in support of the judgment, that the court acted on evidence of some kind.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3682-3688, 3777-3781; Dec. Dig. §§ 911, 934.*]

2. APPEAL AND ERROR (§ 911*)—PRESUMPTIONS—JURISDICTION OF TRIAL COURT.

Where the record on appeal discloses a recital in the judgment or judgment roll that jurisdiction has been acquired or of facts from which jurisdiction may be inferred, the presumption of jurisdiction of the trial court of the subject-matter and of the person of defendant need not be invoked.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 911.*]

3. APPEAL AND ERROR (§ 911*)—PRESUMPTIONS—JURISDICTION OF TRIAL COURT.

The court on appeal never presumes that a court of record heard a controversy before determining that it had jurisdiction of the cause and the parties, for to do so would involve the presumption that the court failed to do its duty.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 911.*]

4. APPEAL AND ERROR (§ 911*)—PRESUMPTIONS—JURISDICTION OF TRIAL COURT.

On appeal from a domestic judgment, the party seeking to sustain it must show by the record that the court had jurisdiction of de-

pendant, for on a direct attack there is no presumption in favor of the existence of any fact essential to the jurisdiction over defendant, but in all matters of which the judgment contains a record, its verity, in the absence of contradictory evidence, will be presumed, and defendant may, by bill of exceptions, present evidence outside the record to show that the court did not have jurisdiction over him, and the recitals in the record may be aided by facts on which, if they appeared in the judgment roll, a finding of jurisdiction might be predicated.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 911.*]

5. JUDGMENT (§ 495*)—COLLATERAL ATTACK—JURISDICTION—PRESUMPTIONS.

On a collateral attack of a domestic judgment, the entry of the judgment is itself conclusive of the jurisdiction of defendant, and, in all matters in which the judgment contains a record, its verity is presumed, and the objection of want of jurisdiction over defendant is available only when it appears from the record itself.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 933, 934; Dec. Dig. § 495.*]

6. JUDGMENT (§ 279*)—JUDGMENT ROLL.

An appearance made by a defendant in either of the manners authorized by Code Civ. Proc. § 1014, need not be made a part of the judgment roll.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 546-551; Dec. Dig. § 279.*]

7. APPEAL AND ERROR (§ 911*)—PRESUMPTIONS—JURISDICTION.

Where there is a recital in the judgment roll that a defendant appeared in the action, and uncontradicted evidence in the bill of exceptions sustains the recital, the contention that the court was without jurisdiction to render judgment in favor of plaintiff against defendant cannot be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 911.*]

8. APPEAL AND ERROR (§ 193*)—PRESENTATION OF GROUNDS OF REVIEW—OBJECTIONS TO COMPLAINT.

Where, in a suit to foreclose a mechanic's lien, the court found that the contract was to erect a building for a price exceeding \$1,000, and that the contract was not recorded, and the issue was tried without objection by the parties or limitation by the court, objection on appeal to the complaint based on its failure to allege that there was anything due from the owner to the contractor at the time the lien was filed, or that the contract was for an amount exceeding \$1,000 and not recorded, came too late.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1240; Dec. Dig. § 193.*]

9. MECHANICS' LIENS (§ 78*)—NOTICES—STATUTES.

Where an owner used a lessee as an agent to construct a building, and he had knowledge of the intention to build as early as there was such an intention, and the lease was given for the purposes of the lessee erecting the building, the finding that the owner did not post notices under Code Civ. Proc. § 1192, within three days after he obtained knowledge of the intended construction of the building was immaterial, for the owner was not entitled to give such notices.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 111; Dec. Dig. § 73.*]

10. MECHANICS' LIENS (§ 78*)—NOTICES—STATUTES.

Code Civ. Proc. § 1192, providing for the giving of notice by the owner after obtaining knowledge of the construction of a building

on his land that he will not be responsible therefor, does not give to the owner two periods at which he may give the notice, and where he has knowledge of the intention to build, he must act on that knowledge, and at once post the notice, and where he has no knowledge of the intention, he must move with like promptness on learning of the fact of construction.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 73.*]

11. MECHANICS' LIENS (§ 290*)—ENFORCEMENT—FINDINGS—CONFORMITY TO ISSUES.

A pleading in a suit to enforce a mechanic's lien which alleges that defendant was the owner of the premises, and that a codefendant was the lessee, and a finding that the lessee was the mere agent of the owner in the construction of the building, are not inconsistent, because neither the ownership of defendant nor the holding of the lease by codefendant prevented the latter from acting as agent of the former in constructing the building.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 290.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Consolidated actions by the Western Lumber & Mill Company and by the Pacific Ornamental Decorating Company against the Merchants' Amusement Company and others. From a judgment for plaintiffs in each action, defendant, J. R. Gager, in each action appeals. Affirmed.

Elon G. Galusha and Gray, Barker & Bowen, for appellant. Scarborough & Bowen, for respondent Western Lumber & Mill Co. Lloyd W. Moultrie, for respondent E. G. Judah. Borden & Carhart, for respondents City Mill & Mfg. Co., Whittier-Coburn Co., and L. J. Smith. G. P. Adams, for respondent Howe Bros. Hickcox & Crenshaw, for respondent United Casting Co. Haas, Garrett & Dunnigan, for respondent Pacific Ornamental Decorating Co. John W. Kemp and Kemp & Collier, for respondents J. B. Dawson and Merchants' Amusement Co.

TAGGART, J. Consolidated action to foreclose mechanics' liens. Complaints were filed by Western Lumber & Mill Company and Pacific Ornamental Decorating Company. In the former action, the owner of the land, Gager, the lessee in whose name the building was constructed, Merchants' Amusement Company, the contractor, J. B. Dawson, and all persons claiming liens, including the plaintiff in the other action, the Pacific Ornamental Decorating Company, were named as defendants. In the action last entitled only the owner, lessee, and contractor and two fictitious persons were made defendants. Of the defendant lienors, in the first action, Whittier-Coburn Company, E. G. Judah, City Mill & Manufacturing Company, Mutual (United) Casting Company, Howe Bros., and L. J. Smith filed answers and cross-complaints. The defendants owner, lessee, and contractor answered to each of the cross-complaints, except that of Howe Bros., and to the complaint

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the Western Lumber & Mill Company, but did not answer the complaint of the Pacific Ornamental Decorating Company, and no answers or cross-complaints were filed by any one in the action instituted by the last-named plaintiff. Neither did the Pacific Ornamental Decorating Company file an answer or cross-complaint in the other action. Judgment was given for both plaintiffs and all the lien claimants who appeared, and a sale of the premises to satisfy the liens ordered.

This appeal is by Gager, the owner of the land upon which the building was constructed. It is contended that as to the action of the Pacific Ornamental Decorating Company the record fails to show that jurisdiction was ever acquired of the person of the appellant, and that as to him the complaint filed by that corporation states no cause of action. A reversal of the entire judgment is also asked upon the grounds that the evidence does not sustain the finding of the trial court that appellant's attempt to post a notice of nonliability under section 1192 of the Code of Civil Procedure was ineffective because not posted in accordance with the provisions of the section, or the finding that the Merchants' Amusement Company was merely the agent of appellant in the construction of the building on his premises, and that therefore appellant was not entitled to give the notice provided by that section.

The copy of the judgment roll in the transcript, which is certified to be full, true, and correct, contains no evidence of any service of summons or of the complaint of the Pacific Ornamental Decorating Company upon any of the defendants therein named, of any appearance by either or any of them, or of any issue joined upon any of the allegations of the complaint, and the only finding or recital in this respect is found in the findings of fact, that "the plaintiffs and cross-complainants, and the various defendants appearing by their respective attorneys," etc. The bill of exceptions recites that upon the trial of the consolidated actions the attorneys for the Western Lumber & Mill Company appeared for the plaintiff, while the names of the attorneys signing the complaint in the other action appear as attorneys "for the defendant the Pacific Ornamental Decorating Company." Appellant was represented at the trial by counsel, and it was stipulated by the parties, and ordered by the court, that "any testimony introduced in the case will be introduced for the benefit of all the parties to the suit represented upon the trial"; and also, "that it may be deemed that the defendants Gager and Dawson and Merchants' Amusement Company specifically deny each of the allegations in each of the cross-complaints, except the allegation that Gager is the owner of the property. * * * except also where answers are filed to such cross-complaints the case will stand on such answers." Unless the complaint of the Pacific Ornamental Decorating Company is assumed

to have been treated the same as a cross-complaint in the other action, the latter stipulation would affect only the defendant Howe Bros. It is apparent from the stipulation as to the evidence, and the introduction of the notice and lien of the Pacific Ornamental Decorating Company without objection, that all parties assumed that corporation to be properly before the court to present its lien and obtain a judgment, if otherwise entitled. The question of jurisdiction was not raised at the trial, and seems to hinge upon whether or not the recital in the findings that there was such an appearance by Gager is sufficient to sustain the judgment against the attack here made.

The fact that a judgment was rendered against Gager in favor of the Pacific Ornamental Decorating Company implies that the court ascertained that it had jurisdiction of both the subject-matter of the complaint and the person of appellant before rendering such judgment. It will be presumed in support of the judgment of a court of record that the court acted upon evidence of some kind. If the record discloses a recital in the judgment or judgment roll that jurisdiction has been acquired, or facts from which jurisdiction may be inferred, there is no occasion to invoke the presumption; it is only when the record is silent that the necessity for the presumption arises. To assume that a court has proceeded to hear a controversy before determining that it had jurisdiction of the cause and the parties to the controversy would involve the presumption that the court had failed to do its duty, and such a presumption is never indulged. In *re Eichhoff*, 101 Cal. 600, 36 Pac. 11. While the attack upon the judgment in the case cited was a collateral one, it was said by the Supreme Court in another case in which the jurisdiction of the trial court to enter a judgment was questioned on a direct appeal: The presumption of verity which attaches to the record of a domestic judgment is the same upon a direct appeal therefrom as exists in the collateral attack, the only difference being that upon a direct appeal it is essential for the party seeking to sustain the judgment to show by the record itself that the court had jurisdiction of the defendant, whereas in a collateral attack the entry of the judgment is itself conclusive of such jurisdiction. Upon a direct attack there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant; but in all matters of which the judgment contains a record, its verity, in the absence of any contradictory evidence, will be presumed as fully as upon collateral attack. The defendant may, upon a direct appeal, by bill of exceptions, present evidence outside of the record for the purpose of showing that the court did not have jurisdiction over him, while in a collateral attack such objection is available only when it appears from the record itself. In both cases the record is con-

clusive as to all matters as to which it speaks, unless impeached in the foregoing manner. *Sichler v. Look*, 93 Cal. 600, 606, 29 Pac. 220. No effort was made to impeach the recital of the trial court that the appellant appeared by attorney at the trial of the issues raised by the Pacific Ornamental Decorating Company's complaint. The same rule which permits the record to be impeached also allows a showing to be made in support of the recitals in the record, and the latter may be aided by the presentation of any facts upon which, if they appeared in the judgment roll, a finding of jurisdiction might be predicated. The recital in the judgment roll that appellant appeared by attorney, impliedly to contest the claim of the Pacific Ornamental Decorating Company, is supported by the record of the proceedings at the trial, while, on the other hand, no attempt is made to impeach either the recital or the evidence tending to establish its truth. The voluntary appearance of a defendant is equivalent to personal service of summons and complaint. Code Civ. Proc. § 416. A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of an appearance for him (Code Civ. Proc. § 1014). The Code does not require such an appearance to be made a part of the judgment roll (*Lyons v. Roach*, 84 Cal. 27, 29, 23 Pac. 1026); and if the judgment roll were silent, the presumption that the court had some evidence to sustain it in assuming jurisdiction would be supported by the facts in the bill of exceptions above mentioned, and there is no evidence in conflict with this. There being, however, a recital in the judgment roll that appellant appeared in both actions, and uncontradicted evidence tending to sustain the recital in the bill of exceptions, the contention that the court was without jurisdiction to render judgment in favor of the Pacific Ornamental Decorating Company cannot be sustained.

It is contended that the complaint of the Pacific Ornamental Decorating Company does not state a cause of action because it neither alleges that there was anything due from the owner to the contractor at the time the lien was filed, nor that the contract was for an amount exceeding one thousand dollars and not recorded. No demurrer to the complaint was filed, and the evidence at the trial disclosed, and the court found, that the contract was to erect a building for a price exceeding one thousand dollars, and that the contract was not recorded. This issue having been tried and a general finding made thereon as to all the parties to both actions, without objection by appellant or limitation by the court, it must be presumed that the trial was had and the finding made in support of the claim of the decorating company. It is, therefore, too late to object to the absence of this allegation, if necessary (which we are not to

be understood as holding) at this time. It is conceded that, if it had been alleged that there was a contract for an amount exceeding \$1,000, which was not recorded, it would have been unnecessary to allege there was anything due on the contract in order to bind the owner.

The finding of the trial court that appellant did not post notices under section 1192 within three days after he had obtained knowledge of the intended construction of the building thereon, and not within three days after he obtained knowledge of the actual work of construction, etc., is rendered immaterial by the other finding that the corporation lessee was the mere agent of the owner of the land in the erection and construction of the building, and that such an owner was not entitled to give the notice under section 1192, Code Civ. Proc. No other inference could well be drawn from the evidence than that Gager had full knowledge of, and participated in, all the acts of the corporation, either in person or by representative. He had knowledge of the intention to build as early as there was such an intention, and the lease was given to the defendant corporation, and the corporation was formed for the purpose of erecting the building in question. We do not understand that the law gives to an owner two periods at which he may give the notice provided by section 1192. If he has knowledge of the intention to build, he must act on that knowledge and at once (within three days) post the notice that all materialmen, artisans, and laborers may know that he will not be responsible. If he has no knowledge of the intention upon which to act, he must move with like promptness upon obtaining knowledge of the construction. As above said, however, this is rendered immaterial, as the evidence justifies the finding that Gager was himself merely using the corporation as an instrument to carry out the venture in which that body was engaged.

We do not think the latter finding is inconsistent with the pleadings. It is true that it was both alleged and stipulated that Gager was the owner of the premises, and that the amusement company was the lessee, but neither the ownership of the former nor the holding of the lease by the latter prevented the latter from acting as the agent of the former in constructing the building. If it were alleged that Gager was the owner, and the evidence disclosed that the work was done in the name of a corporation which he organized and controlled and through which he acted, a finding that he acted through such corporation as his agent would be sustained. *Shorb v. Beaudry*, 56 Cal. 446; *Cornell v. Corbin*, 64 Cal. 197, 30 Pac. 629; *Hunt v. Davis*, 135 Cal. 31, 66 Pac. 957.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

13 Cal. A. 35)

**SULLIVAN v. MORTON DRAYING
& WAREHOUSE CO. et al.**
(Civ. 755, 757.)

Court of Appeal, First District, California.
March 11, 1910. Rehearing Denied April 8,
1910; Denied by Supreme Court May 9,
1910.)

**MASTER AND SERVANT (§ 304*)—INJURIES
TO THIRD PERSONS—NEGLIGENCE OF SERV-
ANT—LIABILITY OF MASTER—VIOLATION OF
ORDINANCE.**

Where the driver of a dray left his team on a public street without first securing the wheels on the dray, in violation of ordinance, is employer is guilty of statutory negligence, though a suitable chain for locking the wheels as attached to the body of the dray.

[Ed. Note.—For other cases, see Master and servant, Dec. Dig. § 304.*]

**MUNICIPAL CORPORATIONS (§ 705*)—USE OF
STREETS—LOCKING WHEELS—LEAVING VE-
HICLES WITHOUT LOCK—"LEAVE."**

Defendant's dray driver finished loading a dray from a car, drove away from the car four to six feet and stopped the team, and was tying the load on the dray without having hold of the lines, when another team frightened his horses and they backed against the car, crushing plaintiff. *Held*, that the driver as not negligent as having left his team, within an ordinance making it unlawful to have an animal attached to a dray upon a public street without locking the wheels of the vehicle; to "leave," within the ordinance, meaning depart or abandon for the time, to go away from the immediate charge and supervision of the animals.

[Ed. Note.—For other cases, see Municipal corporations, Dec. Dig. § 705.*]

For other definitions, see Words and Phrases, 1. 5, pp. 4050-4053; vol. 8, p. 7703.]

**MUNICIPAL CORPORATIONS (§ 703*)—ORDI-
NANCES—CONSTRUCTION—USE OF STREETS—
FASTENING WHEELS OF WAGON.**

An ordinance making it a misdemeanor to have an animal attached to a dray on a public street without locking the wheels of the vehicle, to drive a dray, etc., without having attached a suitable chain for locking to the body thereof is penal in its nature, and cannot be extended beyond the plain meaning of its words.

[Ed. Note.—For other cases, see Municipal corporations, Dec. Dig. § 703.*]

NEGLIGENCE (§ 121*)—BURDEN OF PROOF.

The burden is upon plaintiff to prove negligence, either by direct or circumstantial evidence.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. §§ 224-228; Dec. Dig. § 121.*]

**MUNICIPAL CORPORATIONS (§ 706*)—IN-
JURIES—ACTIONS—ADMISSIBILITY OF EVI-
DENCE.**

In an action against two defendants, B. and M., for injuries by the team of M. being frightened by B.'s team and backing against a crushing plaintiff, evidence was admissible that the space between the horses attached by M.'s dray and the railroad tracks was sufficient for its own team to pass.

[Ed. Note.—For other cases, see Municipal corporations, Dec. Dig. § 706.*]

**APPEAL AND ERROR (§ 1057*)—HARMLESS
ERROR—EXCLUSION OF EVIDENCE.**

Where, in an action against two defendants, M. and B., for injuries by M.'s team being frightened by B.'s team and backing against a crushing plaintiff, ample evidence was adduced as to whether there was room for B.'s team to pass in front of M.'s horses, and the

evidence sustained a finding that B.'s team was negligently driven into M.'s team, causing it to back, error in excluding other evidence offered by B. as to the space in front of M.'s horses to show that there was sufficient space for its team to pass between the tracks and the horses, was not reversible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199; Dec. Dig. § 1057.*]

**7. EVIDENCE (§ 507*)—OPINION EVIDENCE—
EXPERT TESTIMONY—MATTERS OF COMMON
KNOWLEDGE.**

The question of how near the driver of a team can approach the heads of horses of another team without danger, in the exercise of due care, depends on various circumstances which are matters of common knowledge and experience and not of science, so that expert testimony on the question is not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2310; Dec. Dig. § 507.*]

**8. APPEAL AND ERROR (§ 1041*)—HARMLESS
ERROR—RULINGS ON PLEADINGS—AMEND-
MENTS.**

In an action against two defendants for negligent injuries, one defendant could not complain of an amendment to the complaint tending to show negligence of the other defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041.*]

**9. TRIAL (§ 252*)—INSTRUCTIONS—APPLI-
CATION TO FACTS.**

In an action against two defendants, M. and B., for injuries by M.'s team backing over plaintiff and crushing him because frightened by B.'s team claimed to have been caused by the violation of an ordinance making it unlawful to leave a dray without locking the wheels, an instruction requested by B. that men in governing their conduct, in absence of contrary knowledge, may assume that others have not violated the law, was properly refused as inapplicable, where M.'s driver did not leave the dray, within the meaning of the ordinance.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 252.*]

**10. MUNICIPAL CORPORATIONS (§ 705*)—USE
OF STREETS—NEGLIGENT DRIVING—PROXI-
MATE CAUSE OF INJURY.**

While the driver of M.'s team had gotten down to fasten his load, B.'s team was negligently driven so as to frighten M.'s team, which backed up and crushed plaintiff's intestate. *Held*, that the fact that the accident would not have happened if the wheels of M.'s dray had been locked was no excuse for the negligent driving of B.'s team, where the act of M.'s driver in getting down did not amount to a leaving of his team within an ordinance requiring wheels to be locked in such cases, the condition and equipment of M.'s dray being immaterial on the question of B.'s liability, unless M.'s driver violated the ordinance and by the fact of so doing was negligent.

[Ed. Note.—For other cases, see Municipal corporations, Dec. Dig. § 705.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Frank J. Sullivan, administrator of the estate of Michael P. Sullivan, against the Morton Draying & Warehouse Company and another. From a judgment for plaintiff and an order denying a motion for a new trial, and an order denying a motion to vacate the judgment, each defendant appeals.

Reversed as to defendant named, and affirmed as to the other defendant.

In No. 755: Myrick & Deering, for appellant. William J. Herrin, for respondent. Jesse W. Lillenthal, for Morton Draying & Warehouse Co.

In No. 757: Jesse Lillenthal and Albert Raymond, for appellant Morton Draying & Warehouse Co. William J. Herrin, for respondent Sullivan. Myrick & Deering, for respondent Bocarde Draying Co.

COOPER, P. J. This action was brought against defendants to recover damages caused by reason of their alleged joint negligence in causing the death of plaintiff's intestate. The jury returned a verdict in favor of plaintiff against both defendants, and judgment was accordingly entered. Each defendant appeals in a separate record from the judgment and the order denying its motion for a new trial, and from an order denying its motion to vacate the judgment, but both appeals will be considered together. In this opinion the appellants will be referred to as the Morton Company and the Bocarde Company respectively. Upon an examination of the record we are of the opinion that the motion of the Morton Company for a nonsuit should have been granted, and that the evidence is not sufficient to sustain the verdict as to it.

The evidence shows that while deceased was standing at the door of a railroad box car, with his back toward the dray of the Morton Company, in a place of apparent safety, where he was following his usual avocation, the dray, which was from four to six feet from the car, and which had just been loaded with freight, consisting of boxes, tent poles, tents, and government supplies, was backed up by the team jerking backward toward the car, thus catching deceased between the dray and the car, crushing and killing him. The evidence tended to show that while the Morton dray was standing in the street, and about four to six feet from the said car, with two horses attached, a team with the dray attached belonging to the Bocarde Company was carelessly and negligently driven into the Morton Company's team, thereby frightening the team and causing it to back the dray against the car. There is no claim made as to negligence on the part of the Morton Company except that it was guilty of statutory negligence in violating an ordinance of the city and county of San Francisco, which ordinance is as follows:

"Section 1. It shall be unlawful for any person using or having control of any animal to leave the same upon any public street without being securely fastened, unless it be attached to a dray, truck or water-cart; or, if attached to a dray, truck or water-cart, to leave such animal upon the public street without first securely locking the wheels of the vehicle to which it is attached.

"2. It shall be unlawful for any person to drive or use any truck, dray or water-cart without having attached to the body thereof a suitable chain for locking the wheels thereof.

"3. Any person who shall violate any of the provisions of this ordinance shall be guilty of a misdemeanor."

It is admitted that the Morton Company's dray did not have attached to the body thereof a suitable chain for locking the wheels, and that the wheels were not locked at the time of the accident. In so far as the Morton Company violated the ordinance by not having a suitable chain attached to its dray, that is a matter entirely with the city authorities in a proper proceeding, and in no way applies to the facts here. If the driver of the Morton Company's team left it upon a public street without first securely locking the wheels of the dray the company would be guilty of statutory negligence, and this would be so even if a suitable chain had been attached to the body of the dray. The question then, as to the Morton Company, is narrowed down to the single one as to whether or not its driver left the team upon the public street within the meaning of the ordinance.

The evidence shows, without conflict, that the Morton Company's driver Sorensen, had just finished loading the dray with freight, tent poles and tents in cases; that he then pulled away from the car from four to six feet, stopping the team and heading the horses towards Sixth street; that he then took a rope and was engaged in fastening the load and tying the cases when he heard some one give the alarm and immediately he observed that his team was backing from the fright caused by the approach of the Bocarde team and dray. Sorensen did not then have hold of the lines, but he was right at the dray and engaged in fastening the load. Immediately upon hearing the alarm and seeing the team backing he jumped on the footboard and drove the horses up so as to release deceased. In our opinion the driver had not left the team within the meaning of the ordinance. The meaning of the word "leave" as used in the ordinance is, to depart or go from, to quit. We use the word "leave" in such sense when we say, "He has just left the house," or "He left his plow in the furrow," or "He has left his wife and children." Thus Milton says (P. L. XI, 1, 269):

"Must I leave thee, Paradise? thus leave
"Thee, native soil; these happy walks and
shades."

The ordinance means, to depart from, to abandon for the time, to go away from the immediate charge and supervision of the animal or animals so left. It is penal in its nature and cannot be extended beyond its plain words and its ordinary common sense meaning. No one in the ordinary walks of life would say that a teamster, while tying

up his load, had left his team. If the ordinance had said that no one should let loose of the lines by which his horses are held without first securely locking the wheels the meaning would be very different; but if the respondent's contention is correct the driver who should attach his lines to the seat or lever of the brake, and get down on the ground to lock the wheels, would be guilty of leaving his team, at least while going from his seat to the wheels. Such is not the meaning of the ordinance.

In *Wasmer v. Del., Lacka. & W. R. R. Co.*, 80 N. Y. 212, 38 Am. Rep. 608, the ordinance of the city made it unlawful for any person to leave a horse in the street unless securely tied. The court, in passing upon the meaning of the ordinance, said: "It cannot be supposed that it was intended by this ordinance to require all vendors or peddlers of commodities in the streets to tie their horses or have some one hold them while they are momentarily engaged in delivering the commodities to persons in the streets or at the doors of the houses along the streets. Nor can it be supposed that it was intended to inflict a penalty upon every person who should fail to tie or hold his horses in the streets while standing near them. The ordinance was manifestly intended to reach the cases of persons who might leave their horses in the streets not tied, and go away from them out of sight, or to such a distance as to lose that control which persons may usually exercise over horses when near them."

In *Oddie v. Mendenhall*, 84 Minn. 58, 86 N. W. 881, the ordinance provided that it should be "unlawful for any person to leave any horse attached to a vehicle in a street without fastening such animal in the manner provided for herein." The court said: "A reasonable construction must be given to this ordinance. Its object was evidently to prevent drivers from leaving horses standing in the streets without control. It cannot be held that this ordinance must be construed to require a person getting out of a wagon or carriage to hitch the horse attached thereto, even though occupants of the carriage remain therein." See, also, *Monroe v. Hartford, etc., Co.*, 76 Conn. 201, 56 Atl. 498; *Rowe v. Reneer*, 30 Ky. Law Rep. 545, 99 S. W. 250.

It is incumbent upon a party seeking to recover against a defendant by reason of alleged negligence to prove such negligence, and this proof may be either direct, or by the proof of facts and circumstances from which negligence may be inferred. In this case there is no attempt to prove any fact or circumstance, as to the Morton Company, except the fact that its team attached to the dray was standing on one of the public streets of the city and county of San Francisco, and that the driver of the team was not holding the lines, but was with the dray or truck engaged in fastening the load, and

near to and within easy access to the team. In such case we cannot hold that the Morton Company is liable under the ordinance. As to the Bocarde Company, other errors are alleged, which we will consider in their order.

The court excluded certain testimony offered by the Bocarde Company for the purpose of showing the space between the horses of the Morton Company and the tracks of the Southern Pacific Railroad Company to the south on King street. It is claimed by the Bocarde Company that the offered testimony was material, and that it should have been permitted in order to show that there was plenty of room for its team to pass between the team of the Morton Company and the railroad track. While, in our opinion, it would have been better for the court to have admitted the testimony and to have allowed the cross-examination more scope in order that the jury might be fully informed upon each and every phase of the case, yet we do not think the rulings of sufficient importance to justify a reversal of the case. The witness Ryan testified to this point, and when asked by counsel what was the space, answered "I think the width of this room." The question as to the space was fully covered by the evidence of the witnesses Rich, Free, and Archibold. Not only this, but there is testimony in the record amply sufficient to sustain the finding of the jury that the Bocarde Company's team was negligently driven into the team of the Morton Company, thus causing it to back, and in such case it is not very material as to whether the space was 8 feet or 15 feet in width. If the driver of the Bocarde team had plenty of space and yet drove into or against the horses of the Morton team, it would tend to show a still greater degree of negligence.

The court did not err in excluding the testimony of experts as to how near in the exercise of care and skill the driver of a team can approach the heads of the horses of another team and drive past without danger, or as to the custom or peculiarities of horses in settling back in their breeching. The question was not one relating to science, art, or trade. As to how near the driver of one team can approach the horses' heads of another team without danger necessarily depends upon a variety of circumstances, such as the location, the kind of team being driven, and the kind of team being approached, and the kind of vehicle to which the team is attached. These were matters of general, every day knowledge, observation, and experience, and the jurors hearing the evidence and all the facts were as capable of forming correct conclusions as any so-called experts could be. We all know that most animals will shrink or retire from approaching danger, and that a team of horses upon being run into or struck by the harness or wagon of an approaching team would be very likely

to pull back or retire so as to avert the danger.

It was not error for the court to allow the plaintiff to amend his complaint by alleging, as an act of negligence on the part of the Morton Company, that it drove its truck without having attached thereto a suitable chain for locking the wheels. *Ryan v. Oakland Gas Light, etc., Co.*, 10 Cal. App. 484, 102 Pac. 558. Not only this, but the Bocarde Company has no right to complain of an amendment tending to show negligence on the part of the Morton Company.

The Bocarde Company was not injured by the refusal of the court to instruct the jury that "men in governing their conduct, in the absence of knowledge to the contrary, are entitled to assume that others have not violated the law." The proposition as stated in the abstract may be correct, but it has no application to the facts here. It was evidently intended to be considered in connection with the claim that the driver of the Morton team had left his dray without locking the wheels; but, as has been before stated, the driver had not left his team within the meaning of the ordinance. The court gave other instructions fully and fairly covering every material phase of the case, and as favorable to the Bocarde Company as it was entitled to under the law.

The instruction numbered 36, requested by the Bocarde Company, was properly refused. The evidence did not warrant it, as it did not show that the Morton Company had omitted to perform any duty imposed by ordinance.

The findings of the jury in regard to the special issues submitted to it are not inconsistent with each other or with the general verdict. It was found upon sufficient evidence that the driver of the Bocarde team carelessly and negligently drove his team in front of the horses of the Morton Company; that this caused the horses of the Morton Company to back, and that this was the proximate cause of the injury to deceased. The finding to the effect that if the Morton Company had supplied its dray with a suitable chain, and that if the chain had been used, and the wheels of the Morton truck locked, the accident would not have occurred is not material, nor does it in any way tend to excuse the negligence of the Bocarde Company. Unless the Morton Company was guilty of negligence by reason of the violation of the ordinance, the condition and equipment of its dray was wholly immaterial.

We conclude that the judgment and orders as to the Morton Company must be reversed, and as to the Bocarde Company affirmed, and it is so ordered.

We concur: HALL, J.; KERRIGAN, J.

(18 Idaho, 149)

CUNNINGHAM v. THOMPSON et al.
Board of County Com'rs.

(Supreme Court of Idaho. April 28, 1910.)

(Syllabus by the Court.)

1. HIGHWAYS (§ 122*)—SPECIAL TAX—VALIDITY OF STATUTE.

A section of a statute which provides for raising a fund to pay bonds by a special tax, and which provides no machinery or method for carrying into effect such section, will be held to be inoperative and void.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 380; Dec. Dig. § 122.*]

2. HIGHWAYS (§ 122*)—SPECIAL TAXES—VALIDITY OF STATUTE.

Section 21 of an act approved March 16 1909 (Laws 1909, p. 285), commonly known as the "good roads law," imposes no duty upon the board of county commissioners to levy the special tax referred to in such section, and provides no method or manner of levying such tax or the collection of the same, and provides no machinery for carrying said section into execution, and is therefore inoperative and void.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 380; Dec. Dig. § 122.*]

3. STATUTES (§ 64*)—EFFECT OF PARTIAL INVALIDITY.

It is the law in this state that if the provisions of an act are connected in subject-matter, dependent on each other, and designed to operate for the same purpose, or are otherwise so dependent in meaning that it cannot be presumed that the Legislature would have passed one without the other, then, if one part fails, the entire act must fall.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 58; Dec. Dig. § 64.*]

4. STATUTES (§ 64*)—EFFECT OF PARTIAL INVALIDITY.

Held, that section 21 of the act of March 16, 1909 (Laws 1909, p. 285), is an essential and necessary part of said act, and that it clearly appears that the Legislature would not have passed said act without section 21 having been made a part thereof, and that section 21 and section 20 were designed by the Legislature to operate for the same purpose; that is, to provide the method of creating a fund for the construction and maintenance of the roads of the county, and that each section depends upon the other.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 62, 65; Dec. Dig. § 64.*]

5. STATUTES (§ 64*)—EFFECT OF PARTIAL INVALIDITY.

Held, that, section 21 (Laws 1909, p. 285) being inoperative and void, the entire act is void.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 62, 65; Dec. Dig. § 64.*]

6. COUNTIES (§ 161*)—TRANSFER OF FUNDS—STATUTORY PROVISIONS.

The emergency contemplated by Rev. Code, § 937, which authorizes the board of county commissioners to transfer funds from the current expense fund to the road fund, was such emergency as might arise out of the actions of the elements in destroying or injuring roads or bridges, and not emergencies arising by the failure of the Legislature to authorize the levying of an adequate tax to keep the roads in such condition as the board of commissioners deem they should be kept in, or emergencies arising because of inoperative and void acts of the Legislature in creating such road fund.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 220; Dec. Dig. § 161.*]

Appeal from District Court, Ada County; Fremont Wood, Judge.

W. H. Thompson and others, as the Board of County Commissioners of Ada County, transferred money from the current expense fund to the road fund, and, from a judgment affirming their order of transfer, Arch Cunningham appeals. Reversed.

E. J. Frawley, for appellant. Chas. P. McCarthy and Cavanah & Blake, for respondents. McCready Sykes, amicus curiae.

STEWART, J. The appellant, a resident taxpayer of Ada county, appealed to the district court from the following order made by the board of county commissioners: "Whereas, it appears to this board of county commissioners that the maximum amount of eighty cents on one thousand dollars on the assessable property in Ada county, which can be levied for road purposes for the fiscal year beginning on the second Monday in January, 1910, will yield approximately the sum of \$8,000.00; and, whereas, it appears that during the fiscal year beginning on the second Monday in January, 1910, it will be necessary for this board of county commissioners in keeping the public highways within said Ada county in repair and in a safe condition for public travel to expend not less than the sum of \$20,000.00; and, whereas, it appears that the amount of money that can be raised by levying the maximum rate provided for by law for road purposes will be entirely insufficient to keep the public highways of Ada county in repair and in a safe condition for public travel, and that it will be necessary for this board to cause to be transferred from the current expense fund of said Ada county to the road fund the sum of at least \$12,000.00 for road purposes: Now, therefore, be it resolved: That for the purpose of providing sufficient finances to keep the roads and bridges of Ada county, state of Idaho, in repair and in a safe condition for public travel during the fiscal year beginning on the second Monday in January, 1910, the amount of \$12,000.00 be, and the same is hereby, transferred from the current expense fund of said Ada county for said fiscal year for the county road fund for said year. The said sum of \$12,000.00 so transferred to the county road fund to be used to meet the necessary cost and expenses of constructing, maintaining, and repairing roads and bridges during the said fiscal year. And be it further resolved that a special tax not to exceed one-half of one per cent. on the taxable property of said Ada county be levied annually until the said amount of \$12,000.00 so transferred from the current expense fund to the county road fund is raised and paid." The cause was tried in the district court, and the order of the board of county commissioners was sustained and affirmed. From that judgment this appeal was taken.

It is contended by appellant that the board

of county commissioners had no authority to make the order appealed from for the reason that such order was made by reason of the provisions of an act approved March 16, 1909 (Laws 1909, p. 274), commonly known as the "good roads law," which act is inoperative and void.

It may be conceded that, if what is known as the "good roads law" is void, then the county commissioners had no authority to enter the order appealed from, and the same should be annulled and set aside. Referring to this act, it will be observed that two methods are provided for raising revenue for road purposes. The first is by levying a road tax which shall not exceed 80 cents on each \$1,000 of the assessed valuation of the property taken from the assessment roll for the preceding year; the second, by issuing bonds of the county upon a two-third's vote of the electors of the county, and the creation of special taxing districts extending along the course of a road or highway, and by levying a special tax upon the lands within said district to pay such proportion of such bonded indebtedness as the board may determine. The second method thus provided for is embraced in the provisions of section 21 of this act, and it is the contention of appellant that this section is so indefinite, uncertain, and incapable of execution that it is void, and because such section is void the entire act is void. By the provisions of this section it, no doubt, was the intention of the Legislature to provide a method by which, when bonds were authorized to be issued by a vote of the electors of the county for the purpose of constructing or improving a particular line of road or a bridge, the cost of constructing or improving such road should be partly assumed and paid by the county as a whole and partly assumed and paid by a taxing district including certain lands especially benefited by the construction of such road. After providing for the method of voting bonds, said section provides: "And in addition may provide for the creation of a special taxing district, extending along the course of such road, or highway; such taxing or assessment district shall consist of the land and property which shall abut such highway, when it shall have been constructed, and all other lands nearby, which, in the judgment of the commissioners, will be especially benefited by such highway. Such special taxing or assessment district shall be subject and liable to such proportion of the indebtedness created by such bond issue, and in such degree as the board shall designate in such resolution, and such bonds shall constitute a lien on all taxable property therein, as to such proportion so designated by the board of county commissioners. The board shall direct the road supervisor to prepare a map, to be filed with the clerk of the board, showing the tracts of land therein included, and the assessed owners thereof, and giving the definite boundaries of such district with reference to the

legal subdivisions, which map shall be incorporated by reference into the resolution authorizing the bond issue. And such boundaries, and the land included therein, shall thereafter constitute such special taxing or assessment district."

It will be observed that this section provides for the creation of a special taxing district, and that such district shall be subject and liable to such proportion of the indebtedness created by such bond issue and in such degree as the board shall designate in such resolution; and such bonds shall constitute a lien on all taxable property therein. There is no provision, however, made in said section, which requires or makes it the duty of the board of county commissioners to levy a special tax to discharge such lien. No method is provided for or designated as to the manner of levying this tax or the collection of the same, and no machinery is outlined for carrying into execution the levying or collecting of the special tax to be levied against the lands within said taxing district. It is impossible to determine how the special tax shall be levied or distributed, and how or in what manner it shall be collected, or by whom, or what shall be done with the money to be thus collected. In other words, the section standing alone fails to provide any machinery for carrying into execution the provisions with reference to the special tax to be levied in the taxing district. This is the only section found in the act which deals with the subject of assessment districts or the levying of a special tax within such district. If bonds, therefore, were voted by the county, there is no method provided for paying the proportion of the indebtedness created by such bond issue, designated to be paid by the taxing district, in the order or resolution of the board authorizing a vote to be taken as to the issuance of such bonds. It requires no extended argument to prove that this section provides no means for its execution. A casual reading of such section is sufficient proof.

It was conceded upon the argument by counsel for respondent, as well as special counsel who presented a brief upon behalf of the good roads association as *amicus curiæ*, that such is a fact. But it is argued by counsel for respondent and also by counsel for the "Ada County Good Roads Association" that, even though section 21 be void, still it is the duty of the court not to declare the statute as a whole void unless the nullity and invalidity are beyond reasonable doubt. This is now the settled law of this state. *Gillesby v. Board of Com'rs*, 107 Pac. 71.

It is also settled in this state that if the provisions of an act are connected in subject-matter, dependent on each other, and designed to operate for the same purpose, or are otherwise so dependent in meaning that it cannot be presumed that the Legislature would have passed one without the other, then if one part fails the entire act must fail.

Ballentine v. Willey, 3 Idaho (Hasb.) 496, 31 Pac. 904, 95 Am. St. Rep. 17; *Knight v. Trigg*, 16 Idaho, 256, 100 Pac. 1060; *Gillesby v. Board of Com'rs*, 107 Pac. 71. If, therefore, taking this statute as a whole, it clearly appears that section 21 was considered and recognized by the Legislature as an important and integral part thereof, and so connected in subject-matter with other provisions of the act, and other provisions were so dependent upon section 21, that it cannot be presumed that the Legislature would have passed said act with such section omitted, then the entire act must fall.

Under the road law as it existed prior to the adoption of the act now under consideration, the board of county commissioners were authorized to levy a tax for road purposes of not less than 10 nor exceeding 60 cents on each \$100 of valuation. Under the good roads law now under consideration, the board is authorized to levy a tax for road purposes to not exceed 80 cents on each \$1,000 of valuation. There must have been some reason for this decided and great reduction in the general levy the board were authorized to make, and an examination of section 21 clearly discloses such reason. This section provides for the creation of special taxing districts and authorizes the issuance of bonds upon a vote of the electors of the county for the construction of roads and bridges within such district and the levying of a special tax within said district to aid in paying such bonds.

The Legislature no doubt were of the opinion that the creation of special taxing districts and the issuing of bonds as provided by this section would make it unnecessary to authorize the board of commissioners to levy so high a tax for general road purposes. In other words, the general levy was reduced in contemplation of the bond issue and the creation of the special taxing districts, and section 21 is intended to supplement section 20, each depending upon the other, and so connected that if section 21 fails the purpose of the Legislature in enacting said good road law has been defeated. These two sections were clearly designed by the Legislature to operate for the same purpose; that is, to provide the method of creating a fund for the construction and maintenance of the roads of the county. In our opinion, these two sections are so dependent in meaning that it clearly appears that the Legislature would not have passed one without the other. If these two sections are obliterated, then the act has no force whatever because no provision is left for raising funds for road work.

It is, however, argued by counsel for respondent that, although section 21 is void, yet the remainder of the act should be upheld because Rev. Codes, § 937, provides means by which sufficient funds can be covered into the road fund to supply the loss occasioned by reason of the defeat of the bond proposition. This section, among other things, provides: "Whenever it appears to the board of coun-

ty commissioners that the road fund is or would be unreasonably burdened by the expense of constructing, or of maintaining and repairing, any bridge or road, * * * the said board may, in its discretion, cause a portion of such cost or expense to be paid out of the current expense fund of the county, and may levy a special tax" to pay the same. This, however, does not answer the contention that section 21 of the good roads law is an essential part thereof, and was an inducement which led the Legislature to enact such law, because, if that be true, then the entire act must fall, and the provisions of Rev. Codes, § 937, cannot save the law. This section was intended as an emergency provision and authorizes the board of county commissioners to cause a portion of the cost of constructing, maintaining, and repairing any bridge or road to be paid out of the current expense fund when the road fund would be unreasonably burdened by such expense. The emergency, however, contemplated by this section, was such as arises by reason of destruction or injury to roads or bridges previously constructed. It was not intended to authorize the transfer of funds from the current expense fund to the road fund for the purpose of creating a sufficient road fund to inaugurate a new plan or system of constructing or building roads throughout the county. Neither was it intended that the board should be authorized to make such transfer to replace funds lost to the road fund by reason of inoperative or void acts of the Legislature. When this section was enacted, the Legislature certainly did not anticipate that the road fund of the county would be burdened on account of the Legislature passing inoperative or void acts affecting the means and method of providing a road fund, but rather had in mind emergencies which might arise out of the action of the elements in destroying or injuring roads or bridges. It was clearly within the power of the Legislature to authorize the board of commissioners to levy a higher rate of taxes for general road purposes, and the Legislature has the constitutional power to determine the extent of such levy. The mere fact that the levy provided by the Legislature will not raise a sufficient amount of money to keep the roads of the county in that state of repair in which the board of commissioners believe they should be kept would not be a reason why the board of commissioners could draw upon the current expense fund, and was not the emergency contemplated by the provisions of section 937, *supra*.

We have carefully examined the act involved in this case with a view of giving it effect, as it appears to have been the intention and desire of the Legislature in enacting such statute to provide means for better roads, but we cannot do so without trespassing upon the powers of the Legislature. As

said by the court in *State v. Partlow*, 91 N. C. 550, 49 Am. Rep. 852: "A statute must be capable of construction and interpretation; otherwise, it will be inoperative and void. The court must use every authorized means to ascertain and give it an intelligible meaning; but if, after such effort, it is found to be impossible to solve the doubt and dispel the obscurity, if no judicial certainty can be settled upon as to the meaning, the court is not at liberty to supply—to make—one. The court may not allow conjectural interpretation to usurp the place of judicial exposition. There must be a competent and efficient expression of the legislative will." And as was said by the Supreme Court of Montana in *Hilburn v. St. Paul, M. & M. Ry. Co.*, 23 Mont. 229, 58 Pac. 551: "So, if an act of the Legislature is so vague and uncertain in its terms as to convey no meaning, or if the means for carrying out its provisions are not adequate or effective, or if it is so conflicting and inconsistent in its provisions that it cannot be executed, it is incumbent upon the courts to declare it void and inoperative." *State v. West Side St. Ry. Co.*, 146 Mo. 155, 47 S. W. 959; 1 Lewis' *Sutherland*, Stat. Const. § 86.

From what has been said, it follows that the judgment of the district court is reversed. Costs awarded to appellant.

SULLIVAN, C. J., and AILSHIE, J., concur.

(18 Idaho, 124)

MILLER v. LEWISTON NAT. BANK et al.
(Supreme Court of Idaho. April 27, 1910.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 513*)—
FINAL REPORT—APPROVAL—SCOPE OF ORDER.

Where an administrator has tendered his resignation and makes his final report as such administrator, an order made by the probate judge approving such report and discharging him as administrator and appointing his successor approves all that is contained in such final report, but does not approve and allow claims against the estate which are under contest upon objections of the heirs to a former report listing such claims, and the allowance of which claims upon the hearing of the former report was expressly ordered by the probate judge to be continued for further consideration.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2267-2291; Dec. Dig. § 513.*]

2. EXECUTORS AND ADMINISTRATORS (§ 513*)—
FINAL REPORT—APPROVAL—SCOPE OF ORDER.

Where an administrator allows certain claims against the estate and thereafter renders a report listing such claims, and heirs of the deceased object to such report and the allowance of such claims, on the ground that the administrator is interested in such claims as a joint debtor with the decedent, and upon the hearing of such report the probate court approves the same except as to such claims and continues such claims for future consideration, and the administrator tenders his resignation as administrator and renders his final report, and the probate court accepts such

resignation and appoints his successor, the approval by the probate court of the final report of such administrator does not approve and allow such contested claims.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 513.*]

3. EXECUTORS AND ADMINISTRATORS (§ 236*)—CLAIMS—FAILURE TO INDORSE ALLOWANCE OR REJECTION—EFFECT.

Where claims are pending against an estate before the probate court upon an order setting aside their former allowance by the administrator and the probate judge upon objections by the heirs, the probate judge is not required to indorse upon said claims his allowance or rejection of the same within ten days after such order, nor does his failure to do so amount to a rejection of said claims, and defeat his jurisdiction to set said claims for hearing upon the objections made by the heirs.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 236.*]

4. EXECUTORS AND ADMINISTRATORS (§ 256*)—ALLOWANCE OF CLAIMS—APPEAL TO DISTRICT COURT—JUDGMENT.

Where claims are filed against an estate and objections are made by heirs of the decedent to their allowance, and such objections are heard and tried by the probate court and thereafter appealed to and heard and tried in the district court, a judgment rendered in the district court against the administrator of said estate for the aggregate amount due upon said claims, with direction that said judgment be paid by the administrator in due course of administration, is in proper form, and not erroneous.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 256.*]

5. LIMITATION OF ACTIONS (§ 83*)—DEATH OF PERSON LIABLE.

The provisions of Rev. Codes, § 4071, were not intended to shorten the time within which an action may be brought, under the general provisions of the statute, but were intended to extend such time in certain cases; that is, where at the time of a party's death there is not one year left of the period of limitation prescribed by the general statutes after the issuing of letters, the claimant shall have at least one year therefrom; and to this extent this section extends rather than shortens the period. If, however, at the time of issuing letters more than one year is left of the period of limitation prescribed by the general statute, then this statute does not shorten that period, and in such case has no effect.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 426, 431-438; Dec. Dig. § 83.*]

6. EXECUTORS AND ADMINISTRATORS (§ 241*)—ALLOWANCE OF CLAIM—INTEREST OF ADMINISTRATOR.

The fact that an administrator allows a claim against the estate, based upon promissory notes upon which the administrator and the deceased guaranteed the payment, does not render void or uncollectible such claim.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 849; Dec. Dig. § 241.*]

7. GUARANTY (§ 31*)—JOINT AND SEVERAL OBLIGATION.

A contract of guaranty indorsed upon the back of a promissory note in the following words: "For value received I hereby guarantee the payment of the within note and waive protest, demand and notice of nonpayment thereof"—is a several, as well as a joint, obligation of each person who executes such contract.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 33, 34; Dec. Dig. § 31.*]

8. GUARANTY (§ 47*)—NATURE OF SEVERAL OBLIGATION.

Such contract of guaranty being several, the obligation of each person who executed such guaranty becomes absolute upon default of the maker of such note.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 58; Dec. Dig. § 47.*]

9. GUARANTY (§§ 46, 70*)—NECESSITY FOR NOTICE OF NONPAYMENT BY PRINCIPAL.

Under the provisions of such contract of guaranty, the holder of such note was under no obligation to pursue the maker or use any diligence whatever to enforce the collection of said note against the maker, or to give notice to the guarantors of the nonpayment of said note.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 56, 57, 78-80; Dec. Dig. §§ 46, 70.*]

10. EXECUTORS AND ADMINISTRATORS (§ 234*)—ALLOWANCE OF CLAIM—COLLUSION BETWEEN ADMINISTRATOR AND CLAIMANT.

The fact that an administrator, jointly liable with the deceased upon a contract of guaranty, allows a claim against such estate founded upon such contract of guaranty, does not show or tend to show a collusion between the administrator and the claimant to allow or enforce such claim against the estate in fraud of the rights of the heirs of said estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 234.*]

11. GUARANTY (§ 77*)—REMEDIES.

The holder of a promissory note is under no obligation in equity to pursue the maker of such note rather than a guarantor of the payment of such note, upon default being made in the payment of such note according to its terms, but may rely wholly upon the contract of guaranty and resort to such in enforcing the payment of such obligation.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 87-90; Dec. Dig. § 77.*]

(Additional Syllabus by Editorial Staff.)

12. GUARANTY (§ 1*)—DEFINITION.

"A 'guaranty' is a contract by which one person is bound to another for the due fulfillment of a promise or engagement of a third party."

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3179-3186; vol. 8, p. 7676.]

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Proceedings for settlement of the estate of Cary A. Coryell. From a judgment allowing claims of the Lewiston National Bank and others, George T. Miller, administrator, appeals. Affirmed.

John O. Bender, for appellant. James E. Babb and John R. Becker, for respondents.

STEWART, J. On March 2, 1907, Cary A. Coryell died in Nez Perce county, this state, and on April 30, 1907, J. Howard Howe was appointed administrator with the will annexed. On November 6, 1907, there were presented to J. Howard Howe, as such administrator, claims in favor of the Lewiston National Bank as follows: A note dated April 1, 1904, payable to the order of the said bank for the sum of \$8,616.75 and interest, executed by C. W. Colby.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

J. Howard Howe, and C. A. Coryell, on which note it was alleged there was still due the sum of \$8,018.75 and interest. A note dated December 29, 1905, payable to the order of said bank for the sum of \$10,000 and interest, executed by the Colby-Coryell & Howe Lumber Company, and upon the back of which was written the following guaranty: "For value received I hereby guarantee the payment of the within note and waive protest, demand and notice of nonpayment thereof. C. W. Colby. J. Howard Howe. C. A. Coryell." A note dated March 30, 1906, payable to the order of said bank for the sum of \$10,000 and interest, executed by the Colby-Coryell & Howe Lumber Company, and indorsed with the following guaranty written on the back thereof: "For value received I hereby guarantee the payment of the within note and waive protest, demand and notice of nonpayment thereof. C. W. Colby. C. A. Coryell. J. Howard Howe. Louis Diether." A note dated June 13, 1906, payable to the order of said bank for the sum of \$5,000 and interest, executed by the Colby-Coryell & Howe Lumber Company, and upon the back of which was indorsed the following written guaranty: "For value received I hereby guarantee the payment of the within note and waive protest, demand and notice of nonpayment thereof. J. Howard Howe. C. A. Coryell. Louis Diether. C. W. Colby." Thereafter, and on November 18, 1907, said administrator indorsed upon each of said claims an allowance thereof, and on the same date they were presented to and indorsed as allowed by the probate judge. On November 21, 1907, said administrator returned an inventory and appraisal. On February 14, 1908, Howe filed an account which after notice was approved February 24, 1908, without objection. In this report is found the following recitation: "All claims that have been presented against said estate are on file in said court except the claim in favor of the M. E. Church for \$100, which has been returned to claimant for correction." On February 29, 1908, Fred D. Coryell filed a petition for the removal of J. Howard Howe as administrator. Citation was issued returnable March 10th. On March 10th the administrator filed an answer to the petition, and asked leave to resign as such administrator. On March 14th he filed his final account and resignation. On the same day an order was entered setting said final account and resignation for hearing on March 23, 1908. On March 27th Norah B. McDole, Alice E. Denberger, and Ella F. Phillips, children of the deceased, Cary A. Coryell, filed exceptions to the account of the administrator, one of which was to the effect that the administrator had not returned a statement of claims against the estate containing names of creditors, nature of each claim, when due

or when to become due, and whether allowed or rejected. On April 4th the administrator filed a verified statement listing claims and containing the information on account of which the exceptions to the administrator's account were made by McDole et al. Among the claims thus listed were the claims of the Lewiston National Bank heretofore referred to. On April 4th heirs of the deceased filed a motion to vacate and set aside the order made by the probate judge approving as allowed by the administrator the claims presented by the Lewiston National Bank. This motion was based upon the claim that J. Howard Howe, C. W. Colby, Louis Diether, and C. A. Coryell, deceased, were jointly liable on said notes as guarantors, and were not jointly and severally liable or severally liable thereon, and, for that reason, upon the death of said Cary A. Coryell, said obligations abated and the estate of the deceased was not liable, and J. Howard Howe, the administrator, C. W. Colby, and Louis Diether, were alone liable for the payment of such claims.

On April 4th the probate court made an order to the effect that the account filed March 14th having been heard on the objections filed, said account is settled and approved and allowed, except that the validity and amount of the claims allowed in favor of the Lewiston National Bank not having been passed upon or allowed or adjudicated by a foregoing order, and the validity thereof and the amount due thereon having been reserved for future consideration, and right having been reserved to the heirs, creditors, and succeeding administrator to take such proceeding as they might deem proper against said claims of Lewiston National Bank, at any time prior to final settlement of the estate, but that the foregoing statement shall not delay the final settlement of the account of the present administrator or the acceptance of his resignation. On April 10th a citation was issued addressed to Howe, administrator, and James E. Babb and the Lewiston National Bank, directing them to show cause on April 20th why the motion of Phillips, Denberger, McDole, and Coryell should not be allowed; and attached to the citation was a copy of the motion, which, in addition to the grounds stated in the original motion, alleged that the claims were the claims of the administrator, and had not been presented or allowed as provided by law, and because the administrator was liable for the claim of \$8,018.75, which had not been presented or allowed as provided by law. On April 23, 1908, the administrator filed an answer to the order to show cause, and the bank also filed an answer. On April 30th the court made an order, which, among other things, accepted the resignation of J. Howard Howe as administrator, and directed that upon the pay-

ment by him to his successor of the balance on hand as per a previous order, together with such other sums as shall have come into his hands since the filing of his final account, he should be discharged and George T. Miller appointed administrator as his successor; that the order vacating an order approving as allowed certain claims to the Lewiston National Bank and specifically reciting "that the exhibit of J. Howard Howe, administrator, marked 'Statement of J. Howard Howe, administrator with the will annexed, in re presentation and disposition of claims,' filed April 4, 1908, in the probate court of Nez Perce county, Idaho, be, and the same is hereby, approved and allowed as rendered and presented, save and except as to the items numbered, respectively, 8, 9, 10, and 11 thereof, relating to claims of the Lewiston National Bank for, respectively, \$10,000 \$5,000, \$10,000, and \$8,016.75, which said items are not allowed and approved as rendered and presented by said administrator in said exhibit, but on which the order of approval has as to each thereof been vacated, set aside, and held for nought by an order this day made and entered herein." On May 4th Howe filed a report showing the status of his account with such estate accompanied with a receipt of Miller, his successor, for all the property belonging to said estate. This report, however, contained no lists of any claims filed against said estate either allowed or rejected. No mention whatever was made of any claims filed or pending against said estate. The report is brief, recites the cash on hand, the sources from which it was received, the amount paid out, the amount claimed as commission, and the amount of his certificate of deposit showing the balance in the hands of the administrator. Then follows a receipt from his successor. An order was made fixing a day for settlement of this account and notice given as required by law, and on May 25th the probate court made an order approving and allowing the resignation of the administrator and the acceptance and approval of his final account. No mention, however, was made in this order with reference to the claims of the Lewiston National Bank, or whether the same had been allowed or rejected or were still pending against said estate.

The Lewiston National Bank appealed to the district court from certain orders made by the probate court, and the cause was heard in the district court and a judgment entered therein reversing certain orders of the probate court, and from which judgment the administrator appealed to this court. The case was heard in this court, and was reported in *Lewiston National Bank v. Miller*, 16 Idaho, 201, 101 Pac. 723. In that opinion this court held: "We therefore conclude in this case that the district court did not err in dismissing the appeal from the

probate court, and that the claims of the Lewiston National Bank and the final account of J. Howard Howe, administrator, with reference to such claims, are still pending in the probate court upon the objections and exceptions of the heirs and parties appearing against the allowance of such claims." After the opinion was rendered in that case by this court, and on June 12, 1909, the probate court of Nez Perce county ordered that the claims of the Lewiston National Bank against said estate and that part of the account of J. Howard Howe as administrator with reference to said claims be set for hearing on June 28, 1909. Objections were filed by children and heirs of the deceased, Cary A. Coryell, to the probate court proceeding further under the order that was made June 12, 1909. This motion is quite elaborate, but in the main assigned as a reason that it appears from the records that on May 23, 1908, Howe was finally discharged as administrator, and that he had rendered a full, true, and correct final account, and because this court in the opinion heretofore referred to held that on April 30, 1908, the date when the orders of the probate court were made from which appeals were taken, the claims of said bank were still pending against said estate, and under that decision the claims stood on April 30, 1908, the same as if they had been presented to said probate judge for his approval as provided by section 5466, Rev. Codes, and that said claims remained pending against said estate for a period of 10 days or more after said April 30th, and said probate judge refused and neglected to indorse on said claims his refusal of allowance or rejection, and that his failure to act amounted to a rejection of said claims by operation of law, and inasmuch as the probate court thereafter on May 25th approved the final account of Howe and thereby disposed of said claims of said bank, and no appeal having been taken from said order, the probate court thereby lost jurisdiction of said matter without first vacating and setting aside said order of May 25th.

This matter came on for hearing before the probate court, and the probate court made an order to the effect that the order of May 25, 1908, approving said final account of said Howe and discharging him as administrator of said estate, embraced all matters of said administrator in his administration of said estate which had not theretofore been passed upon by said court, that the claims of said Lewiston National Bank were not approved by the probate judge of said court at any time after the making of said orders on April 30, 1908, from which said appeal was taken to the district court, and that said claims upon the expiration of 10 days from the date of said orders became rejected, under the provisions of section 5466 of the Revised Codes, and stood rejected in said account of said administrator thereafter.

er, and at the time of the approval of said account by said court on May 25, 1908, that said order of May 25th has not been vacated, but remains in full force and effect, and that the claims of the bank are denied, rejected, and disallowed and the proceedings dismissed. From this order of the probate judge an appeal was taken to the district court.

When this case was called for trial in the district court, the heirs of Coryell made a motion to dismiss the appeal on the following grounds: First. That this appeal is not taken from a judgment or order of the probate court granting, refusing, or revoking letters testamentary or of administration or of guardianship, admitting or refusing to admit a will to probate, acceptance or in favor of the validity of a will or revoking the probate thereof, acceptance or in favor of setting apart property or making an allowance for a widow or child, acceptance or in favor of directing the partition, sale, or conveyance of real property, settling an account of an executor or administrator or guardian, refusing, allowing, or directing the distribution or partition of an estate or any part thereof, or the payment of a debt, claim, legacy, or distributive share, confirming the report of appraiser setting apart the homestead. Second. That the probate court had no jurisdiction because the matter had been finally determined in the order of May 25th approving the final account of Howe. This motion was denied, and thereafter counsel or the heirs objected to the court hearing the matter on the ground that the court had no jurisdiction because the matter had been determined by the decree of the probate court on May 25, 1908. This objection was overruled by the district court, after which counsel for the bank made a motion for judgment in favor of the bank and against George T. Miller as administrator of the estate of Cary A. Coryell, deceased, upon transcript of the record from the probate court. This motion was also overruled. Whereupon transcript certified by the clerk of the probate court on September 28, 1909, and filed in the district court on the same day, was received and received in evidence. The bank so introduced in evidence each of the promissory notes heretofore referred to, and upon which the bank based its claim against the administrator of the Coryell estate. No objection whatever was made to the introduction of these notes, and no question urged as to the genuineness of the signatures. J. Howard Howe was then sworn as a witness, and testified that the several claims referred to were presented to him as administrator of the estate of C. A. Coryell on November 6, 1907, and that the notes had not been paid and stated the amount due. F. W. Ketzbach was also sworn, and testified that nothing had been paid upon these notes since their presentation to Howe as administrator.

The court made its findings of fact and conclusions of law, and entered judgment in favor of the Lewiston National Bank v. George T. Miller, Administrator De Bonis Non of the Estate of Cary A. Coryell, Deceased, for \$38,865.58.

There was no error in overruling the motion to dismiss respondent's appeal from the probate to the district court. Section 4831, Rev. Codes, clearly authorized the appeal from the order made by the probate judge, which, in effect, amounted to a disallowance of the respondent's claims against said estate. The question upon which this appeal necessarily turns is: Was the objection made to the jurisdiction of the probate court to proceed under the order made on June 12, 1909, setting the claims of the Lewiston National Bank against said estate and the account of Howe as administrator for hearing on June 28, 1909, well taken? This objection was based upon two propositions: First. That this court having decided (16 Idaho, 201, 101 Pac. 723) that the claims of the respondent were in the status of pending and undetermined claims on April 30, 1908, the date of the order from which the appeal was taken in that case, under the provisions of Rev. Codes, § 5466, the probate judge was required to approve or disallow said claims within 10 days after such date, and, the probate judge not having indorsed his approval of said claims within the said ten days, such neglect amounted to a rejection of said claims. Second. The administrator, having made a report on May 25, 1908, and subsequent to the date this court in the former opinion, held that said claims were in the status of pending claims, and, said report having been approved and no appeal having been taken from the order of approval, the action of the probate court in approving said account became final and conclusive as to such claims.

The status of these claims at the time the order of April 30, 1908, was made and from which the appeal was taken, is very fully discussed in the former opinion in this case, (16 Idaho, 201, 101 Pac. 723, supra), and in that opinion this court says: "It appears that the Lewiston National Bank presented claims to the administrator on November 6, 1907; that on November 16, 1907, the administrator allowed said claims, and on the same day they were presented to the probate judge and by him allowed. On the 14th of March the administrator filed his account and resignation, and the same was set for hearing on the 23d of March. On April 4th, after exceptions had been filed to the failure of the administrator to return a list of claims, and after a motion had been filed to vacate the allowance of the claims by the court, the probate court filed an order to the effect that the claims of the Lewiston National Bank had not been passed upon and allowed and were reserved for future consideration; and on April 30th the resignation of the administrator was allowed, a new administra-

tor was appointed, and an order was made vacating and setting aside the order made by the probate judge on the 16th day of November, 1907, approving and allowing the claims of the Lewiston National Bank, and the report of Howe administrator, made on April 4, 1908, of a re-presentation and disposition of claims against the estate was approved, except as to the claims of the Lewiston National Bank, which were not allowed and approved as rendered and presented by the administrator." It thus appears that the claims of the respondent were presented to J. Howard Howe, the original administrator, and by him allowed, and that their allowance was approved also by the probate judge; afterwards objection being made to such allowance by the heirs of Cary A. Coryell, on the ground that Howe as such administrator was interested in such claims by reason of his contract of guaranty, and therefore not qualified to act as administrator or allow such claims as administrator. Upon this objection being made, the probate court set aside the allowance previously made and continued such claims for future consideration, and upon this condition of the record this court held in the former opinion that on April 30, 1908, such claims were in the status of pending claims against such estate. The statute regulating the presentation of claims for allowance does not require that said claims shall be presented to each administrator who may act as such during the administration of such estate. One presentation of a claim is sufficient, and, if objections are made to its allowance, it becomes a contested claim, but the statute does not require a representation of such claim after it becomes a contested claim. The claims involved in this case were presented to both the administrator and the probate judge. The fact that the allowance indorsed upon such claims at the time of presentation was afterwards set aside by the probate judge upon objection being made by heirs of the deceased would not necessitate any further presentation of such claims to the administrator or the probate judge. The indorsement of the time of presentation and the allowance or rejection of a claim is a requirement for the purpose of fixing the time from which the statute of limitations begins to run, but is not a requirement which in any way affects the validity of the claim. One of the methods specifically pointed out by statute by which the heirs of a decedent may contest a claim presented against the estate is by objections to the report of the administrator which shows the allowance of such claim; and it was this method the heirs of Cary A. Coryell pursued in this case, and it was upon such procedure that this court held in the former opinion that the claims of the respondent were pending claims on April 30, 1908, the date of the order from which the appeal was taken in that case. Upon the second proposition it would seem that a discussion is wholly unnecessary, because, if

appellant is correct in his contention that the approval of the report made on May 25th disposed of the claims of the respondent, then the approval of such report approved such claims, and appellant has no standing in this court.

Counsel for appellant, however, contends that it was necessary for respondent to present the claims involved in this case to the administrator and the probate judge for indorsement within 10 days after April 30, 1908, and that, this not having been done, such claims were rejected by law and after that date stood as rejected claims, and, when the report of May 25th was approved, the rejection of such claims was also approved. But we do not believe that this contention is correct. The report made on May 25th was merely a supplemental report covering the acts of the administrator subsequent to his former report, and in no way alluded to or gave an account of or reported on the claims of the respondent. The heirs had objected to Howe as administrator allowing such claims, and it was upon this objection that Howe tendered his resignation as such administrator, and the orders of the probate court show conclusively that the claims of the respondent were continued and no disposition whatever made of them for the express purpose of leaving such claims pending for consideration by the administrator to be appointed as the successor of Howe. For this reason no mention whatever was made of these claims in the final report of Howe made on May 25th, and which was afterwards approved. The approval of that account in no way disposed of the respondent's claims. They had been expressly reserved by the orders of the probate court for future consideration, and the report shows conclusively that no hearing was had subsequent to April 30th upon these claims, or did the probate court take any action upon such claims subsequent to that date. If, then, the report of the administrator made on May 25th did not embrace these claims, and the approval of such report in no way approved or disposed of such claims, then such claims were in the status of pending claims against said estate and in the same condition in which they were on April 30, 1908, the date the order was entered from which the former appeal was taken.

Counsel for appellant, however, contends that either the order made on April 30th or the order made on May 25th revoked the letters of administration issued to Howe and determined every matter which was necessary to be determined, including the settlement of all the accounts of such administrator including the claims of the respondent, and that such order released such administrator from any further duties to the estate, and ousted the probate court of jurisdiction over him and over the affairs and accounts of his administration. Returning to the order of April 30th we find that such order accepted the resignation of J. Howard Howe

as administrator, and appointed George T. Miller as his successor, and directed that Howe turn over to Miller all moneys and property belonging to said estate, and then expressly recited: "That the exhibit of J. Howard Howe, administrator, marked 'Statement of J. Howard Howe, administrator with the will annexed, in re presentation and disposition of claims,' filed April 4, 1908, in the probate court of Nez Perce county, Idaho, be, and the same is hereby, approved and allowed as rendered and presented, save and except as to the items * * * relating to claims of the Lewiston National Bank for, respectively, \$10,000, \$5,000, \$10,000, and \$6,016.75, which said items are not allowed and approved as rendered and presented by said administrator in said exhibit, but on which the order of approval has as to each thereof been vacated, set aside, and held for nought, by an order this day made and entered herein." This order then accepted the resignation of Howe, appointed his successor, directed him to turn over the property of the estate to his successor and approved all of his account except the matters relating to the claims of the Lewiston National Bank, respondent herein. In reviewing this order in connection with previous orders made by the probate court, this court held that such claims were pending claims upon the making of such order. 16 Idaho, 201, 101 Pac. 723. Referring also to the report made by Howe on May 25th, it shows that it embraced matter and acts of the administrator subsequent to his former report, and was a final account showing the receipt of his successor for the property belonging to said estate, and was made in accordance with the provisions of the order of April 30th, and in no way referred to the claims of the bank, thus leaving such claims in the same condition in which they were at the time the order of April 30th was made. The approval of the report filed May 25th ended Mr. Howe's connection as administrator with such estate, and was final as to his accounts, except on such matters as had not been disposed of and were continued for future consideration. The probate court in approving the report of Howe as administrator and accepting his resignation and appointing his successor did not thereby approve claims filed against said estate which were expressly reserved for future consideration. Neither was it necessary for the probate court to finally dispose of pending claims against such estate before the court had power to accept the resignation of the administrator or appoint his successor.

It is next contended that the district court erred in rendering judgment against the appellant estate in the aggregate sum found due upon the contested claim. Under this contention, it is claimed that the only judgment the district court could render was to order the probate court to allow such claims, and that any heir or creditor of said estate, notwithstanding such order or judgment of

the district court, would have the right to contest said claims at any time before they were passed upon in settling the final account of the administrator. In the case of *In re McVay's Estate*, 14 Idaho, 64, 93 Pac. 31, this court very fully discussed the question of practice on appeal to the district court from the probate court in probate matters, and said: "Whatever judgment may be entered in the district court is to be certified back to the probate court for execution in accordance therewith." When an account rendered by an administrator comes on for hearing, everything contained in such account also comes on for hearing, including listed claims, and, when an order is entered approving such account, such order approves everything contained in such account. If, however, such account is not approved in toto, and claims listed in such account are rejected and disallowed upon objection and protest of heirs or creditors of said estate, and such matter is thereafter appealed to the district court and there litigated and tried, and a judgment rendered in favor of the claimants, such judgment establishes the claim in the same manner as if it had been allowed by the executor or administrator and the probate judge; and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due. A certified transcript of the judgment must be filed in the probate court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment. In other words, such claim by passing to judgment becomes an acknowledged debt of the estate to be paid in due course of administration.

Referring to the judgment in this case, it is for the aggregate amount found by the district court to be due the respondent upon such claims, and is rendered against the appellant as administrator for such sum, and directs that such judgment is to be paid in due course of administration of said estate. We see no reason why this judgment is not correct in form or why it would have been necessary to render a separate judgment on each one of the specific claims. They were all alleged to be due the same claimant by the same estate, and, while the findings of the court specified the amount due upon each, yet there is no reason why the judgment should be a separate judgment upon each claim. In any event, we are unable to see how the appellant could in any way have been prejudiced by the form of the judgment.

It is also contended that the claims involved in this case are barred under the provisions of section 4071 of the Revised Codes. This section in part is as follows: "If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives,

after the expiration of that time, and within one year after the issuing of letters testamentary or of administration." It is apparent that the provisions of this section were not intended to shorten the time within which an action may be brought, under the general provisions of the statute, but were intended to extend such time in certain cases; that is, where at the time of a party's death there is not one year left of the period of limitation prescribed by the general statutes after the issuing of letters, the claimant shall have at least one year therefrom, and thus to this extent this section extends rather than shortens the period. If, however, at the time of issuing letters more than one year is left of the period of limitation prescribed by the general statute, then this statute does not shorten that period, and in such a case it has no effect whatever. In the case of *McMillan v. Hayward*, 94 Cal. 357, 29 Pac. 774, the Supreme Court of that state had under consideration section 353 of the Code of Civil Procedure of that state, which is identical with section 4071, supra, and held: "The evident purpose of section 353 is to secure to a party who has a cause of action against a decedent one year after the appointment of a legal representative within which to bring his action. This may or may not have the effect of extending the time. If it be necessary in order that such person shall have one year after the appointment of a legal representative, then suit may be brought after the expiration of the general limitation; otherwise this section does not have, nor was it intended it should have, any effect whatever upon his rights. Such construction does not shorten his time, as limited by the general statute. It simply leaves him to that statute, because it was not necessary to extend the time in order to give him his year." Referring to the notes upon which the claims involved in this case are based, we find that the first note was dated April 1, 1904, and payable on demand; the second, March 30, 1906, payable on demand; the third, dated June 13, 1906, payable on demand; the fourth, dated December 29, 1905, payable on demand. The limitation for commencing an action founded upon these notes is five years, as provided by Rev. Codes, § 4052. The record in this case shows that the deceased died March 2, 1907. Letters testamentary were issued April 30, 1907. Notice to creditors was ordered May 11, 1907, and the first publication was made May 12, 1907, and the claims were presented and allowed by the administrator and judge on November 16, 1907. The order vacating the allowance of the judge was made April 30, 1908. The claims were listed by the administrator supplementary to his account of March 14, 1908, such supplementary list filed April 4, 1908. Objections were made to the allowance of these claims and they were set for hearing and have been under contest ever

since. From this record it appears that on November 16, 1907, at the time such claims were allowed by the administrator and the probate judge, the general statute of limitations had not run against any of these notes; neither had such statute run at the time objections were made by the appellants to the allowance of such claims and the claims were set for hearing. We are unable to find any statutory authority for the contention of the appellant that it was the duty of the respondents to have their claims either allowed or rejected, and suit brought thereon within one year from the date of the issuing of the letters of administration. That is not what is meant by the provisions of section 4071, supra.

It is next contended that the allowance of the claims in controversy by J. Howard Howe while he was administrator was a nullity because he was a co-guarantor with the deceased for their payment and was also a stockholder in the lumber company, the principal debtor, and by reason of such facts his interest was adverse to the interests of the estate, and the approval of his account as administrator would be equivalent to the payment of his own obligation. It will be observed that the allowance of respondent's claims by Howe as administrator was set aside by reason of objections made by heirs of the deceased, and that such claims thereafter were heard upon trial both in the probate and the district court, and the respondent was required to prove its claims. The allowance, therefore, of Howe, whether valid or invalid, in no way affected the respondent's right to recover upon said claims against said estate. As said by this court (16 Idaho, 201, 101 Pac. 723, supra): "The mere fact that such claim has been previously allowed by the probate judge would not affect such claim upon such hearing except to cast upon the heir the burden of proof as the former allowance of such claims would become evidence prima facie of the claim. The order, however, of the probate judge setting aside the former allowance, was not equivalent to a disallowance of such claim, but left such claim as still pending against said estate." But, in addition to this reason, we do not believe that the allowance of such claims by Howe rendered said claims void or uncollectible. Howe was appointed administrator upon petition of the heirs. He had no claim against the estate and made no claim by reason of the notes in controversy in this case. He had not paid said notes; therefore, was not a creditor or a claimant against said estate. Before he could have been a claimant against said estate on account of such notes, it would have been necessary for him to have paid such notes; and, even if it be conceded that he was a creditor or might have become a creditor of said estate, still such fact would not have disqualified him from acting as administrator or render-

ed said claims void or uncollectible. Rev. Codes, § 5351.

It is next contended that the presentation of such claims to Howe and his allowance of the same in toto while he was equally liable as guarantor and also as a stockholder of the principal debtor, the lumber company, and the fact that the bank as claimant and Howe as administrator had the same attorney, in resisting the motion of the heirs to vacate such allowance, amounted to a collusion to defraud the estate of its rights to indemnity against the principal debtor, and the right to contribution against Howe as co-guarantor. We think that there can be no question but that the contract of guaranty indorsed upon the claims in controversy in this case and signed by Colby, Coryell, and Howe is a joint and several obligation of said guarantors. The contract, "For value received I hereby guarantee the payment of the within note and waive protest, demand and notice of non-payment thereof," is a several as well as a joint obligation of each person who executed such contract. It is expressly provided by subdivision 7 of section 3474 of the Revised Codes as follows: "Where an instrument containing the words, 'I promise to pay' is signed by two or more persons, they are deemed to be jointly and severally liable thereon." In construing such promises the courts have as a rule reached the same conclusion as is announced in this statutory provision. 14 Am. & Eng. Ency. of Law, 1160; 1 Daniel on Neg. Instruments, § 104; 2 Page on Contracts, § 1134; 1 Parson on Contracts, p. 27. If, then, the contract of guaranty was several, the obligation of Coryell to pay became absolute upon default of the principal, the lumber company. *Armstrong v. Slick*, 14 Idaho, 208, 93 Pac. 775; *Bagley v. Cohen*, 121 Cal. 604, 53 Pac. 1117. The signers of this guaranty were under an absolute agreement to see that the maker paid the notes at maturity. The contract of guaranty was absolute, and not conditional. If the maker failed to pay the note when due, the contract of guaranty was broken, and the holder of such notes had a right of action against each or all of said guarantors. The holder of such note was under no obligation to pursue the maker or use any diligence whatever to enforce the collection of said note against the maker or to give notice to the guarantors of the nonpayment of said note. *Roberts v. Hawkins*, 70 Mich. 566, 38 N. W. 575. In this latter case the court very exhaustively deals with the nature and extent of a contract of guaranty, and in the course of the opinion says: "A guaranty is held to be a contract by which one person is bound to another for the due fulfillment of a promise or engagement of a third party. 2 Pars. Cont. 520." And the court also quotes with approval from the case of *Brown v. Curtiss*, 2 N. Y. 226, as follows: "The undertaking of the defendant was not conditional, like that of an indorser, nor was it upon any condition

whatever. It was an absolute agreement that the note should be paid by the maker at maturity. When the maker failed to pay, the defendant's contract was broken, and the plaintiff had a complete right of action against him. It was no part of the agreement that the plaintiff should give notice of the nonpayment, nor that he should sue the maker, or use any diligence to get the money from him." In the case of *Hungerford v. O'Brien*, 87 Minn. 806, 34 N. W. 161, the Supreme Court of Minnesota had under consideration a guaranty in the following language: "For value, I hereby guaranty the payment of the within note to Cassie Hungerford or bearer." The court says: "The guaranty of 'the payment of the within note' imported an undertaking, without condition, that, in the event of the note not being paid according to its terms—that is, at maturity—the guarantor should be responsible. The nonpayment of the note at maturity made absolute the liability of the guarantor, and an action might at once have been maintained against him without notice or demand." The principle thus announced is in accord with the general weight of authority. *Delsman v. Friedlander*, 40 Or. 33, 66 Pac. 297; *Johnson v. Charles D. Norton Co.*, 159 Fed. 361, 86 C. C. A. 361; *Hoyt v. Quint*, 105 Iowa, 443, 75 N. W. 342. When, therefore, claims based upon said notes were presented to Howe as administrator of the estate of Coryell, and Howe allowed the same, he did no more than recognize the legal liability of the estate of Coryell under the contract of guaranty. There was no reason why such claims should not have been allowed, in so far as the contract of guaranty was concerned, and in making such allowance the administrator merely recognized the liability of the estate under the contract of guaranty.

The statement embraced in the last objection, to the effect that the bank as claimant and Howe as administrator had the same attorney in resisting the motion of the heirs to vacate such allowance, is not borne out by the record. The uncontradicted evidence in this case shows that James E. Babb was the attorney for J. Howard Howe, administrator, and that he had nothing whatever to do with the presentation or allowance of the claims of the respondent; that, after Mr. Howe's resignation as administrator and the appointment of Miller, then Mr. Babb became attorney for the bank in prosecuting such claims. There is nothing in the record in this case which even tends to show any collusion or fraud in the allowance or prosecution of the respondent's claims.

The fifth contention of appellant, as to the contract being joint and not several, has heretofore received attention.

It is next contended that, before the bank could recover upon the claims involved in this case, it was necessary to prove that the principal debtor, the lumber company, was insolvent and unable to pay said claims, and

that it was also necessary to show that the claims could not be collected from either the lumber company or Howe in order to refute the evidence of collusion between the respondent and Howe. This is a most remarkable contention, and, as we view the case, is founded upon surmise rather than the facts as disclosed by the record. As heretofore shown, the contract of guaranty entered into by Coryell, as one of the guarantors, became absolute upon the failure of the lumber company, the principal debtor, to pay the note; and, when such obligation became absolute, no duty was imposed upon the bank to pursue the principal debtor, but the bank had its option to resort to the contract of guaranty and this it did, and the fact that Howe as administrator recognized this contract of guaranty does not establish the fact that he was acting in collusion with the bank in order to injure the estate of Coryell or take from such estate property for which it was not legally liable.

There is no equitable principle to which our attention has been directed, and none suggested by the facts, which would require the bank to pursue the principal debtor, the lumber company, before it attempted to enforce the contract of guaranty. No doubt when the bank loaned the money, to secure which the notes involved in this case were given and the contracts of guaranty entered into, the bank relied upon such contracts of guaranty to the extent of the financial responsibility of the guarantors as security for such debts; and the bank had a legal right to pursue such contracts in order to recover the amount due upon such obligations, and no duty was imposed upon them to select any one of the debtors rather than any other one against whom to enforce such obligations. There is no pretense in this case that the appellant was not legally obligated to pay the claims involved in this case upon the contract of guaranty, unless they have been released therefrom by the fact that Howe, a co-guarantor acting as administrator of the appellant estate, allowed such claims against said estate, or because a collusion was shown to exist between the bank and Howe, for the purpose of compelling the estate to pay such claims, or because the contract of guaranty was joint, and, upon the death of Coryell, he thereby became released from said obligation. Whether Howe and Colby as joint guarantors with Coryell are liable to the appellant estate for their contributive share is not involved in this case. The death of Coryell would not release his estate from its liability, under the contract of guaranty, or pay the debt.

Counsel for appellant has exhaustively presented this case both in oral argument and brief. The questions upon which he relies for a reversal are in the main theoretical and technical. We have made an exhaustive ex-

amination of this case, and find no error in the record which calls for a reversal.

The judgment is affirmed. Costs awarded to respondent.

SULLIVAN, C. J., and AILSHIE, J., concur.

(41 Mont. 226)

VON TOBEL v. CITY OF LEWISTOWN.

(Supreme Court of Montana. April 23, 1910.)

1. APPEAL AND ERROR (§ 987*)—EQUITY CASES—CONSIDERATION OF EVIDENCE.

In an equity suit, where all the evidence is before the Supreme Court on appeal, it will make such disposition of the questions involved as the case requires.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3895; Dec. Dig. § 987.*]

2. DEDICATION (§ 39*)—ESTOPPEL TO ASSESS—MUNICIPAL CORPORATIONS.

Where a city permitted plaintiff to occupy a tract for 20 years without objection, during which time he placed valuable improvements thereon, and plaintiff would be compelled to remove his barns and other outbuildings and sustain great injury in having a part of his premises segregated by opening a street through such tract, and his trees, etc., would be thereby destroyed, the city was estopped from opening up a street through such tract under a claim that a part of it was dedicated as a street; the doctrine of estoppel in pais being applicable to municipal corporations in exceptional cases.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 77; Dec. Dig. § 39.*]

Appeal from District Court, Fergus County; Frank Henry, Presiding Judge.

Suit by Rudolf Von Tobel against the City of Lewistown. From a decree for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Wm. M. Blackford, for appellant. O. W. Belden and Rudolf Von Tobel, for respondent.

HOLLOWAY, J. This suit was brought to obtain an injunction restraining the city of Lewistown from opening or attempting to open a public street through certain premises claimed by the plaintiff. The plaintiff alleges that he is, and for more than 20 years last past has been continuously, the owner and in possession of certain lands situated within the corporate limits of the city of Lewistown (then follows a description by metes and bounds), that Third avenue in said city abuts on his property, and that about August 16, 1907, the city, without any right and against the will of the plaintiff, tore down his fence inclosing his property, and threatens to, and, unless restrained, will, open and extend Third avenue through his property for a distance of about 300 feet. The answer admits that defendant tore down plaintiff's fence, that unless restrained it will open and extend Third avenue through his premises; but denies that in so doing

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

it has acted or will act wrongfully. The answer then contains new matter by way of defense, to the effect that in 1882 Francis A. Janeaux and wife were the owners of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 15, township 15 N., range 18 E., in Meagher (now Fergus) county; that they then caused a portion of said land to be surveyed and platted as a town site, and a plat thereof to be duly filed in the office of the county clerk and recorder; that one of the avenues surveyed, staked out, and made to appear on said plat was and is the Third avenue mentioned above; that thereafter, in 1884, the said Janeaux and wife again caused the said lands to be surveyed, staked out, marked, and platted and a plat thereof to be filed in the office of the county clerk and recorder, but, by mistake, the plat and indorsements thereon made it appear that the land so surveyed and platted was the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section 15, whereas it was intended to represent the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section; that thereafter, on August 20, 1890, for the purpose of correcting the erroneous description, an amended map or plat was filed; that in making the surveys, marking and designating the lots, blocks, streets, avenues, and alleys, and in filing the plats, it was the intention of the owners to "devote, remise, grant, quitclaim, convey and dedicate the streets, avenues, and alleys thus staked off, laid out, marked, and designated to the public for its use and benefit forever." It is then alleged that in 1886 the plaintiff purchased from Francis A. Janeaux and wife the land now claimed by him, and received a deed therefor which described the land by metes and bounds, which description concludes: "Except the streets and alleys contained thereon." It is further alleged that within the exterior boundaries as given in the deed above there was a portion of Third avenue, a portion of Water street, and a portion of the alley which passes through block S22, and that the respective portions of said avenue, street, and alley were expressly excepted from the grant contained in the deed to plaintiff. It is then alleged that the public accepted the dedication of the streets, avenues, and alleys, and, as rapidly as the same could be, they were improved and used by the public. Most of these affirmative allegations were put in issue by reply. There is in the reply also a plea of the bar of the statute of limitations, a plea of estoppel in pais, and an attempt to plead title by adverse possession. The trial court found in favor of plaintiff on his plea of adverse possession, and further found that the evidence was not sufficient to show that any of that portion of Third avenue in question had ever been dedicated to the public as a street, highway, or otherwise. From the findings made the court concluded that the acts of the defendant city in attempting to

extend Third avenue through plaintiff's property were wrongful, and that plaintiff was entitled to a permanent injunction restraining the city from further interfering with his possession of that particular portion of his property. From the decree entered in favor of plaintiff, and from an order denying it a new trial, the city appeals.

Much of the argument of counsel for the respective parties is devoted to a consideration of two questions: (1) What is necessary to constitute a valid and effective dedication of a street; and (2) does the statute of limitations run against a municipal corporation with respect to property held in trust for the public use? While a discussion of these questions would involve many interesting legal propositions, we do not deem it necessary to consider either of them to any great extent. This is a suit in equity, and the evidence is all before us. It therefore devolves upon us to make such disposition of the questions involved as the exigency of this particular case requires.

The record discloses that in 1882 Janeaux and wife filed the first plat of the original town site of Lewistown. At that time there was not any statute authorizing such procedure. Therefore the acts done by the owners of the property in that year could not amount to a statutory dedication of the streets, avenues, and alleys; furthermore, the 1882 plat does not embrace the premises now in controversy, and, so far as this case is concerned, all evidence touching that survey and the proceedings had thereon is of little or no value. In 1884, after the passage and approval of the act of February 19, 1883, authorizing the laying out of town sites on private property, Janeaux and wife caused a portion of 40 acres to be surveyed, staked out, and platted, and a plat thereof to be filed with the county clerk and recorder, but by a mistake the plat and indorsements thereon are made to describe and represent land a quarter of a mile away from the original town site of Lewistown. In several minor particulars the proceedings taken at that time did not conform to the statutory requirements. This, then, was the condition of affairs when, in 1886, this plaintiff purchased the land now claimed by him, went into possession, and commenced improving the same. In 1890 the mistake in the 1884 plat was discovered, and an attempt was made by the administratrix of the Janeaux estate to correct the same by having another plat filed; but the evidence falls to show that any authority was sought or obtained from the probate court for the proceedings taken. From the evidence presented in this record we are left somewhat in doubt as to whether Third avenue, where it passes through the property claimed by plaintiff, was ever actually surveyed. McFarland, who made the survey for Janeaux and prepared the 1884 and 1890 plats, testified that he could not remember whether he established the corners along that portion of

Third avenue. But these facts are recited only for the purpose of showing that at the time plaintiff purchased his property, and went into possession of it, it was at least doubtful whether any attempt had been made to dedicate that portion of Third avenue to the public use. In view of these conditions, and the fact of the proximity of this property to the business center of the city; the fact that Third avenue, before it reaches the boundaries of plaintiff's property, has been during all these years practically cut off and terminated by a creek and slough, and that it will require great expenditure of time and money to improve it; the further fact that there is some evidence that the survey of the original town site did not extend to the east line of the 40-acre tract, and therefore the city would be without authority to connect this avenue with any other street or alley, or, to speak more accurately, would be confronted with a strip of land from 30 to 35 feet in width, extending diagonally across this avenue, to which strip of land the plaintiff appears to have a good title—all lead us to entertain a serious doubt whether the city ever intended to assert any claim to this particular portion of Third avenue, so called, until this controversy arose. And in view of the fact that for more than 20 years the city has lain by and without objection has permitted plaintiff to occupy this portion of the so-called Third avenue and at considerable expense to place permanent improvements thereon, and the fact that the plaintiff must sustain great injury in having a portion of his premises segregated from the rest, by the opening of this avenue, that he would be compelled to remove his barn and other out-buildings, and would suffer his trees, vines, and shrubbery to be destroyed, it would seem extremely inequitable for the city at this late date to assert its right to devote to public use, without compensation to the plaintiff, a portion of this property which he has so long claimed and the undisputed possession of which he has so long enjoyed. Under these circumstances, we think the city should be, and is, estopped to assert the claim which it now makes.

In 2 Dillon on Municipal Corporations (4th Ed.) § 675, it is said: "The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel in pais as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time, but upon all the circumstances of the case, to hold the public estopped or not, as right and justice may require." Acting upon the doctrine of this text, the courts have repeatedly applied to municipal corporations the doctrine of equitable estoppel, and we

think it peculiarly applicable here. *John Monat Lumber Co. v. City of Denver*, 21 Colo. 1, 40 Pac. 237; *Baldwin v. Trimble*, 85 Md. 396, 37 Atl. 176, 36 L. R. A. 489; *Orr v. O'Brien*, 77 Iowa, 253, 42 N. W. 183, 14 Am. St. Rep. 277, and note; *Chicago & N. W. Ry. Co. v. Elgin*, 91 Ill. 251; *Platt County v. Goodell*, 97 Ill. 84; *Hamilton v. State*, 106 Ind. 361, 7 N. E. 9; *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449, 61 N. W. 1108.

Without determining whether the trial court was correct upon the theory which it adopted, we approve the result, but prefer resting our decision upon the application of the doctrine of estoppel in pais. The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

(41 Mont. 245)

UNITED MISSOURI RIVER POWER CO. v. YODER.

(Supreme Court of Montana. April 29, 1910.)

STATES (§ 60*)—OFFICERS—FEES.

Under Rev. Codes, § 165, providing that the Secretary of State shall charge certain fees for recording "each certificate of increase of capital stock," where two foreign corporations filed their certificates of incorporation and paid the fees thereon, and subsequently one of the corporations absorbed the other and issued its stock to the stockholders of the absorbed corporation and increased its capital stock in an amount larger than the amount of capital stock of the absorbed corporation, the Secretary of State, on the filing of the certificate of increase of capital stock, should charge fees for the entire amount of the increase, and need not deduct from the amount of such increase the capital stock of the absorbed corporation on which fees were already paid.

[Ed. Note.—For other cases, see States, Dec. Dig. § 60.*]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

Action by the United Missouri River Power Company against A. N. Yoder. Judgment for defendant, and plaintiff appeals. Affirmed.

Wm. Wallace, Jr., for appellant. Albert J. Galen, Atty. Gen., and E. M. Hall, Asst. Atty. Gen., for respondent.

HOLLOWAY, J. Prior to January, 1910, the United Missouri River Power Company and the Capital City Power Company were New Jersey corporations, doing business in this state, the former with a capital stock of \$10,250,000, and the latter with a capital stock of \$2,000,000. The former company owned a majority of the stock of the latter, and by an agreement made on January 26, 1910, pursuant to a statute of New Jersey, there was effected a merger of the two companies, by which the Capital City Power Company was literally absorbed by the other concern. The agreement provides for

the purchase, by the United Missouri River Power Company, of all the property, rights, privileges, and franchises of the Capital City Power Company, the surrender and cancellation of the certificates representing the capital stock of the Capital City Power Company, and the issuance, to the holders thereof, of certificates representing shares of stock in the United Missouri River Power Company. The agreement further provides that thereafter the capital stock of the United Missouri River Power Company shall be \$14,000,000. On March 3, 1910, a duly authenticated copy of the agreement was tendered to the Secretary of State of Montana for filing, together with the sum of \$380 as the filing fee. Upon demand of the Secretary of State, an additional sum of \$200 was paid under protest, and this action was commenced to recover back said sum of \$200. The cause was submitted to the district court upon an agreed statement of facts, and judgment was rendered and entered in favor of the defendant, dismissing the action. From that judgment the plaintiff appeals.

The question presented to us is: Upon what basis should the Secretary of State compute his fees for filing this paper, which amounts to a certificate of increase of capital stock? Section 185, Rev. Codes, provides: "The Secretary of State, for services performed in his office, must charge and collect the following fees: * * *

(4) For recording and filing each certificate of incorporation and each certificate of increase of capital stock, the following amounts shall be charged:" Then follows a schedule of fees graduated according to the amount involved. By section 4413 these provisions are made applicable to foreign corporations doing business in this state. If this paper, then, discloses that the capital stock of the United Missouri River Power Company was increased to the extent of \$3,750,000, the Secretary of State was entitled to receive \$580 in fees; if, however, the increase was only \$1,750,000, then he was entitled to only \$380. This is conceded.

Upon entering this state to transact business each of the two corporations mentioned above paid the full legal fees for filing its articles of incorporation, the United Missouri River Power Company upon its capital stock of \$10,250,000, and the Capital City Power Company upon its capital stock of \$2,000,000; and it is now insisted by counsel for appellant that, since the fees have been paid upon this \$2,000,000, and this amount of capital stock has been merely absorbed by the other company, an additional fee imposed upon this same \$2,000,000 should not be exacted. In other words, the contention is that the Legislature never intended that a company should pay more than one filing fee upon the same capital stock. Whatever may be said of this ar-

gument, it is manifest at once that the Legislature never contemplated any such conditions as have arisen in this case. We have a very elaborate system of laws governing the organization and management of domestic corporations and prescribing the conditions upon which foreign corporations may do business in this state. But there is not any provision whatever authorizing two or more domestic corporations to consolidate or one to be merged in the other, except section 3898, Rev. Codes (substantially duplicated by section 4408), which relates to certain mining corporations exclusively, and House Bill 160, approved March 6, 1909 (Laws 1909, p. 146), authorizing one corporation to acquire shares of stock in another corporation; and neither of these statutes has any reference to the subject before us. Under these circumstances, of course, the Legislature did not make any provision for filing the articles of consolidated corporations, as such, and neither did it prescribe the fees for filing the certificate of consolidation or merger of foreign corporations which may have thus united under the laws of the state of their creation.

When the certificate was presented to the Secretary of State, we think he did not have any authority to inquire by what means or for what purpose the capital stock of the United Missouri River Power Company had been augmented. The only legitimate inquiry he could make was: To what extent does this certificate indicate that the capital stock of the corporation has been increased? The records in his office and this certificate itself show that prior to January 28th the capital stock of the United Missouri River Power Company was \$10,250,000, and this certificate discloses that after that date the capital stock was \$14,000,000, an increase of \$3,750,000. Under the mandate of the statute, the secretary charged and collected the fees imposed upon this amount of increase, and the fact that of this amount \$2,000,000 represented the capital stock of the Capital City Power Company, for which the capital stock of the United Missouri River Power had been substituted, was not a matter with which he could concern himself. The argument which counsel for appellant make might be convincing to the legislative assembly; but, under the law as it now stands, we think the Secretary of State is not warranted in looking beyond the ultimate fact of increase as disclosed by the certificate which is tendered for filing.

Counsel have not, and neither have we, found any decided cases bearing directly upon the subject. We have proceeded upon the theory, which we deem correct, that in matters of this character the Secretary of State is controlled altogether by statute, and for every act done by him the authori-

ty for his act must be found written in the statute.

We think the judgment of the district court is correct, and it is affirmed.

Affirmed.

BRANTLY, C. J., and SMITH, J., con-
it.

(41 Mont. 249)

STATE BANK OF MOORE v. FORSYTH.
(Supreme Court of Montana. April 30, 1910.)

1. **BILLS AND NOTES (§ 452*)—NECESSITY FOR CONSIDERATION.**

It is a valid defense to the enforcement of a note against the maker, by the party to whom it was delivered, that the note was without consideration and was delivered on condition that the maker should not be held liable thereon.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1367-1370; Dec. Dig. § 452.*]

2. **BANKS AND BANKING (§ 109*)—AUTHORITY OF CASHIER.**

Defendant was induced by the cashier of a bank to sign a note and deliver it to the bank, in order that the cashier might substitute the note for the notes of the cashier held by the bank and some charges against him by the bank, and signed the note under the assurance of the cashier that he would not be liable upon it, and would never be asked to pay it. The cashier turned the note in to the bank and withdrew his own notes, and received the excess of the note over his indebtedness to the bank in money. There was no evidence that the officers or directors of the bank authorized the cashier to make any such arrangement with plaintiff, and it was the first note of the kind which he had given the bank. *Held*, that the cashier had no authority by virtue of his office, to make such an arrangement, that defendant was chargeable with notice that the arrangement was not authorized, and that defendant acted upon the cashier's statement at his peril.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 109.*]

3. **BILLS AND NOTES (§ 452*)—NECESSITY FOR CONSIDERATION.**

Where defendant was induced to sign a note and give it to the cashier of a bank under an agreement with the cashier that plaintiff was not to be held liable on the same, plaintiff will not be held liable if there was no consideration for the note, as long as it is held by the bank, although the cashier had no authority to promise defendant that he would not be called upon to pay.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1361, 1367-1370; Dec. Dig. § 452.*]

4. **BANKS AND BANKING (§ 227*)—AUTHORITY OF CASHIER—EVIDENCE.**

In an action by a bank on a note, evidence *held* to show that defendant in giving the note was aware that the cashier was to withdraw his own notes from the assets of the bank and substitute plaintiff's obligation instead.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 227.*]

5. **BILLS AND NOTES (§ 92*)—SUFFICIENCY OF CONSIDERATION.**

Plaintiff was induced by the cashier of a bank to give his note to be substituted by the cashier for notes of the cashier held by the bank. The note was so substituted, the cashier's notes withdrawn, and the excess of the amount of the plaintiff's note over the cashier's obli-

tions was paid by the bank to the cashier. *Held*, that the note was supported by a sufficient consideration.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 92.*]

6. **BANKS AND BANKING (§ 116*)—AUTHORITY OF CASHIER—KNOWLEDGE OF CASHIER IMPUTED TO BANK.**

Defendant, at the request of the cashier of a bank who was defendant's partner in a real estate business, gave his note to the cashier to be substituted in the bank's assets for notes of the cashier. He was told by the cashier that the bank would not want the cashier's paper, and that it would not look well to the bank examiner, and he told defendant that he would never be called upon to pay the note. Rev. Codes, § 4001, makes it a penal offense to knowingly make false entries in the books of a bank, or to knowingly subscribe, or exhibit false papers with intent to deceive the state bank examiner. *Held*, that defendant was chargeable with notice of the statute, and that it was the cashier's purpose to violate it, and therefore the knowledge possessed by the cashier would not be imputed to the bank, and thus give it notice that defendant received nothing for the note, as notice to an agent will not be imputed to the principal, where the conduct of the agent is such as to raise a clear presumption that he would not communicate the fact in controversy to his principal.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 116.*]

Appeal from District Court, Fergus County; J. Miller Smith, Presiding Judge.

Action by the State Bank of Moore against John R. Forsyth. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions to enter judgment in favor of plaintiff.

O. W. Belden, for appellant. Blackford & Blackford, for respondent.

SMITH, J. The plaintiff began this action in the district court of Fergus county to recover judgment against the defendant on a certain promissory note for \$1,550, dated June 20, 1907, due four months after date, with interest after maturity at the rate of 10 per cent. per annum. The defendant answered, admitting the corporate capacity of the plaintiff, and that the latter was the owner and holder of the note. He also admitted the making and delivery of the note, but denied that it was given for a valuable consideration, or for any consideration whatever. By way of affirmative defense he alleged that the note was made at the express instance and request of the plaintiff, without consideration, and for plaintiff's accommodation. He further pleaded in his answer that at the time the note was made and delivered, it was agreed between him and the plaintiff that he should not be required to pay the note, and that he should not be in any manner liable thereon. As a further affirmative defense he alleged that the note was procured by plaintiff through false and fraudulent representations on the part of plaintiff's cashier, with intent to deceive and defraud him. This latter defense was abandoned at the trial.

The plaintiff by replication denied the new matter set forth in the answer. The cause was tried to the district court of Fergus county sitting with a jury. A verdict was returned in favor of the defendant, and judgment was entered thereon. From that judgment and an order denying a new trial the plaintiff has appealed to this court.

The note purported to have been made for value received. After the same was introduced in evidence the plaintiff rested. Thereupon the defendant testified, in part, as follows: "This note was made in the bank at Moore, at C. W. Thurston's bank. Thurston was at that time cashier of the bank. Q. How came you to make this note?" This question was objected to on the ground that any oral contemporaneous agreement would tend to vary and change the tenor of the note, and because it had not been shown that Thurston was acting within the scope of his authority as cashier. The objection was overruled, and the witness continued: "Well, Mr. Thurston asked me to make a note, sign a note, for \$1,500, and I told him that I did not want to sign the note, and he asked me why, and I told him I could not pay the note if I was called upon to do so. He said that the bank would not hold me responsible. He said that his paper would not, that the bank would not want his paper in there, and that it would not look well to the bank examiner, and I told him that was the condition under which I would sign it; that the bank would not hold me liable or responsible on the note, and he said the bank would never ask me to pay it, and that he would look after it, and that I never need bother about it. And I signed the note, and he took it and turned it in to the teller. I did not receive any of the proceeds of the note. I was not called upon to pay the note at the time of maturity. It must have been a month after the note matured before anything was said about it. Mr. Thurston was not still cashier of the bank. Mr. Hedrick, the cashier that went in afterwards, called upon me to pay the note. It is supposed Thurston got the proceeds of the note. Of course, at that time I didn't know whether he did or not. What makes me think he did is because it has been shown that he did to my mind. It is through matters subsequently learned that I base my answer that Thurston got the proceeds of the note. Of my own knowledge I don't know anything about the matter. I had no dealings of that sort with Thurston before. He and I were in the real estate business together at that time. We were partners at that time in the Judith Basin Realty Company. At that time I was occupying an office in the State Bank of Moore; I had a back room. The Judith Basin Realty Company did not share any of the proceeds of that note. I did most of the work of the realty company."

John N. Phillips, a former bookkeeper and teller of the bank, testified: "Mr. Thurston was cashier of the bank until September 3,

1907. When this note went into the bank it took up three of Mr. Thurston's cash items, aggregating \$480.48, which had been running some little time; also two notes carried in the bank by Mr. Thurston, aggregating \$423.07. These notes were given to the bank by Thurston, and the proceeds of the Forsyth note, or part of it, took up those two notes. Four drafts issued by the bank on June 20, 1907, through Mr. Thurston, aggregating \$51.40, were also paid by Thurston from the proceeds of the note. Part of the other proceeds of this note went to the credit of Mr. Thurston's account, and he took cash for some of it. Under date of June 20, 1907, Thurston's account shows a credit of \$400. That \$400 came from the proceeds of the Forsyth note. The balance was taken in cash. While I was employed in the bank, Mr. Thurston had charge of making the loans; that was principally his work. He made all kinds of loans. He made loans as large as the capital of the bank would stand. I don't think he consulted any of the directors of the bank. I know positively that on certain loans he did not consult with other directors of the bank. As long as he had charge of the bank he pursued that line of conduct, or making loans of that character and size without consulting the other directors or officers of the bank. He had charge of the promissory notes taken by the bank. In making payments of notes no one was consulted but the cashier. I didn't consult any one except Thurston. If he was away I used my own judgment in the matters. The bank had a manager. Mr. Thurston was the manager. The directors of the bank held meetings once a year, on the 1st of January. They never held any meetings after that, until September of the year 1907. Mr. Hauck, the president of the bank, was about the bank there quite often, probably twice a week, or once. He usually came into the bank and talked a little while and went out again. Mr. Thurston issued the drafts of the bank exclusively. He made the loans if he was there. If he was away, I made them in his place. Mr. Thurston used his own judgment in making loans. There was no one there for him to consult with. It was the custom to make loans immediately upon application. A great many promissory notes were taken without security. Notes were usually taken by Thurston without consulting any one else. The president of the bank resided 10 miles from Moore, and the vice president resided 50 miles away. Thurston was in charge of the bank as manager on June 20, 1907. This note came to the bank in the usual course of business. Thurston brought it to me. The rest of the banking force were working under him. He overlooked their work. He had charge of the moneys."

At the close of defendant's case the plaintiff moved for a directed verdict in its favor. The motion was overruled. Thereupon John C. Hauck, the president of the bank, was

called as a witness for the plaintiff. He said: "I was supervisor of the affairs of the bank during the year 1907. Every once in a while we would go over the accounts and check them all up, I and Mr. Warr, the cashier of the Bank of Fergus County. We did that for about four months after the bank was started, and then we done it off and on ever since up to the time Thurston left. I went through everything that was in the bank several times in the two years, about five or six times I should judge. That was when Thurston had charge of the bank. I never, as president, authorized Thurston to make any collateral agreements that the paper of the bank should not be, or was not to be, collected. I don't think we directors had any meetings in the spring and summer of 1907."

At the close of all the testimony, the plaintiff's counsel requested the court to charge the jury that, if the State Bank of Moore paid any consideration for the note, their verdict must be for the plaintiff, and also that the alleged oral agreement of Thurston that the defendant would not be called upon to pay the note was no defense to the action. The court refused the requests. Over appropriate objection by the plaintiff, the court advised the jury that, as between the maker and payee of a promissory note, oral evidence touching the consideration thereof could be considered by them, and that if they found that the defendant received no consideration, and that the note was made for the accommodation of the plaintiff, their verdict should be for the defendant. The jury was also instructed, without objection, that: "If Thurston owed to or borrowed from the plaintiff the amount of the note sued upon, and if, at the request of Thurston, the defendant gave to the plaintiff the note sued upon in satisfaction of such indebtedness of Thurston, to the plaintiff, and the plaintiff accepted the note as such satisfaction, then the note was given upon sufficient consideration, and the plaintiff is entitled to recover the amount due on the note."

The court also gave to the jury instruction No. 3, as follows: "The court instructs the jury that the burden of proof was on the plaintiff to show that the note was given upon a valuable consideration, and that, if that was doubtful upon the whole evidence, plaintiff could not recover; that the admission by the defendant of the execution of the note and its production in evidence made a prima facie case for the plaintiff upon which the jury might find a verdict for plaintiff, unless the defendant introduced evidence which showed that it was not given for a valuable consideration, or evidence to render it doubtful in the minds of the jury whether it was given on a valuable consideration, and that if not so given, or if it was doubtful whether it was given for a valuable consideration, the plaintiff could not recover." Plaintiff objected to this instruction, for the reason that it placed the burden of proving the considera-

tion for the note upon plaintiff, whereas the burden of showing a failure of consideration was upon defendant; also because the instruction is in conflict with instruction No. 9, which reads as follows: "(9) You are instructed that the note sued upon in this case imports a consideration, and the burden of showing a want of consideration sufficient to support a written instrument lies with the party seeking to invalidate it."

Instruction No. 7 reads as follows: "The court instructs the jury that, if you find from the evidence that the defendant signed the note sued upon in this case as an accommodation maker for the plaintiff, and delivered the note to the plaintiff, or one of its officers for the bank, the defendant cannot be held liable thereon, no matter how the bank may have dealt with the note, so long as it retained ownership and control thereof; and, even though you find that the bank, after the note was delivered to it, gave Thurston the benefit of the whole or a part of it, this fact would not render defendant liable on the note." This instruction was also objected to for several reasons; among others, that it conflicts with instructions 8, 10, and 11, given by the court. These latter instructions read as follows:

"No. 8. If you find from the evidence that the note in question was made, executed, and delivered to the State Bank of Moore by John Forsyth, for the accommodation of Mr. Thurston, and that Thurston received the benefits therefrom, then you must find for the plaintiff."

"No. 10. The plaintiff in this action is a corporation, and you are instructed that a corporation is bound by the acts of its officers or agents only so far as they act within the scope of their authority. In this action, the burden is upon the defendant to prove by a preponderance of the evidence that in making the oral agreement, if you believe that such oral agreement was made, Thurston, the cashier of the plaintiff, was acting within the scope of his authority as such cashier, or that such agreement was subsequently ratified by the plaintiff in the action. If the defendant has failed to prove these allegations by a preponderance of the testimony, your verdict should be for the plaintiff."

"No. 11. In this action the defendant claims, among other things, that the note sued upon was made for the accommodation of the plaintiff. You are instructed that an accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser without receiving any value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value notwithstanding such holder, at the time of taking an instrument, knew him to be only an accommodation party."

We think the foregoing extracts from the instructions fairly illustrate the theory upon which the case was tried, and that the mo-

lons and exceptions of counsel for appellant are sufficient to raise the vital questions argued in this court. We shall not analyze the instructions, but will content ourselves with the statement that, assuming that they correctly state the law, the jury failed to follow them. The testimony, however, is practically uncontradicted. There is no conflict in essentials, and, in our judgment, but one inference may be drawn from it. Therefore the cause should not have been submitted to the jury. The court should have directed a verdict for the plaintiff.

1. The first question arising is whether the defense of want of consideration in the note, pleaded and attempted to be interposed by the defendant, was a valid one. In the case of *Higgins v. Ridgway*, 153 N. Y. 180, 47 N. E. 32, the Court of Appeals, after a review of the New York cases on the subject, held that it was a valid defense to the enforcement of a promissory note against the maker, by the party to whom it was delivered, that he note was without consideration, and was delivered upon the condition that the maker should not be held liable thereon. To the same effect are the rulings of the courts in *Breneman v. Furniss*, 90 Pa. 186, 35 Am. Rep. 51; *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698; *Benton v. Martin*, 52 N. Y. 570; *Garfield National Bank v. Holwell*, 57 Hun, 160, 10 N. Y. Supp. 864; *Simmons v. Thompson*, 29 App. Div. 559, 51 N. Y. Supp. 1018; *McFarland v. Sikes*, 54 Conn. 250, 7 Atl. 408, 1 Am. St. Rep. 111; *Williard v. Chaffee*, 92 N. Y. 529; *Schindler v. Muhlheiser*, 45 Conn. 153. In the case of *Acoma Mill. Co. v. Sherwood*, 11 Wash. 492, 9 Pac. 977, cited by appellant in opposition to the principle laid down in the foregoing cases, it appeared that there was a consideration for the note in question, and the court said: "The law will not permit the maker of a note, where there is a consideration, to show an oral agreement that he was not to be liable at all on the note." Appellant also cites the case of *Dolson v. De Ganahl*, 70 Tex. 20, 8 S. W. 321, but in that case the court said: "The note fixes the obligation of the appellant to pay, and his pleadings leave open to him only the defense that it was executed without consideration. Evidence tending to support that defense is admissible." The court then proceeded to show that there was a valid consideration for the note. The case of *Davy v. Kelley*, 66 Wis. 452, 29 N. W. 32, is also called to our attention. In that case it was held that evidence of a contemporaneous oral agreement between the parties to a note that it was not to be enforced between them is inadmissible. But the opinion of the court, by Mr. Justice Taylor, discloses the fact that it was finally determined that the note in suit was given upon efficient consideration. We are of opinion, in view of the authorities, and in principle, the rule laid down by the New York Court of Appeals, in *Higgins v. Ridgway*, su-

pra, is founded in sound reason, and that the court below properly followed the same.

2. Was the bank bound by the representations of its cashier that defendant should not be called upon to pay the note? The Supreme Court of the United States, in *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49, held that, although a cashier of a bank ordinarily has no power to bind the bank except in the discharge of his customary duties, and although the ordinary business of a bank does not comprehend a contract made by a cashier, without delegation of power from the board of directors, involving the payment of money not loaned by the bank in the customary way, nevertheless it may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been suffered by the directors, without interference or inquiry, to conduct the affairs of the bank; and, when during a series of years, or in numerous business transactions, he has been permitted, in his official capacity and without objection, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. The matter involved was a legitimate transaction, from which the bank derived an advantage. It will be observed that the principle of estoppel in pais was thus invoked against the bank.

Again, the Supreme Court of the United States, in *Savings Bank v. County Bank*, 95 U. S. 557, 24 L. Ed. 490, said: "Ordinarily the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the power necessary for such an officer in the transaction of the legitimate business of banking; * * * but certainly he is not presumed to have power, by reason of his official position, to bind his bank as an accommodation indorser of his own promissory note. Such a transaction would not be within the scope of his general powers; and one who accepts an indorsement of that character, if a contest arises, must prove actual authority before he can recover. There are no presumptions in favor of such a delegation of power." Mr. Thompson in his work on *Corporations* (volume 2 [2d Ed.] § 1532) says: "The principal limitation upon the powers of a cashier is that his acts must be within his ordinary duties. It cannot be assumed that he is authorized to do every act within the powers of the bank. His implied authority is limited to acts done in the usual and ordinary course of business, and cannot be extended to cover unusual and extraordinary transactions. For the transaction of such business, special authority must be conferred upon him by the directors." In volume 1 of *Morse on Banks & Banking* (4th Ed., Parsons) § 167, we find

this statement: "It can never be pretended that he [the cashier] has any incidental powers to bind the bank by declarations or admissions which are made beyond the scope of his duties. Thus, his statement or promise given to a person who is about to put his name as indorser upon a note which the bank has agreed to discount, to the effect that such person will not be held liable or shall not be looked to by the bank, is altogether inoperative and void as an undertaking of the bank." See, also, Bolles, *Modern Law of Banking*, p. 361.

In the case of *Bank of the United States v. Dunn*, 6 Pet. 51, 8 L. Ed. 316, the defendant offered to prove that the cashier and president of the bank gave him to understand that if he indorsed the note in suit, he would incur no risk or responsibility. The court said: "The most decisive objection to the evidence is that the agreement was not made with those persons who have power to bind the bank in such cases. It is not the duty of the cashier and president to make such contracts, nor have they the power to bind the bank except in the discharge of their ordinary duties." In *Bank of the Metropolis v. Jones*, 8 Pet. 16, the court said: "It is unnecessary to add, in this case, as was stated by the court in *Bank v. Dunn*, that the officers of the bank had no authority, as agents of the bank, to bind it by the assurances which they gave." In the *Jones* case it appeared that the president of the plaintiff bank had assured the indorser, through the maker, that he would incur no responsibility on the note on account of the fact that certain property, which could be subjected to its payment, was very valuable. In the case of *Thompson, as Receiver, v. McKee*, 5 Dak. 172, 37 N. W. 367, the facts were these: McKee went to the First National Bank of Sioux Falls to identify one Wolf, and at the request of the cashier wrote his name on the back of a draft, the cashier assuring him that he should not be liable on it; his name being wanted merely to show who identified Wolf. McKee afterwards gave his note to the bank for the amount of the draft it had cashed, with an understanding with the cashier that his liability on the note should not be greater than it was on the draft, and he subsequently renewed this note, with a similar understanding with the president and cashier. The court held that the facts constituted no defense, for the reason that the president and cashier had no authority to make any such contract. Mr. Justice Spencer, speaking for the court, said: "It has been repeatedly held by the highest judicial tribunals that officers of banks have not the power to excuse or limit the legal obligations of persons to the banks they represent, by agreeing with them that they shall not be held liable or called upon to pay the obligations which they make, either as principal debtors or accommodation makers

or indorsers, and on the credit of which the bank has parted with its funds." In the case of *Claffin v. Farmers' & Citizens' Bank*, 25 N. Y. 293, it was held that the general authority of the president of a bank to certify checks drawn upon it does not extend to checks drawn by himself. The Supreme Judicial Court of Massachusetts, in *Institution v. Slack*, 6 Oush. (Mass.) 408, held that the treasurer of an incorporated institution for savings has no authority, as such, and without being specially authorized thereto, to execute a release in the name of the corporation. In *Gallery v. Bank*, 41 Mich. 169, 2 N. W. 193, 32 Am. Rep. 149, it was shown that one Irwin was president of the bank and also of a railway company. With other directors of the railway company he made a note to the bank. Evidence was introduced tending to prove that the note was not to be paid by the makers thereof, but only from the assets or funds of the railroad company. It was claimed that Irwin, as president of the bank, consented to an arrangement by which the debt was assumed by a third person and the makers released. The court said: "Even had he [Irwin] assumed to act for and represent the bank, being liable as maker and indorser, he could not consent to his own release and that of his co-makers and bind the bank thereby. That he could not act in such a double and antagonistic capacity is well settled in this state." See, also, *Payne v. Bank*, 8 Smedes & M. (Miss.) 24; *Bank v. Hart*, 37 Neb. 197, 55 N. W. 631, 20 L. R. A. 780, 40 Am. St. Rep. 479; *Bank v. Reed, Watts & S. (Pa.)* 101; *Hodge's Executor v. Bank*, 22 Grat. (Va.) 51; *Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 68; *Savings Ass'n v. Sailor*, 63 Mo. 24; *Sandy River Bank v. Merchants', etc., Bank*, 1 Bliss. 146, Fed. Cas. No. 12,309; *Ellis v. Bank*, 22 R. I. 565, 48 Atl. 936; *German Savings Bank v. Des Moines National Bank*, 122 Iowa, 737, 98 N. W. 606; *Mendel v. Boyd*, 71 Neb. 657, 99 N. W. 493.

The testimony shows that the transaction in controversy was an isolated one. The defendant testified that he had previously had no dealings of the kind with Thurston. No question of estoppel is involved. Hauck testified that he, as president, had never authorized the cashier to make the arrangement testified to by the defendant, and there is no evidence that the board of directors did so. We conclude, therefore, that the promise of Thurston was, on its face, beyond the scope of his authority, and that the defendant was chargeable with notice thereof. We hold that the cashier of a bank, by virtue of his office, has no authority to make such an arrangement as that testified to by the defendant, and that whoever accepts such an agreement and acts upon it does so at his peril.

3. But it is contended that the note was in fact given without consideration. If so, this was an available defense against the payee, regardless of whether the cashier had au-

thority to promise that defendant should not be called upon to pay. The testimony shows conclusively that the plaintiff in fact parted with full consideration for the note, and, to our minds, the evidence of the defendant himself proves that a valid consideration passed, and that he was aware of the fact that certain assets of the bank were to be withdrawn and his note substituted in place thereof at the time he executed and delivered the same. How otherwise can his statement that "the bank would not want to have Thurston's paper in there" be explained? The only reasonable construction to be placed upon his testimony is that he knew that Thurston was personally desirous of withdrawing his paper. But it is immaterial what phraseology was employed. The very fact that Thurston proposed to withdraw his own paper was notice to the defendant that he was acting for himself.

And there are other reasons why the judgment cannot stand. The whole transaction shows on its face that Thurston was in fact acting for himself, and not for the bank, and that the defendant either knew the fact, or should have known it. Thurston was engaged in a palpable attempt to defraud the bank of which he was cashier, and the defendant by his acts made it possible for him to consummate the fraud. In the case of *Pauly v. O'Brien* (C. C.) 69 Fed. 400, Judge Ross said: "It is said for the defendant that the note sued on was without consideration. Not so, according to the agreed statement of facts, for it is there stated that it was executed in place of and to take up the note of Naylor, then represented by the bank officers to be past due and to be secured by collaterals which were believed to be ample to pay it, and which they represented the bank wanted to get 'out of the past-due notes,' and which together with the collaterals were to stand as collateral to the note executed by the defendant, upon the execution of which the Naylor note was entered as paid on the books of the bank, and the defendant's note was entered thereon 'as a discount for its face.' It thus appeared that the defendant executed his first note, subsequently renewing it from time to time, and ultimately by the note in suit, for the purpose of having it take the place of the Naylor note, which, together with the collaterals, 'were to be collateral to the note' given by him. If, however, this was not really the case, but that, in truth, the transaction was a mere trick to make it appear to the government and to the creditors and stockholders of the bank that it had a valuable note when in fact it did not have one, the result must be the same; for, when parties employ legal instruments of an obligatory character for fraudulent and deceitful purposes, it is sound reason, as well as pure justice, to leave him bound who has bound himself. It will never do for the

courts to hold that the officers of a bank, by the connivance of a third party, can give to it the semblance of solidity and security, and, when its insolvency is disclosed, that the third party can escape the consequences of his fraudulent act. It would require more credulity than I possess to believe that the defendant, when his brother, who was the bookkeeper of the bank, came to him with the proposition of its vice president, in its every suggestion and essence deceptive and fraudulent, did not know its true character and purpose. So far as appears, Naylor was a total stranger to him. Why should he execute his note to take up the note of Naylor? What moved him to do it, except to enable the officers of the bank to supplant the overdue note of Naylor with a live note, which he now insists was without consideration and purely voluntary, but which enabled the bank officers to make a deceptive, and therefore fraudulent, showing of assets?"

In the case of *Allen v. First National Bank*, 127 Pa. 51, 17 Atl. 896, 14 Am. St. Rep. 829, the facts were these: The bank brought an action to recover the sum of \$5,000 alleged to be due on a promissory note. The defendant offered to prove that Beecher, the cashier of the bank, came to him at the post office and said that the bank was carrying for his firm of Beecher & Copeland a quantity of oil certificates, in excess of what they were permitted to carry for one firm under the laws of the United States, and that the bank desired to have the oil carried in the name of other parties, so as to make an appearance of compliance with the law, and for that purpose he asked the defendant to become the maker of a note for \$5,000, to be secured by 5,000 barrels of oil that the bank was carrying for Beecher & Copeland; and, in compliance with this request, Allen executed the note without other consideration, and with the express agreement that he should not be held liable thereon. The trial court directed a verdict for the plaintiff bank. On appeal the Supreme Court said: "Assuming all the facts covered by the offers to have been proved, they would not have amounted to a defense as against the bank. The whole confusion in the case grows out of the fact that Mr. Beecher was at the same time a member of the firm of Beecher & Copeland and cashier of the bank. The effort here is to make the bank responsible, not merely for matters done in the scope of his duties as cashier, or by authority of the bank, but also for his acts and declarations done or made in the pursuit of his private business. His interview with the defendant at the post office can only be taken as an effort on his part to procure accommodation paper to the amount of \$5,000 to take up a like amount of his firm's paper at the bank. In some way his firm had obtained a larger line of discount at the bank than is permitted by the general banking law; the bank examiner was expect-

ed soon, and it became necessary for defendant's firm to retire some of its paper. It was equally necessary, perhaps, for the bank; and (the defendant as) its cashier must have been fully aware of the importance of getting the account of his own firm in proper condition. He succeeded in procuring from the defendant his note for \$5,000 to replace a like amount of his firm's paper, with an assurance that the defendant should never be called upon to pay it." The case of *Simmons v. Thompson*, 29 App. Div. 559, 51 N. Y. Supp. 1018, is called to our attention by the learned counsel for the respondent. In that case, however, the court held that the vice president of the Loan & Trust Company who induced the defendant to make the note in suit, by representations that he should not be held liable upon it, was apparently clothed with authority in the premises; the facts show that he was actually engaged in carrying forward a transaction which was beneficial to his principal, and also that the corporation had ratified his acts. The question of consideration as arising from the detriment to the trust company which advanced money on the note is not mentioned in the majority opinion, but is quite clearly shown by the dissenting opinion of Mr. Justice Ingraham. Aside from this, we do not regard the doctrine laid down by the court in that case as a healthy one. It loses sight of the rights of innocent stockholders and depositors in banks altogether, and relieves a party who, by affirmative action, has brought about the unfortunate condition in which he finds himself.

But it is contended that the knowledge possessed by Thurston is to be imputed to the bank, and therefore the latter had notice that Forsyth received nothing for the note. The correct rule on this subject is, we think, laid down in *Innerarity v. Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710, as follows: "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating. * * * A bank * * * can only act through agents, and it is generally true that, if a director who has knowledge of the fraud or illegality of the transaction acts for the bank, as in discounting a note, his act is that of the bank, and it is affected by his knowledge. * * * But this principle can have no application where the director of the bank is the party himself contracting with it. In such case the position he assumes conflicts entirely with the idea that he represents the interests of the bank. To hold otherwise might sanction gross

frauds, by imputing to the bank a knowledge those properly representing it could not have possessed." See, also, *State Savings Bank of Iowa v. Montgomery*, 126 Mich. 327, 85 N. W. 879.

In the case at bar we have only to consider the effect of the testimony to determine that the defendant is not in a position to dispute his liability on this note. It would be a most dangerous holding if we should decide, upon the facts disclosed by the record, that he could do so. We find no evidence that he had any idea or purpose of accommodating the bank. It does not appear that Thurston was present at the trial. It does appear, however, that he used the funds of the bank from time to time, that he resigned his position there, and that it was necessary to prove his handwriting by another person. The whole record seems to show that his management of the bank was at least open to criticism, and it is not a violent conclusion, perhaps, that he was not available as a witness. The defendant was his partner at the time the note was given, and had his office in the rear of the bank. Upon being requested to sign a note for \$1,500, on account of the fact that his (Thurston's) paper in the bank would not look well, he did so without inquiry as to the amount of such paper, which it was proposed to take up, and without asking what disposition was to be made of the balance, if any, of the proceeds of the note. He thus made it possible for Thurston, not only to take up two of his own notes for \$200 each, which were assets of the bank, but to also draw out a large amount in cash. It seems to us that the request of Thurston bore on its face conclusive evidence that some fraud was projected. The defendant knew that his note was to pass through the regular channels of the bank. He saw Thurston hand it to the teller. It is a penal offense in this state to knowingly make false entries in the books of a bank, or to knowingly subscribe or exhibit false papers with intent to deceive the state bank examiner. Rev. Codes, § 4001. The defendant was chargeable with knowledge of this statute, and with notice that it was Thurston's purpose to violate it. How can it be possible for a man of ordinary intelligence to suppose that a request for an accommodation note for a large amount, made by a cashier, is intended to be for the benefit of the bank? Notes are ordinarily given to a bank for the purpose of borrowing money therefrom. We can conceive of no circumstances under which a bank can require an accommodation note on its own account for any legitimate purpose. It seems to us that the mere request carries notice that the purpose for which such paper is intended to be used is not a lawful one. What legitimate end could possibly be served by carrying in a bank commercial paper which was not to be paid under any circumstances? Obviously none. The only possible design would be to deceive some one, either the stockholders, the

depositors, or the bank examiner, who acts for them in the name of the state. It is only an innocent party who may take advantage of such a defense as that attempted to be interposed in this case, when other innocent parties have suffered. The defendant cannot claim to occupy such position. The stockholders in the plaintiff bank have, through his connivance, suffered a loss of \$1,550, and a case might arise, as it often does, where the loss would fall upon the still more innocent depositors. We cannot give our assent to the proposition, whatever may have been the holdings of other courts upon the subject, that a party who has been guilty of such gross negligence as has the defendant in his case can escape liability on account of technical rules of law, and compel other persons to stand the loss caused by his total lack of care. The presumption that Thurston informed the bank, through its proper officers, of his fraudulent intention to withdraw its funds for his own personal use, through the medium of defendant's note, is fully removed by the reflection that, had he done so, his purpose would have been defeated.

The order and judgment appealed from are reversed, and the cause is remanded to the district court of Fergus county, with directions to enter judgment in favor of the plaintiff as prayed for.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

1 Mont. 105)

DOLENTY v. ROCKY MOUNTAIN BELL TELEPHONE CO.

Supreme Court of Montana. April 18, 1910.)

GARNISHMENT (§ 110*)—RIGHTS OF GARNISHEE—PAYMENT OF CLAIMS.

Where a garnishee had retained a part of the purchase price of certain property of the debtor with which to pay liens on the property, and in fact had parted with its money to release the property from such liens, it was entitled, as against the plaintiff in garnishment, to credit for the full amount paid by it on each of the claims.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 230, 231; Dec. Dig. § 110.*]

GARNISHMENT (§ 110*)—RIGHTS OF GARNISHEE—PAYMENT OF CLAIMS.

Where a garnishee had retained part of the price of property purchased from the debtor, with which to satisfy liens, and without excuse had permitted a lien claim to be increased by costs, expenses, and interest after judgment, it was only entitled, as against the garnishing plaintiff, to credit for the amount of the judgment.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 230, 231; Dec. Dig. § 110.*]

GARNISHMENT (§ 190*)—RIGHTS OF GARNISHEE—BURDEN OF PROOF.

Where a garnishee, having retained part of the purchase price of property purchased from a debtor, with which to pay liens, did not pay judgment foreclosing the lien, amounting to

\$1,913, until after a sale had been had and the amount increased to \$2,109.40, and plaintiff, in an action against the garnishee, proved that the garnishee had money in its possession with which to pay such liens, and showed the amount thereof, the burden was on the garnishee to excuse the delay and show that it was entitled to more than the amount of the original judgment.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 370; Dec. Dig. § 190.*]

4. SET-OFF AND COUNTERCLAIM (§ 7*)—RIGHT TO SET-OFF.

A set-off, as such, is not recognized under the Montana Codes.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 8; Dec. Dig. § 7.*]

5. GARNISHMENT (§ 190*)—ACTION AGAINST GARNISHEE—COUNTERCLAIM.

In a suit against a garnishee by the attaching creditor, the garnishee cannot assert a counterclaim under a general denial of indebtedness, but must plead the same as a counterclaim as in an action by the original debtor.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 370; Dec. Dig. § 190.*]

6. GARNISHMENT (§ 190*)—PLEADING—BILL OF PARTICULARS.

In an action by an attaching creditor against a garnishee, the furnishing of a bill of particulars in which a claim against the original debtor is listed, for deduction, does not constitute a pleading of the claim as a counterclaim as required by Rev. Codes, § 6540.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 370; Dec. Dig. § 190.*]

7. GARNISHMENT (§ 110*)—RIGHTS OF GARNISHEE—UNAUTHORIZED PAYMENTS.

Where a contract for the sale of a debtor corporation's assets to the garnishee provided that the garnishee should deposit \$20,000 of the price with a bank to be applied by the bank to the payment of the debtor's bonds, the debtor agreeing to pay all costs and charges of redeeming the bonds, and the garnishee retaining \$5,000 more with which to pay liens on the property, it was not entitled to an allowance out of the amount so retained as against plaintiff for expenses, incurred by it, in discharging the outstanding bonds.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 230, 231; Dec. Dig. § 110.*]

8. GARNISHMENT (§ 190*)—RIGHTS OF GARNISHEE—PAYMENT OF OUTSTANDING CLAIMS—MODIFIED CONTRACT—EVIDENCE.

Where a garnishee by agreement had retained part of the price of certain property purchased from the debtor with which to pay liens, evidence in an action against the garnishee, held insufficient to show a subsequent parol modification of the contract authorizing the garnishee to pay, out of the amount so retained, claims which were not liens against the property.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 370; Dec. Dig. § 190.*]

9. GARNISHMENT (§ 42*)—IMMATUREITY OF DEBT.

In order that a garnishee may be charged, there must be an existing debt at the time of the service of the garnishment, and not a mere conditional or contingent liability.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 83-88; Dec. Dig. § 42.*]

10. GARNISHMENT (§ 40*)—NATURE OF DEBT—UNCERTAINTY OF AMOUNT.

Rev. Codes, § 6667, authorizes the charging of a garnishee, where his liability is certain,

or other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and the only uncertainty is as to the amount thereof.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 82; Dec. Dig. § 40.*]

11. GARNISHMENT (§ 40*)—LIABILITY OF GARNISHEE.

Where a garnishee, under a contract of purchase, retained part of the price of the property from the debtor, with which to pay off liens, the garnishee was chargeable for the entire balance above the amount of the claims included in the contract, though at the time of the service of the writ the amount of the balance was not definitely fixed.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 82; Dec. Dig. § 40.*]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

Action by W. B. Dolenty against the Rocky Mountain Bell Telephone Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Walsh & Nolan and Miller & O'Connor, for appellant. H. G. & S. H. McIntire, for respondent.

HOLLOWAY, J. On June 14, 1905, this plaintiff commenced an action in the district court of Park county against the Yellowstone Park Telephone & Telegraph Company (hereinafter referred to as the "Park Company"), and Frank A. Hall, to recover \$4,982, with attorney's fees and costs, on a contract for the direct payment of money. A writ of attachment was issued, and on June 28th served upon the Rocky Mountain Bell Telephone Company (hereafter referred to as the "Bell Company"), as garnishee. Such further proceedings were had in the action that on February 8, 1906, a judgment in favor of plaintiff and against the Park Company and Hall was duly given and made for \$8,405.26 and costs. Upon this judgment execution was issued and placed in the hands of the sheriff of Park county, who thereupon demanded of the Bell Company that it pay over to him all sums of money owing by it to the Park Company or Hall. The Bell Company having failed and refused to pay over any sum, this action was brought by the judgment plaintiff against the Bell Company as garnishee. The complaint in this action, after setting forth the foregoing facts, which are admitted to be true, further alleges that, at all the times since the commencement of the action of Dolenty against the Park Company and Hall, the Bell Company has been indebted to the Park Company in the sum of \$5,000, for which amount judgment is demanded. The amended answer denies any indebtedness to the Park Company, and alleges that, prior to the levy of the writ of attachment, the Bell Company had purchased from the Park Company certain property, and that the parties agreed that the Bell Company should pay \$20,000 of the purchase price in the discharge of a certain mortgage then upon the property purchased, and that the further sum of \$5,000

should be withheld by the Bell Company, to be applied by it to the payment of certain other debts and liabilities of the Park Company, not including the claim of this plaintiff, and that such debts and liabilities exceed the sum of \$5,000. These affirmative allegations were put in issue by reply. The cause was tried to the court without a jury. Findings of fact and conclusions of law were made, and judgment entered in favor of the defendant, from which judgment, and an order denying him a new trial, plaintiff appealed.

There is not any conflict in the evidence. Before trial the plaintiff demanded a bill of particulars which would show the debts and liabilities of the Park Company, to pay which the \$5,000 was withheld by the defendant. In compliance with this demand, a bill of particulars was furnished, the items of which are as follows:

1. Lien Claim of Bronson.....	\$ 182 45
2. " " " Cory	129 00
3. " " " Miller	150 00
4. " " " Montana Electric Company	2,109 40
5. " " " Enoch	82 50
6. " " " Ludwigson	207 50
7. " " " Montana L. & Mfg. Company	479 73
8. " " " Rickman	23 90
9. Claim of Rocky Mt. Bell Tel. Co.....	394 71
10. Expense redeeming Bonds.....	537 38
11. Claim of Chicago Tel. Co.....	543 44
12. " " John Walsh.....	56 65
13. " " Thompson Falls Merc. Co.....	459 00
14. " " Ludwigson	101 70
15. " " Miles	46 25
16. " " Turners	24 65
17. " " Fransham	51 00
Total	\$5,649 32

The evidence discloses that on June 23, 1905, the Bell Company purchased from the Park Company certain telephone and telegraph lines, and the instruments, easements, and fixtures used in connection therewith, for the sum of \$25,000; and at the same time the parties entered into a contract in writing, by the terms of which it was agreed that \$20,000 of the purchase price should be deposited with the American Trust & Savings Bank, of Chicago, to be by that bank applied to the payment of certain bonds of the Park Company, then outstanding and secured by trust deed or mortgage. The Park Company agreed to have the trust deed or mortgage satisfied of record, and "to pay all costs and charges by way of premiums or otherwise of redeeming said outstanding bonds and satisfying said mortgage." The contract further provides: "The balance of said purchase price, to wit, \$5,000.00 shall be paid by the party of the second part [Bell Company] and by it applied to the payment of any and all liens, claims, or judgments which are or may be incumbrances upon the property herein agreed to be sold, and if, after all said liens, claims, or judgments shall have been paid, there shall remain any balance of said sum of \$5,000.00,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the party of the second part agrees to pay such balance to the party of the first part [Park Company]. It is the purpose, spirit, and intention of the parties hereto by these presents that the property hereinabove mentioned is to be sold and delivered by the party of the first part to the party of the second part for the said sum of \$25,000.00, free and clear of all liens, charges, and incumbrances." Provision is then made for an indemnity bond, and for the transfer of the immediate possession of the property to the Bell Company, and these last provisions were carried into effect.

The defendant having admitted the possession of the \$5,000, the plaintiff, to make out a prima facie case, introduced evidence showing the claims outstanding against the Park Company which were incumbrances upon the property, and that but \$50 had been paid in satisfaction of the Bronson claim, and but \$70 in satisfaction of the Enoch claim, and rested. The defendants then introduced evidence showing: That it had paid full value in satisfaction of the Bronson and Enoch claims. That it had paid \$2,109.40 in satisfaction of the claim of the Montana Electric Company. That it had paid \$461.40 as expenses incident to the discharge of the outstanding bonds of the Park Company. That it had retained \$394.71 in satisfaction of a claim which it had against the Park Company. And further that in July, 1905, Frank A. Hall, president of the Park Company, had authorized it to pay out of the \$5,000 the following claims: Chicago Telephone Company, John Walsh, Thompson Falls Mercantile Company, A. Ludwigson, A. W. Miles, Pauline and Lillian Turner, and W. J. Fransham. And that the balance of the \$5,000 was retained by it to discharge these claims, or so much thereof as such balance would pay.

The trial court found that the claims which were incumbrances against the property aggregated \$3,374.47; that the claim of the defendant company for \$394.71 was a valid set-off; that, to pay the outstanding bonds of the Park Company, the Bell Company was compelled to incur an additional expense of 461.41; and that this last-mentioned sum and the aggregate amount of the lien claims were covered by the written contract of June 3d. In its finding No. 8 the court found that by an agreement between the Park Company and the Bell Company it was further provided that the Park Company should furnish to the Bell Company a list of other claims then owing by the Park Company, which should also be paid out of this \$5,000, and that such list was furnished, the claims herein scheduled amounting to \$1,504.80, and of these the claims of the Chicago Telephone Company, Ludwigson, Thompson Falls Mercantile Company, the Turners, and Fransham were intended to be paid "under and by virtue of said contract of June 23, 1905"; and that, after paying the first 10 claims men-

tioned in the bill of particulars, the Bell Company should pay the claims listed by Hall in July, 1905, as shown above; and finally the court found that the Bell Company was not indebted to the Park Company at the time of the levy of the writ of attachment, or thereafter, in any amount whatever. From these findings the court concluded that the defendant company was not liable to plaintiff, and rendered and entered judgment in its behalf.

1. The claims scheduled in the bill of particulars fall into two groups; the first eight claims comprising the first group. Every claim of that group was a lien upon the property for some amount, and of those claims only three are contested by plaintiff. It is contended that the claim of Bronson was discharged for \$50, and the claim of Enoch for \$70, and such appears to be the fact; that is to say, Bronson received only \$50 for his claim, and Enoch only \$70 for his. But it does satisfactorily appear that the Bell Company was compelled to pay full value for each. Some one profited by the transaction, but the record is so meager that we are unable to determine the real facts; and, since the defendant company parted with its money in order to release the property from these liens, we think it should be given credit for the full amount paid by it on each of these two claims.

Claim No. 4, of the first group, presents some complications. On October 1, 1904, the Montana Electric Company filed its claim against the property of the Park Company for \$1,463.80. On May 4, 1905, it commenced a suit to foreclose, claiming the principal sum with interest, costs, and attorney's fees for foreclosure. On July 18, 1905, it recovered judgment for \$1,585, together with costs, taxed at \$28 and an attorney's fee of \$300, a total of \$1,913. Upon this judgment execution or order of sale was issued, and the property of the Park Company sold to the Montana Electric Company for \$1,977.54. On May 5, 1906, the Bell Company satisfied this judgment by the payment of \$2,109.40. With respect to the payment of this claim, P. R. Ferguson, the auditor of the Bell Company and a witness in its behalf, testified: "I do not know why we did not pay that judgment as soon as it was entered. I do not know why we allowed it to go into judgment at all and didn't pay it immediately after the 23d of June, 1905." This is the only evidence in the record touching the payment of this claim. When we recall that the Bell Company purchased the property from the Park Company on June 23, 1905, and retained the money to pay these claims, its delay in discharging this particular claim for nearly eleven months, during which time costs, expenses, and interest were permitted to accumulate, is wholly inexcusable. To permit it now to be credited with the \$2,109.40 which it paid for the redemption of this claim, in May, 1906, in the absence of any excuse what-

ever for the delay, would be tantamount, to saying that it might have deferred payment of all of these lien claims until by the accumulation of costs and expenses they consumed the entire \$5,000. But that was not the intention of the parties to the contract, and as against the claim of an attaching creditor it could not be done. The pendency of this action was not any excuse for the delay. The Bell Company was obligated to pay the lien claims, of which this was one. There is not anything in the record that would justify a court in crediting the Bell Company with more than the face of the judgment, \$1,913.

In the brief of respondent it is suggested that the appellant did not prove that the entire \$2,109.40 was not properly allowed; but, as we said above, the plaintiff made out his *prima facie* case by the admission of the defendant that it had the \$5,000 in its possession and by showing the amount of the claims which were incumbrances on the property; and as to this particular claim he showed the amount of it and that foreclosure suit had been brought; in other words, that an amount substantially the same as the face of the judgment was necessary to discharge it. Having made this showing, it is not imposing any hardship upon the defendant to require it to assume the burden of showing that it was entitled to credit in a greater amount, since the facts constituting its excuse for the delay in making payment were peculiarly within its own knowledge. Under the evidence the defendant is entitled to credit for each claim of the first group as returned in the bill of particulars, except that the claim of the Montana Electric Company should be limited to \$1,913, the amount of the judgment.

2. The second group embraces the remaining nine claims, listed in the bill of particulars. The first of these is the claim of this defendant, for \$394.71. This was for telephone services furnished by the Bell Company to the Park Company, and was not a lienable claim. It was not reduced to judgment prior to the date of the levy of the writ and was not an incumbrance upon the property of the Park Company. But it is insisted that it constitutes a valid set-off against a claim by the Park Company for the balance of the \$5,000, and, since the plaintiff as attaching creditor virtually stepped into the shoes of the Park Company, it can be asserted against this plaintiff. A set-off, as such, is not recognized by our Codes, and this is an action at law. It is true, as against a claim of the Park Company, this defendant could have asserted its demand as a counterclaim, if it had pleaded it; otherwise it could not have done so. This is elementary. The amended answer in this action denies generally any indebtedness by the Bell Company to the Park Company at the time of the service of the writ of attachment, or subsequently, but does not set forth any counterdemand and

ask to be permitted to retain a sum sufficient to discharge it. It cannot be disputed that any defense which the Bell Company could interpose as against an action by the Park Company for the balance of the \$5,000 it can now interpose as garnishee in an action by the attaching creditor (30 Cyc. 1073); but the rule which requires it to plead a counterclaim as against the Park Company likewise requires it to plead such counterclaim in an action against it as garnishee, at the suit of the attaching creditor, and it cannot assert such counterclaim under a general denial of indebtedness. 9 Ency. Pl. & Pr. 835, and note; 14 Am. & Eng. Ency. Law (2d Ed.) 845, and note; 20 Cyc. 1007, and note; *Kling v. Tunstall*, 109 Ala. 608, 19 South. 907. Furnishing a bill of particulars in which this claim is listed is not pleading a counterclaim within the meaning of section 6540, Rev. Codes. In finding that this claim was a valid set-off in favor of the Bell Company, in the absence of any pleading asserting it, and in the absence of any directions to the Bell Company, given prior to the levy of the writ to pay such claim, the trial court erred.

The next item in the second group is one for \$587.86, and this was reduced upon the trial to \$461.41, for expenses incurred in discharging the outstanding bonds of the Park Company. It will be remembered that by the terms of the written contract of June 23d \$20,000 of the purchase price was to be deposited with the American Trust & Savings Bank, to be by the bank applied to the payment of those bonds, and that the Park Company agreed to pay all costs and charges of redeeming the bonds. The authority of the Bell Company to pay \$20,000 towards the discharge of those bonds is at least an implied prohibition against the expenditure of any greater amount, and we are not informed by what authority the Bell Company assumed to increase its liability. If the contract had provided that the Bell Company should pay off the bonds, then it would have had authority to use such sum as was necessary for that purpose; but that is not the contract. The Bell Company may have a valid claim against the Park Company for this additional outlay; but this record not only fails to disclose any authority for asserting it against the attaching creditor, but does show a want of such authority. The Bell Company was limited by the contract to the expenditure of \$20,000 for that single purpose; and since it was not authorized, prior to the levy, to make such additional expenditure, finding No. 5 made by the trial court is erroneous as to the excess over \$20,000 expended in redeeming those bonds.

The other claims in this second group may be considered together. There is not a word of evidence to indicate whether any of these claims were or might become lienable. The witness Ferguson, the only one who testified in regard to them, did not know anything as to their character. If the claim of the Chi-

cago Telephone Company was ever a lienable claim, the evidence affirmatively shows that a lien for it has never been filed, and that the time for filing a lien had expired long prior to the date of the levy of the writ of attachment. There is not any evidence that any of these claims were for materials which went into the property of the Park Company or for labor done upon its property, nor is there any evidence to show when any of such claims matured; and therefore finding No. 10, made by the trial court, that the claim "of the Chicago Telephone Company for \$477.15, Anton Ludwigson for \$101.70, the Thompson Falls Mercantile Company for \$459, Pauline and Lillian Turner for \$34.65, and W. J. Fransham for \$51, aggregating \$1,123.50, were for materials furnished to and work done for said Yellowstone Park Telephone & Telegraph Company, and were referred to and intended by said last-named company under and by virtue of said contract of June 23, 1905, to be paid out of the aforesaid price of its said property, in addition to the liens, incumbrances, and mortgages hereinbefore referred to in so far as the purchase price for its said property would pay the same," has not any support in the evidence whatever, if the reference is to the written contract of June 23, 1905.

But it is insisted that all of the claims of this second group, excepting claims Nos. 9 and 10 above, were properly allowed under a parol agreement of June 23, 1905, made subsequently to the execution of the written contract. The written agreement provides for the payment, out of this \$5,000, of claims which were or might become incumbrances upon the property. It is now urged that under this parol agreement such other claims were to be paid as might be embraced in a schedule then agreed to be furnished by Hall, the president of the Park Company. The evidence touching this alleged parol agreement is submitted in full: "H. L. Burdick, being recalled for further examination, testified as follows: [Direct examination:] I was present when this contract between the two companies and Mr. Hall was signed. Mr. S. H. McIntire was also present. Q. Now was there anything said about what claims were outstanding against the Yellowstone Telegraph Company after the making of the contract? A. I inquired of Mr. Hall, after he had signed the contract, if he was quite sure that the amount of claims outstanding would not exceed \$5,000. Mr. Hall stated that he did not at that time know, but would submit to us a list of claims which could be paid as against the Yellowstone Park Telephone & Telegraph Company. He submitted such a list as that to Salt Lake, not to me. Q. Do you know whether or not the list submitted by him is the list that is contained in the bill of particulars attached to the answer in this case? You know the bill of particulars, you can look at it. A. A good deal of the correspondence was sent to me with reference to

these claims. The liens were submitted by me to Salt Lake. They were first handed to me. I can designate on that bill of particulars what claims I discovered myself to be against the property, and that Mr. Hall sent on to me. The claims submitted by Mr. Hall to me were Harry Bronson, C. L. Cory, Lew Miller, Montana Lumber & Manufacturing Company, Montana Electric Company, J. C. Enoch, Anton Ludwigson, and C. C. Rickman. [Cross-examination:] It seems quite evident from the contract which I made that I was a little apprehensive, even before the contract was signed, that the claims might amount to more than \$5,000; and I practically protected myself against such deficiency as that by requiring and obligating them to put up a bond to the amount of \$10,000, to the effect that it should not be more than that. Mr. Wallace, the president of the company, instructed me to find out as far as I could what liens lay against the Yellowstone Park Telephone & Telegraph Company. That was before the contract was signed. I started the procedure, but was not satisfied that we had found everything that might lie against the company. Therefore we had some discussion as to whether we were free and clear as to the amount. So as to be sure to be protected in the matter, we put this clause in the contract requiring a bond that there should not be more than \$5,000. We asked Mr. Hall to submit to us a list of claims that in his knowledge lay against the company. I found the lien of Harry Bronson, Cory, Montana Electric Company, Lew Miller, J. C. Enoch, Anton Ludwigson, on file, and I believe the Montana Lumber & Manufacturing Company was also on file. Mr. Hall really did not submit any claims to me personally. There were some claims sent to me for submission to the Salt Lake office, by Mr. Hall to me; but I don't remember what claims they were. [Redirect examination:] I have designated the liens that were first submitted to me."

When we consider the subject-matter of this conversation, the purpose to be accomplished, and the efforts that had already been put forth, it appears to us that there is not any room for a difference of opinion as to the effect of this evidence. The written agreement had just been executed. It provides for the payment of such claims as were or might become incumbrances upon the property then purchased. The contract in terms declares that it was the intention of the parties that the property should be turned over to the Bell Company free from any incumbrances. Mr. Wallace, the president of the Bell Company, had instructed Burdick, who was local superintendent, to ascertain what claims were outstanding that were liens upon the property, and Burdick had made an effort to comply; but, not being fully satisfied, this discussion arose, resulting in Hall's agreement to furnish "a list of claims that in his knowledge lay against the company."

Since it was wholly immaterial to the Bell Company what indebtedness the Park Company had aside from claims which were or might become incumbrances upon the property, it is impossible to suppose that any indebtedness other than such lienable claims was ever in contemplation of the parties when this conversation was had. The record discloses that the Bell Company has not paid these additional nonlienable claims, and it cannot have any interest in paying them. As to any balance of the \$5,000 it is the mere trustee, and as to the final disposition of the balance it cannot have any interest. In view of the fact that a written agreement had just been executed, which fully sets forth the intention of the parties, it seems altogether unreasonable that the parties would proceed immediately to enter into a parol agreement which would have the effect of enlarging the scope of the written contract, and that such parol contract should be called into existence at the instance, not of Hall, who might have had some interest in seeing these nonlienable claims paid, but of the Bell Company, which was not interested in them to any extent whatever. We are thoroughly convinced that Burdick desired a list of lienable claims, such claims as Mr. Wallace had directed him to investigate, and that Hall's agreement to furnish a list of claims which lay against the company was intended to and did refer to the very claims with regard to which Mr. Wallace was solicitous; and the fact that in July following Hall approved these other claims, and directed the Bell Company to pay them, cannot be invoked to the prejudice of this plaintiff, whose rights attached as of the date of the levy of the writ. The evidence fails to support finding No. 8 made by the trial court, and fails to justify the court in holding that the Bell Company was entitled to be credited with any of the claims comprising this second group, referred to above.

But there is a suggestion found in the brief of respondent, that, at the date of the levy of the writ, the \$5,000 was retained to meet the payment of outstanding claims against the Park Company, and, until the amount of such claims was determined, the Bell Company did not owe to the Park Company anything whatever; in other words, that the Bell Company's liability was then so far contingent that it was not subject to garnishment; and *Cowell v. May*, 26 Mont. 163, 68 Pac. 843, is cited, and the following quoted from the opinion: "Although the immaturity of a debt at the time of garnishment is, of itself, unimportant in so far as the ultimate liability of the garnishee is concerned, yet, in order to charge him, there must be an existing debt at the time of the service—a contract under which a debt may or may not arise is not sufficient. There must be at the time of the service a debt due or to become due, and not a contingent liability or a conditional contract merely." And this is followed by a quotation from section 551, Drake on At-

tachment. That this is a correct statement of the rule is evidenced by the authorities generally; but if the liability of the garnishee is certain, and the only uncertainty which exists is as to the amount of such liability, then the debt, whatever it may be, is subject to attachment. This is the meaning of section 6667 of the Revised Codes, and is the rule recognized by the authorities. 20 Cyc. 1008, and note; 14 Am. & Eng. Ency. Law (2d Ed.) 769; 2 Wade on Attachment, § 450; *Wagon Co. v. Peterson*, 27 W. Va. 314; *Miller v. Scoville*, 85 Ill. App. 385; *Downer v. Toplift*, 19 Vt. 399. In 2 Shinn on Attachment & Garnishment, § 481g, it is said: "The contingency which will prevent the property or debt from being attached must be such a contingency as affects the property or debt itself, and not simply one which affects the liability of the garnishee to have the effects or credits taken from him in a particular manner. It must be such a contingency as may preclude the principal from any right to call the garnishee to account." *Dwinel v. Stone*, 30 Me. 384.

There is not any difference in principle, and little, if any, in the facts, between the present action and the case of *New England Marine Insurance Co. v. Chandler & Burroughs*, 16 Mass. 275. In the latter case Chandler was indebted to the Union Bank and to other parties, including the insurance company. He transferred to Burroughs, as trustee, certain certificates of stock, with the understanding that Burroughs should sell the stock, pay the bank, and turn over any surplus to Chandler. Before the securities were sold, Burroughs was served with garnishment process in an action by the insurance company against Chandler. Burroughs answered setting forth the facts, from which it appeared that the value of the available assets in his hands exceeded Chandler's indebtedness to the bank, and the court properly held that, though the insurance company's case would have to be delayed until Burroughs could sell the securities and account for the surplus over the amount due the bank, such surplus, whatever it might be, was a garnishable debt. The Massachusetts case is cited with approval in *Cutter v. Perkins*, 47 Me. 557.

If in this present case the Bell Company had made answer to the garnishment immediately after service of the writ, it would have been compelled to set forth that it had in its hands, as trustee for the Park Company, \$5,000, out of which it was obligated to pay all claims against the Park Company which were then or might become incumbrances upon the property transferred by the agreement of June 23d; that the amount of incumbrances then on the property, was \$3,178.07; that there were the outstanding claims of Walsh, Thompson Falls Mercantile Company, Ludwigson, Miles, the Turners, and Fransham, aggregating \$749.25, which might or might not be lienable, dependent upon the

character and the claims and the time when each matured. Such would have been a full and fair return by the garnishee, and it would have shown a substantial balance in its hands, which under the contract belonged to the Park Company. That amount was certain, and there was a further balance which might or might not be subject to garnishment, depending upon the result of an investigation of the claim last mentioned, and, if such investigation had disclosed the nonlienable character of those claims, the entire balance over and above \$3,178.07 would have been subject to garnishment. Apparently the Bell Company did not make any answer to the garnishment until long after the time for filing liens for these claims just mentioned had expired, and no liens were filed, and, since the written contract of June 23d does not provide for the payment of these claims, the entire balance over and above the amount of the claims which were included in the contract of June 23d is subject to garnishment, even though at the date of the service of the writ the exact amount of such balance was not definitely fixed.

Since there is not any dispute as to the facts of this case, a new trial is not necessary; but the cause is remanded to the district court, with directions to set aside its findings and judgment, and enter judgment in favor of the plaintiff for \$1,821.93 and costs.

Reversed and remanded.

BRANTLY, C. J., and SMITH, J., concur.

Utah. 428)

IN RE JENSEN'S ESTATE.

GREEN v. JENSEN.

Supreme Court of Utah. April 29, 1910.)

LIS (§ 72*)—PROBATE—NATURE OF PAPER.

Decedent wrote a letter to petitioner, dissing in a general way their plans after they were married, stating therein that he would make petitioner his sole heir whether they were married or not, and if he died before they were married would make her his legal heir, but "I hope I will enjoy your company and association more than that, now this is only talk. I don't expect to die, but I am just telling you what I mean." Held, that the letter was not intended as a present disposition of decedent's property, but merely expressed an intention to dispose of it some future time, and was not admissible in probate as a will.

Ed. Note.—For other cases, see Wills, Cent. 189; Dec. Dig. § 72.*]

Appeal from District Court, Uintah County. J. E. Booth, Judge.

Petition by Millie Green against Jensen to probate an alleged will. From a judgment denying probate, proponent appeals. Affirmed.

Jensen & Meredith (Goodwin & Van Pelt, counsel), for appellant. John T. Pope (M. Warner, of counsel), for respondent.

FRICK, J. The appellant filed her petition in the district court of Uintah county, Utah, and with it presented for probate a certain writing which she alleged was the last will and testament of one John Jensen, late of Uintah county, deceased. The alleged will was in the form of a letter written by the deceased and directed to the appellant, who was his fiancé. The letter in full is as follows: "John Jensen & Co., Dealers in Miners' and Ranchers' Supplies. Dragon, Utah, Jan. 28, 1909. My Dear Millie: I had just written a letter to you when I received your most interesting letter I ever got from you. I am glad to hear that you favor our union this spring. Yes, my dear Millie, we will try to get our union sealed as soon as we can. I need you here and I want you here to comfort me and be a helpmate to me, and that we both may be benefited and blessed. (This is a kiss.) I am surprised to see your thoughts correspond with mine. You need not worry about your travel across the country. I will come and get you, and we will go right on to Salt Lake and back to Dragon and never mind the reception, we will have that some other time. I appreciate your sentiments and I am fully in sympathy with them, as I am with all you propose, but we must economize as much as we can. We are not millionaires and you and I must live, and so we will make things match as much as we can, and when we get well off then we will spread it on (do you see). Sweet Millie, I do not know if you like this or not, but I think you a sensible girl. I will make you my sole heir whether we get married or not, and if I die before you and me are married I will make you my legal heir, but I hope that I will enjoy your company and association before that, now this is only talk. I don't expect to die, but I am just telling you what I mean. If we were together we could talk all this thing face to face—I will be other there some time this spring. I will let you know later and we will arrange things. We may get married in Vernal, and then go to Salt Lake City, but I have to see the State President about that. You just keep your ears stiff and trust in the Lord. Pray for me and yourself and we will be all right. Yes, my dear, I hope all saloons will be closed and whiskey banished from the face of the earth. You shall not think that those post cards is of any consequence. It was only to show you what the store looks like. I will send you some more to show you Dragon from different points. We don't want to stay here all our lives, but we will stay here till we can do better or worse. I like to make a few dollars and go in the chicken business. God bless you, my dear Millie. From your loving John." The district court held that the writing was not intended as a will,

and that, in legal effect, it was not such, and hence refused to admit it to probate, and entered judgment accordingly. The appeal is from the ruling and judgment.

It is urged that the district court erred in its conclusions and judgment. Conceding, for the purposes of this decision, that the writing in question is in form and execution sufficient as a holographic will under the provisions of section 2736, Comp. Laws 1907, yet the writing lacks the elements of substance which are requisite to constitute it a will whether holographic or regular. It is manifest, from the face of the writing itself, that the writer did not intend it as constituting a disposition of his property, or any part of his property. True, the writer says, "I will make you my sole heir, * * * and if I die before you and me are married I will make you my legal heir." These are the only words that even the most liberal constructionist could claim had any tendency towards manifesting an intention on the part of the writer to make a post mortem disposition of property. It is, however, clear from the language used that the writer did not intend to presently bequeath or devise any property, but that he merely expressed an intention to do so at some future time. This is not only the unavoidable conclusion to be deduced from the language itself, but such a conclusion is fortified by the fact that the writer does not mention or specify any property of any kind whatever. If the writer had intended the letter as a present disposition of his property, or any part of it, he no doubt would have said something about property of some kind. To our minds it is very clear that the letter in question was not intended as a will, but that it was intended for what it purports to be, namely, a letter by which the writer communicated his thoughts and plans, in a general way at least, to one with whom it was his intention to establish the closest social relations in the near future. Such a writing, therefore, falls far short of being a present disposition of property.

The judgment is therefore affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

(37 Utah, 392)

SARGENT v. UNION FUEL CO.

(Supreme Court of Utah. April 26, 1910.)

1. DISMISSAL AND NONSUIT (§ 50*)—GROUNDS—ESTOPPEL.

Decedent died, leaving a widow, and she sued as widow and sole heir for wrongful death. Thereafter she, having been appointed administratrix of decedent's estate, moved to amend by adding herself as administratrix as party plaintiff. This was allowed, and defendant

again answered the amended complaint, and, after the jury was impaneled, plaintiff, without objection, was permitted to again amend by striking her individual name as a party plaintiff from the record. Held, that defendant, having permitted such amendments without objection, was estopped to demand a dismissal of the action on the ground that one party had been substituted for another.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 100-102; Dec. Dig. § 50.*]

2. PARTIES (§ 59*)—SUBSTITUTION.

In an action for wrongful death, the substitution of decedent's personal representative for decedent's widow as plaintiff was not a violation of the rule forbidding a substitution of parties which operates to change the original causes of action.¹

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 93, 94; Dec. Dig. § 59.*]

3. APPEAL AND ERROR (§ 197*) — REVIEW — QUESTIONS NOT MADE AT TRIAL.

Where, in an action for death, the amended complaint alleged that the widow was the sole heir, but no objection was made at the trial that the evidence showed that decedent left surviving his widow and his father, it could not be first claimed on appeal that the court should have granted a motion to dismiss because of such variance.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 197; Pleading, Cent. Dig. § 1438.]

4. PLEADING (§ 248*)—AMENDMENT—NEW ISSUES.

Where, in an action for death of a servant in a mine, the complaint alleged that defendant permitted the roof to be dangerous, and negligently failed to timber it or in any manner support the roof or provide against its dangerous condition, by reason of which a large mass of rock fell and killed deceased, the court did not err in permitting a trial amendment by inserting the words "and because the pillars of the mine had been and were being withdrawn therefrom," objected to on the theory that such language interposed a new issue, defendant not having claimed surprise, or that it was unprepared, and not having asked for a continuance or postponement.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 694; Dec. Dig. § 248.*]

5. MASTER AND SERVANT (§ 270*)—DEATH OF A SERVANT—MINES—ACTION—EVIDENCE.

In an action for the death of a miner who was struck by rock falling from the roof of a tunnel, evidence that rock and earth had fallen from the roof at different times prior to the accident and at other places was admissible to show the character of the ground and the necessity of timbering or otherwise supporting the roof, and notice to defendant of the defective and dangerous conditions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 919; Dec. Dig. § 270.*]

6. APPEAL AND ERROR (§ 231*)—EVIDENCE—HYPOTHETICAL QUESTIONS—REVIEW.

Where error was assigned on the admission of evidence in answer to hypothetical questions over an objection that the questions assumed facts not in evidence and that facts in evidence were not embraced in the action, but counsel, after the question had been reformulated to meet his objections, did not point out either at the trial or on appeal what facts were erroneously included or omitted, the assignment would not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 231.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

¹ Pugmire v. Diamond Coal & Coke Co., 26 Utah, 115, 73 Pac. 335.

7. APPEAL AND ERROR (§ 204*) — OBJECTION NOT MADE AT TRIAL — RULINGS ON EVIDENCE.

An objection to evidence not made at the trial will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1258; Dec. Dig. § 204.*]

8. APPEAL AND ERROR (§ 237*)—RULINGS ON EVIDENCE—MOTION TO STRIKE—NECESSITY.

Where the cross-examination disclosed that an expert's opinion was based partially on what plaintiff's counsel had told him out of court, as well as the facts assumed in a hypothetical question, but no motion was made to strike the testimony at the trial, its admissibility could not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 237; Trial, Cent. Dig. § 235.]

9. TRIAL (§ 252*) — INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

Where there is no evidence on which to predicate a request to charge, it may be properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 596; Dec. Dig. § 252.*]

10. APPEAL AND ERROR (§ 1004*)—QUESTIONS AVAILABLE—EXCESSIVE VERDICT.

That the verdict was excessive and was given under the influence of passion and prejudice cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3044; Dec. Dig. § 1004.*]

Appeal from District Court, Summit County; T. D. Lewis, Judge.

Action by Rose C. Sargent, as administratrix of the estate of George Lorenzo Sargent, deceased, against the Union Fuel Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mathoniah Thomas and W. J. Barrette, for appellant. Evans & Evans and David Evans, for respondent.

STRAUP, C. J. 1. This is an action to recover damages for wrongful death. From a judgment entered upon a verdict rendered in favor of the plaintiff the defendant appeals. The deceased was a married man and left no issue. By section 2912, Comp. Laws 1907, it is provided that, "when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death." The action was commenced in the name of Rose C. Sargent, the deceased's widow. It was alleged in the complaint that the deceased left no issue, and that she was his widow and sole heir. A demurrer was interposed to the complaint on the ground, among others, that the plaintiff had not the legal capacity to sue. The demurrer was overruled. The defendant answered, pleading to the merits. Thereafter the plaintiff proposed an amended complaint wherein Rose C. Sargent administratrix of the estate of the deceased was added as a party plaintiff. In the amended complaint it was alleged that she was the duly appointed, quali-

fied, and acting administratrix of the estate, and that she was the widow of the deceased and his sole heir. The amended complaint was allowed and filed with the consent of the defendant. The defendant again answered, pleading a general denial, contributory negligence, and assumption of risk. After the jury was impaneled the plaintiff again proposed an amendment to the amended complaint by striking out the individual name of Rose C. Sargent as a party plaintiff. In response to an inquiry from the court, the defendant's counsel stated that there was no objection to the amendment, and thereupon it was allowed. The complaint, as amended, then stood in the name of the administratrix in her representative capacity, and contained the allegations that she was the widow of the deceased and the sole heir and beneficiary of the estate. The defendant then moved to dismiss the action "on the ground that an entirely different plaintiff has been substituted for the one that originally brought the suit." The court denied the motion. Complaint is made of this ruling.

No complaint is made of the proceedings by which the administratrix was made a party to the action, nor the individual name of the widow stricken as a party; nor could the defendant well complain of them because of its consent to the rulings in that regard. If the defendant had cause for complaint, it ought to have made it when leave was asked to make the administratrix a party to the action. The defendant, having consented to the amendments making the administratrix in her representative capacity a party, and striking the individual name of the widow as a party, cannot thereafter be heard to assert that one party has been substituted for another, and seek to dismiss the action on such ground. To allow that is to permit it to take inconsistent positions. If there was a substitution of parties, the defendant consented to it when it consented to the amendments. Furthermore, in the case of *Pugmire v. Diamond Coal & Coke Co.*, 26 Utah, 115, 72 Pac. 385, it was held by this court that, in an action for wrongful death, the personal representative could be substituted in place of the widow and children, and that such substitution was not in violation of the general rule forbidding a substitution of parties which operates to change the original cause of action. While it was alleged in the original and amended complaint that the widow was the sole heir, it was, however, shown by the evidence that the deceased left surviving him his widow and his father. But no complaint was made of that to the court below, and no action of the court invoked in respect of it. Counsel, however, in argument here attempt to make much of it in support of their contention that the court erred in denying the motion to dismiss the action. Such observations have

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

no pertinency to the question in hand. A defendant might as well before trial move the court to dismiss the action upon alleged grounds that the allegations of the complaint are untrue. We think no error was committed in the ruling complained of.

2. The defendant was engaged in operating a coal mine and in mining and removing coal therefrom. The deceased was in its employ, engaged in hauling cars loaded with coal along an underground tunnel from the place where the coal was dug to the place where it was hoisted to the surface. It was alleged in the complaint that the ground above the tunnel was loose, broken, and insecure, and that timbers were required to protect the roof of the tunnel and to prevent earth and rock from caving and falling therefrom, and that the defendant suffered and permitted the roof to be insecure and dangerous and "negligently and carelessly failed to timber or in any manner support said roof, or in any manner provide against the dangerous condition thereof," by reason of which a large mass of earth and rock fell from the roof and struck the deceased and killed him. On the day of the trial, and before the jury was impaneled, the plaintiff asked leave to amend the complaint by inserting the words "and because the pillars of said mine had been and were being withdrawn therefrom." With such amendment the complaint then read to the effect that the rock and earth which struck the deceased fell by reason of the negligence of the defendant in failing "to timber or in any manner support said roof, or in any manner provide against the dangerous condition thereof" (as stated in the complaint before the proposed amendment), "and because the pillars of said mine had been and were being withdrawn therefrom," as added by and stated in the amendment. The defendant objected to the amendment on the ground that it introduced a "new and different charge of negligence." The court, in overruling the objection and allowing the amendment, observed that "that evidence could be introduced without the amendment." Complaint is made of this ruling. It is urged by the appellant that "it should not have been forced to the trial of an issue withheld from its knowledge and then sprung at the moment of trial." We think the ruling was right. No new issue was presented by the amendment. Furthermore, the defendant did not then claim that it was taken by surprise, or that it was unprepared, nor did it ask for a continuance or postponement. It cannot be heard to make such claim now.

3. Over defendant's objections, plaintiff was permitted to show that rock and earth had fallen from the roof of the tunnel at different times prior to the accident, and at places other than the place of the accident. We see no error in these rulings. Such evidence was admissible as tending to show the character of the ground, the necessity of

timbering or otherwise supporting the roof, and notice to the defendant of the defective and dangerous conditions.

4. Lengthy hypothetical questions were propounded by plaintiff to expert witnesses examined in her behalf and their opinions asked with respect to the usual method of timbering under the conditions assumed, and they were asked "What in your judgment as an experienced miner should have been done in order to render" the roof "reasonably safe so that rock" sloughing or breaking off "would not be falling," and to prevent rock and earth from falling? Over the objections of defendant, the witnesses were permitted to answer, to the effect that the usual method was "by putting square sets of timbers in and lagging over the top." The objections made at the trial were that the hypothetical questions proposed were indefinite, included some things not in evidence, excluded others in evidence, and that the witnesses had not qualified. No objection was made, nor is it contended, that the questions called for opinions or conclusions of an issue to be tried, and upon which the decision of the case depended, nor is it here claimed that the witnesses had not properly qualified, except that they had not been in the mine, and had no personal knowledge of the conditions assumed in the questions. We therefore pass that. When the objection was interposed to the question propounded to the first witness, the court inquired of counsel for the defendant "what facts are assumed in the hypothetical question of which there is no evidence?" Counsel replied: "Perhaps I would better put it that it bears on the indefiniteness" with respect to the frequency of the falling of the rock, and that "no condition is involved as to the kind or character of the rock, conditions with relation to coal, the relation of the soil, its dryness or dampness, seams or no seams, hardness or softness of the rock." The question was then reframed, embracing such conditions. The defendant still objected on the same grounds. The objection was overruled, and the court took the answer of the witness. Upon an objection made to the question propounded to the second witness, the court again inquired of counsel what facts were assumed in the question which were not in evidence. Counsel replied: "I do not think that we are called upon to suggest what it should be or in what respect it fails." The court indicating a different view, counsel suggested that there was not any evidence "as to the consistency and the character of the soil and the rock in that place, and as to its condition with relation to cracks and crumbling." Again, the question was reframed embracing such conditions. The defendant still objected on the same grounds, which objection was overruled and the answer of the witness received. These rulings are also complained of.

The appellant still asserts that "the questions did not include all, or even substantial-

ly all, of the facts brought out in the evidence." No attempt is made to inform us what facts were assumed in the question which were not in evidence, or what facts in evidence were not embraced in the question. If after the questions were reframed counsel were unable to point out any to the trial court and are unable to do now, we think they no longer have cause for complaint in that regard.

Further complaint is made with respect to the testimony of one of these witnesses upon the alleged ground that his answer was based "not upon the alleged facts in the hypothetical question, but a statement of alleged conditions made to him out of court." No such complaint was made to the court below. It is here made for the first time. The witness on cross-examination was asked if the attorneys for the plaintiff had not talked with and described to him the conditions of the tunnel and entryway, and asked his opinion. He replied that they had, and that he told them his opinion. He was then asked if he did not come into court with that opinion, and if his answer which he made in response to the hypothetical question propounded to him was not partly based on what was told him out of court, and partly upon the question propounded to him, and he replied that it was. Counsel, however, made no motion to strike the testimony of the witness, nor did they otherwise ask any ruling of the court or raise any question in respect of the testimony in such particular, nor was the court in any manner given an opportunity to rule thereon. If counsel at the trial were content to let the testimony of the witness remain notwithstanding such showing on the cross-examination, they must be content now.

5. It is also urged that the defendant's motion of nonsuit ought to have been granted on the ground that the evidence was insufficient to show negligence on the part of the defendant, and that it conclusively appeared that the deceased assumed the risk. All counsel have to say in support of the first is that the substance of the evidence on behalf of the plaintiff, except the testimony of the experts, "was a narrative of the occurrence of the accident and a description of the physical conditions in the mine. There was no hint in any of that testimony that these conditions were other than the usual conditions in coal mines, or that the accident was other than one of the unfortunate occurrences in what is recognized by all as an extremely hazardous employment," and that the plaintiff tried but failed "to supply the deficiency by testimony of the experts." In support of the second, all that is said is "it appeared from plaintiff's own evidence that the hazards of the business were open and apparent, and that, if the deceased had the intelligence claimed for him, he could not

help realizing them, and therefore assumed the risk of them." Counsel have not referred us to any evidence where these things are made to appear, nor have they attempted to do so; nor have they attempted to point out in what particular the evidence lacked in essential facts to show negligence on the part of the defendant, except to urge us that the conditions of the defendant's mine as shown by plaintiff's evidence were no worse than those found in other mines. Notwithstanding the failure of counsel in such particulars, and of the additional burden cast upon us in consequence of it, we have nevertheless examined the record, and find that all the essential averments of the complaint with respect to the defendant's negligence are sufficiently supported by the evidence to carry the case to the jury, and that the question of assumption of risk was also one of fact. No error was therefore committed in submitting the case to the jury.

6. Error is also assigned upon the ruling of the court in refusing to give certain requests of the defendant. They are to the effect that if the deceased was not at the place where the rock and earth fell upon him in the discharge of duties assigned to him, and if he voluntarily assumed to labor at such place when he was required and instructed by the defendant to labor elsewhere, the plaintiff could not recover. We find no evidence upon which to predicate such a charge. The requests were therefore properly refused.

7. It is also contended that the verdict is excessive, and was given under the influence of passion and prejudice. We have so frequently held such a question not reviewable here that it is useless to longer urge it.

We are of the opinion that the judgment of the court below ought to be, and it accordingly is, affirmed, with costs.

FRICK and McCARTY, JJ., concur.

(37 Utah, 450)

GRANT v. LAWRENCE.

(Supreme Court of Utah. April 29, 1910.)

1. PROCESS (§ 69*) — SUBSTITUTED SERVICE — EFFECT—"PERSONAL SERVICE."

Substituted service of summons if properly made by leaving copy at defendant's usual place of abode with some suitable person of at least 14 years of age, as authorized by Comp. Laws 1907, § 2948, subd. 3, constitutes personal service.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 83; Dec. Dig. § 69.*

For other definitions, see Words and Phrases, vol. 6, p. 5363.]

2. DOMICILE (§ 8*) — PRESUMPTIONS — PLACE OF ABODE.

The presumption that a man's place of abode is prima facie where his family lives is one of fact, and not of law, and may be overcome by evidence to the contrary.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 36, 37; Dec. Dig. § 8.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**3. PROCESS (§ 79*)—SUBSTITUTED SERVICE—
"PLACE OF ABODE"—"DOMICILE."**

Plaintiff in May, 1884, was married to A., and, while she was still his wife, during the same month he married E., she being his plural wife. Thereafter he went to England as a missionary, and took with him his wife E. and her children, and resided and worked there. During his absence in England, his wife A. built a house in Salt Lake City with money furnished by plaintiff, and during plaintiff's absence lived therein. Plaintiff never saw the house nor lived in it until after his return from England, during which time summons was attempted to be served on him in an action brought by defendant by leaving a copy at such house with his wife A., on which judgment was rendered against him by default, concerning which he had no knowledge until he returned from England. *Held*, that such house was not plaintiff's "usual place of abode" within Comp. Laws 1907, § 2948, subd. 8, authorizing substituted service by leaving a copy of the process at the defendant's usual place of abode with a suitable person at least fourteen years of age; the term "place of abode" as so used being the place where defendant lives or abides, his "then present residence," and is not synonymous with "domicile."

[Ed. Note.—For other cases, see Process, Cent. Dig. § 91; Dec. Dig. § 79.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5388, 5389; vol. 3, pp. 2168, 2179; vol. 8, pp. 7641, 7642.]

Appeal from District Court, Salt Lake County; O. W. Morse, Judge.

Suit by Heber J. Grant against Franklin Lawrence. Decree for plaintiff, and defendant appeals. Affirmed.

C. S. Patterson, for appellant. Young & Snow, for respondent.

FRICK, J. Respondent instituted this action in equity to set aside a judgment rendered against him in a former action. The present action is based on the alleged ground that the court in the former action had no jurisdiction of the person of respondent for the reason that summons was not served upon him in that action as required by the statutes of this state. The former action was also an action in equity to quiet the title to certain real estate of which respondent claims to be the owner, or in which he has an interest.

The undisputed facts which are deemed material, in substance, are: That with the exception of two years as a resident of Tooele county, this state, and two years while on a mission in Japan, and three further years while on a mission in England (seven years in all), the respondent has been a resident of Salt Lake City, in Salt Lake county, Utah, all his life. That at the time of trial and for many years prior thereto he was engaged in the insurance business in Salt Lake City, and that there was no interruption in the conduct of said business while respondent was absent in Japan and England as aforesaid. That respondent in May, 1884, married one Augusta W. Grant, and thereafter, and while said Augusta was

still living and continued to be his wife, he also married one Emily W. Grant, the latter becoming his plural wife. That, when respondent went to England, he took with him said Emily W. Grant and her six children, and she and respondent established house-keeping in the city of Liverpool, and lived together with said children as a family. That Augusta W. Grant remained in Salt Lake City, and after respondent had departed from this state, and while he was sojourning in England for the purpose aforesaid, said Augusta W. Grant erected a dwelling house at No. 174 East South Temple street, in Salt Lake City. That said house was paid for by money furnished by respondent. That said Augusta and her child during respondent's absence in England moved into said house and lived therein, but respondent had never seen the same nor lived therein when the summons hereinafter referred to was served, but, when he should be released from his services as a missionary in England, he intended to, and when he returned did, go to and live with said Augusta W. Grant in said house. That on the 25th day of April, 1906, and while respondent was absent from Utah and in England as before stated, a certain action was commenced in the district court of Salt Lake county by one Franklin Lawrence to quiet the title to certain real estate in Salt Lake county, in which a judgment or decree was entered quieting the title to said real estate in said Lawrence. That respondent was made defendant in said action, and the only service of summons that was made on him was made by one Brunner, who was not a party to said action nor an officer authorized to serve process, and, as his return made under oath shows, service was made on respondent as follows: "I further depose and say that the within summons came into my hands for service on the 25th day of April, A. D. 1906, and that on the same day I served the same as follows: On the defendant Heber J. Grant by leaving a true copy thereof at the usual place of abode of the said defendant at Salt Lake City, Utah, with Mrs. Heber J. Grant, wife of the said defendant, she being a suitable person and more than fourteen years of age." That said summons was served as aforesaid on said Augusta W. Grant at the house aforesaid, to wit, No. 174 East South Temple street. It is also conceded that respondent had no knowledge of the entry of the judgment aforesaid until more than a year after it was entered, that the present action was commenced within a reasonable time after he had obtained knowledge of said judgment, and that said respondent "had a probable defense to said action" to quiet title as aforesaid. Upon the foregoing facts the district court made conclusions of law, by which it was, in substance, found that the service of summons as

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

set forth in the foregoing statement was not a legal service, and that, therefore, the district court in the action to quiet title did not acquire jurisdiction of the person of respondent. Upon these conclusions the court entered judgment setting aside the former judgment quieting the title in so far as it affected the respondent. The appeal is upon the judgment roll.

While various errors are assigned, the only ones that it is necessary to consider are that the court erred in its conclusions of law, and in entering judgment vacating the former judgment and decree. The only question is: Did the court acquire jurisdiction of the person of respondent in the action to quiet title by the service of summons made on him in the manner set forth in the statement of facts?

The service was what is usually designated as substituted service. That is, it is a substitute for service on the defendant by delivering to him personally a copy of the summons. Such service, when properly made, in legal effect constitutes personal service under our statutes. Such a service may be made in all actions, and is not, as in some states, upon the condition that the defendant cannot be found. Section 2948, Comp. Laws 1907, provides on whom service of summons shall be made. The introductory part of the section provides: "The summons must be served by delivering a copy thereof as follows." This statement is followed by various subdivisions in which it is prescribed on whom the summons shall be served when the action is not against an individual or natural person. When the action is against a natural person, the service of summons must be made on said person as provided in subdivision 8 of said section, which must be made by delivering a copy "to the defendant personally, or by leaving such copy at his usual place of abode with some suitable person of at least the age of fourteen years." From the foregoing statement of facts, it is apparent that service was attempted to be made on respondent at his "usual place of abode." Respondent contends, and the court found, that No. 174 East South Temple street, where Augusta W. Grant, the wife of respondent, and her child, lived when the service of summons was made in the former action, was not his usual place of abode within the purview of our statute, but that at said time his usual place of abode was in Liverpool, England, where he lived with Emily W. Grant and the children as aforesaid. The question of what constitutes or what is intended by the phrase "usual place of abode" is not always free from doubt; and the courts have arrived at different conclusions, depending somewhat, however, on the nature of the proceeding and the subject-matter which gave rise to the decisions. It may be accepted that as a general rule a man's place of abode, *prima facie* at

least, is presumed to be where his family lives. 10 A. & E. Ency. L. (2d Ed.) 23; Missouri K. & T. Trust Co. v. Norris, 61 Minn. 250, 43 N. W. 634. "This presumption, however, is one of fact and not of law, and may be overcome by evidence showing the fact to be otherwise." 10 A. & E. Ency. L. (2d Ed.) 24; Schlawig v. De Peyster, 83 Iowa, 323, 49 N. W. 843, 13 L. R. A. 785, 32 Am. St. Rep. 308; Wolf v. Shenandoah Nat. Bank, 84 Iowa, 138, 50 N. W. 561. Usual place of abode is sometimes referred to as being synonymous with domicile or permanent residence. In our judgment there is a broad distinction between domicile and usual place of abode as the latter term is used in our statute. Such also seems to be the conclusion reached by the authorities, as is demonstrated by the following cases: In Mygatt v. Coe, 63 N. J. Law, 512, 44 Atl. 199, the Supreme Court of New Jersey, in construing a statute authorizing substituted service in terms similar to ours, says: "The statute does not direct service to be made at the 'residence' of the defendant, but at his dwelling house or usual place of abode, which is a much more restricted term. As was said in Stout v. Leonard, 37 N. J. Law, 492, many persons have several residences which they permanently maintain, occupying one at one period of the year and another at another period. Where such conditions exist, a summons must be served at the dwelling house in which the defendant is living at the time when the service is made." That is, where a person abides—lives—at the particular time when the summons is served, constitutes his usual place of abode. A similar question was before the Supreme Court of the United States in Earle v. McVeigh, 91 U. S., where, at page 608 (23 L. Ed. 398), it is held that, where service of summons is required to be made at the "usual place of abode," such service, in order to constitute legal service, must be made at the defendant's "then present residence." In other words, at the place where the defendant then lives or abides. The same conclusion was reached by the Supreme Court of Missouri in the case of Bank v. Suman, 79 Mo. 527, where the case of Earle v. McVeigh, *supra*, is reviewed and approved.

It will be observed that in the case at bar there is no finding that the respondent, before going to England, had his usual place of abode either with Augusta W. or with Emily W. Grant. All that appellant relies on is the fact found by the court, namely, that respondent "was married to Augusta W. Grant in May, 1884, and afterward, in the same month, while Augusta W. Grant was still his wife, was married to Emily W. Grant." From this finding appellant contends the presumption arises that respondent lived with Augusta W., because she, as he contends, was his legal wife. We have already pointed out that the presumption that a man lives with

his family is merely one of fact, and is thus a rebuttable presumption. In view, therefore, of the further finding that in the same month in which respondent married Augusta W. he also married Emily W. and in the absence of any finding with respect to where Augusta W. lived at the time of her marriage, or that she ever lived in the state of Utah, how can the presumption be indulged that respondent had in fact his "usual place of abode" with Augusta W. at any time before he went to England? The utter failure of such a presumption becomes still more apparent when we remember the conceded fact that the summons in the former action was in fact served at a place where the respondent had never made his usual place of abode. The house, as a place of abode, had no existence when respondent departed from the state, and, if it were conceded that he at some time in the future intended to make it his place of abode, yet it manifestly was not such at the time the summons was served. If the court had found that at the time respondent went to England he was married to Augusta W., that she at that time was his wife, and that he actually lived with her in Salt Lake City up to the time of his departure, it might be inferred that his home continued to be at such place as she made her home in said city. Under all the facts as found, and in the absence of other findings to which we have referred, it seems to us that no presumption can be indulged in this case that at the time the summons was served in the former action respondent had his usual place of abode at No. 174 East South Temple street in Salt Lake City. In order to so hold, the conclusion would have to be based upon a fiction which in our judgment is entirely overcome by all the facts found in the case.

Counsel for appellant has referred us to a number of cases in which, as he contends, the courts have arrived at a conclusion different from that arrived at by us. We do not deem it either necessary or profitable to review those cases at length, for the reason that all of them, except the case of *Missouri K. & T. Trust Co. v. Norris*, supra, and to which we have referred, pass upon the question of residence or usual place of abode in the light of local statutes and in connection with the pleas of the statute of limitations, or of the exercise of the franchise by a citizen, or where a claim of homestead was invoked, or where the question arose of what constituted the usual place of abode or residence of persons who were sentenced to be imprisoned at a place or county other than where they lived at the time sentence was imposed. Those cases, therefore, have but little, if any, influence upon this case, in view of the undisputed facts.

Under all the facts and circumstances of this case, we are constrained to hold that the district court committed no error either in

the conclusions of law or in setting aside the judgment entered against the respondent in the former action. The judgment is therefore affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

(32 Nev. 384)

STATE v. PETTY. (No. 1.859.)

(Supreme Court of Nevada. May 19, 1910.)

1. CRIMINAL LAW (§ 393*)—COMPELLING ACCUSED TO TESTIFY AGAINST HIMSELF—PHYSICAL EXAMINATION.

Where the defense in a homicide case was sadistic insanity, and accused was examined by a physician for the purpose of testifying for accused as to his physical condition as bearing upon the question of insanity, accused's examination upon an order of court by physicians appointed by it upon the state's request to enable them to testify as to the same facts did not compel accused to become a witness against himself contrary to Const. art. 1, § 8.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 871-874; Dec. Dig. § 393.*]

2. CRIMINAL LAW (§ 670*)—EVIDENCE ADMISSIBLE FOR PARTICULAR PURPOSE.

Where, in a prosecution for uxoricide, in which the defense was sadistic insanity, accused's medical witness testified as to the condition of accused's heart and genital organs, and did not state until cross-examination that he did not base his conclusions upon the condition of the heart and genital organs, the state could introduce evidence of the condition of such organs; and hence an objection as to its propriety as impeaching testimony was not well taken.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1593; Dec. Dig. § 670.*]

3. CRIMINAL LAW (§ 396*)—ADMISSION OF EVIDENCE—SIMILAR EVIDENCE BY ADVERSE PARTY.

The overruling of an objection to the state's medical testimony as to the condition of accused's heart and genital organs, given in connection with testimony on the concededly material questions of the condition of his head, etc., on the ground that it was immaterial, was not error, unless accused withdrew or struck the testimony offered by himself on the condition of such organs.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 861, 862; Dec. Dig. § 396.*]

4. WORDS AND PHRASES—"SADISM."

Sadism is a mental disease in which the sexual instinct is abnormal or perverted.

5. CRIMINAL LAW (§ 730*)—TRIAL—IMPROPER ARGUMENT—ACTION OF COURT.

In a prosecution for uxoricide, in which the defense was sadistic insanity, in objecting to accused's medical witness detailing statements made by accused during a physical examination of him before trial by the witness, the state's attorney stated that he objected to a conversation occurring in a jail three or four days before trial, as it was highly improper, and no doubt was manufactured for the physician's benefit, and that he knew there were eyewitnesses to the killing, and that a legitimate defense of insanity would not avail accused. Held, that striking out such remarks and instructing the jury to disregard them cured any injury that might have resulted to accused therefrom, they being merely the expression of the state's attorney's opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. CRIMINAL LAW (§ 1171*)—APPEAL—HARMLESS ERROR.

An assertion by an attorney in argument, either directly or by innuendo, of the existence of a fact tending to prejudice the jury against accused, when such fact is not in evidence, is generally held prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

7. CRIMINAL LAW (§ 730*)—TRIAL—ARGUMENT—ACTION OF COURT.

The limits of argument before the jury is necessarily a matter for the trial court's discretion, and an instruction to disregard improper argument will be held not to cure such argument only where the remarks are clearly prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

Appeal from District Court, Washoe County.

C. C. Petty was convicted of murder in the first degree, and appeals. Affirmed.

F. B. Mayers, for appellant. R. C. Stoddard, Atty. Gen., L. B. Fowler, Deputy Atty. Gen., W. Woodburn, Jr., Dist. Atty., and M. B. Moore, Asst. Dist. Atty., for the State.

NORCROSS, C. J. On the 9th day of March, 1909, upon a public street in the town of Sparks, Washoe county, defendant killed his wife, May Petty, by shooting her five times with a pistol. He was indicted for this uxoricide, and upon trial a verdict was returned of murder in the first degree, with punishment fixed at death. Judgment was entered in accordance with the verdict. From the judgment and from an order denying defendant's motion for a new trial, defendant has appealed.

Upon the trial defendant relied upon the defense of sadistic insanity. In support of this defense, the defendant went upon the stand and testified in his own behalf. He also called as a witness Dr. A. H. Hepner, who qualified as an expert, and testified, among other things, to having made a physical examination of the defendant prior to the trial, and detailed certain physical conditions existing in the defendant, which, in part, formed a basis for his opinion that at the time of the killing the defendant was insane. For the purposes of rebuttal, counsel for the state requested the court to appoint three physicians and to order that the defendant be submitted to an examination by them relative to the physical conditions detailed in the testimony of Dr. Hepner. Over the objection of counsel for defendant, the order as requested was made, and the following named physicians were appointed by the court for the purpose of making the examination: Dr. B. F. Cunningham, Dr. W. H. Hood, and Dr. L. T. Ritchie. The examination was made in a suitable room in the county jail in the presence of counsel for the state and for the defendant. Each of the said physicians so appointed by the court

subsequently, upon rebuttal and over the objection of defendant, testified to the facts disclosed by their examination of the person of defendant within the limits specified in the order of the court. Exceptions to the order directing the examination, and to the testimony of the appointed physicians, were based upon the contention that the constitutional guaranty that no person shall be compelled, "in any criminal case, to be a witness against himself," was violated. Const. Nev. art. 1, § 8. We think the court did not err in the order or in the admission of the testimony.

Considering this constitutional provision, this court by Hawley, J., in *State v. Ah Chuey*, 14 Nev. 88, 33 Am. Rep. 530, said: "The Constitution means just what a fair and reasonable interpretation of its language imports. No person shall be compelled to be a witness—that is, to testify—against himself. To use the common phrase, it 'closes the mouth' of the prisoner. A defendant in a criminal case cannot be compelled to give evidence under oath or affirmation or make any statement for the purpose of proving or disproving any question at issue before any tribunal, court, judge, or magistrate. This is the shield under which he is protected by the strong arm of the law, and this protection was given, not for the purpose of evading the truth, but, as before stated, for the reason that in the sound judgment of the men who framed the Constitution it was thought that, owing to the weakness of human nature and the various motives that actuate mankind, a defendant accused of crime might be tempted to give testimony against himself that was not true. * * * From whatever standpoint this question can be considered, the truth forces itself upon my mind that no evidence of physical facts can be upon any established principle of law, or upon any substantial reason, be held to come within the letter or spirit of the Constitution. The question of whether or not the court erred in compelling the defendant, Ah Chuey, to exhibit his arm must, in my opinion, be determined upon other grounds. Was the defendant compelled to exhibit himself in such a manner as to unjustly or improperly prejudice his case before the jury? Did the act in question have a tendency to degrade, humiliate, insult, or disgrace the defendant? Did the judge, by the act in question, convey to the jury the idea that he believed the defendant to be guilty of the offense charged against him? If either of these questions ought to be answered in the affirmative, then I think the defendant should be granted a new trial. A defendant in a criminal case is entitled to a fair and impartial trial, free from insult or obloquy, and courts cannot be too particular in guarding his personal rights and privileges. He

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

should never be compelled to make any indecent or offensive exhibition of his person for any purpose whatever. The judge presiding at the trial should not express any opinion upon the facts (*State v. Tickel*, 13 Nev. 502, and the authorities there cited), or compel the defendant to do any act which would clearly convey to the jury an intimation that the defendant was guilty of the offense charged, or to exhibit himself in such a manner as to prejudice his case before the jury." While this opinion was rendered more than 30 years ago, it is recognized as a leading case construing this provision which exists in most of the state Constitutions and in the federal Constitution. Not all of the authorities are in harmony with the *Ah Chuey Case*, but the weight of authority is. The reasons supporting the conclusions reached in that case are convincing, and need not be repeated here. In this case the defendant had interposed the defense of insanity, had offered himself as a witness solely in support of this defense, had been physically examined by a physician for the purpose of enabling such physician to testify concerning his physical condition as bearing on his alleged insanity, and such physician had testified in regard thereto. He could not therefore interpose any legal objection to the state having the benefit of the same character of expert examination which he had through the testimony of his physician submitted to the jury.

The recent case of *People v. Furlong*, 187 N. Y. 198, 79 N. E. 978, presents a situation somewhat similar to that here involved. We quote from the opinion the following: "The only exceptions taken by the defendant that are urged before us relate to the examination of the defendant by Dr. Flint during one of the adjournments of the court, while the defendant was on trial, and also to the subsequent testimony of Dr. Flint, in which he related to the jury the conversation which he had with the defendant, and described what he found upon a physical examination. It is claimed in behalf of the defendant that such examination was obtained by entrapping the defendant, and that it was generally unfair and prejudicial to him, and that he was thereby compelled to give testimony against himself in violation of his constitutional rights. * * * The defendant was distinctly told that he might decline to answer any questions that were put to him, and that anything that he said in answer to questions might be used against him. * * * The record does not disclose any justification for the claim that Dr. Flint was used to entrap the defendant into making a statement for use against him on the trial. There is no denial of the testimony that Dr. Flint examined the defendant after being told that it was requested by the court, and that the examination was made without the knowledge or presence of either counsel. We are not to pass upon the question wheth-

er due courtesy was shown to the counsel engaged in the trial in holding the examination without notifying them. * * * The statement made to Dr. Flint was not within the constitutional prohibition against compelling a defendant to give testimony against himself. *People v. Truck*, 170 N. Y. 203 [63 N. E. 281]; *People v. Gardner*, 144 N. Y. 119 [38 N. E. 1008, 28 L. R. A. 699, 43 Am. St. Rep. 741]; *People v. Van Wormer*, 175 N. Y. 188 [67 N. E. 299]; *People v. Adams*, 85 App. Div. 390 [83 N. Y. Supp. 481], affirmed 170 N. Y. 351 [68 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675], affirmed [*Adams v. New York*] 192 U. S. 585 [24 Sup. Ct. 372, 49 L. Ed. 575]; *People v. Mills*, 178 N. Y. 274 [70 N. E. 786, 67 L. R. A. 131]." See, also, *State v. Tettaton*, 159 Mo. 354, 60 S. W. 743; *O'Brien v. State*, 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323; *Gordon v. State*, 68 Ga. 814; *Commonwealth v. Buccieri*, 153 Pa. 550, 26 Atl. 228; *People v. Hock*, 150 N. Y. 303, 44 N. E. 976.

Counsel for appellant further contends that it was error to order the examination of defendant's person or to permit the physicians appointed by the court to testify to facts disclosed by such examination, for the reason that the purpose of such examination was to contradict the witness Dr. Hepner for purposes of impeachment, and, as Dr. Hepner had, upon cross-examination, testified that he had not based his opinion on the physical symptoms of defendant testified to by him, "except the typical degeneracy written on his face and head," his testimony relative to defendant's heart and genitals was as to an immaterial matter, and hence could not be contradicted for purposes of impeachment. We do not think the testimony of the physicians appointed by the court can be regarded solely in the light of impeaching evidence. Dr. Hepner had testified at length as to the condition of defendant's heart and genital organs, and it was not until cross-examination that he stated that he did not take into consideration the condition of these organs in reaching his conclusions as to defendant's mental condition. Counsel for defendant never withdrew this portion of Dr. Hepner's testimony from the case or offered to have it stricken out. It was all included in the hypothetical question propounded to the witness by defendant's counsel. Sadism is a mental disease in which the sexual instinct is abnormal or perverted. Where this character of insanity is relied on, the physical facts, now claimed to be immaterial, would very naturally be given some weight by the jury in defendant's favor where it was shown by uncontradicted testimony that they were abnormal. The testimony of Dr. Hepner was that defendant's heart and genital organs were abnormal, while that of the physicians appointed by the court was that they were normal. The court in ordering the physical examination of defendant was

careful to limit it to the points testified to by defendant's own expert. If counsel for defendant deemed these physical facts immaterial, he should not have offered testimony concerning them, but, having offered testimony of the existence of certain physical characteristics of defendant, he was not in a position to object to the state offering testimony in reference to the same physical facts, and, as before stated, such testimony could hardly be held to be governed by the rules relating to impeaching testimony. At the time the order was made, it could not be told whether the investigations of the physicians appointed by the court would confirm the testimony of Dr. Hepner or not. The purpose of making the order was to enable the court to arrive, if possible, at the truth of the existence or nonexistence of certain physical facts, which the defendant had introduced into the case in his defense, and not to impeach the defendant's witness. The mere fact that one expert witness may reach a conclusion different from that of another expert witness does not of itself impeach the former witness. In any event the physical examination of the defendant went to all the points testified to by Dr. Hepner which he found as a result of his examination, all of which were considered by him in reaching his conclusion that the defendant was insane at the time of the homicide, with the exception of those above mentioned.

The objection to the testimony of the physicians appointed by the court was general, and went to all of their testimony, without specifying any certain portion thereof that was claimed to be immaterial. The examination also went to the head, including the mouth, teeth, and tongue, of the defendant, which are conceded to be material points. No specific objection to the testimony relative to the other alleged immaterial points was ever made. If such objection had been made, its overruling could not, we think, constitute prejudicial error, unless defendant withdrew or caused to be stricken out the testimony offered in his behalf concerning the same facts.

Counsel for appellant also contends that prejudicial error was committed because of certain remarks of the deputy district attorney embraced in an objection to certain testimony offered upon the part of the defendant, and because of certain remarks of the district attorney during his argument to the jury. During the progress of the examination of Dr. Hepner by defendant's counsel, the witness was asked to describe his examination of the person of the defendant made prior to the trial, and to detail statements made by the defendant during such examination. To the witness detailing these statements objection was interposed by the deputy district attorney, and as a part of such objection he said: "But I do object to his stating a conversation that occurred three or four days ago in the jail down here just before

this trial commenced, as it is highly improper, and may be, and no doubt is, and was, manufactured for the doctor's benefit." During the course of his argument to the jury, the district attorney made the following remark: "He knew that there were eyewitnesses to the killing that night, and that thereby an endeavor to establish an alibi would be futile. And he knew also, gentlemen, that a legitimate defense of insanity would not avail him anything in this case." Both these remarks were but the expression of the opinion of the state's attorney, and, conceding that they were improper, we think the order of the court striking them out and instructing the jury to disregard them obviated any injury that might possibly otherwise have been done to defendant. Counsel during the heat of a trial occasionally express opinions and make unwarranted statements, but the courts generally hold that these statements are not sufficient to warrant a new trial where they are either withdrawn or ordered stricken out as was the case here, and the jury directed to disregard them. Where an attorney asserts either directly or by innuendo the existence of a fact that would tend to prejudice the minds of the jury against the defendant, and there is nothing in the evidence tending to establish the existence of such fact, courts generally hold such statement to be prejudicial, and the striking of it out and the instruction to disregard it may not be held to cure it. Such a situation is illustrated in the case of *State v. Rodriguez*, 81 Nev. —, 102 Pac. 863, recently decided by this court—a case in which the judgment of conviction was reversed for remarks of the district attorney which were held not to have been cured by the order and instruction of the court. The limits which counsel may go in addressing a jury or in the conduct of a case must necessarily be left to the discretion of the trial court, and it is only in cases where remarks are clearly prejudicial that an instruction to disregard will be held not to cure. No hard and fast rule can be laid down, and each breach of professional propriety must be determined upon the particular facts of the particular case. Courts have frequently been called upon to reverse cases because of the remarks of attorneys for the prosecution, who through a misguided zeal appear to have forgotten that they owe a duty to the defendant as well as to the state. This case, however, does not present a situation of this kind, and we think it clearly falls within that class of cases where the error if any is cured by the action of the court. *Sawyer v. United States*, 202 U. S. 150, 26 Sup. Ct. 575, 50 L. Ed. 972; *State v. Simpson*, 31 Nev. —, 104 Pac. 244; *People v. Owens*, 132 Cal. 471, 64 Pac. 770; *People v. Pope*, 108 Mich. 361, 66 N. W. 213; *Palmer v. People*, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146; *Grubb v. State*, 117 Ind. 277, 20 N. E. 257, 725; *People v. Smith*, 180 N. Y. 125, 72 N. E. 931; *People v. Matthews*, 139 Cal. 528, 73 Pac. 416.

The judgment and order denying the motion for a new trial are affirmed, and the district court is directed to fix a time and make all necessary and proper orders for having its sentence carried into effect by the warden of the state prison.

SWEENEY and TALBOT, JJ., concur.

(58 Wash. 300)

NORTHERN PAC. RY. CO. v. RAILROAD COMMISSION OF WASHINGTON.

(Supreme Court of Washington. May 18, 1910.)

CONSTITUTIONAL LAW (§ 297*)—DUE PROCESS—REGULATION OF RAILROAD.

An order of the Railroad Commission, requiring a railroad company to construct a spur track between stations to a private mill and furnish cars and facilities to the mill owner for loading the produce of his mill thereat for shipment, is a taking of its property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 832-834; Dec. Dig. § 297.*]

Fullerton, J., dissenting in part.

Department 1. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

H. A. Burnham petitioned the Railroad Commission for an order to the Northern Pacific Railway Company, which was granted, and it appeals. Reversed and dismissed.

B. S. Grosscup, for appellant. W. P. Bell and W. V. Tanner, for respondent.

GOSE, J. This appeal is prosecuted from a judgment of the superior court of Pierce county, affirming an order of the Railroad Commission requiring the appellant to construct and operate a spur track from its main line road to the sawmill of one H. A. Burnham. The appellant owns and operates a line of railroad, extending from Tacoma easterly and southeasterly through the state and southerly through Rainier and McIntosh to the Columbia river. Rainier and McIntosh are stations about four miles apart. Mr. Burnham owns and operates a sawmill about midway between the stations and about 300 feet from the appellant's main-line track. He manufactures about 6 car loads per week of lumber and other sawed timbers, for shipment over appellant's lines of road, and hauls it by means of wagons and teams to Rainier, a distance of about 2½ miles by wagon road, at an expense of about \$40 a car load for hauling and loading. With a spur track to his mill, he could put his products aboard the car for about \$5 per car load. He has demanded of the appellant that it furnish him with a spur track to the mill, has offered to furnish a right of way for the track, grade the track, and furnish and lay the ties under the direction of the appellant; but it has refused to comply with his demand. Upon a complaint alleging these facts, and also al-

leging that a spur track can be constructed at small expense to the appellant, extending from the main line of its road to the mill, without endangering or rendering difficult the operation of trains, the case was heard before the Railroad Commission. The commission found the facts stated, and that a necessity exists for the spur track. Thereafter it entered an order requiring Burnham to construct the grade and furnish proper and necessary ties, and requiring appellant to furnish and lay the rails, construct the spur track, provide proper connections with its main line, and furnish Burnham with cars and facilities for loading his lumber at his mill for shipment over the appellant's lines. The order makes no provision for a right of way, and the evidence does not disclose who owns the land over which the spur track is to be constructed. A compliance with the order would require switching to the extent of about a mile, and would consume from a quarter to a half hour every time a car was taken to or from the mill.

The appellant contends that the order is a taking of its property without due process of law, and that it contravenes the fourteenth article of amendment to the federal Constitution. We think this view must prevail. The sawmill is a private industry, and the effect of the order is to take the private property of the appellant and devote it to the private use of Burnham. *Healy Lumber Co. v. Morris*, 33 Wash. 491, 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964. A railroad is a public highway and, as such, is subject to regulation; but the regulation must be promotive of the public interest. Notwithstanding the fact that it is a public highway, its property is private. In *Missouri Pacific Railway Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463, speaking of the fourteenth amendment, it is said: "It would be difficult and perhaps impossible to give to those words a definition, at once accurate, and broad enough to cover every case. The difficulty, and perhaps impossibility was referred to by Mr. Justice Miller, in *Davidson v. New Orleans*, 96 U. S. 97 [24 L. Ed. 616], where the opinion was expressed that it is wiser to ascertain their intent and application by the 'gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.'" It is true that railroad companies may be required to fence their tracks, establish proper crossings at points of intersection with public roads, patrol their tracks at thickly populated points, establish depots and stations, provide suitable connection with intersecting lines, adopt suitable safety appliances for the coupling of cars, properly light and heat their cars and depots, and many other things which touch the public business. The sawmill of Mr. Burnham, while an important

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Industry, is no more a public business than a flouring mill, a dairy, a farm, a livery barn, or a manufacturing plant of any other character or description.

The case at bar falls squarely within the principle announced and applied in *Missouri Pacific Railway Company v. Nebraska*, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489. In that case the Supreme Court of the state of Nebraska had awarded a writ of mandamus to compel the railway company to comply with an order of the State Board of Transportation, which directed the company to grant to certain private persons the right and privilege of erecting an elevator upon the grounds of the railway company at one of its stations. The complaint upon which the order was based recited that the elevator would be used to store the cereal products of the farms and leaseholds of the complainants as well as the products of other neighboring farms. Upon a writ of error to review the judgment, the court said: " * * * The order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was in essence and effect a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is in violation of the fourteenth article of amendment of the Constitution of the United States."

In *Northwest Warehouse Company v. Oregon Ry. & Nav. Co.*, 32 Wash. 218, 73 Pac. 883, a mandamus proceeding to require the railroad company to extend its track 250 feet to a grain warehouse, to afford it loading facilities, this court said: "Under any view of the requirements of the statute, it certainly cannot be contended that appellant could have been required to build a track over and it did not own, or that it was under the duty to go out and buy a right of way for that purpose. * * *" In that case the record shows that a deed to the right of way or the extension of the track was tendered by the railroad company at the time of the trial.

In *Harp v. Choctaw, O. & G. Ry. Co.* (C.) 118 Fed. 169, the railroad company had at a time permitted the owners of coal mines to load their coal from wagons onto the cars on its commercial switches. It was insisted that, if this method were discontinued, it was the duty of the company to put in a new track for the benefit of the mineowner. In considering that question the court said: "It must be remembered that the plaintiff in this case was not engaged in any public business, but was simply a private citizen operating the coal mine on his own account."

In *Missouri Pacific Railway Co. v. Nebraska*, decided by the United States Supreme Court since the case at bar was argued, a

statute providing that: "Every railroad company or corporation operating a railroad in the state of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right of way and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made, shall erect, equip and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of their right of way when necessary and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants adjacent to their right of way for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favoritism or discrimination in any respect whatever. Provided, however, that any elevator hereafter constructed, in order to receive the benefits of this act, must have a capacity of not less than fifteen thousand bushels"—and making railroads liable for a fine for failure to obey the command of the statute, was held unconstitutional. The case arose out of two suits based upon the statute. The first was brought by the state of Nebraska to recover a fine of \$500. The second was brought on the relation of the interested party, to compel the extension of a side track and the granting of shipping facilities; the railroad company having refused an application for a site for an elevator on its right of way. *State v. Missouri Pacific Railway Co.*, 81 Neb. 15, 115 N. W. 614, and *Farmers' Elevator Co. v. Same*, 81 Neb. 174, 115 N. W. 757, were reversed; the court saying: "We are of the opinion that this statute is unconstitutional in its application to the present cases, because it does not provide indemnity for what it requires." The same principle is announced in *Chicago, B. & Q. R. Co. v. State*, 50 Neb. 389, 69 N. W. 955, and *State v. Chicago, Milwaukee & St. Paul Ry. Co.*, 36 Minn. 402, 31 N. W. 365.

However desirable it may be for Mr. Burnham and others engaged in a like business to have switches and sidings extended to their mills, the fourteenth amendment to the federal Constitution, as construed by the highest federal court and by this court as well, presents an insuperable barrier against compelling such accommodations.

The contention of the Attorney General that the order is promotive of the public convenience, and within the recognized police power of the state, cannot be upheld. We are persuaded, upon both principle and authority, that the Burnham mill is a private

business, and that an order requiring the railroad company to extend a switch or spur track beyond its right of way to afford him better and cheaper shipping facilities is, in substance and effect, requiring the company to devote its property to the private use of another, and is within the protective clause of the federal Constitution.

The judgment is reversed, with directions to dismiss the petition.

RUDKIN, C. J., and CHADWICK and MORRIS, JJ., concur.

FULLERTON, J. Since the Supreme Court of the United States holds that a railroad company cannot be compelled without compensation to afford facilities to a private shipper other than it offers at its general public stations, I am constrained to concur in the judgment the majority have directed to be entered in this case. I cannot concur, however, in all that is said in the opinion. I cannot concur in the view that to compel a railway company to stop at points other than its public stations and take on for carriage the property of a private shipper is taking its property for the private use of another in violation of the due process of law clauses in the state and federal Constitutions. As I understand it, the principal purpose for which a railroad is constructed is to carry from one point to another the private property of the individual; that it is for this purpose it has its existence and is given the vast powers and rights it possesses. This function, then, the state may compel it to fulfill. If, therefore, its public stations do not afford an adequate facility for the shipment of the property of a particular individual, I know of no legal reason why the company cannot be compelled, on due compensation, to furnish that particular individual with additional facilities, even to the extent of putting in an additional side track for him. For this reason I dissent from the holding that to do so is to take private property for a private use.

(58 Wash. 410)

OLYMPIA LIGHT & POWER CO. v. HARRIS et al.

(Supreme Court of Washington. May 20, 1910.)

1. EMINENT DOMAIN (§ 126*)—ACQUISITION OF LAND—RIGHT TO RESTRICT USE—EFFECT.

A power company seeking to condemn land bordering on a lake to carry out its scheme to use the lake as a storage basin by constructing dams and thereby increasing the waters of the lake so as to flood the land sought to be taken may, during the trial, limit its appropriation by giving to the owners of the land and their successors the right of access to the lake raised or lowered over the lands appropriated for the purpose of watering their stock, boating, fishing, hunting, and domestic purposes, provided such rights shall be exercised without damage to the dikes constructed by the company, and the com-

pany may also hold itself to any specified method of constructing the dikes, which method shall be embodied in the decree, and such limitation must be given due weight in determining the damages to be awarded.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 126.*]

2. EMINENT DOMAIN (§ 219*)—TRIAL OF CAUSES TOGETHER.

Where actions to condemn lands separately owned were for convenience tried as one, because the facts involved in each action, except as to their application to distinct lands, were the same, the court must limit the inquiry in each case to the value of the land taken in that case, and the damages, if any, to the remainder, and must keep the questions to be submitted to the jury as separate as the nature of the case will permit.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 219.*]

3. EVIDENCE (§§ 271, 474*)—ADMISSIBILITY—CONJECTURES.

In proceedings to condemn land bordering on a lake to carry out a scheme to make the lake a storage basin by means of dams and a natural ridge 1,000 feet wide at its base as a retention wall on the raising of the waters of the lake, evidence of nonexperts as to whether the ridge will successfully retain the waters of the lake when raised is inadmissible because conjectural, and when it is ascertained that the ridge is ineffectual, the owners of the land may pursue their remedy in an action for the damages sustained.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. §§ 271, 474.*]

Department 1. Appeal from Superior Court, Thurston County; W. O. Chapman, Judge.

Actions by the Olympia Light & Power Company against Henry Harris and others and against Henry Harris alone. From judgments awarding compensation for the land taken, plaintiff appeals. Reversed and remanded.

T. N. Allen, A. J. Falknor, and Troy & Sturdevant, for appellant. James M. Ashton and Thomas M. Vance, for respondents.

MORRIS, J. The appellant brought two actions to condemn certain lands in Thurston county bordering on Lake Lawrence. In the one, Henry Harris and others were made defendants; in the other, Henry Harris was the sole defendant. For the convenience of trial the actions were tried together before the same jury, but two separate verdicts were submitted and returned. Upon entry of judgment appeal was taken, and the two appeals are here consolidated and heard together, the same questions being involved in each. The purpose of the actions was the appropriation of lands bordering upon the lake which appellant desired to flood, in its scheme to use the lake as a storage basin for the waters of the Des Chutes river, taking the surplus water from the river in the wet season, and, by means of an aqueduct or ditch, conveying it to the lake, and there holding it until the dry season, when it would be returned to the river for use in appellant's power plant further

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

down the stream. In order to use the lake as such storage basin, it will be necessary to construct certain dams and dikes, as the waters of the lake when so used will at times be raised to a height of 30 feet above the present level. Between the lake and the river is a natural divide or ridge of land, which it is purposed to use as a wall or dam to confine the water in the lake when the same is raised to the 30-foot line, the water when so raised being on an average 200 feet from the summit of the ridge. During the trial, some question arose as to the damage to be sustained by respondents because of what was contended to be the loss of their riparian rights in the lake; the right to fish, hunt, water their stock, boating, and other domestic uses; whereupon appellant offered the following: "The plaintiff and petitioner herein hereby offers that the claimants or their grantees or successors in interest to the lands, a part of which is appropriated in these proceedings, shall at all times and at any place have access to the lake as it is raised or lowered over the lands appropriated herein, for the purposes of watering their stock, using boats, fishing, hunting, and all other domestic purposes; provided, however, that those rights shall be exercised without damage to the dikes constructed by the petitioner. These rights to be exercised without cost or compensation and to be embodied in the decree herein. L. B. Faulkner, Manager of the Petitioner. Troy & Falknor, Attorneys for Petitioner." This offer, being objected to by respondents, was denied and refused by the court, and petitioner excepting raises thereon its first assignment of error. Further on, a second offer was made as to the character of the dikes, with reference to their safety and security, which offer was also refused by the court upon respondents' objection.

We think each of these rulings erroneous. Appellant could undoubtedly have the damage estimated with reference to any particular method it sought to adopt in the taking and use of respondents' lands. And, if in any sense the use sought to be appropriated was a restricted or limited use, and one which would still reserve to the landowner any use to which such lands were put or adapted, then such restriction or limitation should have been made a part of the record and embodied in the decree, and if appellant held itself to any specified or particular method of constructing the dikes, such method should also be embodied in the decree and such limitations given their due weight by the jury in determining the damages to be awarded. *Oregon Ry., etc., Co. v. Owsley*, 3 Wash. T. 38, 3 Pac. 186; *Seattle & Montana R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864, *Spokane Valley Land & Water Co. v. Jones & Co.*, 53 Wash. 37, 101 Pac. 515; *Leberman v. Chicago Rapid Transit R. Co.*, 41 Ill. 140, 30 N. E. 544.

The court below, for the purpose of ascertaining the damages, if any, to the part of the land not taken, treated the lands involved in the two actions as one tract, and in effect so instructed the jury. This was error. The actions were separate, and the ownership of the lands involved was separate and distinct. The actions were tried as one for the convenience of all parties, as the same facts were involved in each action except as to their application to distinct lands; separate verdicts were to be rendered, and it became the duty of the court to keep the questions to be submitted to the jury as separate as the nature of the case would permit. In each action the value of the lands taken in that action, and the damage, if any, to the remainder, should have been ascertained. The same error was permitted to creep into the evidence in ascertaining the value of the lands taken. The inquiry in each case should have been the value of the land taken in that proceeding, and the damage, if any, to the remainder, and in ascertaining that fact it would only be proper to ascertain the fair market value of the land taken irrespective of any benefit, and the condition and effect of the taking, and the purpose of the taking upon the lands remaining, to enable the jury to ascertain if such remaining lands were damaged, and, if so, to fix the amount of such damage to be determined by them in considering any item or element of damage that might be suggested in the testimony.

Another error complained of was in permitting nonexpert witnesses to give their opinion as to whether the ridge would successfully retain the waters of the lake when raised to the 30-foot contour line. This was improper. The base of this ridge is given as about 1,000 feet wide, and the petitioner, in purposing to use it as a retaining wall or dam for the waters of the lake, when raised, does so upon the theory that it will be sufficient for that purpose and permit of no leakage or seepage. As to whether it will or not is now conjectural, and must be until it is put to the desired use. If it then should be ascertained that it is ineffectual, respondents have their remedy in an action where the damage can be readily and easily determined from the physical facts then existing, and not as a matter of speculation and conjecture as it must now be.

The judgments are reversed, and the cause remanded for a new trial.

RUDKIN, C. J., and CHADWICK and GOSE, JJ., concur.

(58 Wash. 355)

PITT et al. v. LITTLE.

(Supreme Court of Washington. May 16, 1910.)

1. EVIDENCE (§ 81*) — PRESUMPTIONS — FOREIGN LAW.

The court in an action on a note executed in a foreign country will assume, in the absence

of any pleading or evidence to the contrary, that the law of the foreign country on the subject is the same as the law of the forum.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 102; Dec. Dig. § 81.*]

2. BILLS AND NOTES (§ 94*)—CONSIDERATION.

A note executed by the president of a corporation in consideration of a debt due from it and an extension of time for the payment thereof is supported by a sufficient consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-212; Dec. Dig. § 94.*]

3. EVIDENCE (§ 441*)—EXTRINSIC EVIDENCE—COLLATERAL AGREEMENT.

In the absence of fraud or mistake, one signing a note as principal may not predicate a defense on any collateral agreement exempting him from liability, especially where he fails to show that the note was without consideration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2043, 2045; Dec. Dig. § 441.*]

4. ALTERATION OF INSTRUMENTS (§ 2*)—MATERIALITY.

Alterations of a note which make no change in its date, the sum payable either as principal or interest, the time of payment, the number or relation of the parties, or the medium in which payment is to be made, and which do not add the place of payment, where none was specified, or which do not affect the note in any respect, are immaterial, and do not avoid the note within Rem. & Bal. Code, §§ 3514, 3515, defining material alterations and the effect thereof.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 1-4; Dec. Dig. § 2.*]

5. BILLS AND NOTES (§ 52*)—RELEASE—"RENUNCIATION."

Rem. & Bal. Code, § 3512, providing that the holder of a negotiable instrument may renounce his rights against any party thereto, but that a renunciation must be in writing, unless the instrument is delivered up to the person primarily liable, refers to a release, for the word "renunciation" is used in the sense of release, and, in the absence of any written release or surrender of the note to the maker, the maker is not relieved from liability.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 52.*]

For other definitions, see Words and Phrases, vol. 7, p. 6096.]

Department 2. Appeal from Superior Court, Pacific County; A. E. Rice, Judge.

Action by Thomas Pitt and another, copartners as Pitt & Peterson, against A. C. Little. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

H. W. B. Hewen, for appellants. Welsh, Welsh & O'Phelan, for respondent.

CROW, J. This action was commenced by Thomas Pitt and A. H. Peterson, copartners as Pitt & Peterson, against A. C. Little, to recover an indebtedness claimed to be due on a promissory note executed and delivered by the defendant. The jury returned a verdict in favor of the defendant, and the plaintiffs have appealed from the final judgment entered thereon.

The appellants' controlling contention is that the trial court erred in refusing to direct a verdict and judgment in their favor. The original note read as follows: "Victoria,

B. C. Febr. 1st, 1903. Due Oct. 1st/03. \$206³⁹/₁₀₀. Eight months after date I promise to pay to the order of Messrs. Pitt & Peterson, Duncan's Station, two hundred and six ³⁹/₁₀₀ dollars at interest 8 per cent. per annum. Payable at the Canadian Bank of Commerce, Victoria, B. C. Value received. A. C. Little. No. ——— Given on act. of International M. & D. Co." Although it appears upon the face of the note that it was executed in British Columbia, no contention or claim predicated upon British Columbia laws has been made. We will therefore consider the laws of this state only; it being presumed, in the absence of any pleading or evidence to the contrary, that foreign laws are the same. Gunderson v. Gunderson, 25 Wash. 459, 65 Pac. 791; Daniel v. Gold Hill Mining Co., 28 Wash. 411, 68 Pac. 884.

The complaint is in usual form. The respondent, answering, admitted the execution and delivery of the note, but denied that he had promised to pay the appellants \$206.39, or any other sum. For his first affirmative defense he, in substance, alleged that some time prior to February 1, 1903, the International Mining & Development Company, a corporation organized and existing under the laws of the state of Washington, was indebted to the appellants in the sum of \$206.39; that on said date respondent at their request signed and delivered the note; that he himself was not indebted to them in any sum; that the note was without consideration; that he did not receive anything of value therefor; and that prior and subsequent to its execution the appellants agreed with him that they would not attempt to collect the note from him, but would look solely to the International Mining & Development Company for payment. For a further affirmative defense the respondent alleged: "That after the execution of said note, and some time during the year 1903, the exact date being to defendant unknown, in the city of Victoria, British Columbia, the plaintiffs and each of them, for a valuable consideration, released defendant from all liability, on said promissory note, and informed the defendant that they would look to the International Mining & Development Company solely and exclusively for the payment of said note, which said release was oral and was made in consideration of the said defendant promising and agreeing with the plaintiffs to use his influence with and endeavor to persuade the International Mining & Development Company and one T. J. Reinhart and other persons, whose names are at this time unknown to defendant, and who were indebted to plaintiffs, to pay to plaintiffs their said indebtedness; and defendant alleges that thereafter and in compliance with said agreement he did use his influence with and endeavor to persuade the said International Mining & Development Company and said T. J. Reinhart and said

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

other persons to pay plaintiffs the amount of their said indebtedness to plaintiffs."

The evidence fails to sustain respondent's contention that the note was without consideration. It appears that the International Mining & Development Company, of which the respondent was president, was indebted to the appellants in the sum of \$206.89 for merchandise sold; that the appellants endeavored to collect the same; that respondent executed and delivered the note in consideration of such debt and an extension of time for payment, which appellants granted by accepting the note. The debt of the corporation and the extension of time constituted a sufficient consideration. A negotiable promissory note is not void for want of consideration, if given for the matured debt of a third party; the time of payment being thereby extended. *Daniel on Negotiable Instruments* (5th Ed.) § 183; *Galena National Bank v. Ripley*, 55 Wash. 615, 104 Pac. 807; *Mechanics', etc., Bank v. Wixson*, 42 N. Y. 438. The respondent did not plead any fraudulent act on the part of the appellants by which he was wrongfully induced to execute the note, nor did he allege any mistake upon his own part. He not only admitted the execution of the note, but his own evidence shows that his acts were intentional and voluntary. In *Anderson v. Mitchell*, 51 Wash. 265, 98 Pac. 751, we said: "It has been repeatedly held by this court that, in the absence of fraud or mistake, it is incompetent for one who signs a promissory note as principal to set up an independent collateral agreement limiting or exempting him from liability. He is bound by the terms of his obligation." The respondent has failed to make any showing that the note was without consideration, and he cannot be permitted to predicate a defense on any alleged collateral agreement exempting him from liability.

Respondent's next contention was that the note had been avoided by reason of material alterations appearing upon its face, made after its execution and without his knowledge or consent. The alleged alterations are immaterial memoranda or notations. They made no change in the date, the sum payable either principal or interest, the time of payment, the number or relation of the parties, or the medium or currency in which payment was to be made. Nor does any other alteration appear which added a place of payment where none was specified, or which altered the effect of the note in any respect. The note was not avoided by alteration. *Rem. & Bal. Code*, §§ 3514, 3515.

By his last defense the respondent in substance contended that the appellants had released him from personal liability, and he introduced parol evidence to sustain this contention. Section 3512, *Rem. & Bal. Code*, being section 122 of the negotiable instruments act of 1899 (*Laws 1899*, c. 149), reads as follows: "The holder may expressly renounce

his rights against any party to the instrument, before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon." In *Baldwin v. Daly*, 41 Wash. 416, 83 Pac. 724, construing this section of the statute, we said: "This plainly provides that the renunciation of a debt must be in writing where the debt is evidenced by a negotiable instrument, and, if 'renunciation' is used therein in the sense of 'release,' there can be no question that the appellant must show a written renunciation in order to prove the allegations of his answer. Counsel for the appellant argues that the word is used in a sense different from that of release, and that, while a renunciation must be by a writing, a release may be proved by parol. But we cannot think the statute permits of this distinction. The words, 'The holder may expressly renounce his rights against any party to the instrument,' must refer to the release and discharge of a party to the instrument from his obligation to pay it, else they can have no legitimate meaning." There was no written evidence of any renunciation or release of their claim by the appellants, nor had the note been surrendered to respondent. Construing all of the evidence most favorably to the respondent, we find that he has failed to sustain any defense to the note, the execution and delivery of which he has admitted.

The trial court erred in denying appellants' motion for a directed verdict.

The judgment is reversed, and the cause remanded, with instructions to enter judgment in favor of the appellants.

RUDKIN, C. J., and DUNBAR, PARKER, and MOUNT, JJ., concur.

(58 Wash. 403)

MOSES v. SUMMERSETT, County Treasurer, et al.

(Supreme Court of Washington. May 20, 1910.)

AGRICULTURE (§ 3*)—FAIRS—PUBLIC AID—STATUTORY PROVISIONS.

Laws 1903, c. 174, entitled "An act to encourage county agricultural fairs and to provide funds therefor," provides that any association which has a corporate existence for the purpose of holding a fair and agricultural exhibition may apply to the county commissioners for a grant to pay expenses and premiums, and that the commissioners shall be ex officio members of the fair association in counties where appropriations are made under the act. Laws 1909, c. 62, amends the act of 1903, and provides that any buildings erected with funds appropriated shall become the property of the county, and that vouchers for all expenditures of money appropriated by the county, shall be made to the county commissioners before the close of each cal-

endar year. Laws 1909, c. 237, established a state institution to be known as the "Southwest Washington Fair Association," declares its objects, provides for the inclusion of certain counties as the fair district, and for its management by commissioners to be appointed by the Governor, fixes its location, and makes an appropriation to carry out the law. *Held*, that laws granting aid to agricultural societies should be strictly construed, and no appropriation can be made by a county for the support of the Southwest Washington Fair Association.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.*]

Department 1. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by E. M. Moses against P. Summerset, Treasurer of Lewis County, and the Southwest Washington Fair Association. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Forney & Ponder, Reynolds & Stewart, and G. E. Hamaker, for appellant. O. D. Cunningham and J. R. Buxton, for respondents.

CHADWICK, J. Chapter 237, Laws 1909, after reciting that, "Whereas, the public welfare requires that there be established a state institution to be known as the Southwest Washington Fair Association," declares the objects and purposes of such association, provides for the inclusion of certain counties to be known as a "fair district," provides for its management by certain commissioners to be appointed by the Governor, fixes their terms of office, their duties and responsibilities, defines their powers, fixes a location at which the fair is to be held, provides for the acquisition of land, and makes an appropriation to carry out the provisions of the law. As provided by the terms of the law, the state, or possibly the counties comprising the district, acquired title to certain lands located between the cities of Chehalis and Centralia in Lewis county. On June 22, 1909, the board of county commissioners of Lewis county passed a resolution appropriating out of the current expense fund of the county the sum of \$5,000 in aid of, and for the use of, the fair association. Warrants in denominations of \$500 each, payable to the order of the treasurer of the fair association, were drawn by the county auditor. These have been presented to, and registered by, the treasurer of the county, and will be paid in the regular order unless that officer is restrained. Plaintiff brought this action setting up the facts as briefly stated by us. A demurrer was filed by the defendants and sustained by the court, upon the grounds that the complaint did not state facts sufficient to constitute a cause of action. Plaintiff has appealed.

As we read the record, the only question calling for our opinion is whether the appropriation can be sustained by reference to chapter 174, p. 363, Laws 1903, entitled "An act to encourage county agricultural fairs, and to provide funds therefor," section 1 of

which reads as follows: "That any agricultural fair association which has a corporate existence for the purpose and object of holding a fair and agricultural exhibition of stock, cereals and agricultural produce of all kinds, including dairy produce as well as arts and manufactures in any county, may apply to the board of county commissioners of such county for grant to pay expenses and premiums awarded." It is also provided that the board of county commissioners shall be ex officio members of the county fair association, in all counties where appropriations are made under the provisions of the act. This act was amended by the last Legislature. Chapter 62, p. 113, Laws 1909. As amended, the act provides that any and all buildings and structures erected with the funds so appropriated shall become the property of the county making such appropriation, and that full and complete vouchers, covering all expenditures of public money appropriated by the county, shall be made to the board of county commissioners before the close of each calendar year.

Although it is contended that the Southwest Washington Fair Association has a corporate existence within the meaning of the law of 1903—a contention which may well be questioned—we think the judgment of the lower court must nevertheless be reversed. It is admitted that the right to use or appropriate public moneys must be given by statute; but it is insisted that we should follow the intent rather than a literal interpretation of the law. If such be the rule, there is absolutely nothing in the law of 1903, or the amendments thereto, to indicate that the Legislature intended to give the county commissioners the right to appropriate county funds in aid of a state institution. It is only in cases where the statute is ambiguous or doubtful and requires construction that courts are warranted in leaving the plain mandate of the law and speculating upon the intent of the legislative body. "When the means for the exercise of a granted power are given, no other or different means can be implied because more effectual or convenient." *Bloomer v. Todd*, 3 Wash. T. 599, 19 Pac. 135, 1 L. R. A. 111.

Aside from this, the law of 1903 and the amendment of 1909 antedated the law creating the Southwest Washington Fair Association, so that, to impute an intent to permit an appropriation of county funds to this fair association, we would have to presume that it had in mind a general application of the statute, when upon its face it is special in the sense that it applies to a certain defined object. If the commissioners can appropriate the funds of a county at all, it must be, as contended, under the act of 1903. This being so, the appropriation must also be subject to expenditure under the terms of that act. The law does not work piecemeal. Un-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

der respondents' theory the Southwest Washington Fair Association could expend the moneys without regard to the objects of the grant; whereas, the law is that the county commissioners shall be ex officio trustees of the association receiving the grant, implying, if not expressly providing, that the funds should be expended under their direction. In any event, the right of auditing all accounts and expenditures is reserved to them. Nor does the law of 1903 intend a free gift, as this appropriation must be if sustained, but provides in terms that all buildings and structures erected with the funds appropriated shall be the property of the county. But for these conditions, the validity of the act might well be doubted. Laws granting aid to agricultural societies have been generally upheld, but have always been strictly construed. *Harding v. Bader*, 75 Mich. 316, 42 N. W. 942; *Agricultural Society v. McIntyre*, 17 Johns. (N. Y.) 87; *Warren County Agricultural Co. v. Barr*, 55 Ind. 30; *Hogleskamp v. Weeks*, 37 Mich. 422; *Hall v. Kellogg*, 16 Mich. 135; *Silabee v. Stockle*, 44 Mich. 562, 7 N. W. 160, 367.

Finding no warrant in the statute for extending the terms of the 1903 statute to cover this appropriation, the judgment of the lower court is reversed. This cause will be remanded, with instructions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

RUDKIN, C. J., and FULLERTON, MORRIS, and GOSE, JJ., concur.

(58 Wash. 368)

CITY OF ABERDEEN v. LYTLE LOGGING & MERCANTILE CO.

(Supreme Court of Washington. May 18, 1910.)

1. WATERS AND WATER COURSES (§ 75*)—POL- LUTION OF STREAM—RIPARIAN RIGHTS.

Under the rule that the use of each riparian owner of the waters must be consistent with the rights of the others, a riparian owner may be restrained from polluting a stream forming the water supply of a city maintaining a pumping station on its banks, where to obviate the pollution it is only necessary to lift a bridge at a trifling expense.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 75.*]

2. WATERS AND WATER COURSES (§ 75*)—POL- LUTION OF STREAMS—RELIEF.

Where a lumber company maintained a bridge across a stream in such a condition as to pollute the water when hauling logs over the bridge, and the bridge could be lifted at a trifling expense and thereby obviate the pollution, equity would restrain the pollution at the suit of a city using the stream for its water supply on the ground that the pollution results from the use by the company of its lands.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 75.*]

Department 1. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by the City of Aberdeen against the

Lytle Logging & Mercantile Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Abel and C. W. Hodgdon, for appellant. Austin M. Wade, for respondent.

CHADWICK, J. The present source of water supply of the city of Aberdeen is Stewart creek, upon the banks of which a pumping station has been maintained by the city for the past 15 years. Stewart creek flows across section 31, township 18 N., range 9 W., Willamette meridian. A tributary rises and flows into the creek on the said section. Section 31 is owned by the Lytle Logging Company, a corporation, and it is complained that it has located and is maintaining its camps and is logging the lands, so that quantities of brush, debris, and surface soil are dragged into the waters of Stewart creek, so that they are polluted and contaminated and rendered unfit for domestic use. The trial court found that in the prosecution of its logging operations the company has constructed a logging road, or fore and aft bridge or pole road, across a portion of section 31 and across Stewart creek; that the bridge is so constructed that it rests in the waters of, and in the bed of, the creek; and that the injury complained of has resulted because of the improper construction and use of the logging road. The court also found that the defendant was logging in the way such operations are usually carried on in Western Washington, and in a reasonably prudent and careful manner. The court decreed that the logging company be perpetually enjoined and prohibited from hauling or transporting any logs across Stewart creek, and prohibited from hauling or transporting logs across the fore and aft bridge maintained across the creek, until the bridge be reconstructed in such way that the bridge will not interfere with the natural flow of the creek; the court having theretofore found that the bridge could be raised about one foot above the water at a very slight expense. Defendant has appealed.

The only question in the case is stated by counsel for appellant as follows: "Whether, since appellant is carrying on its logging operations in an ordinarily prudent and careful manner, it can be enjoined at the suit of the city on account of the slight incidental disturbance of the waters of Stewart creek from which the city derives its water supply. * * * The determination of this case depends upon whether our use of the stream is reasonable." Both parties, so far as it is made to appear, are rightfully occupying the land, and, if the court's findings could be limited to the one holding that the logging operations were carried on in a reasonably prudent and careful manner, nothing would be left for our consideration. But the court

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

having also found that the defendant had after the issuance of the restraining order hauled some of its heavy equipment over the fore and aft bridge, causing the bridge to settle and lower into the creek, that, if used in its present condition, the water would be made muddy and somewhat polluted, and that, to obviate this possibility, the bridge should be elevated—we think a case is presented calling for the equitable interference of the court, opening as it were the legal question whether one of two joint or common occupants of the land can so use the stream as to annoy or injure the other when it can reasonably be avoided.

The cases cited by appellant go no further than to hold that every man had the right to the natural use and enjoyment of his property, and if, as an incident to that use and enjoyment, he does not unreasonably trespass upon the rights of others, no action will lie. But it does not follow that others may not compel a reasonable regulation of that use. Such mischief as appellant is likely to feel from the insistence of respondent that its water supply be kept pure and clear can be obviated at an expense so trifling that compliance with the order of the court cannot be called a hardship or work a loss of property rights. On the other hand, any obstruction tending to the pollution of the waters of Stewart creek might work irreparable mischief, reaching far beyond the inconvenience of the landowner. Even in the case of *Helfrich v. Catonsvills Water Co.*, 74 Md. 269, 22 Atl. 72, 13 L. R. A. 117, 28 Am. St. Rep. 245, cited by counsel, an exception to the general rule that the pollution of a stream by a riparian owner could not be restrained where it was a natural incident to the proper and reasonable use is admitted where there is a necessity founded upon "grave public considerations." The whole subject is covered by the case of *McEvoy v. Taylor*, 105 Pac. 851, where this court said: "Each riparian owner is entitled to a reasonable use of the waters as an incident to his ownership, and, as all owners upon the same stream have the same right of reasonable use, the use of each must be consistent with the rights of others, and the right of each is qualified by the rights of others." We have met this case, as it has been presented to us, upon the theory of riparian ownership. But it seems to us that the judgment of the lower court may be sustained upon the further ground that the use of the stream by the logging company is not in any way involved within the meaning of the authorities cited, or in any way necessary to the logging operations of appellant. That is to say, the fouling of the water results, not from the use of the stream for any purposes incident to the ownership of the land, but from the use of the land itself; and, this being so, the

condition put upon appellant by the court—that is, that it raise its bridge one foot above the flowing water—is a reasonable regulation in favor of the one who is, and who alone is, using the waters of Stewart creek. In other words, appellant is using the land, and not the water, and its pollution is not a necessary incident to the business it is carrying on.

The judgment is affirmed.

RUDKIN, C. J., and FULLERTON, MORRIS, and GOSE, JJ., concur.

(53 Wash. 333)

JACKSON v. LAMAR et al.

(Supreme Court of Washington. May 18, 1910.)

1. DEEDS (§ 211*)—VALIDITY—MENTAL CAPACITY—EVIDENCE.

Evidence held not to show grantor's lack of mental capacity when he executed a deed.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 211.*]

2. DEEDS (§ 194*)—DELIVERY—PRESUMPTION FROM POSSESSION OF GRANTEE.

The mere possession of a deed by the grantee carries with it a presumption of delivery which can only be overcome by clear and convincing evidence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 514, 583, 623; Dec. Dig. § 194.*]

3. DEEDS (§ 58*)—DELIVERY—DELIVERY TO AGENT.

Delivery of a deed to an agent designated by the grantee to receive it is a delivery to his principal.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 130-135; Dec. Dig. § 58.*]

4. DEEDS (§ 208*)—DELIVERY—EVIDENCE.

Evidence held not to show that a deed was not delivered.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 208.*]

Morris, Fullerton, and Parker, JJ., dissenting.

En Banc. Appeal from Superior Court, Walla Walla County; Thos. H. Brents, Judge.

Action by H. S. Jackson, administrator of James C. Lamar, against David Lamar and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Sharpstein & Sharpstein and Jas. H. Hull, for appellants. Cary M. Rader, Ellhu F. Barker, T. P. Gose, C. C. Gose, and James W. Boyd, for respondent.

RUDKIN, C. J. James C. Lamar and Joseph Lamar, his brother, lived for many years in Walla Walla county, where they accumulated real and personal property of considerable value, which they held in common. The brothers never married, but lived together in bachelor quarters, at a place called Lamar Station. It appears that James C. Lamar, the elder brother, was strongly opposed to making a testamentary disposition of his property, fearing that his will would be contested and overthrown after his death. To avoid such a contingency, the two brothers

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

had an agreement or understanding between themselves that whichever one should die first would convey his interest in the common property to the survivor before the end came. On the 4th day of October, 1901, James C. Lamar was taken to St. Mary's Hospital at Walla Walla, suffering from some malady, the nature of which is not disclosed by the record. On the 10th day of October, 1901, he executed a deed of the property now in controversy in favor of his brother Joseph Lamar, pursuant to the agreement above referred to, and thereafter died intestate on the 11th day of November following. On the 24th day of October, 1907, the plaintiff was appointed administrator of his estate, and by this action sought to recover the property described in the above deed from the grantees of Joseph Lamar. From a judgment in favor of the plaintiff, this appeal is prosecuted.

The rights of creditors are not involved, and, if the deed of October 10, 1901, was valid as between the parties, the judgment of the court below is erroneous, and must be reversed. The validity of that deed is challenged on two grounds: (1) Because of mental incapacity of the grantor at the time of its execution; and (2) for want of a valid delivery. At the date of the execution of the deed, the grantor was 85 years of age, and was suffering from the illness or disease that caused or resulted in his death about a month later. There was considerable testimony tending to show that the grantor was weak, had no expression in his face, did not care to talk, was indifferent and unconcerned, was not competent to attend to ordinary business, and the like during his stay in the hospital. This testimony all came from nonexpert witnesses, some of whom at least manifested no little bias in favor of the respondent. Their testimony was based on appearances only. They testified to no act or statement of the grantor tending to show that his mind was unbalanced, or that he was bereft of reason. The appearances and conditions described by these witnesses were not at all unusual when we consider that the grantor was an eccentric old man on his deathbed. On the other hand, the testimony of the two witnesses who were present at the execution of the deed shows clearly and convincingly that the grantor was then in full possession of his faculties, and understood the nature and quality of his act and the business in hand. Their testimony is strongly corroborated by the signature to the deed, and by a witness for the respondent who claims to have appeared on the scene at the moment of the transmission of the deed. The latter witness testified that the grantor gave certain instructions as to the final disposition of the deed showing clearly that he fully understood the nature of the business under consideration. The respondent relies largely on the testimony of this

witness to show a nondelivery of the deed, and, if the grantor had sufficient mind and memory to give these instructions, he also had sufficient reason and intelligence to enable him to execute and make an absolute delivery of the deed. On the entire record we are convinced that the judgment cannot be sustained on the ground of mental incapacity on the part of the grantor at the time of its execution, for there is no substantial testimony in the record tending to establish that fact. The circumstances attending the execution and delivery of the deed are these: The deed was prepared by, or at the instance of, the grantee, who informed one Max Baumeister of the agreement between himself and his brother, and requested him to go to the hospital and procure the deed. Baumeister repaired to the hospital and had a social talk with the grantor for a few moments, after which he informed the grantor of his mission and of the agreement with his brother relating to the final disposition of their property. The grantor admitted that such was their agreement, and stated that he was ready and willing to execute the deed. The deed was thereupon signed by the grantor before Baumeister and one Blanchard as witnesses, and acknowledged before Baumeister as a notary public. The deed was then handed to Baumeister, who returned to his office and delivered it to the grantee. After the death of the grantor, the deed was returned to Baumeister for the purpose of having it recorded. The mere possession of a deed by the grantee carries with it a strong presumption of delivery, which can only be overcome by clear and convincing evidence. *Tunison v. Chamblin*, 88 Ill. 379; *Richmond v. Morford*, 4 Wash. 338, 30 Pac. 241, 31 Pac. 513; 1 *Devlin on Deeds* (2d Ed.) § 294.

The evidence relied upon to show a nondelivery is the following: Baumeister testified: "A. I just went into the room, and afterwards I got social with him for perhaps a few minutes, had a social chat with him, and then I questioned him regarding that deed and what Joe had told me, and he admitted that that was the case, and that he was ready to sign and willing to sign, and he did sign. Q. And that is all there was to it? A. Yes. Of course, he said that Joe and he had had an understanding to that effect, and he wanted Joe to have the interest in it in case he passed on, to keep him from being annoyed by the heirs in the East." Mrs. De Gruchy, a witness for the respondent, testified: "A. I left the room, and after awhile my attention was called that Mr. Baumeister was going, and I went to see if their business was concluded, and I heard Mr. Lamar say, as best he could, he spoke up and said, 'Take care of the deed until I shall ask you for it, which I will as soon as I get well.' And Mr. Baumeister said: 'Very well, James, I will take care of it.'"

Also: "Q. I will ask you, Mrs. De Gruchy, speaking of the conversation that you had with James C. Lamar, how soon was that after Mr. Baumeister went out of the room? A. One of the sisters came in and gave him a stimulant, and, after the medicine had comforted him, then he told me that he had deeded his land to Joseph after his life, but not until I am dead, and I said, 'What then, James?' 'Then,' he said 'it must go back to Missouri to the poorer portion of my relatives.'" A special interrogatory was submitted to the jury, embodying the substance of the testimony of the last-named witness first above mentioned, but the jury were unable to agree upon an answer. There is nothing whatever in the testimony of the witness Baumeister tending to defeat the operation of the deed. The mere statement of the grantor that he wanted his brother to have his interest in the property in case he passed on, to keep him from being annoyed by the heirs in the East, has no tendency to establish a nondelivery of the deed or to overcome the presumption arising from its possession by the grantee. The conversation referred to the agreement between the brothers, and not to the delivery of the deed. If, therefore, the deed was not delivered, the fact of nondelivery must rest on the testimony of Mrs. De Gruchy, and if her testimony is sufficient, if believed, to show a nondelivery, the case must be remanded for a new trial, because the special finding of the jury shows that the general verdict was not based on her testimony or on the statements she attributed to the deceased grantor, and there is no other theory upon which the judgment can be sustained. If, on the other hand, the testimony of this witness was incompetent or is insufficient as a matter of law to show a nondelivery of the deed, a final judgment should be directed by this court. It may be that the grantor did not intend to divest himself of all his property during his lifetime, or that he expected to recall the deed in the event of his recovery; but are we permitted to speculate as to his probable intentions? Does not the law on grounds of public policy attach certain consequences to his overt acts against which his intentions cannot prevail?

In *Braman v. Bingham*, 26 N. Y. 483, approved by this court in *Richmond v. Morford*, supra, the court said: "If the grantor do not intend that his deed shall take effect until some condition is performed, or the happening of some future event, he should either keep it himself or leave it with some third person as an escrow to be delivered at the proper time. If he deliver it as his deed to the grantee, it will operate immediately without any reference to the performance of the condition, although such a result may be contrary to the express stipulation of the parties at the time of the delivery. This is one of the cases in which the law fails

to give effect to the honest intention of the parties, for the reason that they have not adopted the proper legal means of accomplishing their object." See, also, *Dyer v. Skadan*, 128 Mich. 348, 87 N. W. 277, 92 Am. St. Rep. 461; *Darling v. Butler* (C. C.) 45 Fed. 332, 10 L. R. A. 469; *Duncan v. Pope*, 47 Ga. 445; *Ordinary v. Thatcher*, 41 N. J. Law, 403, 32 Am. Rep. 225; *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511. And delivery to an agent designated or appointed by the grantee to receive the deed is a delivery to his principal. *Ordinary v. Thatcher*, supra; *Hubbard v. Greeley*, supra. Under these authorities it is extremely doubtful whether a grantor may make the grantee the depositary of his deed for any purpose, or, if he does, whether the law will not give full effect to the deed contrary to his intentions. But, if we concede that the testimony of this witness was sufficient to defeat the deed, if believed, it is not the clear, convincing proof that the law exacts in such cases. The jury was not satisfied with the truth of her testimony. The witness was sorely disappointed because she did not receive a portion of the estate herself, and was an extreme, if not a bitter, partisan. She was attempting to give the details of a conversation that occurred more than seven years before, and her testimony was denied by other witnesses. It seems to us that such testimony as this is utterly insufficient to defeat a deed seven years after it has been given over to the grantee, and several years after the death of both parties to the instrument. As said by the court in *Tunison v. Chamblin*, supra: "When a deed, duly executed, is found in the hands of a grantee, there is a strong implication that it has been delivered, and only clear and convincing evidence can overcome the presumption. Otherwise, titles could be easily defeated, and no one could be regarded as being secure in the ownership of the land. It cannot be that a grantor may assail a conveyance 15 or 20 years after a deed has been made, and recover the land by merely swearing that he never delivered the deed. The unsupported evidence of the grantor surely cannot be permitted to have such effect, especially when the evidence of such a grantor is in many material matters contradicted, and he seems to act on a low moral plane. To so hold would render all titles insecure, and would be disastrous in the extreme. Any system of jurisprudence adopting rules for the attainment of justice can never sanction a rule fraught with such unjust and iniquitous results."

Believing, therefore, that the deed under which the appellants claim is valid in all respects, the judgment of the court below must be reversed, with directions to dismiss the action. It may be that the law does violence to the immediate intentions of the grantor in this case, but his ultimate inten-

tions are given sway. Reversed and remanded.

CROW, DUNBAR, MOUNT, and CHADWICK, JJ., concur.

MORRIS, J. I dissent. As suggested in the majority opinion, the main questions involved in this appeal are (1) the sufficiency of the evidence to establish mental incapacity of the grantor at the time of the execution of the deed; and (2) its delivery. Upon the allegation of mental incapacity, it was not necessary to show an entire loss of mental power. It was, however, in the absence of any undue influence, necessary to show that at the time of the execution of the deed, October 10, 1901, the mind of James C. Lamar was in such a feeble condition, arising from either mental or physical weakness, that he could not, and did not, understand the nature, character, and consequences of his act. This, however, under the issues, was a question of fact for the jury, and we should not disturb their verdict if there is substantial evidence to support it. Where there is evidence tending to support a given contention, its weight is for the jury. James C. Lamar entered the hospital October 4th. The deed was executed October 10th, and he died November 11th. During all this time he was a very sick man, and a number of persons who saw him during that time gave their opinion as to his mental capacity, based upon what they then and there observed. This evidence was received without any objection as to its competency or the competency of the witnesses, and the jury had a right to consider it. I refer to some of this evidence: "He didn't have any expression in his face at all. He was too weak. He didn't care for anything. * * * He was unconcerned. He didn't pay any attention to any one. * * * He just looked as if he was about through with. He didn't care to talk. You could see that he was giving out. He was not capable of attending to any business. * * * He didn't have any use of his body. He was too weak to raise his hands. He was just a weak, worn-out man. * * * He was very weak. He seemed to be prostrated and languid. He seemed to be growing weak, and he didn't seem to be in his right mind, and he didn't seem like himself some way. * * * It seemed that his mind wandered, and he didn't seem his old self at all. It was difficult for him to talk. His speech seemed to be thick. He couldn't get his voice. He didn't seem to have control of his voice. * * * He seemed to have a vacant expression. He didn't seem to be natural. * * * He was growing weaker all the time. He was swollen all over. His bowels were awfully swollen. He couldn't stand the cover on his bowels. His feet, hands, and arms were swollen. His limbs were helpless. * * * He would be lying there apparently unconscious, couldn't

lift his hands to his mouth, couldn't handle a spoon, couldn't get anything out of him. It does not seem that he was ever capable of attending to business. His mind was perfectly blank; could not get anything out of him; don't know whether his mind wandered or not; seemed to be a blank. He lay with his eyes closed, and, when he looked out of them, they were wild." Other witnesses gave it as their opinion that he was capable of understanding and appreciating what was going on. With such evidence submitted to the jury under proper instructions, I cannot say there was no substantial evidence to justify the verdict. It is true that the evidence outside of the opinions given is largely of his physical condition; but there was sufficient to justify the jury in finding that his mind was in such a feeble condition from his bodily infirmities that he had no understanding or appreciation of the character and extent of his act at the time of the signing of the deed.

The second question submitted to the jury was as to the delivery of the deed. To substantiate this contention, respondent relied mainly upon the testimony of Mrs. De Gruchy, who testified that she came to Mr. Lamar's room just as Mr. Baumeister, who had brought the deed to the hospital and taken Mr. Lamar's acknowledgment to it, was leaving, and she heard Mr. Lamar say: "Take care of the deed until I shall ask you for it, which I will as soon as I get well." And Mr. Baumeister said: "Very well, James, I will take care of it." If the jury believed this testimony, it is apparent to my mind there was no delivery of the deed. Mr. Baumeister does not anywhere in his testimony specifically deny this testimony of Mrs. De Gruchy, although he does inferentially by detailing all the conversation he had with Mr. Lamar, which does not include what Mrs. De Gruchy testified to having heard. He says: "I just went into the room and afterwards I got social with him for perhaps a few minutes, had a social chat with him, and then I questioned him regarding that deed and what Joe had told me, and he admitted that that was the case, and that he was ready to sign and willing to sign, and he did sign. Q. And that is all there was to it? A. Yes. Of course, he said that Joe and he had an understanding to that effect, and he wanted Joe to have the interest in it in case he passed on, to keep him from being annoyed by the heirs in the East." Mrs. De Gruchy also testified that she was in the room just prior to Mr. Baumeister's coming in; while Mr. Blanchard, a witness to the deed, says he was there before and after its signing, and there was no one else present except Baumeister; that he did not hear what was said, as he was hard of hearing; that all that he heard was Mr. Lamar asked him to sign the deed as a witness. Baumeister also says Blanchard was the only other person present at the time. The jury was re-

quested to make a special finding, covering this phase, and instructed to answer "Yes" or "No." The finding submitted to the jury was as follows: "Q. Did James C. Lamar at the time he gave the deed in question to Max Baumeister say to Baumeister, 'Take care of the deed until I shall ask you for it, which I will as soon as I get well,' or words to that effect, and did Max Baumeister there say to James Lamar, 'Very well, I will take care of it and you can have it when you want it,' or words to that effect? A. We, the jury, cannot agree to answer the above question by 'Yes' or 'No.'" It is therefore impossible to say what the belief of the jury was as to that conversation—whether they meant by their answer that they were divided, or whether there was some qualification. They did not answer it, and hence it can have no bearing one way or the other. It is difficult to see what effect it could have had upon the general verdict, in case they had answered it. It was by no means a special verdict or finding of any ultimate fact in the case. It was simply an attempt to discover what the view of the jury was as to this item of evidence, which in my judgment was not proper. Questions submitted to a jury should be restricted to ultimate facts upon which the rights of the parties directly depend, and should not relate to mere evidentiary facts. 20 Enc. Pl. & Pr. 330. "However natural the curiosity parties may have to know the precise course of reasoning by which jurors arrive at verdicts, they have no right under guise of submitting questions of fact to require them to give their views upon each item of evidence, and thus practically subject them to a cross-examination as to the entire case." *Chicago & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 145, 22 N. E. 15. "It is the controlling fact or facts that should be ascertained by the special finding, and not the testimony establishing these facts." *Adams v. Louisville & N. R. Co.*, 82 Ky. 603. I cannot therefore hold, as contended for by appellants, that the failure of the jury to answer this interrogatory in the affirmative should be taken as a finding on their part that James C. Lamar and Max Baumeister did not have the conversation attributed to them by Mrs. De Gruchy; nor, as contended by the majority, that the verdict was not based upon her testimony. The general verdict is susceptible of a finding that it did occur, and showed a plain purpose and intent on the part of James C. Lamar that the deed was not then to be delivered to Joseph Lamar, but was to be kept subject to his control. It needs no citation of authority to establish the law to be that there is no delivery of a deed until the grantor has so dealt with it as to lose control and dominion over it. There can be no delivery until there is a surrender of possession by the grantor, either absolute or conditional—absolutely, if the effect of the deed is to be immediate and the title to pass; conditionally, if the opera-

tion of the deed is to be postponed or made dependent on the happening of some subsequent event, in which case the delivery can be made by placing the deed in the hands of some third person to be retained by him until the happening of the event. But even in such a case it is an essential characteristic and indispensable feature that there must be a parting with the possession and with all control and dominion over it. *Prutman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Osborne v. Elringer*, 155 Ind. 351, 58 N. E. 439, 80 Am. St. Rep. 240; *Porter v. Woodhouse*, 59 Conn. 568, 22 Atl. 299, 13 L. R. A. 64, 21 Am. St. Rep. 131; *Hoffmire v. North*, 29 Or. 240, 45 Pac. 754; *Fisher v. Hall*, 41 N. Y. 416; *Cook v. Brown*, 34 N. H. 400; *Walter v. Way*, 170 Ill. 96, 48 N. E. 421.

In this connection I quote the testimony of Baumeister above set out, to the effect that James C. Lamar, at the time of the signing of the deed, said "he wanted Joe to have an interest in it in case he passed on, to keep him from being annoyed by the heirs in the East." This evidence, coupled with the fact that five days after the death of James C. Lamar this deed was filed for record at the request of Baumeister, was a circumstance from which the jury were justified in believing that James C. Lamar never intended to surrender the control of that deed, nor to part with the title to his property until his death, and that his very purpose in making the deed was to have it take the place of a will. This view is strengthened by the testimony of Harvey Shaw, a witness for appellants, who testified that he had a conversation with James C. Lamar, in which he told him "he had better make up his mind about his property, and he (Lamar) said that this man Senator Tilden made a will, and they broke it, and it is of no use for a Missourian like me to make a will. As far as the property was concerned he said that, if he died first, he wanted Joe to have it, and that Joe could settle with them Missourians." John Hoffman, another witness for appellants, testified to talking with James C. Lamar about making a will, in which conversation Lamar said: "That is no way to do. That is not the way I am going to do. I am going to give a deed to the man that I want to give it to my brother or my brother will give it to me. That is the way to do. It is more substantial, for the lawyers get so smart. If you make a will, they always find a loophole in it, and they will throw it out of courts, and your will will not go through." This evidence was offered by appellants to show it was the intention of James C. Lamar to give his property to his brother Joe; but it was also evidence to show, and under the instructions of the court the jury were justified in believing it showed, an intention on the part of James C. Lamar not to part with the possession and title to his property until his death, and then have his deed take the

place of a will. In other words, it was his intention at the time he signed the deed to make a disposition of his property of a testamentary character, which would take effect, not in his lifetime, but at his death. Such being the case, there was no delivery, and the deed could not operate as a will unless it was executed with all the statutory formalities pertaining to wills. *Cline v. Jones*, 111 Ill. 563; *Bovee v. Hinde*, 135 Ill. 137, 25 N. E. 694; *Walter v. Way*, 170 Ill. 96, 48 N. E. 421; *Allen v. De Groodt*, 105 Mo. 442, 18 S. W. 494, 1049; *Patterson v. Snell*, 67 Me. 559.

The judgment should be affirmed.

FULLERTON and PARKER, JJ., concur in the dissenting opinion of Judge MORRIS.

58 Wash. 407)

BUELL v. ABERDEEN STATE BANK.
Supreme Court of Washington. May 20, 1910.)

EVIDENCE (§ 129*)—SIMILAR FACTS—FORGED INSTRUMENTS.

Where, in an action for a bank balance, plaintiff claimed that a check charged against it was a forgery made by M., evidence that about the time the check was drawn witness cashed a similar check for him, payment of which was refused by defendant bank, and that some months thereafter an officer of the bank told witness that payment was refused because of the claim that the check in controversy was issued as a forgery, was inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 388; Dec. Dig. § 129.*]

BANKS AND BANKING (§ 154*)—FORGED INSTRUMENTS—EVIDENCE.

In an action to recover a bank deposit, on an issue as to the forgery of a check charged against it, evidence that plaintiff caused a warrant to issue for the person charged with the forgery, and that one of the bank's officers had refused to contribute to a reward for the arrest of the forger, was inadmissible.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 154.*]

BANKS AND BANKING (§ 154*)—CHECKS—FORGERY—EVIDENCE.

On an issue as to the forgery of a check charged against a bank deposit, evidence that the drawer was skillful in the imitation of signatures, that years before in Alaska he went under an alias, that he could imitate the witness' signature so closely that witness could not detect the real from the assumed, was inadmissible.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 154.*]

Department 1. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by R. A. Buell against the Aberdeen State Bank. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Boner & Boner, for appellant. E. J. Adams and A. Emerson Cross, for respondent.

MORRIS, J. Respondent brought the action to recover the sum of \$310, claimed by him as a deposit to his credit in the appellant bank, and which the bank refused to pay, deny-

ing that respondent was entitled to credit in such sum. Upon the trial the determination of this issue depended upon whether a check for \$310, dated March 10, 1909, purporting to be drawn by respondent to the order of N. L. Marois, and paid by the bank on presentation by Marois, was genuine or a forgery. It was respondent's contention that this check was not a genuine instrument, but had been forged by Marois, and upon this theory the jury returned a verdict in his favor, and the case is brought here upon numerous assignments of error. We will only refer to those we deem material and to be well taken.

F. P. Porter, a witness for respondent, was permitted over objection to testify that on the 9th of March, or a day or two thereafter Marois presented a check to witness at his store; that the same was cashed and was deposited in the bank of Hayes & Hayes, and that payment of such check was refused; that some months thereafter witness had a conversation with Mr. Bradley, an officer of appellant, in which he says he understood the reason for the nonpayment of his check was that the \$310 check was in dispute as a forgery. The Porter check was, like the one in question, purporting to be drawn by respondent to the order of Marois, and was also repudiated as a forgery. We think such evidence was incompetent, and its admission was error. The issue was the genuineness of the \$310 check, and evidence that led the jury to believe that Marois had forged the Porter check was prejudicial, as by its admission the jury might argue that Marois, having forged the Porter check which was not an issue to be determined by them, had likewise forged the \$310 check, and thus reached a determination upon an issuable matter based upon conclusions derived in a nonissuable matter. *State v. Gottfredson*, 24 Wash. 393, 64 Pac. 523; *State v. Oppenheimer*, 41 Wash. 630, 84 Pac. 588.

Respondent was also permitted to testify that he caused a warrant to issue for Marois, in which he was charged with forgery. This was error, as it could prove nothing other than respondent's belief that Marois had committed the crime of forgery, and his desire to apprehend and punish him. If this check was forged by Marois such fact must be established by competent proof, and respondent's belief in Marois' guilt was not proof, of such a character. Mr. Bradley, one of appellant's officers, was interrogated over objection as to whether he had not refused to contribute to a sum to be offered as a reward for the arrest of Marois. This, we think, was incompetent. If the bank had made such a contribution, the fact might have been admissible as an admission or declaration on its part that the check was a forgery, but an attempt to show that respondent desired the bank to offer a reward and its refusal was not permissible for any purpose.

Another witness for respondent testified, over objection, that Marois was skillful in the imitation of signatures; that years before in Alaska he went under an alias; and that he could imitate the witness' signature so closely that witness could not detect the real from the assumed. This, we believe, was error. The effect of such evidence would hedge in appellant with inferential and prejudicial circumstances, and would only seek to establish Marois' ability to successfully forge respondent's signature, were he disposed to do so. *Dow's Executor v. Spenny's Executor*, 29 Mo. 886.

Other testimony is complained of, to the effect that Marois, prior to the alleged forgery, spent money freely, that he spent his time in a manner objectionable to respondent, and when he left was indebted to respondent. We do not pass upon these alleged errors, as the record is not such as to entitle them to review.

The judgment is reversed, and cause remanded for a new trial.

RUDKIN, C. J., and CHADWICK and GOSE, JJ., concur.

(58 Wash. 396)

PHOENIX PACKING CO. v. HUMPHREY-BALL CO.

(Supreme Court of Washington. May 19, 1910.)

1. SALES (§ 345*)—ACTION FOR PRICE—PERFORMANCE OF CONDITIONS PRECEDENT—STATUTORY PROVISIONS.

Civ. Code Cal. § 1440, providing that if a party to an obligation gives notice to another before the latter is in default that he will not perform, and does not retract the notice before the performance is due, the other party is entitled to enforce the obligation without performing any conditions on his part, does not apply in favor of a seller who was notified by the buyer that he would not accept the goods, whereupon the seller notified the buyer that the cancellation of the contract would not be permitted, and that the seller would insist on performance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 958; Dec. Dig. § 345.*]

2. CONTRACTS (§ 144*)—PERFORMANCE—WHAT LAW GOVERNS.

The rights of parties to a contract are determined by the law of the place where the contract is entered into, in the absence of an agreement to the contrary.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 724-727; Dec. Dig. § 144.*]

3. SALES (§ 56*)—PERFORMANCE OF CONTRACT—WHAT LAW GOVERNS.

As affecting the question of what law governs the rights of the parties, a contract of sale which was signed by the purchaser and delivered to the seller's agent in Washington, and after acceptance by the seller in California was returned to the buyer by the agent in Washington, was a Washington contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 2, 153; Dec. Dig. § 56.*]

4. SALES (§ 56*)—PERFORMANCE OF CONTRACT—WHAT LAW GOVERNS.

Where, under a contract of sale, the goods are to be shipped from one state to another,

and the purchaser is allowed three days in which to examine the goods before accepting them, title to the goods does not pass until acceptance, so that the law of the place of delivery to the buyer governs.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 154; Dec. Dig. § 56.*]

5. SALES (§ 77*)—CONSTRUCTION OF CONTRACT—"F. O. B."

In a contract of sale, the phrase "these prices are f. o. b. California" means that the purchaser is to pay the freight from California to the place of destination.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 212; Dec. Dig. § 77.*]

For other definitions, see Words and Phrases, vol. 3, p. 2636; vol. 8, p. 7659.]

6. SALES (§ 56*)—PERFORMANCE OF CONTRACT—WHAT LAW GOVERNS.

Where, under a contract of sale of goods to be shipped from one state to another, they were not to be delivered to the buyer until paid for, the title did not pass until the goods were delivered, so that the contract was governed by the law of the place of delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 154; Dec. Dig. § 56.*]

7. EVIDENCE (§ 450*)—PAROL EVIDENCE—CONSTRUCTION OF CONTRACT.

In a contract of sale, the phrase "Terms—cash with documents attached" is a proper subject of explanation by parol testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2069; Dec. Dig. § 450.*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by the Phoenix Packing Company against the Humphrey-Ball Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

E. C. Macdonald, for appellant. R. E. Porterfield, for respondent.

DUNBAR, J. On the 15th day of June, 1907, the respondent ordered at Spokane, Wash., through appellant's broker, to be shipped at a certain time, various amounts and kinds of raisins, at stipulated prices amounting in the total to \$2,152.50. This order was afterwards accepted by the appellant at its office in San Francisco. The essential part of the contract is as follows: "Spokane, June 15, 1907. We have this day bought from Phoenix Packing Co., of San Francisco, California, through their broker, M. Johnson-Lieber Co., of Spokane, Washington, to be shipped first half of November, or as soon thereafter as goods can be packed, the following viz.: * * * These prices are f. o. b. California, Fresno, less 1½ per cent. cash discount. Terms—cash with documents attached. When buyer requests the privilege of examination before payment of draft, routing to rest with seller. Such examination to be made within three days of the arrival of the goods, otherwise buyer waives all rights of rejection or claim as to quality." There are other provisions in the contract, but their consideration is not necessary to a determination of this case. The contract was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

accepted by the appellant and returned to appellant's agents in Spokane, who in course of time, delivered it to the respondent. On the 10th day of September, 1907, the respondent wrote the appellant, ordering a cancellation of said contract, and stating that it would not accept the shipment. The appellant wrote back to the respondent that it would not agree to the cancellation of the contract, but that it would make the shipment according to the original contract. Nothing further was done in the premises until the commencement of this action for the sum of \$350.14, which sum it is alleged is the difference between the contract price and the market value of said goods at the time they were to have been shipped under the contract at the place of delivery—Fresno, Cal. The respondent admitted the execution of the contract and the attempted cancellation of the same, but denied that appellant had been damaged in any sum. The respondent also interposed a separate and affirmative defense, to the effect that the respondent had sought to countermand and cancel said contract, and that appellant, on or about the 16th day of September, 1907, notified respondent that it refused to accept any cancellation; that it would ship such goods at the specified time, and expected the respondent would accept delivery of the same; that the respondent relied on that notification of the appellant and made no further effort to cancel said contract or countermand said order, and that said appellant failed, neglected, and refused to ship said goods and carry out its contract, against defendant's will. This affirmative answer was denied by the appellant.

The appellant pleaded and proved certain sections of the Civil Code of the state of California, among others section 1440, which is as follows: "If a party to an obligation gives notice to another before the latter is in default that he will not perform the same upon his part and does not retract such notice before the time at which performance on his part is due, such other party is entitled to enforce the obligation without previously performing any conditions on his part in favor of the former party." But this is not the kind of a case, it seems to us, where the section quoted is applicable; for here, notwithstanding the notification on the part of the respondent that it desired to cancel the order, the application for cancellation was positively refused by the appellant, and it notified the respondent to that effect. The last letter written by the appellant to the respondent contains this statement: "We note that you state that you will positively not accept our shipment of raisins under any consideration, and that your letter is to serve notice of cancellation of contract. Now, gentlemen, you know that it took two to make the contract and we believe that it takes two to cancel it. We shall make shipment of this car of raisins on contract time and most certainly shall expect you to take delivery of the same."

And in its letter to its own agent, on the same day, occurs the following: "We have had a letter from Humphrey-Ball in which they inform us that they will not under any consideration accept delivery of the car of raisins. In other words, that they intend to repudiate their contract. We wrote them this morning, and beg to inclose copy of the letter. We wish to state now that we shall insist that they take delivery of this car. We did not care to write them too strong a letter at this time, but for your information we wish to state that we intend to see that they take this car or pay for it, no matter how long it takes us or how much it costs. We are not in the habit of having a firm give us an order, sign a contract, and because the price goes down a little, say that they do not wish the goods." No further communication was had between the parties until the commencement of this action. There was proof of the value of the goods in California at the time they would have been shipped under the contract, but there was no proof offered as to the value of the goods in the state of Washington.

The principal contention of the appellant is that the court erred in not holding that the contract sued on was made in California and should be construed by the laws of that state; and in holding that the law of Washington alone should be considered in measuring the damages, if any, sustained by appellant. It is also alleged that the court erred in permitting the introduction of evidence as to the custom of merchants in shipping goods, and evidence as to the construction of the contract. It is the contention of the appellant that the law of California governs, and that the market value of the goods in California determines the measure of damages to be allowed. In this we think the appellant is mistaken. Of course, as a general proposition, the rights of parties are determined by the law of the place where the contracts are entered into, in the absence of an agreement to the contrary. So that it becomes a pertinent question, where this contract was entered into, or where the minds of the parties met in relation to the subject and terms of the contract. The sale was either made at Spokane when it was signed by respondent, or it was made at Spokane when it was sent back and delivered to the respondent by appellant's agent. It had been in the possession of the appellant from the time of signing by respondent, until delivered to it by appellant through its agent, after its acceptance by the appellant; and if it be conceded that the minds of the parties did not meet at the time of the signing at Spokane, by reason of the lack of authority on the part of the agent to bind the appellant, the time when their minds did meet was when the accepted contract was delivered to respondent at Spokane, by appellant's agent.

Appellant cites many authorities in support of the doctrine that if a person in one state mails an order for goods to a person in another state, and the person in the other state

accepts the same and mails his acceptance to the person sending the proposition, the contract is to be governed by the law of the state where it is so accepted. But these cases do not apply to the case under consideration, for the offer in the first instance was made in Spokane by the agents of the appellant. The acceptance of that offer was also made here, notwithstanding the appellant was doing business in California, for the acceptance was made not through the mail in answer to an offer made, but through the agent of the appellant, resident at Spokane. The contract was delivered at Spokane. The case cited from this court—*Izett v. Stetson & Post Mill Co.*, 22 Wash. 300, 60 Pac. 1128—is not controlling. That was a case where sawlogs had been delivered to the purchaser under a contract of sale providing for payment when they should be scaled, and it was held that the title to the logs passed to the purchaser, and he became liable for the value of the logs in case they should be lost through his negligence prior to their being scaled. That case involved the proposition so frequently discussed that, where it appears that there has been a complete delivery of the property in accordance with the terms of the sale, the title passes, although there remains something to be done in order to ascertain the total value of the goods at the rates specified in the contract. And that was the basis of the decision in that case, following the doctrine announced in *Hatch v. Standard Oil Company*, 100 U. S. 124, 25 L. Ed. 554.

But, outside of any extraneous testimony, the contract itself shows that the title of the goods had not passed to the respondent, and would not have passed to it if they had been shipped at Fresno, Cal.; because, under the contract, the buyer had the right to examine the goods before he was compelled to accept them, and was given three days to exercise such right. All that was meant by the expression "these prices are f. o. b. California" was that the purchaser was to pay the freight from California to the place of destination. The rule applicable to the circumstances of this case is announced on page 1339, subd. 2, of 22 Am. & Eng. Enc. Law (2d Ed.), as follows: "The place of sale of goods is the place of delivery, where the sale is completed by delivery. Thus, if a person residing in one state orders goods of one residing in another state, who there delivers the goods ordered to a carrier for the purchaser, the contract is deemed to be made there, in the absence of an agreement to the contrary. But if the parties agreed that the goods should be delivered by the carrier as the seller's agent in the state of the purchaser, the law of the latter state will govern." Under the undisputed testimony in this case,

and under the terms of the contract, the goods were to be considered the goods of the seller until they were purchased and paid for in Spokane by the respondent. The expression in the contract "Terms—cash with documents attached" was explained by the testimony, and such explanation becomes important in the determination of this cause. Mr. Amos, who was the agent for the appellant and the man who sold the goods to the respondent, in answer to the question, "I will ask you what that sentence means; what is the technical meaning of that phrase?" (the question referring to the phrase "Terms—cash with documents attached") said: "It means that the goods are shipped, the shipping receipt and invoice to be attached to the draft. And afterwards it passes through the bank for collection; the goods thereafter to be paid for before the draft will be delivered by the bank; and the bill of lading would have to be delivered to the railroad before they would deliver the goods. Q. In other words, the goods would not be delivered until they were paid for? A. They would not be released by the railroad until paid for. Q. They would not be delivered to the Humphrey-Ball Company until paid for? Is that the fact? A. Yes, sir." The witness further testified that the bill of lading was attached to the draft sent to the bank, and was not delivered until the draft was paid; that the Humphrey-Ball Company could not get the goods until they were paid for, and that the goods were to be shipped under this contract to the Phoenix Packing Company instead of to the respondent. The witness D. J. O'Callahan testified to exactly the same interpretation of the contract, and stated that the purchaser could not touch the goods; they remained the property of the seller until paid for. To the same effect was the testimony of F. M. Ball. So that it seems plain that this case falls squarely within the rule just cited from 22 Am. & Eng. Enc. Law; that the contract should be construed with reference to the laws of the state of Washington; and, there being no proof of any damages under the laws of the state of Washington, the court was justified in arriving at the conclusion at which it did.

It is contended by the appellant that the court erred in admitting the testimony as to the construction of this phrase in the contract. But this was an expression which is plainly open to explanation. The explanation offered had no tendency to dispute the terms of the contract, but simply to determine its meaning. It was therefore admissible.

The judgment of the court will be affirmed.

RUDKIN, C. J., and PARKER, CROW, and MOUNT, JJ., concur.

(58 Wash. 322)

PUGET SOUND WAREHOUSE CO. v.
NORTHERN PAC. RY. CO.

(Supreme Court of Washington. May 11, 1910.)

1. INSPECTION (§ 1*)—RIGHT OF STATE—REFERENCE TO POLICE CONTROL.

The state has a right to pass inspection laws; but the power must be referable, in some degree, at least, to some recognized subject of police control.

[Ed. Note.—For other cases, see *Inspection*, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. INSPECTION (§ 2*)—STATUTORY PROVISIONS—CONSTRUCTION—TAX ON SHIPMENT OF GRAIN.

Sess. Laws 1909, c. 137, is entitled "An act for the regulation of public warehouses, relating to the shipping, grading, inspection and weighing of grain and hay, defining the duties of railroads, warehousemen and millers in relation hereto, providing penalties," etc. Its whole tenor, as well as every express declaration, is aimed to regulate and protect the public from the imposition of warehousemen, providing in section 9 that their charges shall be just, fair, and reasonable. Sections 10-12, 17-21, refer in terms to public warehouses or warehousemen, and not even inferentially to shipments made by an owner consigned to himself. *Held*, that the law did not cover inspection of grain shipped by the owner to himself, not to be stored in a public warehouse, and that, if it did, a tax on such shipment could not be sustained by reference to the police power.

[Ed. Note.—For other cases, see *Inspection*, Dec. Dig. § 2.*]

Department 2. Appeal from Superior Court, Pierce County; John A. Shackelford, Judge.

Action by the Puget Sound Warehouse Company against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

George T. Reid, W. P. Bell, and W. V. Tanner, for appellant. Hayden & Langhorne, for respondent.

CHADWICK, J. The object of this action is to test the constitutionality of the grain inspection law as amended by the statute of 1909 (Sess. Laws, c. 137, p. 519) in so far as it relates to shipments by and consigned to the owner of grain or other warehouse products referred to in the act. The Puget Sound Warehouse Company was the owner of 1 car load, 310 sacks, of wheat, at Creston, Wash., which it loaded upon a car belonging to the Northern Pacific Railway Company, for shipment to Tacoma, Wash. The wheat was consigned by the owner, the warehouse company, to itself, and not for storage in any public warehouse. The wheat was not sold or offered for sale. Upon receipt of the car at Tacoma, the freight charges were tendered by the owner, and delivery of the wheat demanded. This was refused by the railway company, whereupon action was brought to recover possession of the grain. The railway company defending admitted all the material facts, but set up as a legal defense that: "Under the provisions of chapter 137 of the

Laws of 1909, the Railroad Commission of Washington has fixed a fee of 75 cents for the inspection and weighing of each car load of grain received in Tacoma over the line of defendant's road, and requires defendant to pay such fee and treat the same as advance charges. Said act makes such fee a lien upon such grain. Upon receiving said car of grain No. 90,744 at Tacoma, defendant made out and presented to plaintiff a bill showing the freight charges thereon to be \$77, and the inspection fee to be 75 cents, and defendant thereupon offered to surrender said car of grain to plaintiff upon the payment of said sum of \$77.75; but the plaintiff declined to pay said inspection fee and declined to pay any greater sum than the amount of said freight charges. Defendant is ready and willing to deliver said car of grain to plaintiff upon the payment of the sum of \$77.75, and the only reason why defendant refuses to deliver said car of grain to plaintiff is because plaintiff declines to pay said inspection fee of 75 cents." A demurrer to this affirmative defense being sustained, the railway company refused to plead further. Judgment was entered in favor of the warehouse company. The railway company having no interest in the subject-matter of the controversy or in this appeal, briefs were filed, and the case is presented on behalf of the State Railroad Commission by the Attorney General.

Upon appeal the respondent urges as grounds for sustaining the judgment of the trial court several propositions of law: "(1) The statute, to wit, chapter 137 of the Session Laws of 1909 does not apply to the shipment of grain by consignor to himself. (2) The statute does not apply in any case to a shipment made to other than a public warehouse. (3) The act does not apply except for grain for milling and export, and passing through a public warehouse at an inspection point. (4) If the statute is held to apply to the case of one shipping grain to himself, and to shipments other than to public warehouses, then it is unconstitutional because it is not proper police regulation. (5) The statute, if so construed, is unconstitutional because it provides for state inspection and weighing in Seattle, Tacoma, Spokane, and such other cities as the Railroad Commission may from time to time designate." From the view we take of this case, it is only necessary to discuss the first, second, and fourth propositions, and these together. It is frankly admitted by the Attorney General upon oral argument that, if the law is sustained, it must be because it comes within the police power of the state.

That the state has a right to pass inspection laws cannot be doubted; but in all such cases the power must be referable, in some degree, at least, to some recognized subject of police control. Although the state may act arbitrarily in a proper case and its act will be upheld, it cannot do so without reason.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The act so plainly carries its own meaning and construction that it would seem to be sufficient to rest our judgment upon its title: "An act for the regulation of public warehouses, relating to the shipping, grading, inspection and weighing of grain and hay, defining the duties of railroads, warehousemen and millers in relation thereto, providing penalties," etc. It, like the act of 1895 (Laws 1895, c. 109), was clearly designed to protect the owner or shipper of grain from the frauds practiced by public warehousemen in returning false weights and grades. The whole tenor of the act, as well as every express declaration, is aimed at the regulation and the protection of the public from the impositions of the warehousemen. Section 9 of the act refers to the charges made by any public warehousemen providing that they shall be just, fair, and reasonable. Sections 10, 11, 12, 17, 18, 19, 20, 21, and 30 refer in terms to public warehouses or warehousemen, and do not even inferentially refer to shipments made by an owner which are consigned to himself. There is nothing in the law, nor, indeed, is it so contended except as it may appear inferentially, to sustain the theory that the state has the right to impose a tax for inspecting grain in the possession of the owner, and which may never be stored or offered for sale. Nor can the act be sustained by reference to the police power of the state. The public can have no possible interest in the character or quality of the grain shipped by an owner from one station in the state of Washington to another, although it be one of the points designated for inspection. Nor is there anything in the character of the shipment calling for the exercise of this extraordinary power. Grain is not in itself dangerous to handle; it is not perishable so as to become, under ordinary conditions, unfit for food; it is not explosive; it does not carry or breed disease; its shipment or use does not tend in any degree to incite a breach of the peace, lower the moral standards, or encourage crime.

The cases cited in no way bear out the contentions of the state. In the case of *McDaniels v. J. J. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947, 94 Am. St. Rep. 889, the law (sale of goods in bulk) was sustained upon the theory that it was designed to prevent frauds among individuals. The court recognized in express words that there must be some abuse in the suppression of which the public is interested. In *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725; *McLean v. Arkansas*, 211 U. S. 546, 29 Sup. Ct. 206, 53 L. Ed. 315; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; *Public Clearing House v. Coyne*, 184 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092; *State v. Wilson*, 61 Kan. 32, 58 Pac. 981, 47 L. R. A. 71; and *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 18 Sup.

Ct. 862, 43 L. Ed. 191, the public in each case had a direct and positive interest to protect the community from frauds and impositions in food products or from false weights and measures, for as was said in *State ex inf. Hadley v. Goffee*, 192 Mo. 670, 91 S. W. 486, without some protection one who ships his grain to a public warehouse would be at the mercy of those who handle it and would in the ordinary course of business have no convenient or adequate means of verifying the classification and weight of his grain. It is upon these theories that the public warehouse and inspection laws are sustained. But this case does not fall within any of them. We cannot assume that an owner who ships and consigns his grain to himself needs any protection, or will be guilty of a fraud against himself. The design of the law is to protect an owner against the acts of third parties.

We therefore conclude: (1) That the grain inspection law is not broad enough to cover inspection of grain shipped by an owner to himself, there being nothing in the record to indicate that it is to be stored in a public warehouse; (2) that, if it were so, a tax upon such shipment could not be sustained by reference to the police power.

Judgment affirmed.

RUDKIN, C. J., and CROW, MOUNT, and DUNBAR, JJ., concur.

(58 Wash. 371)

CUNNINGHAM v. INDEPENDENCE CONSOL. MINING CO., Limited, et al.

(Supreme Court of Washington. May 18, 1910.)

1. CORPORATIONS (§ 82*)—SUBSCRIPTIONS—CONSTRUCTION—"FREE OF INCUMBRANCE."

Plaintiff, who was interested in options on mining claims, associated H. with him, who expended considerable money in developing the property. A corporation was formed of which plaintiff was elected secretary and H. president. Plaintiff asserted an interest in the company to the extent of 100,000 shares of the capital stock, under an agreement with H. in which the latter agreed to "protect all present subscribers to the extent of assessing 750,000 shares fully 15 cents before any further assessments shall be levied against those of such subscribers who shall pay their full subscription to said stock, that is, 15 cents per share, fully guaranteeing to carry free from all assessment or incumbrance 100,000 shares of said stock of (plaintiff), who shall not be assessed for said 100,000 shares until all the aforesaid 750,000 shares shall have paid into the treasury fully 15 cents per share." Held, that the words "free of incumbrance" cannot be construed as meaning free from any charge or payment; but the agreement would be construed to mean that plaintiff would not be called upon to pay any assessment upon, or any part of the purchase price of, the stock until H. had paid in full for the 750,000 shares.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 285-295; Dec. Dig. § 82.*

For other definitions, see Words and Phrases, vol. 3, p. 2964.]

2. CORPORATIONS (§ 519*) — ACTIONS — EVIDENCE.

Evidence, in an action to establish an interest in a mining company, *held* insufficient to show that plaintiff was entitled to the stock claimed for nothing, and sufficient to show such bad faith and laches on plaintiff's part as to prevent a recovery.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 519.*]

Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Clarence Cunningham against the Independence Consolidated Mining Company, Limited, and others. Judgment for plaintiff, and defendants appeal. Reversed, with instructions to dismiss.

Alex M. Winston and B. B. Adams, for appellants. Wm. T. Stoll and C. P. Lund, for respondent.

CHADWICK, J. In the spring of 1898, plaintiff became interested in certain mining claims in the Coeur d'Alene country, Idaho. These he held under verbal or written options expiring September 10th of that year. With another he had done some little work on the claims and had made several unsuccessful efforts to interest capital, so that on or about September 1st he sought defendant Kennedy J. Hanley, who went with him to look over the ground, and who thereupon agreed to furnish the money to take up the options, provided extra time could be arranged and the property on further investigation proved to be an attractive investment. New options were obtained by plaintiff in his own name, not only on the property then held by him, but upon some other ground adjoining. Between that time and March, 1899, Hanley expended considerable money in exploring and developing the property. In March, 1899, a corporation, the Independence Consolidated Mining Company, Limited, was organized. A board of trustees was elected. This board selected defendant Hanley as president and plaintiff as secretary. The price of the stock was fixed at 15 cents per share, and plaintiff was made selling agent. He also acted as general superintendent of the work at the mines, and received a salary of \$150 per month. 152,000 shares of stock had been sold or subscribed under contract to pay upon call, up to September 1, 1899. On or about that date a meeting of the trustees was held, at which at least one of the stockholders was present, representing himself and some others who refused to carry out their contracts of purchase for the reason that the company did not have title to the property. Bad feeling had come between plaintiff and Hanley, and in consequence at that meeting the plaintiff resigned as secretary, and another was elected. From that time the plaintiff took no active interest in the affairs of the company. Defendant Hanley assumed the active management of

the company and, out of his own funds, paid the full amount due upon all the options, excepting the sum of either \$500 or \$750, and the balance of the purchase price of one claim which he deemed worthless. The whole sums so paid by him aggregated \$47,200.

In 1901 the company had become indebted to numerous creditors. A suit was brought by the Coeur d'Alene Hardware Company in its own behalf and as assignee of others. This suit was prosecuted to judgment. The several option agreements, together with their accompanying deeds, had been left at the First National Bank of Wallace. Plaintiff was named as grantee in all of these, and, they not having been withdrawn and recorded, the company had no record title to its property. These facts being known to the hardware company, at its solicitation, and upon the request of the creditors who gave plaintiff the \$500 or \$750 necessary to cover the balance due on one of the claims, plaintiff took up the deeds, put them on record, and then made a deed to the Independence Company. Thereupon an execution was levied, and the property sold and bid in by the hardware company. Prior to the transactions just noted, plaintiff had an understanding and agreement with the hardware company that, if the property was not redeemed by the Independence Company, it would sell the claims to him for the amount of the judgment, interest, and costs. Plaintiff says that he intended to buy the property for the benefit of the company; but there is no evidence of this when considered in the light of the fact that a redemption would have accomplished the same purpose, leaving him in a position of a preferred equitable lienholder. Defendant Hanley had made unsuccessful attempts to raise the money to accomplish the redemption, and on the last day he, with another, who, so far as the record shows, was vice president of the company, went to Wallace and sought an extension of 24 hours. This was refused by the hardware company. Hanley and Argyle, the vice president, then arranged with Mr. August Paulsen for the money; but the sheriff, acting under the direction of the hardware company, refused to accept his certified check, demanding United States currency, and that alone. The amount necessary for redemption was finally gotten together and received by the sheriff. Hanley, as president, and the vice president, acting as secretary, executed a deed to Paulsen under an agreement that, if the amount was repaid with 8 per cent. interest within six months, he would reconvey the property. Paulsen executed a deed to the company at the time and left it in escrow at the bank. Mr. Paulsen insisted upon this arrangement in order to avoid the complications of a mortgage and possible foreclosure. His attorney advised him that by so doing he took the absolute title subject only to his

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

agreement to resell within a certain time at a certain price. The money was not paid to Paulsen within the time limited, and some time thereafter Hanley paid the full amount due, \$13,505.92, being the amount advanced with interest, and took a deed to the company. This deed was never recorded, and Hanley now claims it to be lost. The deed from the company to Paulsen was recorded June 14, 1904, and came to the actual notice of plaintiff within the ensuing year. Plaintiff claims that he then sought Argyle, who told him the deed was intended as a mortgage and that it was all done for the benefit of the company; that he and Argyle then went to the bank and examined the escrow agreement with Paulsen, but not the accompanying deed, it being sealed. This he says satisfied him. Argyle, who, at the time his testimony was taken, had no interest in the company, does not remember this circumstance. In January, 1907, the Independence Lead Mines, Limited, was organized, at the instance of and under the direction of the attorneys of third persons who had become interested in the property, and title passed to the lead mines company by deeds executed by Hanley, the consolidated company, and Paulsen; Paulsen in the meantime having, at the request of Mr. Hanley, made another deed direct to him. No stock in the consolidated company had ever been issued; but, prior to the organization of the lead mines company, Hanley paid to all of the stockholders of the consolidated company who had paid 15 cents per share the full amount paid in by them, and became the owner of all the stock, or the right thereto, unless it be held that plaintiff is the owner of the amount claimed by him. The affairs of the consolidated company were not carried on with any formality after September, 1899. Such books and records as there were were turned over by plaintiff to the new secretary elected at that meeting, and have been lost as Hanley claims, or, at any rate, they were not before the court at the trial.

Plaintiff asserts an interest in the consolidated company to the extent of 100,000 shares, or one-tenth of the whole capital stock, under an agreement made by Hanley at the September, 1899, meeting. In the absence of the minute books, he submits the following memorandum, which he says is the original draft of the proposition made by Hanley and taken down by him as secretary at that time: "I will protect all present subscribers to the extent of assessing 750,000 shares fully fifteen cents before any further assessments shall be levied against those of such subscribers who shall pay their full subscription to said stock; that is, fifteen cents per share, fully guaranteeing to carry free from all assessment or incumbrance 100,000 shares of said stock of Clarence Cunningham who shall not be assessed for said 100,000 shares until all the aforesaid 750,000 shares shall have paid into the treasury fully fifteen

cents per share;" it being plaintiff's claim that up to that time he and defendant were equal partners and had equal interest in the company; that they had subscribed for 500,000 shares of the stock, each 250,000, and the balance was to be left in the treasury and sold for the benefit of the company; that, the affairs of the company at that time being in bad shape, he proposed an agreement similar to the one he says Hanley made; but that because of Hanley's financial interest in the company the directors accepted the one made by Hanley. It will be seen that the 750,000 shares, together with the 152,000 already sold, left approximately 100,000 shares unaccounted for. It is this stock that Cunningham claims as his own. On the other hand, Hanley insists that no such agreement was ever made; that the only interest he had in the meeting was to make the subscribers pay up or get out of the company; that plaintiff was never at any time interested other than as his agent; that he was paid a salary for all his services; and that, while he was a trustee and officer of the company, it was understood that his interest was only nominal and sufficient to comply with the law in that respect. Plaintiff does not give a very satisfactory explanation of these preliminary transactions. He says that he signed the subscription book of the company; but, in answer to a question, "How much did you subscribe?" he says, "I don't remember." Although Hanley had, prior to the organization of the company, advanced \$5,250 as against his possible \$1,000, in answer to the question, "Was it your understanding that he was to have credit for this amount of \$5,250?" he says, "No, sir." The trial court found that plaintiff was entitled to 100,000 shares of consolidated stock free of all charge, and appointed a receiver to take over the property. From this decree the defendants other than Argyle and Newel who had no interest in the result of the litigation have appealed.

The testimony is so contradictory and so unsatisfactory, and respondent and appellant Hanley are so antagonistic, and as we believe equally determined to get the advantage of the other, that we shall be governed as far as possible, as the trial judge evidently was, by the written evidence. The writing upon which respondent bottoms his case was construed as follows: "At said meeting the defendant Hanley entered into an agreement with the consolidated company and with the plaintiff, by the terms of which he purchased from the company seven hundred and fifty thousand (750,000) shares of its capital stock at fifteen (15) cents per share, to be paid for in installments in such manner as to provide funds necessary to make all the payments due under the terms and conditions of the said options and to continue development work upon said mineral claims until the full amount of said purchase price of seven hundred and fifty thousand (750,000) shares should be paid into the treasury and expended upon said

property; and also agreed to carry the plaintiff free from any charge or payment for one hundred thousand (100,000) shares of the capital stock of said company, which he, the plaintiff, then owned, until every other share in said corporation should have paid into the treasury the sum of fifteen (15) cents per share. A part of said agreement was, that the plaintiff and defendant Hanley should donate to the treasury of the company sufficient of their individual stock to make up said seven hundred and fifty thousand (750,000) shares, which they accordingly did. Thereupon the defendant, the consolidated company, by and through its board of trustees, caused said agreement to be entered upon the books of the company, which books were then placed in the custody of the defendant Hanley, and have never since been in the custody or control of any other person or persons." It will be noticed that the court gave to the words "free of assessment" the meaning "free from any charge or payment." The writing will not bear this construction. At best the words "shall not be assessed for" can only be held to be an agreement that respondent would not be called upon to pay any assessment upon any part of the purchase price until Hanley had paid in full for the 750,000 shares. It so occurred to the court on the trial. "The Court: My understanding is that he was not to pay anything until all the other stockholders had paid 15 cents a share; then he would have to pay 15 cents?" To which respondent answered: "No; I would meet the assessments after that as they were levied on the entire stock of the company. For instance, when the other stock had paid 15 cents into the treasury of the company, then any further money required would be levied equally or assessed equally against all of the stock of the company, mine included." He also says: "Q. Was it the understanding that Mr. Hanley was to have any stock over and above this 750,000 shares he was to buy at 15 cents? A. No, sir. Q. In other words, there was not anybody to have any stock that they did not buy at 15 cents; is that right? A. I was to have 100,000 shares. Q. Free? A. Under the terms of that agreement. Q. Free, without paying anything for it at any time? A. I considered I had paid something for it at some time. Q. Without paying anything into the company's treasury for it at any time? A. I had already paid in money; yes, sir. Q. And what was Hanley to have for what he had done prior to that time? A. There was no agreement that he was to have anything. Q. Wasn't he to have 100,000 shares of stock himself free? A. It was not so stated. Q. Isn't it a fact that he was to have 100,000 shares of stock himself, the same as you? A. It is not." The contract being denied, respondent does not show any equities that would entitle him as against Hanley to all of the remaining stock for nothing. He had been paid for his services, while Hanley had put up every dollar that had gone into

the property. It is extremely improbable that Hanley would agree to put up \$125,000 as against respondent's nothing, and allow him to take free of all costs \$15,000 worth of stock, and this at a time when they were in bad blood. If such was the intent of the parties, it would seem that common prudence would have dictated a more secure contract than that here offered.

Aside from these considerations, we are convinced that respondent should not recover for other reasons. There are none interested or contending for any interest in the consolidated company other than respondent and Hanley, and, admitting that Hanley got possession of the property in violation of his agreement, he did no more than respondent attempted to do. It can hardly be contended that, when he allowed the judgment creditors to pay \$500 or \$750, as the case may be, for his personal account in order to release the deeds, and when he then recorded them together with a deed from himself to the company so as to permit an execution to be filed and a sale to occur under an agreement with the execution creditor that it would bid in the property and sell to him after the period of redemption, he acted in good faith. Especially so when no demand was, or has since been, made on him for the money advanced to take up the deeds, and the creditors in furtherance of that agreement refused to extend the time for redemption even 24 hours, refused the check of Mr. Paulsen although certified, refused bank notes, or anything other than legal tender under the federal statute. It clearly shows collusion and intent to defeat the company. Good faith and the rights of the company demanded other conduct. Respondent could have as a stockholder paid the judgment or redeemed and held as the equitable owner for the company, or he could have asked the appointment of a receiver and compelled a suit against Hanley to recover the balance due on the contract as he asserts it to be. He took the chance of appropriating the property of the company after the period of redemption had expired, and as against the present owners should not be heard in a court of equity.

Equity bars recovery for another reason. Respondent has not been diligent in the prosecution of his remedy. His rights did not depend, as the lower court seems to have assumed, upon his finding out that the reconveyance from Paulsen was not for the benefit of the consolidated company, but upon the contract which we have hereinbefore quoted. The time within which he should have acted began to run from the time notice of the breach of the contract was brought home to him. He knew as early as 1901 that Hanley had not paid for the 750,000 shares; otherwise no judgment could have been taken against the company. He knew that Hanley, in violation of the agreement, had suffered the property to be jeopardized and subjected to forced sale. Then it was that he should have sought the courts. As we have said, he could

through the medium of a receiver have compelled Hanley to furnish the money to take up these deeds and thus free the property. He did nothing, but suffered and assisted the further progress of events to the end that the title should come under his personal control. This action was begun in December, 1903. Considering all the circumstances, the character of the property, the lapse of time, and conduct of the respondent, the equitable doctrine of laches intervenes. This doctrine is most frequently applied in mining cases, for the reason suggested in *Patterson v. Hewitt*, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214: "The defense of laches, which prompted the dismissal of the bill in this case, has so often been made the subject of discussion in this court that a citation of cases is quite unnecessary. Some degree of diligence in bringing suit is required under all systems of jurisprudence. In actions at law, the question of diligence is determined by the words of the statute. If an action be brought the day before the statutory time expires, it will be sustained; if a day after, it will be defeated. In suits in equity the question is determined by the circumstances of each particular case. The statute of limitations consorts with the rigid principles of the common law, but is ill adapted to the flexible remedies of a court of equity. The statute frequently works great practical injustice; the doctrine of laches never. True, lapse of time is one of the chief ingredients; but there are others of almost equal importance. Change in the value of the property between the time the cause of action arose and the time the bill was filed, complainant's knowledge or ignorance of the facts constituting the cause of action, as well as his diligence in availing himself of the means of knowledge within his control, are all material to be considered upon the question whether the suit was brought without unreasonable delay. * * * It thus appears that the right of action accrued to the appellants in April, 1885, and that this suit was not begun until eight years thereafter—in 1893. Whether the refusal of Hewitt to make the deeds was right or wrong is not material here. There is no doubt from the findings that appellants had no share in the subsequent development of the mine or the discovery of the ore in 1890, and that it was through the efforts and perseverance of the defendants, and the aid they received from Fergusson, that they were put in possession of this valuable property. If appellants had expected a share in this property, they should either have brought a bill promptly to enforce their rights, or at least contributed their proportionate share to the subsequent work and labor, and the expenses then incurred. To award them now a deed to their original interest in the property would be grossly unjust to the defendants, through whose exertions the value of the property was discovered and the mine put up-

on a paying basis. While it is true the court might impose upon the appellants the payment of their proportionate share of labor and expenses as a condition of relief, it could not compensate the defendants for the risk assumed by them that their exertions would come to naught. There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which to-day may have no salable value may in a month become worth its millions. Years may be spent in working such property apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced." *Johnston v. Standard Min. Co.*, 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480; *Great Western Min. Co. v. Woodmas, etc., Co.*, 14 Colo. 90, 23 Pac. 908; *Graff v. Portland, etc., Co.*, 12 Colo. App. 106, 54 Pac. 854; *Rogers v. Van Nortwick*, 87 Wis. 414, 58 N. W. 757.

In *Ferrell v. Lord*, 43 Wash. 667, 86 Pac. 1060, this court said: "There is no inflexible rule controlling the application of the defense of laches. The facts and circumstances of each case must govern courts of equity in permitting said defense to be made. The authorities show that, while lapse of time is one of the elements to be considered in applying this equitable defense to stale claims, it is only one, and that it is not necessarily the controlling or most important one. Regard must be had to all of the facts and surrounding circumstances, and if when carefully considered, they do not appeal to the conscience of the chancellor, on behalf of a claimant, the defense of laches should be allowed."

This case falls within these rules, and for the reasons suggested the judgment is reversed, with instructions to dismiss the bill.

RUDKIN, C. J., and FULLERTON, GOSK, and MORRIS, JJ., concur.

(12 Ariz. 198)

TERRITORY ex rel. GAINES, Tax Collector,
v. COPPER QUEEN CONSOL.
MINING CO.

(Supreme Court of Arizona. April 2, 1910.)

1. TAXATION (§ 421*)—ASSESSMENT ROLL—
DESCRIPTION OF REAL ESTATE—MINING
CLAIMS.

Civ. Code 1887, par. 2652, permits the assessor in preparing an assessment roll to describe real estate by common designation or name, and provides that the description shall be sufficient if it can be readily identified thereby. *Held*, that the description of patented mining claims by name was sufficient, as the name of such a claim was a "common designation or name" within the statute, and by such name the real estate might be "readily identified."

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 421.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. TAXATION (§ 421*)—ASSESSMENT—PATENTED MINES.

The practice of assessing patented mines by name has obtained too long in the territory to be questioned.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 421.*]

3. EVIDENCE (§ 29*)—JUDICIAL NOTICE—STATUTES—EXECUTIVE CONSTRUCTION—ASSESSMENT OF TAXES.

The practice of assessing mining claims by name, followed for a long time without question, is a practical construction of Civ. Code 1887, par. 2652, as to the mode of assessment, of which the courts may take judicial notice.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 29.*]

4. TAXATION (§ 341*)—ASSESSMENT OF REAL ESTATE.

The owner of real estate is entitled to a separate assessment in tracts or parcels, unless the right is waived by a list returned to the assessor.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 574-576; Dec. Dig. § 341.*]

5. TAXATION (§ 341*)—ASSESSMENT OF REAL ESTATE—EFFECT OF RETURNING PROPERTY EN MASSE.

By returning its property en masse a mining company waived its right of separate assessment of its mines, though the list returned was not verified by the oath of its superintendent.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 341.*]

6. TAXATION (§ 437*)—ASSESSMENT—EQUALIZATION—ENTRY OF RAISE ON ORIGINAL ROLL—EFFECT OF OMISSION.

That a raise in an assessment made by a county board of equalization was never entered by the clerk on the original roll, as required by Civ. Code 1887, par. 2654, is a mere omission, and harmless; the raise having been first carried into the tax books by an entry on the duplicate roll.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 437.*]

7. TAXATION (§ 515*)—PAYMENT OF TAXES—REAL ESTATE—PARCELS SEPARATELY ASSESSED.

Civ. Code 1887, par. 2676 (Civ. Code 1901, par. 3900), provides that whenever any tax is paid to the collector, he shall mark the word "Paid" and the date of payment in the duplicate roll, opposite the name of the person or description of property liable, and give a receipt specifying the amount of the assessment, the amount of tax, amount paid, date of payment, description of property assessed with sufficient certainty to identify it, and year for which the tax was assessed, but that no tax collector shall receive any taxes on real estate for any portion less than the least subdivision entered on the roll. *Held*, in view of such statute, that it was a fundamental rule in this state that a taxpayer may pay on any one of parcels separately assessed, discharging the lien, without paying on the remainder.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 515.*]

8. TAXATION (§ 469*)—ASSESSMENT—EQUALIZATION.

Under Civ. Code 1887, par. 2654, authorizing the county board of equalization to determine whether the assessed value of any property is too small or too great, and change and correct the same by addition or deduction, the board had no power to segregate from a tract of land assessed as one parcel a portion thereof, and impose thereon an additional assessment, without first determining that such tract was

improperly assessed as a whole, and causing it to be reassessed and raised in subdivisions, so as to preserve the taxpayer's right to discharge the lien of taxes on such of the several separate tracts as he might elect.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 469.*]

9. TAXATION (§ 592*)—ENFORCEMENT OF LIEN—PLEADING—VARIANCE.

Where, in a proceeding to enforce a lien for taxes against a mining company's property, the complaint, which set forth a list of the mining claims assessed, differs from the list shown in the assessment roll, the duplicate assessment roll, the delinquent assessment roll, and the back-tax book, in that it enumerates claims omitted from such rolls and book, and includes names omitted therefrom, the variance is such as to render the rolls and book inadmissible thereunder.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 592.*]

10. TAXATION (§ 595*)—ENFORCEMENT OF LIEN—NATURE OF ACTION—PERSONAL JUDGMENT.

A special statutory proceeding under Laws 1903, Act No. 92, to enforce a lien for taxes, is an action quasi in rem to fix a lien on specific property, and no personal judgment can be had.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 595.*]

11. STATUTES (§ 226*)—CONSTRUCTION—STATUTE ADOPTED FROM OTHER STATE.

In case of a statute adopted from another state, the prior construction thereof by the courts of last resort of that state is controlling on the Supreme Court of the territory.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. § 226.*]

12. TAXATION (§ 595*)—ENFORCEMENT OF LIEN—JUDGMENT DIFFERING FROM COMPLAINT—INVALIDITY.

Laws 1903, Act No. 92, § 88, provides that the judgment in a proceeding under the act to enforce a lien for taxes shall describe the land on which the taxes are found due, state the amount and interest found due on each tract or lot, and the year or years for which the same are due, up to rendition thereof, and decree that the lien be enforced, and the real estate, or so much thereof as necessary, be sold, and that execution shall issue thereon, to be executed as in other cases of judgment and execution, and that the judgment shall be a first lien on the land. *Held*, in view of this statute, that a judgment in an action to collect back taxes, differing from the complaint in describing the property sought to be subjected to the lien, was void.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 595.*]

13. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a proceeding to enforce a lien for taxes, wherein the amount in suit was a tax on the raise in defendant's assessment, the admission of assessment rolls and a tax book, differing from the complaint in the description of the property, was not rendered harmless by proof that an amount equivalent to the tax on the property as originally assessed was tendered by defendant in full payment, for the purpose of bringing suit to enjoin collection, and subsequently paid in course of suit, and credited on the entire tax claimed to be due.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1052.*]

14. TAXATION (§ 592*)—ENFORCEMENT OF LIEN—PLEADING—VARIANCE.

Where, in a proceeding to enforce a lien against a mining company's property, wherein

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the amount in suit was a tax on a raise in its assessment, the complaint alleged a raise of 65 claims en bloc, proof of a raise on eight thereof, on which alone it was sought to foreclose the lien, was a substantial variance.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 592.*]

Appeal from District Court, Cochise County; before Justice Fletcher M. Doan.

Special proceeding by the Territory, on the relation of J. N. Gaines, Tax Collector for the County of Cochise, against the Copper Queen Consolidated Mining Company. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

This is a special statutory proceeding, brought under Act No. 92 of the Laws of 1903 of the territory of Arizona to enforce a lien for territorial and county taxes for the year 1901 upon the property described in the complaint, amounting, with interest and costs, to the sum of \$120,039.35, on the 8th day of June, 1904, together with interest thereon at the rate of 10 per cent. per annum until paid, and the further sum of 4 per cent. of the amount found due as the tax collector's fee, and the further sum of 25 per cent. upon the amount found due as the tax attorney's fee. The case was tried in the lower court without a jury. Judgment was entered in favor of the defendant and appellee, that the plaintiff and appellant take nothing by its action, and that the defendant and appellee recover its costs, from which judgment the appellant has prosecuted this appeal. A motion for new trial, made on the usual statutory grounds, was denied. Notice of appeal from the judgment and order denying new trial was given, and thereupon this appeal was perfected.

The facts disclosed by the evidence are substantially as follows:

During the time provided by law for the assessment of property for territorial and county taxes in the year 1901, the appellee listed and returned to the assessor of Cochise county for assessment certain patented claims belonging to the appellee, namely, Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave (Dividend-Wedge-Ellie-Coon), East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Holbrook, Howell, Harrison, Iron Monster, Little New York, Little Joker, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear, Sun Rise, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Blisbee, Bell Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia. The tax list so returned appeared upon its face to be verified

by the oath of the superintendent of the mining company, but was in fact not so verified.

The assessment as entered and shown upon the original assessment roll is as follows:

PATENTED MINING CLAIMS	NUMBER OF ACTIONS.	VALUATION OF PROPERTY.	VALUATION OF MINING CLAIMS.
Patented Mining Claims. Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend, Wedge, Ellie Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Holbrook, Howell, Harrison, Iron Monster, Little New York, Little Joker, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear, Sun Rise, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Blisbee, Bell Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia.	698	\$3,180.00	\$5,431.00

A portion of the claims so included are: no sense contiguous.

At a meeting of the county board of equalization, on July 17, 1901, the assessed valuation of the property of appellee was equalized by an increase on the mining claims tax.

Silver Spray mine.....	\$1,000.00
Holbrook mine.....	1,000.00
Hoist and improvements thereon	100.00
Copper Queen mine.....	50.00
Copper Jack.....	50.00
Baxter mine.....	25.00
Atlanta mine.....	25.00
Dividend mine.....	35.00
Rucker mine.....	200.00

Making a total of..... \$3,180.00

In addition the personal property, machinery, merchandise, etc., was increased to a sum of \$358,895, making a total raise of \$464,895. Thereafter the rate of taxation

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter.

county and territorial purposes was duly fixed and levied upon all of the taxable property in Cochise county at \$3.20 upon each \$100 of valuation. The tax so levied upon the property of the appellee as raised amounted to the sum of \$122,657.09. Upon this increase being made, the appellee filed an injunction suit in the district court of Cochise county, prior to September, 1901, to enjoin the collection of the tax upon the ground that said increase had been fraudulently made, and that it was an overvaluation of its property. It therein tendered the full sum of \$14,133.12, being the amount of the tax upon all of its property, real and personal, upon the assessment for said year prior to the increase made by the board of equalization. The district court granted an injunction against the collection of that portion of the tax here in controversy upon the payment of the sum tendered by the plaintiff of \$14,133.12, and also the additional sum of \$9,589.20, subsequently paid, which was the amount of the tax upon the increase made upon certain personal property herein, which increase the court found to be valid. The court in said suit found as one of its findings of fact that the increase of the board of equalization upon the mining claims was not based upon any information or evidence had or obtained by them, but was made arbitrarily and capriciously, and for the purpose of imposing upon the plaintiff an unjust share of the burden of taxation. The sum of \$14,133.12 so paid by the plaintiff to the county for the tax levied upon the original assessment, which the appellee had admitted was due, and tendered in its injunction suit, was accepted by the county treasurer and ex officio tax collector "on account of any moneys which might ultimately be determined as due from said company for its tax for said year." An appeal was taken by the county from this decree to this court. The opinion reversing the decree of the district court is reported under the name of the County of Cochise v. Copper Queen Consolidated Mining Company, 8 Ariz. 221, 71 Pac. 946 (opinion on rehearing, 8 Ariz. 459, 76 Pac. 595). This court there held that the only remedy against excessive taxation at that time, as the cause of action accrued before the Revised Statutes of 1901 became operative, was that afforded under the jurisdiction of a court of equity, but reversed the decree, and remanded the case for new trial, on the ground that the complaint was defective in not expressly averring that the property was assessed in excess of its full cash value.

Subsequent to the rendition of this decision an effort was made to compromise the claim of the county, and an agreement of compromise was made under resolution of the board of supervisors adopted July 7, 1904, whereby the Copper Queen Company agreed to pay, and did pay, the further sum of \$5,661.44 in full settlement of the taxes for the year 1901. Thereupon the injunction suit

was dismissed by the appellee. This \$5,661.44 so paid has been retained by the county. Subsequently a proceeding in mandamus was instituted (Territory ex rel. Clark, Attorney General, v. Gaines, Tax Collector, 93 Pac. 281) to compel the tax collector to commence suit against the Copper Queen Company for the collection of the balance of the tax remaining unpaid, upon the ground that the compromise so made was unauthorized and void. This court held that the board of supervisors had no authority to compromise said tax, and granted the writ. This action was instituted pursuant to the mandate.

There is testimony offered tending to show that the raise made by the county board of equalization was not based upon any evidence of the value of the claims so raised, and was in fact arbitrary. The appellee also offered evidence which was uncontradicted that certain of the mines which were thus raised were assessed far in excess of their full cash value. Inasmuch as it has not been necessary to consider the question of the admissibility of this evidence under the defense interposed by the appellee, it is not necessary to further state the evidence bearing thereon.

W. G. Gilmore, Tax Atty. (Pickett, Bowman & Pickett and E. S. Clark, Special Counsel), for appellant. E. E. Ellinwood and Judson & Green, for appellee.

LEWIS, J. (after stating the facts as above). The description of the 65 patented mining claims of the appellee, by name, as found upon the original assessment roll, was sufficient. The statute then in force (paragraph 2652, Rev. St. 1887) provides: "It shall be the duty of the assessor to prepare a tax list or assessment roll, * * * in which book or books he shall set down in separate columns: * * * Second. All real estate taxable to each inhabitant, firm, incorporated company or association, described by metes and bounds, or by common designation or name, if situate within the limits of any city or any incorporated town, describing by lots, or fractions of lots; if without said limits, giving the number of acres as nearly as can conveniently be ascertained, and the location and township where situate; all improvements upon public lands, describing as nearly as possible the location of such improvements. * * * Sixth. The total value of all property taxable to each, * * * and the description of real estate shall be sufficient if the same can be readily identified thereby. The name of a mining claim is a "common designation or name" within the meaning of the statute. By such name the real estate may be "readily identified." There can be no valid location of a mining claim without the selection of a name therefor. The name must be inserted in the location notice, is inserted in the patent, and the notice and patent made a matter of public record. The

practice of assessing patented mines by name has obtained too long in this territory to be now questioned. This mode of assessment is a practical construction of the statute, of which we may take judicial notice, and is of weight in the determination of the validity of an assessment so made. *Copper Queen Mining Co. v. Territory*, 9 Ariz. 383, 84 Pac. 511.

The appellee was entitled to a separate assessment of its property in tracts or parcels, unless it waived that right by the list it returned to the assessor. The appellant contends that the appellee is estopped by the return of the property described as a single tract or parcel of land from asserting illegality in the assessment here made en masse. There is force in appellee's argument that there is no technical estoppel in pais pleaded or proven. *Centennial, etc., Co. v. Juab County*, 22 Utah, 395, 62 Pac. 1024. Yet the expression is frequently used in tax cases. *Inland Lumber Co. v. Thompson*, 11 Idaho, 508, 83 Pac. 936, 114 Am. St. Rep. 274, and cases therein cited. The Idaho court reaches the conclusion that in tax cases there should be a liberal application of the principle of estoppel in favor of upholding and enforcing an assessment against the taxpayer. Waiver is a definitive expression applicable to the action of appellee in making its list for taxing purposes. Returning its property en masse was a voluntary relinquishment of the known right of separate assessment. The taxpayer should not now be heard to complain. *Kissimmee City v. Drought*, 26 Fla. 1, 7 South. 525, 23 Am. St. Rep. 546. Nor does the fact that the list returned was not verified by the oath of the superintendent of the mining company lessen its effect as such waiver. It is, nevertheless, a voluntary statement by the appellee of the manner in which its property might be properly assessed. *State ex rel. Smith v. Cooper*, Town Clerk, 59 Wis. 666, 18 N. W. 438.

The most important question raised upon the record is as to the validity of the action of the board of supervisors, sitting as the board of equalization, in raising the assessment upon 8 of the group of 65 claims originally assessed en masse, in amounts varying from \$50,000 to \$1,000,000 each. The action of the board of equalization in making this raise is disclosed by the minutes following:

"In the matter coming on this day regularly to be heard before the board of equalization pursuant to a notice heretofore served upon said company in writing, and which notice appears in the minutes of said board, and in which said notice it was proposed to change and correct the valuation of said company's property as the same appears upon said assessment roll, by adding thereto the sum of \$3,464,895, for the reason that the sum fixed in said assessment roll appears to be too small; and this being the day and

hour fixed in said notice for the hearing, and pursuant to a notice so given Walter Douglas, superintendent and agent of said company, appeared before the board in behalf of said company and made statements regarding said valuations and his arguments in reference thereto, and the board being now fully advised in the premises, finds it necessary to add to the assessed valuation of the property of said company on the assessment roll as follows, to wit:

Silver Spray mine.....	\$1,000,000 00
Hoisting works and improvements on said mine.....	50,000 00
Holbrook mine.....	1,000,000 00
Hoist and improvements thereon.....	10,000 00
Copper Queen mine.....	50,000 00
Copper Jack mine.....	50,000 00
On buildings and other improvements.....	50,000 00
On Baxter mine.....	250,000 00
On Atlanta mine.....	250,000 00
On Dividend mine.....	\$50,000 00
On Rucker mine.....	200,000 00
Stock of mdse. in C. Q. store and warehouse.....	203,520 00
Surveying instruments.....	375 00
Horses.....	400 00
Assaying outfit.....	600 00

Or a total valuation of..... \$3,464,895 00

"Paragraph 2054 of the Revised Statutes of 1887 provides: ' * * * The board of equalization shall have power to determine whether the assessed value of any property is too small or too great, and may change and correct any valuation, either by adding thereto or deducting therefrom, if the sum fixed in the assessment roll be too small or too great, whether said sum was fixed by the owner or the assessor; * * * and the clerk of the board of equalization shall give upon the assessment roll all changes made by the board. During the session of the board of equalization the assessor shall be present, and also any deputy whose testimony may be required by the parties appealing to the board, and they shall have the right to make any statement touching such assessment, and producing evidence relating to questions before the board, and the board of equalization shall make use of all other information that they can gain otherwise than by equalizing the assessment roll of the county and may require the assessor to enter on such assessment roll any other property which has not been assessed; and the assessment and equalization so made shall have the same force and effect as if made by the assessor before the delivery of the assessment roll to (by) him by (to) the clerk of the board of equalization. * * *'

The raise here made was never entered on the original assessment roll. This was a mere omission, and harmless. *W. L. Mining Co. v. Territory*, 9 Ariz. 373, 84 Pac. 85. The raise was first carried into the books by an entry upon the duplicate assessment roll as follows:

Duplicate Assessment Roll of Cochise County, Arizona Territory, for the Year 1901

[illegible]

Disregarding for the present a variation in the names of the 65 claims, the delinquent tax roll, the back-tax book, and the back-tax bill substantially conform to the duplicate assessment roll, except as to certain entries of payments, penalties, and interest. It is apparent from an examination of this roll that there are in effect two assessments for the same year against each of the eight claims raised. One, an assessment, commingles with that of 64 other claims en bloc; the other, separate and distinct. This is no mere irregularity. The legality of the original assessment as an entirety has been sustained solely upon the ground that the property was so returned by the taxpayer. The board disregarded such return, and the validity of its action must be determined under the statute alone. It might be argued successfully that had the board of supervisors raised the assessment upon the group, such a raise would have been valid. But the board segregated from the group certain claims, and imposed thereon an additional assessment. It is a fundamental rule of taxation in this territory, that a taxpayer may pay upon any one of parcels separately assessed, discharging the lien thereon, without paying upon the remainder. Paragraph 2676, Rev. St. 1887.

Judge Cooley says: "When two parcels are owned by the same person, if the statute requires a separate assessment, obedience to the requirement is essential to the validity of the proceedings. It cannot be held in any case that it is unimportant to the taxpayer whether this requirement is complied with or not. Indeed it is made solely for his benefit; it being wholly immaterial, so far as the interest of the state is concerned, whether separate estates are or are not separately assessed. And where a requirement has for its sole object the benefit of the taxpayer, the necessity for a compliance with it cannot be made to depend upon the circumstances of a particular case, and the opinion of a court or jury regarding the importance of obedience to it in that instance. That method of construing statutes would abolish all certainty." Cooley on Taxation, p. 735. By the action of which complaint is made here, the board deprived the appellee of this right. Upon the raise being made it had the legal right to determine upon which, if any, of the claims so raised it would pay. If it determined to pay upon none, it was nevertheless obliged to pay a portion of the tax thereon if it exercised its right to pay upon the 57 claims remaining, for the tax collector, under paragraph 2676, supra (re-enacted, paragraph 3900, Rev. St. 1901), could not receive the tax upon less than the entire 65 claims; that being the least subdivision appearing on the assessment roll. If it determined to pay upon one or more of the 8 so raised, and to abandon the remainder, it would have to pay the tax upon the raise, together with the tax upon the entire 65 claims as originally assessed. The undisputed testimony discloses that these

claims were noncontiguous, in instances which would have invalidated an original assessment, except for the return. The board in raising this assessment disregarded the original classification, which has been held good as against the appellee solely by reason of its return. The board of supervisors, sitting as a board of equalization, had no power under paragraph 2654 of the Revised Statutes of 1887 to segregate, from a tract of land returned and assessed as one parcel, a portion thereof and impose thereon an additional assessment, without first determining that such tract was improperly assessed as a whole, and causing such tract to be reassessed and raised in subdivisions in such manner as to preserve the right of the taxpayer to discharge the lien of taxes upon such of the several separate tracts as he might elect.

The question here determined was neither presented nor considered in the case of County of Cochise v. Copper Queen Company, 8 Ariz. 221, 71 Pac. 946. Upon the trial of the case, the court received all evidence offered subject to the various objections made thereto. To the offers by the plaintiff of the assessment roll, the duplicate assessment roll, the delinquent assessment roll, and the back-tax book, the defendant objected upon the ground of a variance from the allegations of the complaint. The list of mining claims set forth in paragraph 4 of the complaint is as follows: "Sixty-five (65) patented mining claims near Bisbee, Ariz., as follows: Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend Wedge, Ellie Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Holbrook, Howell, Harrison, Iron Monster, Little New York, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Belle, Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia"—said mining claims consisting of 636 acres, thus naming 65 claims. It differs from the list shown in the assessment roll in this: It names the "Dividend Wedge," the "Howell," the "Belle" and the "Isle," which are omitted from the assessment roll; and it omits the "Dividend," the "Wedge," the "Powell," the "Little Joker," the "Sunrise," and the "Belle Isle," all of which are included in the assessment roll; it names only 65 claims, whereas the assessment roll names 67. Disregarding the discrepancy in the naming of the Dividend Wedge and the Belle Isle as a mere matter of punctuation and the writing of Sun Rise as a compound name, the error in the names "Howell" and "Powell" and the mention of the Little Joker claim in the assess-

ment list is a material variance which would render the assessment list inadmissible in proof of the allegations of the complaint. Again the complaint differs from the list shown in the duplicate assessment roll in this: It names the "Howell," the "Dividend Wedge," the "Belle" and the "Isle," all of which are omitted from the duplicate assessment roll; and it omits the "Powell," the "Dividend," the "Wedge," and the "Belle Isle," all of which are included in the duplicate assessment roll. The variance disclosed renders the roll inadmissible under the complaint. Again it differs from the list contained in the delinquent roll in this: It names the "Dividend Wedge," the "Howell," and the "Silver Bear," all of which are omitted from the delinquent roll, and it omits the "Dividend," the "Wedge," and the "Powell," all of which are included in the delinquent roll. The delinquent roll is therefore inadmissible. And, finally, the back-tax book is inadmissible under the objection made, for the complaint differs from the list in the back-tax book in this: It names the "Dividend Wedge," the "Howell," the "Silver Bear," the "Belle," and the "Isle," all of which are omitted from the back-tax book, and it omits the "Dividend," the "Wedge," the "Powell," and the "Belle Isle," all of which are included in the back-tax book.

The importance of the objections here considered is rendered more apparent by a consideration of the nature of the action. It is an action quasi in rem to fix a lien upon specific property. No personal judgment can be had. The statute (section 88, Act No. 92, Laws 1903) provides: "The judgment, if against the defendant shall describe the land upon which the taxes are found to be due, shall state the amount of taxes and interest found to be due upon each tract or lot, and the year or years for which the same are due, up to the rendition thereof, and shall decree that the lien of the territory be enforced and that the real estate or so much thereof as may be necessary to satisfy such judgment, interest and costs, be sold, and execution shall be issued thereon, which shall be executed as in other cases of judgment and execution, and said judgment shall be a first lien upon said land." This statute was adopted from Missouri, and the prior construction thereof by the courts of last resort of the state of Missouri is, under well-established principles, controlling upon us. A judgment in an action to collect back taxes, differing from the complaint in the description of the property sought to be subjected to the lien of such tax, is void. *Milner v. Shipley* (1888) 94 Mo. 106, 7 S. W. 175; *Vaughan v. Daniels* (1899) 98 Mo. 230, 11 S. W. 573; *O'Day v. McDaniel* (1904, subsequent to the passage of Act No. 92) 181 Mo. 529, 80 S. W. 895.

Nor is the admission of this evidence rendered harmless by the proof that an amount

equivalent to the tax upon the property as originally assessed was tendered by the appellee in full payment of its tax, for the purpose of bringing a suit in equity to enjoin the collection of the tax upon the various raises, and subsequently paid to the county in the course of suit, and credited by it upon the entire tax claimed to be due. Assuming that it was paid and accepted as a discharge of the original tax, as appellant now contends was the fact, the amount now in suit is the tax upon the raise. Without a valid original assessment there could be no raise. The fact of payment of the original tax does not dispense with the necessity of proof of an assessment admissible under the facts alleged in the complaint.

The defendant also objected upon the ground of variance to proof of the action of the board of equalization as disclosed by the minutes of its meetings. Upon the introduction of the various exhibits showing the separate raises of each of the eight claims therein mentioned, the defendant renewed this objection. To determine whether or not the variance is material, the allegations of the complaint must be examined. Paragraph 4 of the complaint contains the only description of the property sought to be subjected to the tax lien. So far as essential the allegation is "Sixty-five (65) patented mining claims near Bisbee, Ariz. [then follows the list by name as hereinabove set forth]," said mining claims consisting of 636 acres assessed at \$3,180. In paragraph 6 appears the allegation as to the raise, namely, "To the valuation of the patented mines and improvements \$3,260,000." In paragraph 14 the pleader alleges the amount due, "all of which is a lien upon the lands and real estate owned by and assessed against said Copper Queen Consolidated Mining Company for the year 1901, as hereinabove set forth." Nowhere is there a reference to the specific raise upon the eight claims against which the lien is now asserted, nor is there a further description thereof. The prayer of the complaint was originally for a foreclosure of the alleged lien against the tract of 65 claims as an entirety. By leave of the court, subsequent to the admission of the evidence under consideration, the prayer was amended to read: "That the said judgment and whole thereof be adjudged and decreed to be the first and paramount lien upon such of the aforesaid described lots, tracts, and parcels of land and real estate as the court may, from the proof, adjudge to be subject to a lien for said taxes in favor of the territory of Arizona." There was, however, no amendment of the allegations of fact upon which relief was sought. The complaint therefore alleges a raise of the 65 claims en bloc. The proof of raise upon 8 of the 65 claims, upon which alone it is now sought to foreclose the lien is a substantial variance.

The trial court did not err in rendering and

entering judgment for the defendant. The judgment, therefore, is affirmed.

KENT, O. J., and CAMPBELL and DOE, JJ., concur.

(48 Colo. 42)

HEERT v. RIDENOUR-RAYMOND GROCER CO.

(Supreme Court of Colorado. May 2, 1910.)

1. SALES (§ 363*)—PLACE OF DELIVERY—PASSING OF TITLE—QUESTIONS FOR JURY.

In an action for goods sold, the questions as to the place of delivery and when the title passed, if at all, to defendant, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1064; Dec. Dig. § 363.*]

2. TRIAL (§§ 139, 140*)—PROVINCE OF COURT AND JURY—WEIGHT OF EVIDENCE—CREDIBILITY OF WITNESSES.

The jury are the sole judges of the weight of the evidence and of the credibility of the witnesses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 334; Dec. Dig. §§ 139, 140.*]

3. SALES (§ 161*)—PLACE OF DELIVERY.

Where the seller delivered to a carrier goods consigned to the buyer without specific directions, and a bill of lading was sent to a third party, who took the buyer's order, for the buyer, and was received by the latter, and the prepayment of the freight by the seller was not for the purpose of retaining title, delivery to the carrier was a delivery to the buyer; there being no agreement as to the place of delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 377; Dec. Dig. § 161.*]

4. PAYMENT (§ 82*)—RECOVERY OF PAYMENTS—VOLUNTARY PAYMENT.

A buyer, who, with full knowledge of all the facts, and that goods shipped to him have been lost, voluntarily pays a disputed bill therefor, cannot recover back the money by counterclaim or otherwise.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 254-266; Dec. Dig. § 82.*]

5. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3935; Dec. Dig. § 1002.*]

Appeal from District Court, City and County of Denver; Booth M. Malone, Judge.

Action by the Ridenour-Raymond Grocer Company against Harry A. Heert, doing business as the Colorado Cigar Company. From the judgment defendant appeals. Affirmed.

Alfred Muller, H. H. Hindry, and Arthur F. Friedman, for appellant. Davis & Whitney, for appellee.

MUSSEB, J. The issues in this case were on a counterclaim of the appellant, who was defendant below, against the appellee as plaintiff. In the year 1903 the defendant was engaged in the tobacco business in Denver. During the summer he spent most of his time in the mountains, and his business was conducted by his bookkeeper, who ordered goods, drew checks, and appears to have

had general authority, subject to such instructions as were given him by defendant, who came down once or twice a month. During the same spring, the defendant, personally and by his bookkeeper, had purchased from the plaintiff several shipments of tobacco, called "drop shipments." The plaintiff took the orders and sent them to the manufacturer. The latter shipped the tobacco, consigned to the defendant at Denver, and prepaid the freight. It was the understanding in such cases that what the parties termed a "bill of lading" would be sent to plaintiff and by it delivered to the defendant. The manufacturer offered to purchasers of such shipments premiums in cigars. Certificates of such premiums were sent to the defendant, who surrendered such certificates to the plaintiff and received the premiums. About June 1st the defendant purchased from the plaintiff a drop shipment of tobacco. The evidence indicates that this purchase was made by the bookkeeper. The plaintiff sent the order to the manufacturer. The latter delivered the tobacco to a railroad company at St. Louis, consigned to the defendant at Denver, and prepaid the freight. The shipment was lost in a flood in transit and never reached the defendant. In July the bookkeeper filed a claim against the railroad company for this shipment of tobacco, and the defendant afterwards ratified the filing of this claim. The defendant could not remember whether he had received a bill of lading for this particular shipment, though there was evidence from which the jury might believe that he had received the usual bill of lading in due course and had filed it with his claim against the railroad company.

About the 1st of July, the plaintiff presented its monthly bill for June to the defendant, which included the lost shipment. The amount of this shipment was taken out by defendant and the balance paid. The plaintiff again included this lost shipment in its July bill presented in August, and it was paid. The defendant testified that he instructed his bookkeeper not to pay for this lost shipment; but, contrary to such instruction, the bookkeeper did pay it. He further testified that, as soon as he came to Denver in September and ascertained that it had been paid, he notified the plaintiff that it had been paid by mistake and against instructions and demanded back the money. The bookkeeper testified that the defendant concluded he would have to pay for the lost shipment and instructed the bookkeeper to pay it. The defendant testified that he did not know whether he received and accepted the premium cigars for this particular shipment or not; but there was evidence that would warrant the jury in believing that he had obtained them. The defendant testified that this particular shipment was to be delivered at Denver. It is now claimed that this

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

testimony as to the place of delivery stands uncontradicted in the record. Of course, if there was a special agreement to deliver the tobacco at Denver, the plaintiff could not recover the purchase price of defendant until it was so delivered to him. It is true that this testimony is the only direct testimony in the record as to the place of delivery. However, on the other hand, the salesman who made the sale for plaintiff, in his testimony, claims to state all that was said at the time of the sale, and there is no mention in his testimony that any particular place of delivery was designated. The defendant was away most of the time, did not make this particular purchase, and did not appear to have been present. The jury may have thought that he was not in a position to state facts, that what he did say was a conclusion drawn, and that, while he may have been honest in his conclusion, he might be mistaken. The claim of defendant against the railroad company persistently followed up, short of a suit, is at variance with defendant's testimony, for, if the lost goods had not been delivered to him as agreed upon, he had no claim against the railroad company. The testimony of the bookkeeper that the defendant directed payment for the lost shipment is at variance with defendant's testimony that the goods were to be delivered to him at Denver, for, if the goods were to be delivered to him at Denver, why should he pay for them before delivery and at a time when it was certain they would not be delivered? All these facts and circumstances, and others that might be mentioned, tended in some degree to overthrow or weaken the testimony of defendant as to the place of delivery.

Some authorities say that the prepayment of the freight affords some evidence that the manufacturer intended to retain title of the tobacco until it reached its destination. *McLaughlin v. Marston*, 78 Wis. 670, 47 N. W. 1058; *Neimeyer Lumber Co. v. B. & M. R. Co.*, 54 Neb. 321, 74 N. W. 670, 40 L. R. 534.

This evidence, however, may have been overcome in the minds of the jury by other facts and circumstances. For instance, these rop shipments were special sales at special prices, for a limited period, and were fully explained to the defendant and his bookkeeper. It appears from the evidence that, in addition to the prepayment of freight, the manufacturer offered to the purchaser of rop shipments premiums in cigars, and the purchaser obtained the tobacco, the freight, and the premium cigars for the special price named. The prepayment of freight seems to have been made, not for the purpose of retaining title in the manufacturer or the plaintiff, but for the same purpose as the premium cigars, namely, to induce a purchase. It was also thoroughly understood that, when the tobacco was consigned by the manufacturer to the defendant, the plaintiff

would have no control over it, and under no circumstances was it to be diverted to the plaintiff, yet it was the plaintiff who was to pay the manufacturer for it. When the manufacturer consigned it, as agreed upon, the plaintiff lost all control of the tobacco and was liable to the manufacturer for its price. On the whole, therefore, the evidence as to the place of delivery, and when the title passed to the defendant, if it did pass, leaves that question in doubt, and it was properly for the jury. The jury were the sole judges of the weight of the evidence and the credibility of the witnesses. From the evidence, they could conclude that there was no special agreement as to the place of delivery; that the prepayment of the freight was not for the purpose of retaining title; that the tobacco was delivered to a common carrier at St. Louis, consigned to the defendant without specific directions or contract differing from ordinary uses; and that a bill of lading was sent to the plaintiff for the defendant and received by the latter. If the jury so concluded, there was presented a situation whereby the delivery of the tobacco to the railroad company at St. Louis was, in law, a delivery to the defendant, and he then became the owner thereof. *Cary v. Williams*, 47 Colo. —, 107 Pac. 219; *Westman Merc. Co. v. Park*, 2 Colo. App. 545, 31 Pac. 945; *Neimeyer Lumber Co. v. B. & M. R. Co.*, 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534; *L. S. & M. S. Ry. Co. v. Live Stock Bank*, 178 Ill. 506, 53 N. E. 326; *Kelsea v. Ramsey & Gore Mfg. Co.*, 55 N. J. Law, 320, 26 Atl. 907, 22 L. R. A. 415; *Benjamin on Sales* (7th Ed.) § 181.

There is another phase of the evidence upon which the jury was instructed, and from which it could fairly conclude that a situation existed at variance with the allegations of defendant's counterclaim and with his testimony, and that is with reference to the payment for the tobacco. According to the testimony of the bookkeeper, defendant paid for the lost shipment voluntarily, with full knowledge of all the facts and circumstances and at a time when he knew it was lost. If a person pays a disputed bill under such circumstances, he cannot recover the money back by counterclaim or otherwise. *Lewis v. Hughes*, 12 Colo. 208, 212, 20 Pac. 621; *Steck v. Irrigation Co.*, 4 Colo. App. 323, 35 Pac. 919; 22 Ency of Law (2d Ed.) 609; 30 Cyc. 1298.

Upon conflicting evidence, therefore, the jury found against the contentions of the defendant, and their verdict is conclusive. In his brief, the defendant objects to several instructions given by the court, mainly on the grounds that some of the instructions were not based upon any evidence in the case, and that several of them were based alone upon the evidence favorable to plaintiff. It would not be profitable to analyze these instructions and go at length into the evidence to show that these objections are

not well taken. A mere reading of the record discloses that the instructions are based upon evidence. That the theory of the case from the viewpoint of defendant and the evidence in his behalf were fully covered by the instructions will be disclosed by reading all the instructions given.

Finding no error in the record against the defendant, the judgment is affirmed.

Judgment affirmed.

STEELE, C. J., and BAILEY, J., concur.

(48 Colo. 1, 554)

BUFFINGTON v. SUSSEX REAL ESTATE & INVESTMENT CO.

(Supreme Court of Colorado. May 2, 1910.)

1. TRIAL (§ 185*)—NONSUIT—SUFFICIENCY OF EVIDENCE.

To sustain a motion for a nonsuit, the court, looking at the evidence in the most favorable light for the plaintiff in which the jury would be at liberty to view it, must be able to say that there is no evidence which would justify a verdict for him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 374; Dec. Dig. § 165.*]

2. LANDLORD AND TENANT (§ 233*)—REPAIRS—SUFFICIENCY OF EVIDENCE.

In landlord's action for rent, defendant's evidence of an agreement by plaintiff as a part of the contract of lease to make repairs held sufficient to render a nonsuit improper.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 233.*]

Error to District Court, City and County of Denver; Peter L. Palmer, Judge.

Action by the Sussex Real Estate & Investment Company, a corporation, against Mrs. S. Hendrie Buffington. From the judgment defendant brings error. Reversed and remanded, with instructions.

T. E. Watters, D. J. Davies, and Percy S. Morris, for plaintiff in error. John F. Mail, for defendant in error.

MUSSER, J. This action was brought by the appellee against the appellant to recover one month's rent for certain premises. The defendant admitted the occupancy and set up a counterclaim, claiming that at the time she leased the premises the plaintiff agreed to make repairs, which it failed to do whereby she was damaged. At the close of defendant's case, the court directed a judgment of nonsuit against the defendant on her counterclaim and a verdict for plaintiff as prayed in its complaint.

It is conceded that if there is testimony to show that, at the time the premises were leased to defendant, the plaintiff, as a part of the agreement of lease, agreed to make repairs and failed to do so, to the injury of defendant, the court ought not to have nonsuited defendant, nor directed a verdict. While the testimony of defendant is not as

clear as it might be, a reasonable conclusion that can be drawn from it is that on March 7th she went into the house to take possession of the furniture therein, which was owned by the then tenants and upon which she held a mortgage. At the time, she had no contract with the owner of the premises. Immediately after she went into possession, the agents of plaintiff came to the house, and a contract was then made, wherein the plaintiff agreed to make repairs and to let the house to defendant at a certain rental, and the defendant agreed to take the house and pay the stipulated rent, and a few days thereafter she paid the rent for the first month. It is true that an officer of the company, whose deposition was introduced by the defendant, testified that a conversation took place before March 7th between the defendant and three officers of the company, wherein it appeared that the defendant wanted to rent the premises, and the plaintiff's agent said she could have it at a certain rental, and wherein it was said that after a time, probably two months in the future, the house was to be papered. However, this conversation, as related by the witness, does not make it clearly appear that the defendant actually rented the house at that time. The conversation, as set out in the record, has more the appearance of a statement of terms upon which the house would be rented than a finished contract. It does not appear that the defendant said she would take the house upon the terms offered. From the testimony, it is fair to conclude that the conversation was more a negotiation with reference to a lease than a contract of lease. It is apparent that the court, looking at the evidence in the most favorable light for the defendant in which a jury would be at liberty to view it, would be bound to say that there is evidence which would justify a verdict for her. It was said, in *Schwenke v. Union D. & R. Co.*, 12 Colo. 341, 21 Pac. 43, that to sustain a motion for a nonsuit "the court, looking at the evidence in the most favorable light for the plaintiff in which the jury would be at liberty to view it, must be able to say that there is no evidence which would justify a verdict for him."

On the whole, therefore, the record shows sufficient evidence for the defendant that, as a part of the contract of lease, the plaintiff agreed to repair, to require rebuttal from the plaintiff. We must, therefore, adhere to our former conclusion that this case should be reversed and the nonsuit and verdict set aside.

The judgment is reversed, and the cause remanded, with instructions to set aside the nonsuit and verdict and to proceed with the action in accordance with law.

Reversed and remanded.

STEELE, C. J., and WHITE, J., concur.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(47 Colo. 513)

CITY AND COUNTY OF DENVER et al. v. BROWN et al.

(Supreme Court of Colorado. Feb. 7, 1910.
Rehearing Denied May 2, 1910.)

1. APPEAL AND ERROR (§ 781*)—APPELLATE JURISDICTION—WANT OF ACTUAL CONTROVERSY.

Even if there was error in rendering a judgment requiring defendants to carry and deliver water to plaintiffs during the season of 1905 at a certain rate, a writ of error to review the judgment must be dismissed for want of an actual controversy, which is essential to appellate jurisdiction; it not being within the province of an appellate court to decide abstract or hypothetical questions disconnected from the granting of actual relief, or from determination of which no actual result can follow.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3122; Dec. Dig. § 781.*]

2. APPEAL AND ERROR (§ 19*)—DECISIONS REVIEWABLE—DETERMINATION DEPENDING ON REVIEW OF FINAL JUDGMENT—ACTUAL CONTROVERSY.

In a suit to determine plaintiffs' rights to water for irrigation for 1905, it was stipulated that such plaintiffs as desired might deposit \$2 per inch for water during that year, with the understanding that \$1.25 could be withdrawn by defendant; the remaining 75 cents to remain on deposit till final determination of the cause. By the judgment for plaintiffs, giving it the right to the water at \$1.25 per inch, money so paid to the clerk of court should, when the judgment became final by affirmance or otherwise, be refunded to the extent of 75 cents on each inch; but as to the \$1.25 per inch remaining it was provided it should remain in the clerk's hands under his control for the use and benefit of defendants to be paid to them or order, etc. Held that, the \$1.25 per inch having been withdrawn by the defendant, it was presumed to have furnished the water it was adjudged should be delivered in consideration thereof, and the final judgment of which it complained on error was satisfied, so that there was no controversy between the parties, and it could not be reviewed on writ of error to determine whether defendants were entitled to the 75 cents per inch remaining on deposit; the determination of that question being dependent on the result of a review of the final judgment which was satisfied and no longer subject to review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80; Dec. Dig. § 19.*]

3. APPEAL AND ERROR (§ 68*)—SUPREME COURT—DECISIONS REVIEWABLE—RESTRICTION TO FINAL JUDGMENTS.

The Supreme Court is only authorized to review final judgments, and incidental matters connected therewith are not reviewable, and mere orders embraced therein are only reviewable in connection therewith.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 344; Dec. Dig. § 68.*]

Error to District Court, City and County of Denver; Frank T. Johnson, Judge.

Suit by Samuel W. Brown and others against the City and County of Denver and another. There was a judgment for plaintiffs, and defendants bring error. Writ of error dismissed.

Allen & Webster and Harry A. Lindsley, City Atty., for plaintiffs in error. Henry C. Allen, for defendants in error.

GABBERT, J. Defendants in error brought suit against plaintiffs in error to compel the latter to supply them with water from the city ditch for the purposes of irrigation during the season of 1905. From a judgment in favor of some of the plaintiffs, the defendants have brought the case here for review on error.

The proceedings must be dismissed. The judgment of the trial court was to the effect that the defendants should carry and deliver water to the plaintiffs in whose favor judgment was rendered during the irrigation season of 1905 at the rate of \$1.25 per inch. If the court erred in rendering the judgment it did, nothing would be gained by granting the defendants a new trial in a case which involves nothing more than the right to water for a season that has passed. A judgment of this court on that question could not affect the rights of either of the parties at this time. Whatever they may have been when the original suit was instituted, and the judgment below rendered, cannot, in the circumstances of this case, avail either party now, for the obvious reason that the subject-matter of controversy has ceased to exist. The existence of an actual controversy is an essential requisite to appellate jurisdiction, and it is not within the province of an appellate court to decide abstract or hypothetical questions disconnected from the granting of actual relief, or from the determination of which no practical result can follow. *Wheeler v. Northern Colo. I. Co.*, 10 Colo. 582, 17 Pac. 437, 3 Am. St. Rep. 603; *Townsend v. Fulton I. & D. Co.*, 17 Colo. 142, 29 Pac. 453; *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. 966, 31 Am. St. Rep. 275; *Agricultural D. Co. v. Rollins*, 42 Colo. 267, 93 Pac. 1125; *Northern Colo. I. Co. v. Poupert* (decided at the present term) 108 Pac. 23; 2 Cyc. 583.

In the court below it was stipulated by the parties that such of the plaintiffs as desired might deposit with the court the sum of \$2 per inch for water for irrigation from the city ditch for the year 1905, with the understanding that \$1.25 per inch of such deposit could be withdrawn by the city and county of Denver; the remaining 75 cents per inch to remain on deposit until the final determination of the cause in the trial court and in this court, if the cause was brought here for review upon appeal or error by either party. By the judgment rendered it was provided that the money so paid into the hands of the clerk of the trial court should, when the judgment became final, by affirmance upon appeal or writ of error, or by reason of no appeal or writ of error being taken therefrom, be refunded to each of the parties paying such moneys into court, to the extent of 75 cents on each inch; but as to the remainder thereof, namely, the sum of \$1.25 per inch, it was provided that it should remain

in the hands of the clerk or under his control for the use and benefit of the defendants, to be paid over to them or order at any time, upon demand.

At the oral argument it was suggested that because of the stipulation above referred to, and the judgment in accordance therewith, plaintiffs in error are entitled to have the judgment of the trial court reviewed for the purpose of determining whether or not they are entitled to the 75 cents per inch left on deposit with the clerk. The city has withdrawn the \$1.25 per inch, and presumably has furnished the water which the court adjudged should be carried and delivered to the plaintiffs in consideration thereof. In other words, it has satisfied the final judgment of which it complains, so that there is no longer any subject-matter of controversy between the parties; nor can either gain or lose by a reversal or affirmance of the judgment. True, the 75 cents per inch still remains on deposit with the clerk, but whether or not the defendants are entitled to that money would depend upon the result of the review of that judgment by this court; but, as it has been satisfied and complied with, it is no longer the subject of review. Hence the incidental matters connected therewith are not reviewable. This court is only authorized to review final judgments. Mere orders embraced therein are only reviewable in connection therewith.

The proceedings will be dismissed, without prejudice to the rights of the parties to litigate in an appropriate proceeding the questions attempted to be presented.

Writ of error dismissed, without prejudice.

STEELE, C. J., and WHITE, J., concur.

(48 Colo. 27)

DOWNEY v. COLORADO FUEL & IRON CO.

(Supreme Court of Colorado. May 2, 1910.)

1. PLEADING (§ 205*)—DEMURRER—GROUNDS OF DEMURRER TO COMPLAINT.

Where the facts alleged in a complaint, with all fair and reasonable deductions which may be drawn therefrom, are sufficient to state a cause of action, the complaint must be upheld as against a general demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 498; Dec. Dig. § 205.*]

2. PLEADING (§ 67*)—ANTICIPATION OF DEFENSES.

A plaintiff is not called upon to anticipate and negative in his complaint possible defensive matter.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 139; Dec. Dig. § 67.*]

3. PLEADING (§ 216*)—SUFFICIENCY OF COMPLAINT ON DEMURRER.

The sufficiency of a complaint when challenged by general demurrer must be determined from its own averments, unqualified and unaf-

ected by indefinite and uncertain collateral considerations.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 535-539; Dec. Dig. § 216.*]

Error to District Court, Pueblo County: John H. Voorhees, Judge.

Action by John Downey against the Colorado Fuel & Iron Company. From a judgment sustaining a demurrer to the complaint, plaintiff brings error. Reversed and remanded.

M. J. Galligan, for plaintiff in error. Devine, Dubbs & Preston, D. C. Beaman, Cass E. Herrington, and Fred Herrington, for defendant in error.

BAILEY, J. The complaint is not subject to general demurrer. While it may be that it is liable to motion to make more specific, or to special demurrer, points not decided because not here, objections to be thus raised are not necessarily or ordinarily covered by general demurrer. That is true here. The rule is, if the facts alleged, with all fair and reasonable deductions which may be drawn therefrom, are sufficient to state a cause of action, the complaint must be upheld as against general demurrer. Such is the settled doctrine of this court. Insurance Company v. Bonner, 24 Colo. 222, 49 Pac. 366. Bearing in mind that all facts, which are material and well pleaded, with all necessary inferences and deductions, are to be taken as true as against a general demurrer, the complaint states a cause of action. A plaintiff is not called upon to anticipate and negative in advance possible defensive matter. The sufficiency of the complaint, when challenged by general demurrer, must be determined from its own averments, unqualified and unaffected by indefinite and uncertain outside considerations and conditions.

The court, therefore, erred in sustaining the demurrer and dismissing the action. The judgment is reversed and cause remanded, with directions to the court below to overrule the general demurrer, with leave to the defendant to move against or plead to the complaint as it may be advised.

Reversed and remanded.

STEELE, C. J., and MUSSER, J., concur.

(48 Colo. 61)

BOARD OF COM'RS OF WELD COUNTY v. CAMP.

(Supreme Court of Colorado. May 2, 1910.)

SHERIFFS AND CONSTABLES (§ 36*)—COMPENSATION—STATUTORY PROVISIONS.

Under Rev. St. 1908, § 1077, providing that the county commissioners may in their discretion pay the costs of all preliminary examinations except where the prosecution shall have been adjudged to pay them, and section 2576, providing that the county commissioners may in their discretion disallow any charges for fees of district attorneys or others for the trial or

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

examination of any criminal case before any justice of the peace, and in counties of the first and second classes shall not allow any fees for district attorneys, etc., before justices of the peace in misdemeanors, the services of a constable in serving a warrant and arresting an accused person for a preliminary examination was connected with such examination, so that the county commissioners were authorized in their discretion to disallow any fees therefor, and their action was not subject to review by the courts.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 61; Dec. Dig. § 36.*]

Appeal from District Court, Weld County; James E. Garrigues, Judge.

Action by D. F. Camp against the Board of County Commissioners of the County of Weld. From a judgment for plaintiff, defendant appeals. Reversed, and cause remanded, with instructions to dismiss action.

Delph E. Carpenter, for appellant. H. E. Churchill, for appellee.

MUSSER, J. This appeal must be dismissed and the action entered as pending on writ of error under section 388a of Mills' Annotated Code.

The action was brought by a constable against Weld county to recover statutory fees, alleged to have been earned by him in serving a warrant of arrest, and as mileage for each mile traveled by him and for transporting the prisoner. The warrant was duly issued by a justice of the peace and placed in the hands of the constable, commanding him to arrest and bring the accused person before the justice. The constable did as commanded. A preliminary examination was held, and the accused was bound over to appear at the next term of the district court. The constable presented his claim against the county for fees, alleged to have been earned by him as aforesaid. The county commissioners disallowed the claim. The constable, as provided by statute, appealed to the district court. That court rendered judgment for the constable. The county brought the case here for review, claiming that the fees constituted costs in a preliminary examination, payable in the discretion of the county commissioners, and that the action of the county commissioners was not reviewable by the court. On the other hand, the plaintiff claims that the services rendered by him had no connection with the preliminary examination, and that the commissioners had no power to disallow the fees; the services having been rendered.

Section 1077, Rev. St. 1908, among other things, provides: "The county commissioners may, in their discretion, pay the costs of all preliminary examinations, except in cases in which the prosecution shall have been adjudged to pay the costs." A proviso to section 2576, Rev. St., is as follows: "And provided, further, that the county commissioners may, in their discretion, disallow any charges

against the county for fees or costs of district attorneys, or other persons, for the trial or examination of any criminal case, before any justice of the peace, police magistrate, police judge, or any court not being a court of record. They, in counties of the first and second classes, shall not allow any fees for district attorneys, or deputies, or attorney attendance before justices of the peace in misdemeanors."

In *Pitkin Co. v. Sanders*, 27 Colo. 122, 59 Pac. 402, it was said that the proviso of section 2576, quoted above, extended the same discretion over costs of trials in criminal cases in courts not of record, as was given by section 1077 over costs of preliminary examinations, and, further, that the true meaning of the clause or proviso of section 2576 is that the county commissioners "have the discretion, not reviewable by the courts, to disallow the statutory fees and costs of criminal trials and examinations claimed by all persons for whom fees are therein prescribed, and in whose favor costs are taxed," with an exception not applicable in this case.

Under these statutes, it has been frequently held, in this state, that fees for services relating to a preliminary examination before a justice of the peace are payable in the discretion of the county commissioners, and their action thereon is not reviewable by the courts. *Sargent v. La Plata Co.*, 21 Colo. 158, 40 Pac. 366; *Pitkin Co. v. Sanders*, 27 Colo. 122, 59 Pac. 402; *Merwin v. Boulder Co.*, 29 Colo. 169, 67 Pac. 235; *Otero Co. v. Wood*, 11 Colo. App. 19, 52 Pac. 214; *Yuma Co. v. Pendleton*, 17 Colo. App. 159, 67 Pac. 911.

The question for determination is: Were these fees a part of the costs of the preliminary examination, or fees for the examination of a criminal case before a justice of the peace? Our statute provides that when a complaint under oath is made before a justice of the peace, charging a person with a criminal offense, it shall be lawful for the justice to issue a warrant commanding the officer to arrest the person charged and bring him before the justice issuing the warrant, or, in case of his absence, before any other justice. The justice before whom the prisoner is brought shall commit the prisoner, admit him to bail, or discharge him; but before doing so he shall inquire into the truth or probability of the charge—in other words, hold a preliminary examination. The object of the warrant and arrest is to bring the accused before the justice in order that an inquiry may be made to ascertain whether the accused shall be committed, let to bail, or discharged. It is certain that a justice of the peace cannot sit down and hold a preliminary examination alone. Before the examination can be held, certain elements, as it were, must be assembled. The justice is only one of these elements. Among others are the charge under oath, the witnesses, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the accused person himself. When these elements are assembled, the examination may proceed. The assembling of these various elements surely relate to, and are connected with, the examination, and, therefore, services performed in assembling them relate to, and are connected with, the examination. The services of the plaintiff were performed in getting the accused person before the justice for the examination, and the fees for such services must be fees or costs of or for the examination. The cost of doing that which must be done, in order to hold an examination, is surely a part of the costs of or for an examination. This being so, the fees in controversy were payable in the discretion of the county commissioners, and their action thereon was not subject to review by the courts.

It follows, therefore, that the judgment should be reversed. It is so ordered, and the cause remanded, with instructions to dismiss the action.

Reversed and remanded.

STEELE, C. J., and BAILEY, J., concur.

(48 Colo. 28)

FLORENCE & C. C. R. CO. v. JENSEN.

(Supreme Court of Colorado. May 2, 1910.)

1. APPEAL AND ERROR (§ 194*)—PRESENTATION OF OBJECTIONS IN TRIAL COURT—FILING REPLICATION.

Though a replication appears by the record to have been filed after the beginning of the trial, a judgment for plaintiff will not be reversed, where defendant failed to object or except to the filing of the replication out of time or to move to strike it from the files.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1241-1246; Dec. Dig. § 194.*]

2. PLEADING (§ 412*)—NECESSITY OF REPLICATION—WAIVER.

By going to trial and introducing evidence in support of his answer defendant waives the failure of the plaintiff to file a replication.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1387-1394; Dec. Dig. § 412.*]

3. CARRIERS (§ 94*)—CARRIAGE OF GOODS—DELIVERY TO CONSIGNEE — BURDEN OF PROOF.

Where a carrier delivers the goods to a person not named in the bill of lading as the consignee, but who claimed to represent the true owner, the burden of proof is on the carrier to show the true ownership of the goods, and that the person to whom the goods were delivered had authority to receive them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 378; Dec. Dig. § 94.*]

4. CARRIERS (§ 56*)—BILL OF LADING—TRANSFER BY DELIVERY.

The delivery of an unindorsed bill of lading constitutes a good symbolical delivery of the goods represented by the bill of lading only when such was the intent and purpose of the parties.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 130, 168; Dec. Dig. § 56.*]

5. CARRIERS (§ 82*)—CARRIAGE OF GOODS—PERSONS TO WHOM DELIVERY MAY BE MADE.

Where a consignee named in a bill of lading was arrested and thrown into jail, and the bill of lading was taken from his person by the jailer, and the bill of lading was never assigned or indorsed by the consignee, a delivery of the goods by the carrier to a person who by some means obtained possession of the bill of lading from the jailer did not discharge it from liability, though it acted in good faith in surrendering the property.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 290-315; Dec. Dig. § 82.*]

Appeal from District Court, Teller County; Louis W. Cunningham, Judge.

Action by S. Jensen against the Florence & Cripple Creek Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Schuyler & Schuyler and Gunnell & Chinn, for appellant. Huff & Ferguson, for appellee.

WHITE, J. Jensen, the appellee, instituted this suit against appellant, the Florence & Cripple Creek Railroad Company, to recover damages for the value of certain ore alleged to have been delivered by the plaintiff to the defendant, and by the latter wrongfully converted to its own use. The defendant is a corporation, engaged in carrying freight, for hire, between certain points in this state. Plaintiff delivered to the defendant a car load of valuable ore, which the latter was to transport and deliver to a certain smelter at Pueblo known as the "Eller's plant." The defendant, upon receipt of the ore, delivered to plaintiff a bill of lading, in which plaintiff was designated as the "shipper" and the Eller's plant as the "consignee" of the ore. The bill of lading expressly recited that the ore was received "to be transported over the Florence & Cripple Creek Railroad and associate companies, and delivered to consignee at destination (if such destination is located on said company's line), or to the next connecting carrier (if the destination of such ore is beyond said company's line), for such connecting carrier to deliver the said ore to consignee at the destination." About two days after plaintiff delivered the ore to the defendant and received the bill of lading, he was, for some reason, not disclosed by the record, arrested and thrown into the county jail at Cripple Creek, and, while so incarcerated, his pockets were searched by a deputy sheriff and the bill of lading taken from him. Immediately thereafter the defendant received through the mail a letter or order from an organization known as the Cripple Creek Mine Owners' & Operators' Association, to divert the car of ore in question, and deliver it to the Eagle Ore Company at Victor. This letter was accompanied by the bill of lading; the same, however, not being assigned. How the bill of lading came

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

into the possession of the mine owners' association is not disclosed. The defendant failed and refused to transmit the ore to Pueblo, or deliver it to any of its associate or connecting lines for that purpose, but without the knowledge or consent of the plaintiff complied with the request of the mine owners' association, changed the destination of the ore, and delivered it to the Eagle Ore Company at Victor, and it was thereby wholly lost to plaintiff. Defendant contends that plaintiff was never at any time the owner, or the agent of the owner, of the ore or any part thereof; that plaintiff's possession was at all times wrongful and unlawful; that the Cripple Creek Mine Owners' & Operators' Association, having notified the defendant that it represented the owner of the ore, and had the right to control the same, and having presented the bill of lading, and ordered the destination of the ore changed from the Eller's plant at Pueblo to the Eagle Ore Company at Victor, and the defendant having complied with such order, was thereby relieved from its obligation to plaintiff to deliver the ore to the Eller's plant. Neither the answer nor the evidence discloses the particular owner or owners of the ore for whom the Cripple Creek Mine Owners' & Operators' Association claimed to be the agent. On the contrary, the only persons appearing, from the evidence, to have any right or ownership whatsoever in the ore, were the plaintiff and consignee named in the bill of lading. The cause, by agreement, was tried to the court without the intervention of a jury, resulting in a finding and judgment for plaintiff, from which defendant prosecutes this appeal.

The taking of evidence was commenced on April 13th. The replication appears to have been filed on April 14th, and defendant insists that the replication, not having been filed by order of court, cannot be considered, and that the allegations of the answer were, therefore, admitted and are conclusive. It is argued that, under the allegations of the answer, the bill of lading had been properly transferred by delivery, and that defendant transported the ore in question according to the order of the holder of the bill of lading, and, therefore, discharged its full duty as a common carrier.

There is no merit in defendant's contention. No objection, no ruling of the court, or exception to the filing of the replication, appears in the record. The matter does not appear to have been presented to, or passed upon by, the trial court in any way whatsoever. Moreover, no motion was made to strike the replication from the files, and, under the circumstances of this case, we will assume that the replication was properly filed. We will not reverse a judgment upon a point which the trial court was given no opportunity to pass upon, and where the objection, had it been called to the court's attention, might have been obviated. *Cone v. Mont-*

gomery, 25 Colo. 277, 280, 53 Pac. 1052; *Harrison v. Carlson*, 45 Colo. 55, 60, 101 Pac. 76. Besides, it clearly appears that the allegations in the answer are, in effect, only a denial of the allegations of the complaint. But were it otherwise, the defendant, by going to trial, and introducing evidence in support of its answer, treated the defense as though it had been controverted, and thereby rendered it unnecessary to file a replication. *Schecter v. White*, 41 Colo. 219, 221, 92 Pac. 700. Before the defendant could relieve itself of its obligation to plaintiff, it must have complied with its contract, or have been excused therefrom in some way recognized by law. Having delivered the property, not to the consignee, but to another claiming to represent the true owner, it devolved upon defendant to show who such owner was, and the authority of the assumed agent to act in the premises. *Jensen v. Eagle Ore Co.*, 107 Pac. 250.

The defendant contends, however, that, as a matter of law, this obligation was discharged when it delivered the ore upon the order of the holder, and received the bill of lading; that it was not in fault in delivering the ore to the Eagle Ore Company for the reason that the possession of the bill of lading by the mine owners' association was, in effect, an assignment of the ore to that organization, and invested it with the right to demand and receive the ore. We are referred to three authorities which are claimed to support this view. An examination of them, however, shows that the doctrine announced is that a delivery of the shipper's "receipt without assignment, but with intent that the title to the goods for which it was given or an interest therein should be thereby transferred, would be effectual to accomplish the transfer intended." In *Weyand v. Atchison, Topeka & Santa Fé Railway Company*, 75 Iowa. 573, 578, 39 N. W. 899, 902 (1 L. R. A. 650, 9 Am. St. Rep. 504), it is said: "The cases * * * and the general conclusions of the court which made them we think go no further than to hold that the delivery of an unindorsed bill of lading would be a good symbolical delivery of the goods it represented, where such was the intent and purpose of the parties."

It is true the bill of lading is a symbol of ownership of the goods described therein. In a sense it stands in the place of the goods. However, if the goods described in the bill of lading "be lost or stolen, no sale of them by the finder or thief, though to a bona fide purchaser for value, will divest the ownership of the person who lost them or from whom they were stolen. Why then should the sale of the symbol or mere representation of the goods have such an effect?" *Shaw v. Railroad Company*, 101 U. S. 557, 565, 25 L. Ed. 892.

It is, perhaps, safe to say that, if the person in whose favor a bill of lading is writ-

ten delivers it unindorsed, it constitutes a good symbolical delivery of the goods it represents only when such was the intent and purpose of the parties. In the case at bar there was no delivery of the bill of lading by the party in whose favor it was written, the Eller's plant; nor was there a delivery by the party who caused it to be written, the plaintiff herein. Nor was there an intent on the part of any one having any interest whatsoever in the bill of lading to change the relation of the parties to the property in question. The fact that the mine owners' association presented the bill of lading to the defendant was not sufficient to overcome the presumption, which the terms of the bill of lading raised, that the consignee, the Eller's plant, was the owner of the goods. Such presumption is well established. *Cary et al. v. Williams et al.*, 107 Pac. 219; *Congar v. Galena & Chicago U. R. R. Co.*, 17 Wis. 492.

The contract with the defendant required it to deliver the goods to the Eller's plant. The unindorsed bill of lading presented by the mine owners' association was evidence that the contract was still in force, and that Jensen's rights to have the property delivered in accordance with the contract were unimpaired. The delivery to the Eagle Ore Company was in no wise authorized and was made by defendant at its own risk.

It is immaterial that the delivery was secured through mistake or fraud, or the defendant, acting in good faith, was imposed upon. 6 Cyc. 472. However, as a matter of fact, it appears that defendant knew, or had reason to know, when it diverted the goods to the Eagle Ore Company, that it was doing so without the consent of plaintiff or the consignee.

It is clearly evident that the judgment is right, and it is, therefore, affirmed.

Judgment affirmed.

STEELE, C. J., and GABBERT, J., concur.

(48 Colo. 71)

TARBELL v. TARBELL.

(Supreme Court of Colorado. May 2, 1910.)

1. APPEAL AND ERROR (§ 1024*)—REVIEW—QUESTIONS OF FACT.

The refusal of the trial court to amend its record will not be disturbed on appeal, where the ruling is based on evidence heard by the trial judge.

[Ed. Note.—For other cases, see Appeal and Error. Dec. Dig. § 1024.*]

2. PLEADING (§ 403*)—DEFECTS IN PETITION—AID BY ANSWER.

In a petition by plaintiff in a divorce suit to modify a decree for alimony, general allega-

tions of fraud of defendant in the procurement of such decree are cured by an answer to such petition denying that defendant practiced any fraud or deceit as alleged.

[Ed. Note.—For other cases, see Pleading. Cent. Dig. §§ 1344-1346; Dec. Dig. § 403.*]

Error to District Court, City and County of Denver; George W. Allen, Judge.

Action by Annie C. Tarbell against Francis W. Tarbell. From an order granting plaintiff's petition to modify a decree for alimony, defendant brings error. Affirmed.

Robert Collier and T. Webster Hoyt, for plaintiff in error.

CAMPBELL, J. In a divorce action the plaintiff, Mrs. Tarbell, obtained a decree dissolving the marriage relation, and an award of alimony for a fixed sum against her former husband. Within five months after the decree was rendered in the district court, she filed her petition therein, asking for a modification of that part of it which allowed alimony, upon the ground that the amount thereof was fixed by the court as the result of her own tacit agreement thereto, which was procured by the fraud and deceit of her husband. The husband appeared and filed an answer to the petition, and upon the issues joined the court found in her favor and modified the decree accordingly.

The defendant prosecutes this writ of error. His first grievance is that the court erred in refusing to amend its record to make it speak the truth. We cannot disturb the ruling. The trial court, upon a hearing with all the facts before it, denied the motion. Its discretion was not abused in making such order, and, besides, the matter is not at all material.

Another objection is that the petition did not sufficiently allege facts showing fraud. However that may be, defendant in his answer treated the averment as sufficient, and, if the statement in the complaint was too general, it is aided by the answer, which denies that he practiced any fraud or deceit upon her and that the amount of the alimony as fixed by the original decree was fraudulently procured by him. So that the allegation of fraud in the complaint, if not sufficiently specific, was cured by the answer.

The evidence before the court on the question of fraud was sufficient to justify its findings in that behalf, and warranted the judgment, which was entered upon the findings, modifying the decree.

As we understand the record, none of the other questions raised and argued are at this time of any importance whatever.

As no prejudicial error was committed by the trial court, its judgment is affirmed.

STEELE, C. J., and MUSSER, J., concur.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(18 Wyo. 408)

ANDERSON v. ENGLEHART.

(Supreme Court of Wyoming. June 2, 1910.)

1. INJUNCTION (§§ 141, 143*)—TEMPORARY RESTRAINING ORDER—NOTICE.

Rev. St. 1899, § 4041 (Comp. St. 1901, § 4901), provides that before granting an injunction a reasonable notice may be required to be given to the adverse party if the court is of the opinion that such party should be heard on the application. Section 4044 (Comp. St. 1910, § 4904) provides that, when an injunction is allowed at the commencement of an action, the clerk shall indorse on the summons, "Injunction allowed," and that it shall not then be necessary to issue the order of injunction, and that it shall not be necessary to issue such order when notice of application has been given to the party enjoined. Section 4045 (Comp. St. 1910, § 4905) provides that, when an injunction is allowed during litigation and without notice of the application, the injunction shall be issued, and the sheriff shall forthwith serve the same upon the party enjoined. *Held*, that the statutes by implication permit the granting of an injunction before answer and without notice.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 813, 315; Dec. Dig. §§ 141, 143.*]

2. INJUNCTION (§ 145*)—PRELIMINARY ORDER—AFFIDAVIT ON APPLICATION.

Rev. St. 1899, § 4040 (Comp. St. 1910, § 4949), requiring affidavits on an application for an injunction, is satisfied where the petition containing the requisite averments is properly verified.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 145.*]

3. APPEAL AND ERROR (§ 1043*)—HARMLESS ERROR—INJUNCTION.

An order denying a motion to dissolve a temporary restraining order will not be reversed on appeal on the ground that the verified petition did not contain sufficient allegations to warrant the issuance of an injunction, where the party applying for the injunction, on the hearing of the application, filed additional affidavits alleging the requisite facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4119; Dec. Dig. § 1043.*]

4. PLEADING (§ 8*)—CONCLUSIONS OR MATTERS OF FACT.

In a suit to foreclose a mortgage, an allegation, in the petition seeking a temporary injunction to prevent the removal of fixtures, that such fixtures "are a part of said realty and constitute permanent fixtures thereto and necessary for the conduct of the business carried on heretofore on and in said premises," is not a mere statement of a legal conclusion, but is an averment of an ultimate fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

5. FIXTURES (§ 35*)—WHAT CONSTITUTES—PROVINCE OF COURT AND JURY.

Whether a chattel is a fixture is a mixed question of law and fact determinable from a consideration of all the circumstances attending its annexation and use.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 76; Dec. Dig. § 35.*]

6. MORTGAGES (§ 205*)—RESTRAINING REMOVAL OF FIXTURES.

A mortgagee may maintain an action to restrain the mortgagor from removing fixtures from the mortgaged premises when the removal will impair the security, and it is no defense that a sufficient margin of value will be left to render the mortgage a fair security under conditions controlling in the particular locality, al-

lowing for depreciation in the value of the property from other causes.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 544-550; Dec. Dig. § 205.*]

7. APPEAL AND ERROR (§ 1043*)—HARMLESS ERROR—INJUNCTION.

In a suit to foreclose a mortgage, an allegation in the petition that the defendant is about to remove fixtures from the premises, and that such removal "will work injury to said real property, and that said injury will be irreparable, and that no adequate remedy at law exists whereby the plaintiff may protect himself against the said detaching, wasting, damaging, and removing of said parts of said real estate and against the consequent damage and loss to said real property and plaintiff's security," and praying for an injunction, though objectionable in not directly stating that the security would be so impaired as to be rendered insufficient, is not ground for reversal of an order denying a motion to dissolve the injunction, where the hearing on the application for the injunction was before answer and was upon affidavits filed by the contending parties, and the defect in the petition could be remedied by amendment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4119; Dec. Dig. § 1043.*]

8. MORTGAGES (§ 465½*)—PLEADING.

In a suit to foreclose a mortgage, an allegation in the petition that the mortgaged property is described in the mortgage as follows (describing the lot), "together with all the appurtenances, privileges, and hereditaments thereunto in any wise appertaining or belonging," is a sufficient description to support an injunction restraining the removal of fixtures from the property.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 465½.*]

9. APPEAL AND ERROR (§ 954*)—REVIEW—DISCRETION—INJUNCTION.

The rule that the appellate court will not interfere with the action of the trial court in granting or refusing an injunction pendente lite, unless such court has been guilty of a clear abuse of discretion, requires that the reviewing court shall not interfere unless the trial court has committed an error of law in granting or refusing such injunction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.*]

10. INJUNCTION (§§ 135, 161*)—PRELIMINARY RESTRAINING ORDER—DISCRETION OF COURT.

The granting or dissolving of a preliminary injunction is a matter resting largely in the discretion of the court, to which the application or motion is addressed, and this discretion should be exercised so as to prevent injury, having in mind the situation of the parties.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 304, 347; Dec. Dig. §§ 135, 161.*]

Error to District Court, Carbon County; David H. Craig, Judge.

Action by W. M. Englehart against J. F. Anderson. An injunction was issued at the instance of plaintiff, and, from an order denying defendant's motion to dissolve the injunction, he brings error. Affirmed.

See, also, 105 Pac. 571.

N. R. Greenfield, for plaintiff in error. C. E. Winter, for defendant in error.

POTTER, C. J. This is a proceeding in error for the review of an order denying a mo-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion to dissolve a temporary injunction. The action was brought to recover judgment upon certain notes and to foreclose a real estate mortgage given to secure said notes. An injunction was also prayed for to restrain the threatened removal from the mortgaged premises of certain described articles alleged to constitute part of the realty and to be permanent fixtures thereto, and necessary for the conduct of the business theretofore carried on upon said premises. The injunction complained of was issued at the commencement of the action; and, before answer or any other pleading on his part, the defendant filed a motion to dissolve the temporary injunction. The motion was heard upon the petition, and affidavits filed by the respective parties, whereupon it was ordered that the motion be denied, and that the injunction be continued until the final hearing of the cause. The motion to dissolve was made on the following grounds: (1) That the defendant was not notified of the application for the injunction. (2) That the application was not supported by proper affidavits. (3) That the allegations of the petition do not entitle the plaintiff to an injunction. (4) That upon the face of the petition the property in question is personal property and not mentioned or referred to in the mortgage. (5) That from the affidavits filed in support of the motion it appears that the property had in no way been attached to or become a party of the realty covered by the mortgage.

1. Section 4041, Rev. St. 1899, provides: "If, in the opinion of the court or judge, the defendant or any party to the suit should be heard before granting the injunction, a reasonable notice may be required to be given to the party, of the time, place and purpose of the application; and such party may, in the meantime, be restrained." Comp. St. Wyo. 1910, § 4901. Section 4044 of the 1899 revision provides that, when the injunction is allowed at the commencement of the action, the clerk shall indorse upon the summons, "Injunction allowed," and that it shall not then be necessary to issue the order of injunction, and, further, that it shall not be necessary to issue the order when notice of the application therefor has been given to the party enjoined. Comp. St. 1910, § 4904. Section 4045 provides that when an injunction is allowed during the litigation, and without notice of the application therefor, the injunction shall be issued, and the sheriff shall forthwith serve the same upon each party enjoined, etc. Comp. St. 1910, § 4905. Thus the right of the court or judge to allow the injunction before answer without notice of the application seems to be clearly implied. In special cases, such as suits brought to enjoin the use or diversion of water from streams upon which the rights to the use of the water thereof have been adjudicated, the statute prohibits the granting of a restraining order before notice and hearing. Laws 1907, c. 86,

§ 21; Comp. St. 1910, § 4900. But generally the matter is governed by the statutory provisions above referred to. It is not a valid objection, therefore, that the injunction was allowed without notice to the defendant.

2. The statute provides that the injunction may be granted at the time of commencing the action, or at any time afterward, before judgment, upon its appearing satisfactorily to the court, judge, or commissioner, by affidavit of the plaintiff, or his agent, that the plaintiff is entitled thereto. Rev. St. 1899, § 4040; Comp. St. 1910, § 4849. When the petition is sworn to positively, it is itself an affidavit, and, if the necessary facts are set forth in the petition so sworn to, the petition will be sufficient without a separate or independent supporting affidavit to authorize the issuance of the temporary injunction at the commencement of the action. 22 Cyc. 941, 942; *Smith v. Stearns Rancho Co.*, 129 Cal. 58, 61 Pac. 662; *Howard v. Eddy*, 56 Kan. 498, 43 Pac. 1133. The general rule in such case is that the petition must be sufficient not merely as stating a cause of action, but also as an affidavit; that is to say, the facts must be alleged to show a right to the temporary injunction with the same fullness and particularity as would be required in an affidavit. In *Howard v. Eddy*, supra, the rule is stated as follows: "If the petition sets forth the necessary facts, and is properly sworn to, an order may be allowed thereon. When used for that purpose, it must state facts with the detail and particularity that is required in an affidavit or deposition. 'When a verified petition is used as an affidavit, its allegations must be construed as those of an affidavit, and must be such statements of fact as would be proper in the oral testimony of a witness. Allegations which are simply conclusions of law, whether sufficient, or not, as matter of pleading, are incompetent as testimony.'"

The petition in the case at bar seems to be sufficient to show the fact that the plaintiff holds a mortgage upon the premises described, and that the right has accrued to foreclose the same—at least it is not here contended that the petition is insufficient in that respect. It is, however, contended that the allegations with reference to the particular property in controversy are insufficient to show a right to have the removal thereof enjoined. The only substantial objection to the petition, when considered as an affidavit, is its failure to specifically state the manner in which the alleged fixtures had been annexed to, and had become a part of, the realty, and to definitely show that their removal would impair the mortgage security. Had the motion to dissolve been made alone upon the insufficiency of the petition as an affidavit to authorize the allowance of the injunction, and had there been no other affidavits considered upon the hearing, it is at least doubtful whether the petition could be considered suf-

sufficient standing alone to justify the allowance or the continuance of the restraining order. But the motion to dissolve was filed on the day following the commencement of the action, and the hearing was had within 10 days, all before answer or other pleading on the part of the defendant, and it was then ordered, upon a consideration of the affidavits filed by both plaintiff and defendant, not only that the motion to dissolve be denied, but that the injunction be continued until the final hearing of the cause. The affidavits filed by the plaintiff as well as those filed by defendant stated with some particularity the manner in which the articles of property in question were connected with the premises and used; and those filed by the plaintiff were to the effect that the removal of such property from the building erected on the premises would render it unsuited to the purposes for which it was built and had continuously been used, and by reason of its location and other circumstances would greatly depreciate the value of the building and premises and render the same unprofitable. The value of the property either with or without the alleged fixtures is not stated in any affidavit filed by either of the parties; but the defendant did not attempt to show that the removal of the alleged fixtures would not impair the plaintiff's security. On the contrary, it is stated in the affidavit of the defendant that, when he ascertained that he would be unable to pay the mortgage indebtedness, he offered to cede the premises to the plaintiff in satisfaction of the debt, which offer the plaintiff refused to accept. It appears further from the affidavits that the property in question had been fastened to the floor and wall of the building by nails, screws, and iron fastenings, and was in and connected with the building at the time that the mortgage was given, and, indeed, had been there during all the period that the building had been used. The hearing having been had so shortly after the commencement of the action and the original allowance of the injunction, and the plaintiff having at that time made a further showing by filing additional affidavits, we do not deem it very material whether the petition was or was not sufficient as an affidavit to support the original allowance. In view of the situation, the court would have been justified, we think, in disregarding the objection to the sufficiency of the proof on the face of the petition to authorize the temporary injunction, and in determining whether it should be continued upon the evidence presented on the hearing of the motion to dissolve.

3. The sufficiency of the petition as a pleading to entitle the plaintiff to the injunction is so challenged by the motion, and it is conceded that it is insufficient for the reason that it merely alleges generally that the articles in question, which are described as a r, back-bar, and oak partition, are a part of the realty and permanent fixtures thereto,

without stating the necessary facts to show that they had become a part of the realty; that it fails to show that the removal of the alleged fixtures will render the security inadequate; and that it does not appear by the petition that they are described in or covered by the mortgage.

The petition alleges that the defendant threatens to detach and move from the premises described in the mortgage the articles in question, which, it is alleged, "are a part of said realty and constitute permanent fixtures thereto and necessary for the conduct of the business carried on heretofore on and in said premises." That allegation is not, as contended, the statement of a mere legal conclusion. On the contrary, it is the statement of an ultimate fact. Whether a chattel is a fixture or has in any case become a part of the realty is a mixed question of law and fact, and is to be determined from a consideration of all the facts and circumstances attending its annexation and use. 19 Cyc. 1038; Ewell on Fixtures (2d Ed.) p. 34. It is said in *Opelika Bank v. Kiser*, 119 Ala. 104, 24 South. 11, that "courts cannot know otherwise than through the medium of evidence the particular facts necessary to convert this character of property, primarily personal, into fixtures, or parts of the realty in connection with which it may be used." In most cases it would be difficult to set forth in a pleading all the circumstances to show that a chattel has been annexed to real estate in such a manner and under such conditions as to constitute the same a fixture and a part of the realty, without a recital of facts purely evidential in character. With reference to such a matter it must be held usually sufficient to allege the ultimate fact that it is a fixture and a part of the realty, leaving the facts upon which the allegation is based to be brought out by the proof.

The general rule as to the right of a mortgagee to maintain an action to restrain the removal of fixtures is that he may maintain such an action when the removal would have the effect of impairing the security. Where the mortgage is considered a mere security, it is usually held, under the general rule aforesaid, that to entitle the mortgagee to an injunction to restrain such removal it must appear that the property would be diminished in value by the threatened removal to such an extent as to render the mortgage security insufficient or inadequate. This does not mean that the injunction would not be granted in case the diminished value of the property would equal the amount of the debt, but a sufficient margin should be allowed to render the mortgage a fair security under conditions controlling in a particular locality the loaning of money upon such security, and allowing for depreciation in the value of the property from other causes. In *King v. Smith*, 2 Hare, 239, it is said: "The mortgagee is entitled to be protected from acts of waste which would so far impair the value

of the property as to render the security of doubtful sufficiency. He is entitled to have the mortgaged property preserved as sufficient security for the payment of his debt, and it is not enough that its value may be barely equal to the debt. That would not ordinarily be deemed sufficient as security to one whose purpose is to secure payment, and not to become a purchaser of the property at its market value. And not only must it be considered that the mortgage is held to secure payment of the debt, and not for the purpose of converting the mortgagee into a purchaser, but that, if the debt is not yet mature, it is to be considered whether, during the time that may elapse before maturity, the present value of the property may not become depreciated from causes not now known." *Moriarty v. Ashworth*, 43 Minn. 1, 44 N. W. 531, 19 Am. St. Rep. 203; *Moses v. Johnson*, 88 Ala. 517, 7 South. 146, 16 Am. St. Rep. 58; *Fairbank v. Cudworth*, 33 Wis. 358; *Vanderslice v. Knapp*, 20 Kan. 647; *Miller v. Waddingham*, 91 Cal. 449, 27 Pac. 750, 13 L. R. A. 680; *Ewell on Fixtures* (2d Ed.) 609, 610; 1 High on Inj. (3d Ed.) § 481; 19 Cyc. 1072.

The petition alleges that the removal of the alleged fixtures "will work injury to said real property, and that said injury will be irreparable, and that no adequate remedy at law exists whereby the plaintiff may protect himself against the said detaching, wasting, damaging, and removing of said parts of said real estate, and against the consequent damage and loss to said real property and plaintiff's security." The allegation is objectionable for not directly stating that the security would be so impaired as to be rendered insufficient, but as the hearing was had with reference to allowing a temporary injunction, before any pleading filed by the defendant, and upon affidavits filed by the contending parties, and as the suggested defect in the petition may be remedied by amendment, we do not think that the injunction should be vacated on this ground without allowing the plaintiff an opportunity to amend. When the petition is considered in connection with the affidavits, the defect is not so material as to call for a reversal of the order.

It is alleged in the petition that the mortgaged property is described in the mortgage as follows: Lot 22 in block 6 in the town of Grand Encampment, Carbon county, Wyo., according to the recorded plat thereof, together with all the appurtenances, privileges, and hereditaments thereunto in any wise appertaining or belonging. That description is sufficient to cover property like that here in controversy when it has been so annexed to the realty as to become a part of it.

4. Upon an appeal from an order granting or refusing an injunction pendente lite, the rule is that the appellate tribunal will

not interfere with or control the action of the court below unless it has been guilty of a clear abuse of discretion; and by "abuse of discretion," within the meaning of the rule, is meant an error of law committed by the court. 2 High on Inj. § 1696. As said in *Collins v. Stanley*, 15 Wyo. 282, 295, 88 Pac. 620, 123 Am. St. Rep. 1022, the granting or dissolution of a preliminary injunction is a matter resting largely in the discretion of the court to which the application or motion is addressed. "This discretion should be exercised so as to prevent injury, having in mind the situation of the parties. The rights of the defendants are protected by the bond, while there is no such protection afforded plaintiff if the injunction is dissolved, and it should turn out that his action is well founded."

With reference to the evidence produced at the hearing, we think it only necessary to say that it appears to us to be sufficient to justify the order denying the motion to dissolve and continuing the injunction until the final hearing of the cause.

The order complained of will be affirmed.

BEARD, J., concurs. SCOTT, J., did not sit.

(48 Colo. 58)

WOLFER v. WILLIAM REDDING & SON.

(Supreme Court of Colorado. May 2, 1910.)

1. APPEAL AND ERROR (§ 223*)—PRESENTATION BELOW—OBJECTIONS.

Where the record on appeal does not show that any objection was made or exception taken to the judgment, an assignment of error as to the insufficiency of the evidence to support the judgment cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1338-1352; Dec. Dig. § 223.*]

2. TRIAL (§ 192*)—INSTRUCTIONS—INSTRUCTIONS ASSUMING FACTS.

Facts which are uncontroverted, or are so treated by the parties, may be assumed as true in the instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

3. APPEAL AND ERROR (§ 702*)—PRESERVATION FOR REVIEW—INSTRUCTIONS—ABSENCE OF PART OF INSTRUCTIONS.

Appellant cannot complain of errors in instructions, where the record does not contain all of the instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2936-2938; Dec. Dig. § 702.*]

Appeal from District Court, Boulder County; James E. Garrigues, Judge.

Action by William Redding & Son against Charles Wolfer. From a judgment for plaintiffs, defendant appeals. Affirmed.

Miller, Barnd & Affolter and Williams & Montgomery, for appellant. A. C. Patton and Wendell Stephens, for appellees.

CAMPBELL, J. The object of this action is the recovery of the value of services which plaintiffs, who are architects, performed for defendant. Plaintiffs' case as made by the complaint is that, at defendant's request, they agreed to, and did, draw for him plans and specifications for a store building, and to superintend the construction of the same for an agreed compensation of 5 per cent. of its total cost; that they were accepted by defendant, who began construction of the building, which plaintiffs superintended until they were wrongfully discharged. So far as pertinent to questions involved here, defendant's case, as made by his answer, is that while he employed plaintiffs to draw plans and specifications for a building which he proposed to erect, to cost not exceeding \$7,000, the plans and specifications which plaintiffs drew were for a building which, as erected by defendant, cost in the neighborhood of \$15,000, and they were not, as drawn, acceptable to, or accepted by, defendant, who was obliged to make changes therein, and that because of plaintiffs' failure, in this respect, to comply with their contract, he rightfully discharged them. By way of counterclaim defendant asked damages growing out of this contract, in that he rented, in advance of its construction, the building in question at a rental based upon the supposition that the building would cost \$7,000, instead of \$15,000. From the judgment upon these issues in favor of plaintiffs, defendant appeals.

The assignment based upon the alleged insufficiency of the evidence to support the judgment cannot, under our established practice, be considered. The record does not show that any objection was made, or exception taken, to the judgment. The evidence was conflicting, and there was sufficient legal evidence to sustain the finding.

The errors assigned to rulings upon the evidence, even if the points are properly before us, are not well taken. The questions raised are not important in any view of the case, and, if the rulings had not been made, we are satisfied the verdict would not have been different.

Almost the entire argument of appellant is devoted to the alleged erroneous instructions which the court gave to the jury. Such objections, as that mere abstract propositions of law were announced, and that the court improperly assumed as established facts matters which were in dispute, are not borne out by our examination of the charge. Facts which are uncontroverted, or are so treated by the parties, may be assumed as true by the court in its instructions. The court did not transgress the rule invoked.

Besides, appellant is not in a position to be heard upon his objections to the charge. The record does not purport to contain all of the instructions. Appellant's abstract shows that at least nine were given, numbered 2, 3, 4,

6, 7, 8, and 9. Instructions numbered 1 and 5 are absent, and, for aught that appears to the contrary, a number of other instructions may have been submitted to the jury. We are therefore not called upon to consider the objections urged. We may, however, add that we do not find the supposed errors in the partial list of numbered instructions to which appellant has called our attention. Some of them which are altogether favorable to defendant, if not given at his request, are criticised with as much apparent earnestness as are those which seem to have been tendered by plaintiffs.

There being no substantial or prejudicial error in the record, the judgment is affirmed.

STEELE, C. J., and MUSSER, J., concur.

(48 Colo. 339)

TRITCH v. PERRY et al.

(Supreme Court of Colorado. May 5, 1910.)

1. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

There being competent evidence to sustain the findings, they cannot be disturbed, notwithstanding conflicting evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

2. EVIDENCE (§ 581*)—TESTIMONY OF DECEASED WITNESSES IN PRIOR CASE—LAYING FOUNDATION.

Testimony of deceased witnesses given in a prior action may not be admitted on the statement of counsel, or the testimony of a court stenographer, as to the parties and the cause of action being the same in the two cases; but this must be shown by the record of the former case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2414-2418; Dec. Dig. § 581.*]

3. TRIAL (§ 47*)—INTRODUCTION OF EVIDENCE—RENEWAL OF OFFER.

Evidence having been properly rejected because of failure to lay a foundation therefor, there was no error, though foundation was subsequently laid; offer to introduce the evidence not having been renewed thereafter.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 118, 119; Dec. Dig. § 47.*]

Appeal from District Court, City and County of Denver; Samuel L. Carpenter, Judge.

Action by Philip Tritch against Samuel M. Perry, administrator of George Tritch, deceased, and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Jones & Drake, Milton Smith, and Charles R. Brock, for appellant. Charles J. Hughes, Jr., and Gerald Hughes, for appellees.

HILL, J. This action was against the heirs of George Tritch, deceased, the administrator of his estate and others. The complaint alleges the existence of a partnership entered into in 1868 by the plaintiff and his deceased brothers, under which it was claimed the plaintiff contributed the sum of \$1,500 in the hardware business as against the sum of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

\$35,000, which the deceased then had in said business then being conducted by him in the city of Denver. It was alleged that the plaintiff was to be a silent partner, but was to share in the profits in the proportion that his \$1,500 bore to the \$35,000 in the business then owned by his brother. It was further alleged that they so conducted said partnership business in the name of George Tritch under said agreement from the year 1868 until the death of George Tritch, which occurred at Denver in 1899, that the business flourished; large profits accrued therefrom, which remained in the possession of George Tritch, and that the value of the stock of goods and good will of the business at the time of his death was at least \$1,500,000. It was further alleged that during the continuance of said partnership George Tritch took out of the surplus and profits from said business large sums of money and invested it in stock, bonds, real estate, and other property, and that all property owned by him at the time of his death was purchased with funds taken from said partnership business; that it was of great value; that it is in the possession of the defendants, and that no settlement has ever been made of the partnership. The prayer is to compel a recognition of the partnership, an accounting to plaintiff of his interest therein, that the court decree a trust existing in his favor, and that he be awarded his share of the property, for general relief, etc. That portion of the answer necessary to be considered contains a general denial to all material portions of the complaint. Trial was to the court, which found generally in favor of the defendants; from the judgment in favor of defendants the plaintiff appeals.

The principal assignments of error urged are that the judgment is contrary to law and is manifestly against the weight of the evidence. The evidence is conflicting, but from a careful examination of the record we find abundant competent evidence to sustain the findings of the trial court. Where such is the case, under our rules of practice repeatedly announced, it is not the province of this court to disturb the findings. *Chadbourne v. Davis*, 9 Colo. 581, 13 Pac. 721; *Rollins v. Board of Commissioners*, 15 Colo. 103, 25 Pac. 319; *Jones v. Sullivan*, 22 Colo. 224, 43 Pac. 1001; *Cascade Ice Co. v. Water Co.*, 23 Colo. 204, 47 Pac. 268; *Colorado Fuel & Iron Co. v. Pryor*, 25 Colo. 540, 57 Pac. 51; *Barnett v. Jaynes*, 26 Colo. 279, 57 Pac. 703; *Hamill v. Copeland*, 26 Colo. 178, 53 Pac. 901; *Hazletine v. Brockway*, 26 Colo. 291, 57 Pac. 1077.

The only other error urged by counsel in their brief pertains to the rejection of the testimony given in the county court of two witnesses, Gomer and Roberts, now deceased. It is urged by counsel for the appellant that the action in the county court was between the same parties, and that the claim being urged there was substantially the same as the contention made here, for which reason,

when it was shown that the witnesses prior to this trial had become deceased, it was competent to have read their testimony taken at the former trial. We do not find it necessary to pass upon this question, as it was not so presented to the trial court. At the time this evidence was offered, one of the then counsel for the appellant, in substance, stated: "We desire to offer the evidence of P. P. Gomer taken in a case styled: 'State of Colorado, County of Arapahoe, In the County Court. March 21, 1901. In the Matter of the Estate of George Tritch, Deceased, on the Claim of Philip Tritch.' Also the testimony of John W. Roberts taken in the same case and on the same day. We have shown to the court that these witnesses are both dead, and this matter now is familiar to the court as being a similar case to this, an effort to prove the claim." The death of the witnesses was conceded, but objection was made to the introduction of the evidence for the reasons "that it had not been shown in the only proper way that that matter can be shown that the proceeding in the county court was identical as to the nature of the claim and the parties with that now here presented, and the further reason that the record of the county court which discloses the nature of the claim had not been presented." This objection was sustained on the ground that the record in the former case had not been introduced. Thereafter, Mr. Libby, the stenographer from the county court, was called, and testified that he was present at the taking of the testimony in the case of Philip Tritch against the Tritch estate, and upon objection to further questions for the reasons before raised, counsel for appellant offered to prove by the witness that the testimony of the witnesses Gomer and Roberts, then offered, was the testimony that was given by those witnesses in the case in the county court, that he took it, and that it is a transcript, the extended notes of that evidence taken by him, to which the trial judge replied: "I don't think that can be done until the record is brought in. That would be permitting him to testify as to the case instead of the record." The ruling was correct in both instances. To have admitted the evidence in the first instance (if the reasons urged here are correct) would have been the acceptance of the bare statement of counsel (over proper objections) that the parties to, and the cause of, action were the same in the county court as here. To have accepted it in the second, as in substance said by the trial court, would be permitting the witness to testify and give his version as to the claim and parties being the same, instead of proving it by the record. 'Tis true thereafter the entire record in the former case in the county court was introduced in evidence by the defendants, but as the plaintiff did not renew his offer to introduce the testimony after the admission of the record from the county court, and as it was rightly rejected when presented, we are not called upon to

pass upon the question of the identity of claims or parties, or adopt any rule in this case pertaining to the evidence of a deceased witness.

The judgment will be affirmed.
Affirmed.

STEELE, C. J. and GARBERT, J., concur.

(48 Colo. 64)

BENNINGHOFF et al. v. TOWN OF PALISADE.

(Supreme Court of Colorado. May 2, 1910.)

1. EMINENT DOMAIN (§ 203*)—COMPENSATION—EVIDENCE.

In proceedings by a town to condemn a water right, all the facts as to the condition of the land and its surroundings, its improvements and capabilities, including the productive character of fruit trees, the character of the soil, and the amount of water supplied to the land by an irrigation ditch, are admissible in determining the injury to the land resulting from the appropriation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542; Dec. Dig. § 203.*]

2. EMINENT DOMAIN (§ 262*)—COMPENSATION—EVIDENCE—HARMLESS ERROR.

In proceedings by a town to condemn a water right, the admission in evidence of the valuation of the land as made by the assessor was not prejudicial error, where the assessor testified that the valuation was not made with reference to what the land was actually worth.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 686; Dec. Dig. § 262.*]

3. APPEAL AND ERROR (§§ 204, 237*)—OBJECTIONS IN TRIAL COURT—ADMISSION OF EVIDENCE.

The admission of evidence will not be reviewed on appeal, where the complaining party did not object or move to strike out.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1258; Dec. Dig. §§ 204, 237;* Trial, Cent. Dig. § 228.]

4. EMINENT DOMAIN (§ 262*)—APPEAL—HARMLESS ERROR.

Where, in proceedings by a town to condemn a water right, defendants appealed from an order of the court overruling their motion to vacate the award of the condemnation commissioners, and not from the decree, error of the court in its decree adjudging that the town, upon paying into court the amount of the award within 90 days, may take possession of the water right, and upon such payment shall become vested with the title to the same, though contrary to the form of decree specified by Rev. St. 1908, §§ 2420, 2425, 2428, will be regarded as harmless.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 686; Dec. Dig. § 262.*]

Appeal from District Court, Mesa County; Theron Stevens, Judge.

Proceedings by the Town of Palisade against Esther E. Hoover Benninghoff and others, to condemn a certain water right. From a judgment for plaintiff, defendants appeal. Affirmed.

Straud M. Logan, for appellants. Wheeler & Weiser, for appellee.

MUSSER, J. This action was brought under the statutes of eminent domain by the

town of Palisade to condemn a water right with which to supply the town with water for domestic use and fire protection. Three commissioners were appointed, as provided by statute, to appraise and determine the damages and compensation to be allowed the owner. This was fixed by the commissioners at \$4,000 for the water right and \$8,500 for consequential damages accruing to the land on which the water was used. The owners are not satisfied with the award of \$12,500, and are here assigning various errors relating to the admission of testimony before the commissioners, saying, in effect, that the evidence on the part of the town was practically all incompetent, irrelevant, and immaterial, and that the evidence on the part of the owner was the only competent and reliable evidence offered, and for that reason the award should be from \$24,000 to \$27,000. One of the witnesses for the owner, whose testimony tended to show that the award should be about \$25,000, based on values of other lands in the vicinage said that the values he was testifying to, or asked about were uncertain and much inflated. As these values were based upon about the same matters as the values testified to by the other witnesses for the owner, the commissioners, no doubt, felt that the values sought to be established by the owner were inflated and not real. On the other hand, one witness for the town said the land with the water was worth \$5,000 or \$6,000; another from \$7,000 to \$10,000; others placed it higher. Thus is presented the maze of differing opinions usual in cases wherein value is sought to be established. Giving the appellants the benefit of the rules of evidence they invoke, their assignments of error will be considered. The burden of their complaint is that a great deal of the testimony on behalf of the town related to the condition of the trees upon the land, the profits therefrom, the amount of water that was used at various times for the irrigation thereof by means of the water right, and other evidence of like character. They say that such evidence was incompetent in measuring the value of the land. Strictly speaking, it was the value of the water right, the property taken, that was to be ascertained, together with the damages to the land by reason of the taking. The land was not taken. They insist, however, that without the water right the land is worthless, and that, therefore, they are entitled to the value of the land with the water right. Giving them again the benefit of their claim, to avoid contention, it appears that the things they complain of have a direct bearing on the value. If fruit trees on the land are thrifty and produce fruit in great quantity and of good quality, the land is worth more than if the trees were weak and less productive, or produced fruit of inferior

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

quality. Like other property, the value of land is more or less affected by the profit which has been derived therefrom, though, of course, in a developing country, it is true that prospective capabilities of land will have considerable influence in determining its value. Conditions, circumstances, and surroundings which exist, and have existed, character of soil and other like conditions, have some bearing in determining what may be the future capabilities. The source of the water right was a small creek. If there was always enough water in the creek, when needed, to supply the full amount of the appropriation, the water right was worth more than it would be if, at times, the owner had to be satisfied with a less amount than the appropriation. It is true that the town was condemning the right to an amount of water as fixed by the decree, but the decree itself did not supply the water necessary to fill it when needed. Hence evidence of how much water was supplied to the ditch during the irrigation season was competent. Some of the witnesses testified that a large part of the land was rough and rocky, that it was badly washed in places, and that it was inconvenient to get to and from it. Can it be said that such conditions will not affect its value, present or prospective? It is thus seen that all this evidence complained of has a bearing on the value of the property taken. It is to be remembered that in this case, not only is compensation for the property taken to be awarded, but also damages to the property not taken. In such a case, a wide range of evidence is admissible. All evidence having a bearing upon the compensation and damages to be awarded is admissible. *Colo. M. Ry. Co. v. Brown*, 15 Colo. 193, 25 Pac. 87. "All the facts as to the condition of the property and its surroundings, its improvements and capabilities, may be shown and considered in estimating its value. Of course circumstances and conditions tending to depreciate the property are as competent as those which are favorable." 2 *Lewis on Eminent Domain*, § 478.

The admission of the valuation made by the assessor cannot reasonably be held to have been prejudicial. In effect, the assessor said he did not know what he valued, and that he did not know what the land was worth. It is clear that the valuation was a mere setting down of figures without any basis of value. Besides, the valuation was evidently introduced in an attempt to show an expression of the owner in regard to it, which attempt was an evident failure on the part of the town. It is difficult to see how, under such circumstances, the assessor's valuation could have influenced the commissioners one way or the other. It is objected that a witness testified that he offered the owner \$2,000 for the land without the water right. Reference to the particular folio of the abstract mentioned in

the brief and assignment of errors discloses the testimony now objected to. It does not appear at that place that the testimony was objected to at the time, nor that any motion was made to strike it out, if it was not anticipated by a question.

The commissioners in this case filed with the clerk of the court their certificate of their ascertainment and assessment of the damages and compensation to be allowed the owner, as provided in section 6 of the act. Section 2420, Rev. St. Thereupon the owners filed what will be regarded as a motion to vacate and set aside the award of the commissioners. The court overruled this motion, and in the same order adjudged that upon paying into court the amount of the award within 90 days the town was authorized to take possession of the water right, and that upon such payment the town would become vested with the title to the same. The owners complain of this form of judgment, and say that the court acted in excess of its authority. It is true that the statutes do not provide for this kind of a judgment upon a certificate of commissioners. Section 11 (section 2425, Rev. St.) provides for a conditional judgment upon the verdict of a jury when a jury acts. Section 6, § 2420, Rev. St., provides that the court, upon a certificate of the commissioners, or a verdict of the jury, and proof of the payment of the compensation, may make and enter a rule containing certain matter provided for in the statute, and upon the entry of such rule the petitioner shall become seised in fee of the property taken.

In *Denver & N. O. R. R. Co. v. Jackson*, 6 Colo. 340, it was determined that section 13 of the eminent domain act (section 2427, Rev. St.) gives either party a right to a review of the proceedings, either by appeal or by writ of error, upon final determination in the court below, and that section 6 (section 2420, Rev. St.) "clearly indicates what shall be the end of the proceedings where the compensation is assessed by commissioners, provided the money is paid, and no appeal is taken or writ of error issued." Such end indicated in section 6 is the entry of the rule above mentioned. It was further determined in that case that, "when the commissioners have filed with the clerk their certificate of 'ascertainment and assessment,' and the court or judge has denied the motion of petitioner or respondent, as the case may be, to vacate and set aside the same, there is such a final determination as, under the statute, entitles him to his appeal or writ of error," and that when the court or judge has overruled such motion, his power is exhausted until the award or price determined is paid into court, and that when it is so paid, the court or judge must enter the rule, unless under section 14 (section 2428, Rev. St.) it is paid to enable the petitioner to obtain possession of the property pending the review. It is clear, under these sections

and the opinion of this court aforesaid, that when the lower court overruled the motion to vacate the award of the commissioners, the owners then had the right to appeal this case, and the court had no authority to enter the conditional judgment which it did. When the right to exercise the right of eminent domain is settled, it is clearly shown in the opinion in 6 Colorado that the determination of the price to be paid is the principal object of the proceedings. As a matter of fact, this appeal is not from the so-called conditional judgment, but from the award of the commissioners, approved by the court in overruling the motion to vacate the same. The amount of the price to be paid, as fixed, is all that is assailed. The matter complained of in the judgment was without any effect. The award was not affected by it one way or the other. The parties are in precisely the same position as they would be if the court had simply overruled the motion to vacate the award of the commissioners and then stopped. The matter complained of in the judgment could not, and did not, prejudice the owners in any way whatever.

It is apparent from this record that about all the evidence available, bearing upon the value of the water right and the consequent damage to the land, was presented to the commissioners. Some of it was favorable, some unfavorable, to the contention of appellants. In addition, the commissioners viewed the premises. The court below also passed upon and approved their award. It does not appear that any injustice was done, nor does it appear that any prejudicial error was committed. Under such circumstances, the compensation to be paid by the owner, as fixed by the commissioners, should be, and is, affirmed.

Affirmed.

STEELE, C. J., and BAILEY, J., concur.

18 Colo. 12)

GREELEY IRR. CO. et al. v. VON TROTHA et al.

(Supreme Court of Colorado. May 2, 1910.)

LIMITATION OF ACTIONS (§ 55*)—ACCRUAL OF CAUSE OF ACTION—INJURIES TO REAL PROPERTY.

A cause of action for flooding land by the erection of a dam accrues for the purpose of determining limitations when the land is flooded, and not when the dam is erected.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 303-306; Dec. Dig. § 5.*]

WATERS AND WATER COURSES (§ 167*)—ACQUISITION OF WATER RIGHTS—PRESCRIPTION—ERECTION OF DAMS.

The owners of the right to maintain a dam have no right to rebuild and maintain a new dam in such a way as to place a greater servitude or burden on the property of other riparian

owners than had been put upon it by the maintenance of the previous dam.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 194-202; Dec. Dig. § 167.*]

WATERS AND WATER COURSES (§ 179*)—ACTIONS FOR FLOWAGE—INSTRUCTIONS—CONSTRUCTION.

In an action for injuries caused by the overflow of land due to the unauthorized maintenance of a dam, an instruction that if a previous dam had been constructed of dirt, brush, and like material which washed out during flood times, and a second dam of the same height was constructed with flashboards which it was the custom to remove during flood times, the defendants acquired no right to erect and maintain a third solid, immovable dam of the same height of the prior ones, is not objectionable as telling the jury that a temporary break in the dam destroyed the easement.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 257; Dec. Dig. § 179.*]

WORDS AND PHRASES—"EXTRAORDINARY FLOOD."

An "extraordinary flood" is one of the heaviest that ever occurred in a locality.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2623.*]

WATERS AND WATER COURSES (§ 179*)—FLOWAGE—INSTRUCTIONS.

Any inaccuracy in charging, in an action for injuries from the overflow of land, that an extraordinary flood is one of the heaviest that ever occurred in the locality, is not misleading to the jury, where they are also instructed that if the river overflowed its banks by reason of an extraordinary flood, or freshet, which it was not capable of carrying within its banks, and was not occasioned by the dam of defendants, plaintiffs could not recover, and that defendants would be excused from liability on account of an extraordinary flood which could not be foreseen and guarded against.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 259; Dec. Dig. § 179.]

WATERS AND WATER COURSES (§ 179*)—INJURIES FROM FLOWAGE—ACTIONS—INSTRUCTIONS.

In an action for overflow of land caused by the maintenance of a dam and the forming of a sandbar, due to the failure of defendants to operate a sand chute, a request to instruct that if the overflow was caused by certain islands and sandbars in the river above or below the dam, and the bushes, trees, driftwood, and debris collected thereon, or for any other cause than the dam of defendants, plaintiffs could not recover, was properly refused.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 257; Dec. Dig. § 179.*]

TRIAL (§ 261*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS PARTLY ERRONEOUS.

A requested instruction containing a material erroneous proposition was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 660; Dec. Dig. § 261.*]

TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

A requested instruction, in an action for overflow of land, that if the overflow was caused by sandbars, brush, or other causes than defendants' dam, plaintiffs could not recover, was sufficiently covered by an instruction that if the overflow was caused by obstructions in the

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

river other than the dam, or by any cause other than the dam, plaintiffs could not recover.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

9. APPEAL AND ERROR (§ 1001*)—REVIEW—QUESTIONS OF FACT.

Where the verdict is supported by ample evidence, it will not be interfered with on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

10. TRIAL (§ 28*)—CONDUCT IN GENERAL—INSPECTION AND VIEW.

Under the express provisions of Mills' Ann. Code, § 188, permission to the jury to visit and view premises involved in the controversy is entirely within the discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 77-79; Dec. Dig. § 28.*]

11. NEW TRIAL (§ 52*)—GROUNDS—IRREGULARITIES IN VERDICT.

A chance or quotient verdict which was afterwards voted on and accepted by the jury as the legitimate expression of their deliberations is not ground for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 101-105; Dec. Dig. § 52.*]

12. APPEAL AND ERROR (§ 528*)—RECORD—SCOPE AND CONTENTS—AFFIDAVITS.

Though Mills' Ann. Code, § 60, makes certain motions and rulings and decisions thereon part of the record without making them such by bill of exceptions, affidavits of jurors to impeach a verdict not being mentioned in the section, when not embodied in the bill of exceptions, are not part of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2384-2388; Dec. Dig. § 528.*]

Appeal from District Court, Weld County; James E. Garrigues, Judge.

Action by Erich Von Trotha and another against the Greeley Irrigation Company and another. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

C. D. Todd, for appellants. Elbert C. Smith, for appellees.

WHITE, J. Appellees, as plaintiffs, brought this suit against appellants to recover damages to their crops, caused by the overflow of the Cache la Poudre river upon their lands. The appellants owned and operated, jointly, a certain line of ditch commonly known as "canal No. 3," which has its headgate on the south bank of, and takes its supply of water from, the Cache la Poudre river at a point upon plaintiffs' land.

The complaint, in substance, alleges: That defendants in November, 1903, constructed a wooden dam or check in and across said river at a point about 60 feet below the headgate of canal No. 3; that during the spring of 1905 defendants negligently allowed sand, silt, and the debris from the river to accumulate in said canal and headgate thereof; that about the 5th day of June, 1905, the defendants negligently allowed said dam or check to remain in the river during a rise of the water, neither raising nor lowering it; that

on account of said accumulation of sand and debris, and on account of not properly handling or regulating said check or dam, the defendants caused the water in the river to back up and overflow its banks in and upon plaintiffs' property to their damage; that said water would not have escaped its river banks, but would have remained therein without harm to the plaintiffs if said sand, silt, and debris had been properly removed, or said check or dam raised or lowered in the river.

The answer, after admitting certain allegations of the complaint, alleges, in substance: That in 1870, while the land owned by plaintiffs was a part of the public domain, the assignors of defendants constructed a dam across the river at substantially the same point, and of the same height, and for the same purpose as the dam or check of which complaint is made; that from time to time said dam was repaired and reconstructed, and such was the work done thereon in November, 1903; that the dam as repaired and reconstructed, with flashboards thereon, was no higher and no greater obstruction in the river than the dams previously maintained at said point; that said dam was necessary for the operation of said canal, and was constructed according to the customs and laws relative to the construction of dams and canals for the appropriation of water; that the patents for the land, owned by plaintiffs, conveyed the same subject to the rights of defendants to maintain said dam as theretofore maintained, and ever since said dam has been maintained, used, and enjoyed, with the knowledge and consent of all owners of said land, including plaintiffs; that by reason of the premises the appellants obtained, and had a vested right and easement in and upon, said land and stream to keep and maintain said canal, headgate, and dam with the right to check back the waters in the stream and upon appellees' land; that the injury complained of was caused by an extraordinary flood; that plaintiffs had allowed the river channel to become narrowed by the undergrowth and the accumulation of debris in the channel upon their own land and thereby caused the overflow and consequent injury; that plaintiffs' cause of action accrued more than 6 years, and more than 20 years, before the commencement of this suit. The answer then denies all other allegations of the complaint. A replication was filed and the cause subsequently tried. The defendants requested, at the close of the evidence, that the jury view the premises, which was denied. A verdict was returned, and judgment entered, for plaintiffs, from which defendants prosecute this appeal.

In 1870 the defendants, or their predecessors in interest, built a dam of dirt, gravel, and brush, commonly known as a "brush dam," across the river at a point about 60

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

feet below the headgate of canal No. 3, for the purpose of diverting therein the water from the river. The dam would at times wash out, and was rebuilt practically in the same manner from time to time until 1883. In the fall of that year the brush dam was replaced by one made of piles and plank, with flashboards which were taken out or off during periods of high water. This dam with the flashboards was practically of the same height as the original dam.

In November, 1903, the piles forming the basis of the dam constructed in 1883 were sawed off, and an apron or floor was constructed thereon which consists of plank 3 inches thick and 12 feet long. Above the apron is a structure made of 8"x8" timbers about 12 feet in length, set 5 or 6 feet apart, at an angle of about 45° downstream. On each timber in the center is a 2"x2" board and on that a 2"x8" cleat forming a slot or groove into which boards, so made as to slide up or down, are placed, forming the face of the dam. These sliding boards are commonly known as "flashboards," and in operating this dam, as well as the one built in 1883, it was the intention and custom to take out, remove, lower, or raise these flashboards during flood times in order to allow a freer passage of the water in the river. The dam is supplied with a sand chute about 15 feet in width, operated for the purpose of keeping the headgate and ditch from choking up with sand. The sand chute was not operated in 1904, and a sandbar filled in above the dam in the ditch, and in front of the headgate. It was about 130 feet long, 30 to 40 feet wide, 1½ feet in depth, and extended about 40 feet past the headgate. It was two-thirds larger than any sandbar previously there. It so remained in 1905, at the time plaintiffs' crops were destroyed, extending into the ditch between the headgate and the weir. When the high water that damaged plaintiffs came, the flashboards tightened and could not be removed, lowered or raised. At the time of the construction of the brush dam the lands of plaintiffs belonged to the United States, and so continued as to one portion thereof until 1874, and as to the other until 1895, when patents issued to the then purchasers, who thereafter conveyed the same to plaintiffs. The patents to plaintiffs' land conveyed the same "subject to any vested and accrued water rights * * * and rights to ditches and reservoirs used in connection with such water rights as may be recognized by the customs, laws and decisions of courts * * * as by law provided."

At the close of the evidence, the court took from the consideration of the jury the third alleged defense, and instructed them, in effect, that, if plaintiffs were injured as alleged in the complaint, their cause of action accrued at the time the damages were sustained, to wit, in June, 1905, and was not barred by the statute of limitations. The action of the court in this respect is urged as consti-

tuting reversible error. It is contended that this defense involved two propositions: First, "that the plaintiffs purchased their lands with full knowledge of the rights of defendants in and to said dam and ditch, and the nature and extent of said appliances as existing structures, and the effect of the use and operation thereof upon said lands"; and, second, "the defense of the statute of limitations." All the matters contained in the third alleged defense, except solely the statute of limitations, were covered and pleaded in each of the two preceding defenses, and were therein fully submitted to the jury. Moreover, it is quite evident the pleader never intended to present, by the third defense, nor did the court, or jury, understand, that thereby there was presented any defense, other than the statute of limitations. Plaintiffs' cause of action accrued when the water invaded their premises and the damages occurred, and not before. The court, therefore, properly told the jury that plaintiffs' cause of action, if proven, was not barred by the statute of limitations.

Defendants contend that under the facts of the case, and by virtue of sections 2330 and 2340, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1437), and by the reservations in the patents to the land of plaintiffs, the former acquired, and still have, the right to maintain a permanent dam of the elevation originally constructed, and that the court ignored such right by refusal to give instruction No. 6 requested by them. We think that the instruction requested was fully covered by other instructions given, and the matters of defense pleaded were fairly submitted to the jury.

It is, perhaps, true that defendants had a right to maintain a dam across the river at substantially the same place and of the same height, and which set back the water in the river to the same extent, as the dam originally constructed and maintained, and plaintiffs acquired their land subject to such right, and could not recover for an injury sustained by them by reason of the fact of such dam. To this effect the court instructed the jury. The defendants, however, had no right to rebuild and maintain a new dam in such a way as to place a greater servitude or burden upon the property of plaintiffs than had been put upon it by the construction and maintenance of the previous dams, and the jury were so advised.

They were, in effect, told that defendants had a right to maintain a dam across the river for the purpose of diverting water into their ditch, and that plaintiffs acquired their lands subject to the defendants' right to have the dam maintained at its original height, and, if the dam "had since been always maintained at said height," plaintiffs could not recover for any injury resulting therefrom. They were further told that if they believed "from the evidence that, for a period of 20 years or more before the injury complained of, the dam was constructed, kept,

and maintained at substantially the same place, and at all times of the same height so that it would at all times set back the waters of the river to the same extent" as the one complained of, "and that said dam was at all times so maintained and set back the river water," the defendants had thereby acquired an easement in the land of plaintiffs to check up and set back the said river to the extent which they believed from the evidence had been done, if any, during the period of 20 years prior to the alleged injury, "and, if you believe from the evidence that said dam at all times checked up and set back the waters of said river to the same extent as it now does, then plaintiffs cannot recover." The jury were then told that if they found from the evidence that the dam originally built was of dirt, brush, and like material, and that the same washed out, during flood times, and allowed a freer flow of water in the river, and that about 1883 a permanent dam, with flashboards and of the same height, instead of the other, was placed in the river, and that said flashboards could be taken out or removed, and it was the custom to take them out or remove them during the flood times in order to allow a freer passage of the water in said stream, and that said permanent dam was so operated substantially until 1903, then defendants had acquired no easement in said river or against said lands of plaintiffs to maintain a solid, immovable dam of the same height of the prior ones.

It is argued that these instructions are erroneous in that they require, in order to invest defendants with an easement in plaintiffs' lands that would relieve the former from damages to the latter, that the dam be maintained as it was originally built, and that it set back or check the water "at all times" to the same extent; that thereby the jury were, in effect, told that a temporary break in the dam destroyed the easement, "or that, if by reason of low water at some time the dam did not check or back up the water so high as at some other time, therefore the easement was lost." In our opinion the words used do not warrant the conclusions reached by defendants. Ample evidence established the fact that the original dam was of brush, dirt, and like material; that it washed out during flood times and allowed a freer flow of water in the river; that in 1883 a more permanent dam was built in its stead; that this dam was supplied with flashboards which could be, and which it was the custom to take out during flood times in order to allow a freer passage of the water in said stream; that said dam was operated substantially in that manner until 1903. The evidence warrants the conclusion that the dams constructed, maintained, and operated by the defendants, and their predecessors in interest, were adjustable, regulated dams, permanent in the sense of vesting in defendants a right or easement for the diversion into their canal of their appropriation of water from the

river, but permanent for no other purpose. The instructions, while recognizing defendants' easement to maintain a dam in the river for diverting purposes, limited such right or easement to the manner and extent it had been maintained prior to, and at, the time plaintiffs acquired their interest in the premises.

The jury were not told, as defendants contend, that, "if the brush dam washed out during flood times, no easement could be established." On the contrary, it was left to the jury to determine whether the dam was originally built of dirt, brush, and like material, and whether it washed out during flood times, and allowed a freer flow of water in the river, and whether in 1883, in its stead, a dam was built with flashboards upon it, which could be, and which it was the custom to take out or remove during the flood times, in order to allow a freer passage of the water in the stream, and whether the dam was operated substantially in that manner until 1903. If the jury found in the affirmative on these questions, they were told that it necessarily followed that defendants "would have acquired no easement in said river or against said lands to maintain a solid, immovable dam" of the same height of the original dams. They were in no wise instructed that a temporary break in the dam, or a reconstruction of the dam of different material, affected the original easement acquired by its construction. On the contrary, the instructions expressly recognized the easement acquired, and limited defendants' rights accordingly.

The court, in defining "an extraordinary flood," told the jury that it "means one of the heaviest that ever occurred in the locality," and it is claimed that this was erroneous. Certainly an "extraordinary flood" is one of the heaviest that ever occurred in the locality. If there were many such, they would cease to be extraordinary, and become only ordinary. But should we assume that the particular words are improperly used as applied, yet it is clearly evident from the entire instructions that the jury were not misled thereby. In the preceding instruction they were told that if they believed from the evidence that the river overflowed its banks by reason of an extraordinary flood of water or freshet coming down the river, and which it was not capable of carrying within its banks, and was not occasioned by the dam of defendants, plaintiffs could not recover. And in the instruction in which the alleged objectionable words were used, the jury were told that "defendants would be excused from liability on account of (an extraordinary) flood, provided that it was such that by the exercise of reasonable foresight and prudence the natural consequences of such a flood could not be foreseen and guarded against." We think the instructions upon this question fairly submitted the matter to the consideration of the jury.

Defendants requested, and the court refused, an instruction to the effect that, if the overflow of the river, which resulted in the damage to plaintiffs, was caused "by reason of certain islands and sandbars in the river above or below said dam, and the bushes, trees, driftwood, and debris collected thereon, * * * or for any cause other than the dam of defendants," plaintiffs could not recover, and it is alleged that the action of the court in this behalf constitutes reversible error. It will be observed that the requested instruction includes "the sandbars" in the river above said dam. That is sufficient, without more, to justify the action of the court in refusing to give the instruction. The sandbars in the river above the dam were alleged to have been caused by the negligent operation or failure to operate the dam on the part of defendants. It constituted one of the elements of plaintiffs' cause of action, and the evidence tended to support the allegation. The instruction requested contained a material erroneous proposition, and the refusal to give it was proper. *Blackmore v. Neale*, 15 Colo. App. 49, 60 Pac. 952.

Moreover, it appears that all that was applicable and proper in the instruction refused was fully embraced in, and covered by, instruction No. 6 of the court's charge. While the court therein did not specifically mention sandbars, brush, trees, driftwood, rubbish, etc., it told the jury that, if they found from the evidence "that said overflow upon plaintiffs' land, if any, was caused * * * by obstructions in the river other than said dam, or by any cause other than said dam, then plaintiffs cannot recover." With this language in the charge, defendants are not in a position to complain. A party cannot complain of an instruction as favorable to him as the law and the facts warrant or justify.

The contention of defendants was that they had and maintained a permanent dam, and had so maintained it for 35 years, while the contention of plaintiffs was that the original dam constructed and maintained by defendants and their predecessors was of such material that it would readily wash out and not overflow the river; that the dam of 1883 built in its stead was supplied with flashboards that were operated in such manner as to prevent the overflow of the river and consequent injury to adjoining lands; and that the dam constructed in 1903 was likewise built with flashboards; but that defendants carelessly and negligently failed to properly handle or regulate the dam. Each side supported their respective contentions with evidence. The charge given by the court fully and fairly presented to the jury, for their determination, all the material issues in the case. The jury were evidently more impressed with the evidence upon the part of plaintiffs, and found accordingly. We cannot interfere with their verdict; their being ample evidence to sustain it.

It is urged that the refusal of the court to

permit the jury to visit and view the premises was prejudicial to the rights of the defendants. Section 188, *Mills' Ann. Code*, places the matter complained of entirely within the discretion of the court, and settles the matter against the contention of defendants. *Saint v. Guerrero*, 17 Colo. 448, 30 Pac. 335, 31 Am. St. Rep. 320.

The motion for a new trial set forth, as one of the grounds thereof, "that the verdict was a chance or quotient verdict." Affidavits of two of the jurors were filed in alleged support thereof, and that of the other four jurors in opposition thereto. Upon the matter as thus presented, the court refused to disturb the verdict. Section 217, *Mills' Ann. Code*, distinctly provides that such misconduct as alleged may be proven by the affidavits of the jurors. In *Pawnee Ditch, etc., Co. v. Adams*, 1 Colo. App. 250, 252, 28 Pac. 662, 663, speaking upon this subject, it is said: "The difficulties which juries experience in arriving at a conclusion in cases where the damages to be assessed are unliquidated, and to be measured by what may be gathered from the varying opinion of witnesses, have led the courts to permit these verdicts to stand whenever the proof has satisfied them that the finding has subsequently been voted on and accepted by the jury as the legitimate expression of their deliberations. In most cases very little proof in this direction has been required." Assuming, but not deciding, that the verdict in question would come within the legal definition of "chance or quotient verdict," we think the proof was sufficient to satisfy the mind that the finding was "voted on and accepted by the jury as the legitimate expression of their deliberations," and comes clearly within the rule announced.

But if the converse of this were true, defendants are in no position to urge the matter here. Neither the motion nor the affidavits filed therewith, in support thereof, or in opposition thereto, were embodied in the bill of exceptions, and, therefore, are not properly a part of the record. While section 60, *Mills' Ann. Code*, makes certain motions, and rulings or decisions thereon, part of the record, without making the same such by a bill of exceptions, it does not extend the rule to the matters here involved, and we are precluded from considering them. *Rutter et al. v. Shumway*, 16 Colo. 95, 26 Pac. 321; *Servant v. McCampbell*, 46 Colo. 292, 299, 104 Pac. 394; *Jordan v. People*, 19 Colo. 417, 423, 36 Pac. 218.

Several other contentions are presented by defendants for reversal of the judgment; some to instructions given, others to those requested, and refused, and some to the rejection and reception of evidence. The question of the sufficiency and fairness of the instructions given has heretofore been disposed of, and we do not consider it necessary to notice, in detail, the errors assigned upon the admission or rejection of evidence. We think the action of the trial court in these particu-

lars in no wise prejudiced the rights of defendants.

Upon a careful examination of the record, we are unable to find sufficient error to require a reversal of the judgment entered, and it is, therefore, affirmed.

Judgment affirmed.

STEELE, C. J., and BAILEY, J., concur.

(48 Colo. 4)

COLORADO SPRINGS & I. RY. CO. v. ALLEN.

(Supreme Court of Colorado. May 2, 1910.)

1. EVIDENCE (§ 598*)—WEIGHT AND SUFFICIENCY—NUMERICAL PREPONDERANCE.

A numerical preponderance of witnesses does not necessarily determine the issue.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2450-2452; Dec. Dig. § 598.*]

2. EVIDENCE (§§ 127, 268*)—DECLARATIONS.

In an action for injuries to a passenger, evidence of exclamations or complaints of present pain made several months after plaintiff was injured is not admissible as part of the *res gestæ*, but is admissible in support of the issues of the case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 377-382, 1061, 1062; Dec. Dig. §§ 127, 268.*]

3. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—REJECTION OF TESTIMONY.

In an action for injuries to a passenger alleged to have been caused by starting the car with a sudden jerk, plaintiff testified that the car started with a jerk, and several witnesses were permitted to testify that it was impossible for the car to start with a jerk as described by plaintiff, among them being the defendant's superintendent. *Held*, that sustaining an objection to a question to the superintendent whether he had ever known any of the cars of the company to start with a jerk was not prejudicial error as to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199; Dec. Dig. § 1057.*]

4. DAMAGES (§ 158*)—ACTION FOR INJURY TO PASSENGER—VARIANCE.

In an action for injuries to a passenger, plaintiff alleged that she was severely injured "in and upon her back and spinal column, that one of the vertebrae thereof was out of place and dislocated, thereby permanently injuring plaintiff," etc. One of the medical witnesses testified without objection that a skiagraph disclosed evidence of a fracture of one of the processes of the fourth lumbar vertebra. On cross-examination of the witness, more testimony on the subject was elicited, and, after a motion to strike was denied, still more testimony was brought out on cross-examination. The court in its instructions limited recovery to "such injuries as she has alleged in her complaint and which she may have proven she has sustained." *Held*, that the variance should be disregarded, defendant calling no medical witnesses and objecting to an exhibition showing the injured parts, and as a motion to amend to conform to the proof would have been granted, and there was no surprise or prejudice in support of a motion to strike, and the verdict for plaintiff was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 441-443; Dec. Dig. § 158.*]

5. TRIAL (§ 28*)—EXAMINATION OF OBJECTS BY JURY.

In an action for injuries to a passenger caused by starting a car with a sudden jerk, the defendant contended that an examination of one of the cars would show that the appliances used on the cars are such that it is impossible to start them with a sudden jerk, and requested that the jury be permitted to examine one of the cars. *Held*, that it was within the discretion of the court to refuse to allow the jury to examine the car.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 79; Dec. Dig. § 28.*]

6. CARRIERS (§ 280*)—ACTION FOR INJURIES TO PASSENGER—DEGREE OF CARE REQUIRED.

For the safety of their passengers common carriers are required to exercise the highest degree of care reasonably to be expected from human vigilance and foresight in view of the mode and character of the conveyance adopted, and consistent with the practical prosecution of their business.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1106, 1109, 1117; Dec. Dig. § 280.*]

7. TRIAL (§§ 252, 260*)—INSTRUCTIONS.

The court instructed in an action by a passenger for injuries that plaintiff was not entitled to recover unless she was in the exercise of reasonable and ordinary care at the time of the injury, and that, although the jury might find defendant guilty of negligence, plaintiff was not entitled to recover if she was also guilty of negligence directly contributing to the injury. There was no proof of contributory negligence. *Held*, that the rights of defendant were fully protected by the instruction, and that it was not error to refuse instructions upon the subject of contributory negligence in support of a theory of defendant that plaintiff had received her injuries because she negligently held on to the grab handle of the car after she had alighted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612, 651-659; Dec. Dig. §§ 252, 260.*]

8. NEW TRIAL (§§ 147, 150*)—AFFIDAVIT BY ATTORNEY—ACCIDENT AND SURPRISE.

The law requires that affidavits in support of an application for a new trial be made by the party, or a valid excuse offered for his not making them, and also requires that the best evidence be produced. *Held*, that the affidavit of defendant's attorney in an application for new trial, made in support of the claim of accident and surprise during the trial and for newly discovered evidence, is not the best evidence and is hearsay, and is insufficient where there is no showing of any reason for not filing the affidavit of the proposed witness.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 303-310; Dec. Dig. §§ 147, 150.*]

9. DAMAGES (§ 216*)—ACTION FOR INJURIES TO PASSENGER—INSTRUCTIONS—DAMAGES.

In an action for injuries to a passenger, plaintiff testified that, on one occasion after her injury, she started to pick up her grandchild, but could not do it, and that as a result of her injuries she was not able to go to her husband's office or to the ice cream parlors with her friends, as she formerly did. Plaintiff made no claims for damages because of her inability to do the things mentioned, and defendant requested no instruction limiting the recovery to mental suffering in connection with the pain. *Held*, that it was not error to instruct that the jury in arriving at the amount of the verdict might consider the nature and character of the injuries, mental and physical pain, if any, she had or would suffer, whether

such injuries were permanent or otherwise, provided such injuries had been pleaded by plaintiff in her complaint and proven by a fair preponderance of all the evidence introduced on the trial.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

Appeal from District Court, El Paso County; Louis W. Cunningham, Judge.

Action by Julia R. Allen against the Colorado Springs & Interurban Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

McAllister & Gandy, for appellant. Orr & Cunningham (H. M. Mason, of counsel), for appellee.

STEELE, O. J. From a judgment in the sum of \$6,000 in favor of the plaintiff the defendant appealed. The assignments of error are: (1) "The verdict and judgment in favor of plaintiff were unsupported by, and against, the great preponderance of the evidence in the case, and the court should have directed a verdict for the defendant." (2) "The court erred in admitting certain evidence offered by the plaintiff." (3) "The trial court erred in refusing to admit evidence offered in behalf of defendant." (4) "The court admitted evidence with respect to plaintiff's injury not authorized by the pleadings, there being a fatal variance between the allegations and the proof in this respect." (5) "The court below should have granted defendant's motion, made at the conclusion of the evidence, to allow the jury to inspect one of defendant's cars of the character upon which plaintiff claimed to have been riding, and to note its operation," etc. (6) "The court's instruction imposed too high a degree of care upon defendant, and it erred in refusing to instruct the jury upon this subject as requested by defendant." (7) "Defendant's requested instructions numbered 11 to 17, inclusive, should have been given." (8) "A new trial should have been granted, and the judgment should now be reversed, on account of newly discovered evidence."

The plaintiff alleged in her complaint: "That on the 6th day of July, 1904, this plaintiff was a passenger on one of the cars of the defendant, having gotten upon said car at the corner of Tejon street and Pike's Peak avenue on its line of road extending from the city of Colorado Springs westerly to the town of Colorado City at about the hour of 11:30 o'clock in the forenoon of said day, and, when said car had reached the corner of Sixth street and Colorado avenue, it stopped for the purpose of permitting passengers to alight. That plaintiff attempted to alight from the hind end of said car, and, while in the act of alighting, said car without notice or warning to plaintiff was by the defendant suddenly and negligently started, thereby giving the plaintiff a sudden and severe jerk,

inflicting the injuries hereinafter specified." We shall consider the assignments of error in the order in which they have been presented in the briefs of counsel.

1. While there were a greater number of witnesses who testified for the defendant than for the plaintiff, still the plaintiff's testimony supported the allegations of the complaint, and we are unwilling to say that the verdict is so manifestly against the weight of the evidence that it should be set aside.

2. Two or three of the witnesses offered on behalf of the plaintiff were asked (referring to the plaintiff): "Did she make any exclamations or complaints of any present pain?" Each witness interrogated answered the question in the affirmative. What the exclamation or complaint made was is not disclosed by the abstract. It is contended that this testimony was incompetent. The exclamations of present pain were made several months after the plaintiff was injured, and do not constitute any part of the *res gestæ*, but such testimony is admissible not as a part of the *res gestæ*, but in support of issues of the case. In determining whether the plaintiff was or was not suffering at that time, such exclamations were admissible for what they were worth. Such declarations may or may not be of great value, dependent entirely upon the circumstances of each case, but we think their admissibility is supported by the great weight of authority. 1 Greenleaf on Evidence, § 102; A., T. & S. F. R. R. Co. v. Johns, 36 Kan. 769. 14 Pac. 287, 59 Am. Rep. 609.

3. A witness, the superintendent of the defendant, was asked if he had ever known one of the cars of the company to start "with any manner of a jerk." The objection to the question was sustained. The defendant offered to prove that the witness had for a long time prior to July 6, 1904, been "familiar with the manner of starting these Maniton cars, and how they were started by the motormen, and that he never knew of a case where one of those cars was started with any manner of a jerk." The plaintiff had testified with respect to the jerking of the car, and had stated that it had started with a jerk. No witness appears to have seen the plaintiff at the time she is alleged to have received the injury, but several witnesses were permitted to testify that it was impossible for the car to start with a jerk as described by the plaintiff. If any error was committed by the court in rejecting this testimony, it was not prejudicial, for the witness had testified that it was impossible to start the car with a jerk.

4. The third paragraph of the complaint is "that, by reason of the facts hereinbefore alleged, plaintiff was severely and permanently injured in and upon her back and spinal column, that one of the vertebrae thereof was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

put out of place and dislocated, thereby permanently injuring plaintiff, and permanently injuring her nervous system, circulation, and general health, and impairing and destroying her ability to work, and that said injury has caused, and does cause, and will continue to cause, this plaintiff intense mental and physical pain and agony, and has rendered her a cripple for life." One of the medical witnesses testified that a skiagraph disclosed evidence to him of a fracture of one of the processes of the fourth lumbar vertebra. This testimony was received without objection. Plaintiff's counsel then sought to have the physician point out on a skeleton the particular bone that was injured, but, on objection by the defendant, the testimony was refused. On cross-examination more testimony on the subject was elicited. Then a motion to strike was interposed and denied. Then more testimony upon the same subject was brought out on cross-examination. The court read into its instruction the third paragraph of the complaint, and limited recovery to "such injuries as she has alleged in her complaint, and which she may have proven she has sustained." We are of opinion that the variance should be disregarded, because the substantial rights of the defendant were not affected. It appearing that all the testimony on the subject of a fracture was received without objection, or was brought out by the defendant on cross-examination; that the jury was directed to allow the plaintiff damages for such injuries only, as were pleaded and proved (the skiagraph was not offered in evidence); that no medical witness was produced by the defendant, and the defendant objected to an exhibition showing the injured parts; that a motion to amend to conform to the proof would have been granted, there being no contention of surprise or prejudice in support of the motion to strike; that by the verdict the plaintiff was awarded damages in the sum of \$6,000 only; that the physicians who attended her, all testified to her present inability to completely control her lower limbs, and that her condition at the time of the trial was worse than at the time she received her injuries; that the prognosis of those who were asked to venture an opinion was that she would not recover—we are unwilling to set aside the verdict and require the plaintiff to undergo the expense and tedium of another trial, no grave and prejudicial error appearing in the record.

5. Complaint is made that the court refused to permit the jury to examine one of the cars of the company, and witness its operation, it being contended that this would show that the appliances now used upon these cars are such that it is impossible to start them with a sudden jerk. These matters are within the discretion of the court, and we cannot say that the court abused its discretion in its refusal to permit the jury to witness the operation of one of the cars.

6. It is claimed that the court in its instructions imposed too high a degree of care upon the defendant. This court, in the case of the Colo. & Southern Ry. Co. v. McGeorge, 46 Colo. 15, 102 Pac. 747, has declared that: "For the safety of their passengers common carriers are required to exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted and consistent with the practical prosecution of their business." We find nothing in the instructions that holds the appellant to a higher degree of care than is imposed upon common carriers of passengers by the law as declared in the case here cited.

7. With respect to certain instructions refused, appellant has this to say: "Plaintiff's evidence relative to the manner of the accident was so indefinite and inconsistent as to warrant the court in assuming that, if the same occurred at all, it must, or at least might, have been due to the plaintiff's attempting to alight while the car was in motion, holding on to the grab handle of the car after she had alighted, etc. While there was no direct evidence that the plaintiff did this, nevertheless, it was far more consistent with the theory of her having received any injuries at all, than was the version which she gave of the accident. This being true, the defendant offered a number of instructions upon the subject, all of which were refused." There is no rule of law with which we are familiar which requires the giving of instructions upon the theory advanced by defendant, here. The court instructed that the plaintiff was not entitled to recover unless at the time of the injury she was in the exercise of reasonable and ordinary care and caution, and that, although the jury might find the defendant guilty of negligence which contributed to the injury, the plaintiff was not entitled to recover if she also was guilty of negligence directly contributing to the injury. There was no proof that the plaintiff was guilty of contributory negligence, and it is our opinion that the rights of the defendant were fully protected by the instructions given.

8. The motion for a new trial was supported by the affidavit of the attorney for the defendant. The affidavit is in support of the claim of accident and surprise during the trial and the offer to produce newly discovered oral evidence. The law requires such affidavits to be made by the party or a valid excuse offered for his not making it. The law also requires the best evidence to be produced—the affidavit of the attorney is not the best evidence, it is hearsay—and there was no showing of a valid or any reason for not filing the affidavit of the proposed witnesses.

In support of the oral argument our attention is especially directed to the case of Diamond Rubber Co. v. Harryman, 41 Colo. 415, 92 Pac. 922, as bearing upon instruction No. 12 given over the objection of defendant.

The court instructed the jury that, "in arriving at the amount of your verdict, you may take into consideration the nature and character of the injuries, the mental and physical pain, if any, she has suffered, or will suffer as the proximate result of such injuries, whether such injuries are permanent or otherwise, providing such injuries and suffering have been plead by plaintiff in her complaint, and proven by a fair preponderance of all the evidence introduced on the trial." And counsel say that as the plaintiff had testified that on one occasion after her injury "she started to stoop to pick up her grandchild, but could not do it, * * * and also that as the result of her alleged injuries she was not able to go to her husband's office or to the ice cream parlors with her friends as she formerly did. * * *

The court's instruction No. 12 was sufficiently broad to authorize the jury to compensate the plaintiff for the mental suffering occasioned by the thought that she was not able to fondle her grandchild, etc., as she was theretofore able to do." The plaintiff made no claims for such damages nor did the defendant request an instruction limiting her recovery to mental suffering connected with the pain. In the *Harryman Case* the instructions authorized a recovery for "mental suffering arising from disfigurement of person," and the case was reversed because that instruction was given. In the case *Tramway Co. v. Martin*, 44 Colo. 325, 98 Pac. 836, an instruction which authorized a recovery for mental suffering where it occurs in connection with a bodily injury (the court holding that the law does not separate the two, but allows a recovery for both) was sustained.

We find nothing in the record to warrant us in reversing the judgment, and it is therefore affirmed.

Judgment affirmed.

CAMPBELL and MUSSER, JJ., concur.

(48 Colo. 79)

VINSONHALER v. PEOPLE.

(Supreme Court of Colorado. May 2, 1910.)

1. MUNICIPAL CORPORATIONS (§ 111*)—ORDINANCES—INVALIDITY IN PART.

Even if the part of an ordinance authorizing imprisonment as a penalty for its violation be without the power of the town to enact, the rest of the ordinance, providing as a penalty a fine of \$300, being complete in itself, and in no manner dependent on the void part, will be sustained.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 248; Dec. Dig. § 111.*]

2. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR.

Defendant was not prejudiced by admission in evidence of an ordinance which authorized the jury only to assess a fine of \$300 for its violation, while the ordinance as passed pro-

vided in the alternative a penalty of imprisonment not exceeding 90 days.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

Appeal from Larimer County Court.

F. C. Vinsonhaler appeals from a conviction. Affirmed.

Rhodes, Temple & Foster, for appellant. Carlson & Fleming, for the People.

GARBERT, J. Appellant was convicted of violating an ordinance of the town of Wellington. The cause was tried to a jury, with the result that he was found guilty, and a fine of \$300 assessed by the jury. No question is raised regarding the authority of the jury to assess the fine, which was afterwards imposed by the court. At the trial counsel for appellant objected to the introduction of the ordinance under which he was being proceeded against upon grounds among which was one to the effect that it was void because it contained provisions not within the power of the town to enact. The provisions referred to related to the penalties prescribed for its violation as embraced in section 2, which is as follows: "Any person who shall in any manner violate any of the provisions of this ordinance shall, upon conviction thereof, be fined for each offense three hundred dollars, or imprisoned in the town jail or county jail not more than ninety days."

The court ruled that the provision relating to imprisonment was beyond the power of the town authorities to enact, but held that this defect did not invalidate the provision relating to a fine. With the imprisonment clause eliminated, the ordinance was admitted in evidence over the objection of appellant. His counsel here say that under the assignment of errors the only question to consider is whether the ordinance, as passed, recorded, and published, was the ordinance introduced in evidence in this case after the court had eliminated the imprisonment provision. In support of this contention, their argument is to the effect that when the authorities of the town of Wellington passed the ordinance in question, and had it recorded and published as provided by statute, the court on the trial of the cause had no authority to eliminate a part of it and admit what remained as the ordinance of the town, for the reason that the ordinance as passed, recorded, and published was the only authority upon which an action for its violation could be based. The ground upon which the trial court eliminated the imprisonment clause was that the town authorities had no power to provide for such a penalty. Whether or not this ruling was correct is immaterial. In construing statutes it has often been determined that the fact that a part of a statute is unconstitutional does not vitiate the part which is good, if the good and bad can be clearly sep-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

arated. *Carpenter v. People*, 8 Colo. 116, 5 Pac. 828. This rule applies when the portion of the statute remaining after the void portion is stricken is complete within itself, and does not depend upon the part eliminated. *People ex rel. v. Hall*, 8 Colo. 485, 9 Pac. 34.

An ordinance, like a statute, may be valid in part and void in part, and the rule applicable when void only in part is the same as in the construction of statutes under similar circumstances. *City of Durango v. Reinsberg*, 16 Colo. 327, 26 Pac. 820. In the case at bar the ordinance was complete within itself after the provision relating to imprisonment was stricken out, and that which remained was in no manner dependent upon the part eliminated.

It is also urged by counsel for appellant that he was entitled to the exercise of the sound discretion of the jury as to the penalty to be inflicted upon him, of which right he was deprived by the admission of the ordinance without the alternative clause. It may be doubtful, as suggested by counsel for appellee, whether appellant can have this question considered, or the one previously discussed, for the reason that the ruling of the trial court was the result of appellant's attack upon the ordinance; and hence the rule to the effect that a party cannot complain of an error which he invites would be applicable; but, waiving this, it is clear that appellant was not prejudiced. The ordinance as introduced under the ruling of the trial court only provided for a fine. As passed, it provided in the alternative for imprisonment. Certainly appellant was not prejudiced in being found guilty of violating an ordinance where in the penalty imposed was limited to a fine, instead of one where the penalty in the alternative could have been imprisonment. Nonprejudicial error will not work a reversal on appeal.

The judgment of the county court is affirmed.

Judgment affirmed.

STEELE, C. J., and BAILEY, J., concur.

(48 Colo. 47)

CARL v. NORTHCUTT.

(Supreme Court of Colorado. May 2, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 221*)—CLAIMS—EVIDENCE.

Where, in proceedings to establish a claim against a decedent's estate for services rendered, the evidence of the quality and amount of the services was indefinite, and there was no evidence of the value of the services, no part of the claim could be allowed.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 901-903½, 1858-1876; Dec. Dig. § 221.*]

2. SPECIFIC PERFORMANCE (§ 86*)—CONTRACTS ENFORCEABLE.

Where a decedent promised for a valuable and adequate consideration to make a will in favor of one of an undivided half interest in

real estate and then failed to do so, the remedy was to sue for specific performance of the contract, and not for the services rendered constituting the consideration.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 223, 224; Dec. Dig. § 86.*]

Error to District Court, Washington County; E. E. Armour, Judge.

Proceedings by E. S. Carl to establish a claim against the estate of Michael Enright, deceased, in which R. H. Northcutt was administrator. There was a judgment of dismissal, and claimant brings error. Affirmed.

L. W. Newby and Albert Dakan, for plaintiff in error. W. S. Morlan, for defendant in error.

BAILEY, J. Plaintiff in error filed a claim for \$2,500.00 with the county court of Washington county, against the estate of Michael Enright, for services rendered and care given to him in his lifetime, through a period of four years and eight months. Upon this claim the county court allowed the sum of \$143.40, from which allowance there was an appeal to the district court of the county. Trial was had before that court with a jury. At the close of the testimony of the claimant the judge instructed a verdict for the estate, and entered a judgment of dismissal thereon. To review this judgment plaintiff in error brings the case here.

The verdict directed by the district court was right. The evidence offered to show the quality and amount of service was meager, indefinite and unsatisfactory. Not a vestige of evidence was introduced to establish the worth of that service, whatever it may have been. In a total absence of such testimony no part of the claim could properly be allowed.

Some testimony, all of an uncertain and halting character, was introduced tending to show that deceased, some time prior to his death, had promised to remember claimant in his will, for the kindness and consideration that he and his wife had extended him during his lifetime. This testimony tended to show that the deceased had in his mind the purpose, by way of gift, to leave to plaintiff in error the undivided one-half interest which he had in the house, and ground upon which it stood, at Longmont, Colo., then occupied jointly by deceased and the claimant and his family, such interest being of the value of about \$2,375. The testimony indicates that this was in contemplation by deceased purely as a voluntary matter. If, however, as is contended, the promise on the part of deceased was supported by a valuable and adequate consideration, then the cause of action of plaintiff in error, if any, was for specific performance of that contract, and not for services rendered. The proof offered is in hopeless

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

variance with the claim as made, and not only does not support it, but does not tend to do so. The judgment is affirmed.

Judgment affirmed.

STEELE, C. J., and MUSSER, J., concur.

(48 Colo. 25)

MITCHELL et al. v. TURLEY et al.

(Supreme Court of Colorado. May 2, 1910.)

1. JUDGMENT (§ 252*)—ISSUES—PRAYER.

The court will award any relief to which plaintiff's pleadings and proof entitle him, regardless of the prayer embodied in his complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442; Dec. Dig. § 252.*]

2. APPEAL AND ERROR (§ 1041*)—HARMLESS ERROR—AMENDMENTS TO PLEADINGS.

Where the judgment rendered could have been rendered on the facts alleged in the original pleading, the defeated party could not complain of the allowance of an amended pleading embodying the same facts together with others on which the judgment was based, the error, if any, not affecting his substantial rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041.*]

Appeal from District Court, City and County of Denver; Booth M. Malone, Judge.

Action by W. C. Mitchell and another against J. W. Turley and others, who filed a cross-complaint. From a judgment granting the relief prayed for in the cross-complaint, plaintiffs appeal. Affirmed.

Schuyler & Schuyler and Robert S. Ellison, for appellants. Hood & McLean, for appellees.

WHITE, J. The principal objection urged for a reversal of the judgment in this cause is an alleged departure in pleading. A cross-complaint, based upon the alleged fraud and deceit of appellants practiced upon appellee Turley, was filed and the cause heard thereon. Thereafter, and before judgment, an amended cross-complaint was filed by Turley in which the same matters were set forth, and much in addition thereto, which, if proven, would warrant the rescission of a contract entered into between the appellee and one of the appellants acting through the other. The prayer of the amended cross-complaint was for a rescission of the contract, and judgment in the same sum as prayed for in the cross-complaint. The judgment is silent as to the rescission of the contract, but awards damages in favor of the cross-complainant. We are not concerned with the names which counsel assign to actions, nor with the relief which they ask. "In our system of procedure, courts award any relief to which plaintiff's pleadings and proof entitle him, regardless of the prayer embodied in his complaint." *Ross v. Purse*, 17 Colo. 24, 27, 28 Pac. 473.

The facts set forth in the cross-complaint

stated a cause of action against appellants, and, as the judgment that was entered could have been rendered upon the facts as stated in the cross-complaint, appellants cannot complain that thereafter another cross-complaint, embodying the same facts, together with others, was filed over their objections, upon which the judgment was based. If error at all, it was error without prejudice. Moreover, we have carefully examined the record, fully considered the briefs and argument of counsel, and find that the substantial rights of appellants have not been disregarded. It appears that substantial justice was done by the judgment, and it is therefore affirmed. *Ward v. Goodrich*, 46 Colo. 352, 104 Pac. 1134.

Judgment affirmed.

STEELE, C. J., and BAILEY, J., concur.

(48 Colo. 34)

CHAFFEE v. WIDMAN et al.

(Supreme Court of Colorado. May 2, 1910.)

1. APPEAL AND ERROR (§ 435*)—MODE OF REVIEW—MISTAKE—EFFECT.

Where an appeal is erroneously taken from a judgment reviewable only on writ of error, and the successful party enters an appearance in the Supreme Court, the cause will be entered as pending on a writ of error, as authorized by Code, § 388a and reviewed, but if no appearance is entered, the appeal may be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2184-2190; Dec. Dig. § 435.*]

2. BROKERS (§ 48*)—RIGHT TO COMMISSIONS—PERFORMANCE OF ENGAGEMENT.

A real estate broker to recover commissions must have produced a person ready, willing, and financially able to purchase the property at the price and on the terms and conditions fixed by the seller, and must have been the procuring cause of the sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 65; Dec. Dig. § 48.*]

3. BROKERS (§ 56*)—RIGHT TO COMMISSIONS—CONTRACT—ABANDONMENT.

Where a broker opened negotiations for the sale of a ranch, and a contract entered into was abandoned without the seller's fault, and after the broker's contract of employment had expired by limitation the owner sold the property to the broker's former customer and another without further effort on the broker's part, the owner was not liable to the broker for commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 85-89; Dec. Dig. § 56.*]

4. BROKERS (§ 82*)—ACTION FOR COMMISSIONS—ISSUES AND PROOF.

Where a broker sought to recover commissions pursuant to a sale made by the owner to the broker's customer and another after the customer had abandoned the contract made by the broker, and after the broker's contract of employment had expired, the broker could not recover on the theory that he had completed his employment contract, and was entitled to commissions when the original binding contract with this purchaser had been completed.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 103; Dec. Dig. § 82.*]

Error to District Court, Rio Grande County; Chas. C. Holbrook, Judge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by A. E. Chaffee against John Widman and another. From a judgment for defendants, plaintiff brings error; and, defendants having appeared, the cause was allowed entered as pending on a writ of error, and affirmed.

C. M. Corlett, for plaintiff in error. Jas. P. Veerkamp, for defendants in error.

GABBERT, J. Chaffee, as plaintiff, brought suit against Widman & Widman, as defendants, to recover the amount of commissions which he and one Ambler claimed to have earned in effecting a sale of land belonging to the Widmans. The trial resulted in a verdict and judgment in favor of defendants, from which plaintiff appealed to this court.

We have no jurisdiction to entertain the appeal (section 388, Civ. Code; as amended, Sess. Laws 1907, p. 278) but as the defendants have entered an appearance, we have directed, by virtue of section 388a of the Code, that the cause be entered as pending on error, and shall consider it accordingly. The Code provisions to which we have referred provide when the defeated party may appeal to this court, and they should be observed. If a case is appealed which is not appealable, and the appellee does not enter an appearance, the appeal may be dismissed, and thus the party seeking to have a case reviewed in this court may lose his right to a review. *Brady v. People*, 45 Colo. 364, 101 Pac. 340. We mention this for the reason that recently so many cases have been brought here on appeal which are not appealable, and can only be reviewed on error.

Numerous errors are assigned by counsel for plaintiff; but, as the undisputed testimony establishes a state of facts from which it is apparent plaintiff was not entitled to recover a commission from the Widmans, it is only necessary to discuss that phase of the case.

Plaintiff lived in the state of Nebraska. He entered into an arrangement with a firm engaged in the real estate business in the San Luis valley, under the name of the Southern Colorado Land Company, by which he was to be allowed a share of the commissions earned by the land company in effecting sales to parties whom he secured to purchase lands this firm had listed. Ambler above named was a member of this firm. In the spring of 1903 plaintiff brought Halsey L. Hawkins and Donald A. Gove to the valley for the purpose of selling them land. Accompanied by a member of the Southern Colorado Land Company these prospective purchasers and plaintiff visited the Widman ranch. Prior to this Thomas G. Hawkins, who also lived in Nebraska, and was the father of Halsey L., had visited the ranch in question and obtained from the owners the price at which they would sell. Through plaintiff and his associates, constituting the Southern Colorado Land Company, such negotiations were had that the Widmans agreed

to sell for \$20 per acre, or \$16,000 for the ranch. Thereupon a written agreement was entered into between the Widmans and Thomas G. and Halsey L. Hawkins (the latter representing his father) by the terms of which the Widmans agreed to sell to the Hawkinses for the sum of \$16,000; \$500 being paid in cash, one-half of the remainder to be paid on or before March 1, 1904, at which time a note of the purchasers for the remainder of the purchase price secured by mortgage on the premises was to be executed, and the transaction closed. (Perhaps it is not entirely clear from the record whether the elder Hawkins was in Colorado at this time, but that is of no material moment.) On the same day this contract was made the Widmans entered into a written agreement with plaintiff and his associates, the members of the firm of the Southern Colorado Land Company, regarding commissions. In this agreement the Widmans were designated parties of the first part and Chaffee and his associates parties of the second part. In stating the terms of this agreement, we shall, for convenience, refer to them accordingly. By this agreement the Widmans employed the parties of the second part to procure a purchaser for the ranch in question for the sum of \$16,000. It then provides, so far as material to any question involved in this case, that "if the parties of the second part procure a purchaser for the ranch who shall, on or before March 1, 1904, pay or secure to the parties of the first part the sum of \$16,000" then the Widmans should pay the parties of the second part as commissions certain sums, and execute certain notes to the respective parties of the second part, aggregating \$3,200. The contract further provides that should the parties of the second part fail to procure a purchaser for the lands for the sum and within the time specified, then no commission is to be paid. Such unquestionably is the purport and meaning of the contract, although not so stated in express words. It was on this contract that plaintiff based his cause of action declared upon in his complaint, in which he gave it the construction as to time within which he was to secure a purchaser we have given it. He then alleges in his complaint that, in pursuance of his employment as evidenced by the contract, he and his associates procured Thomas G. Hawkins and Donald A. Gove on or before March 1, 1904, to open negotiations with the Widmans to purchase their ranch, with the result that on the 18th of that month a deal for the premises was consummated in accordance with the terms and conditions of the contract upon which he bases his right to a recovery. He alleges that Ambler has assigned to him his share of the commission under this contract.

It is evident the parties entered into this agreement in expectation that the contract which the Hawkinses entered into with the

Widmans would be carried out, and the commissions provided were based upon this contingency; and, while it may be true that plaintiff and his associates would have been entitled to recover the compensation provided for in the event they procured some other purchaser for the lands within the time limited, and upon the terms specified this is evidently the theory upon which the complaint was framed, it becomes important to consider what follows, as it demonstrates beyond question that plaintiff failed to make the case declared upon in his complaint. In January, 1904, he returned to Colorado evidently satisfied that it was doubtful if the Hawkinses would be able to purchase the ranch. He had a conversation with one of the Widmans (a brother of the defendants), in which he asked him to assist in pushing the deal through before the contract expired, and requested that it might be extended beyond March 1st, in order to give him an opportunity to interest someone else in the purchase of the ranch. It does not appear that the request to extend the contract was granted, or that the defendants were requested to extend it. In the meanwhile, before it had expired, the Widmans urged plaintiff and one of his associates to complete the sale. They were not successful, and the result was that the Hawkinses surrendered their contract. It does not appear that the Widmans or any one else was responsible for this result, except that it was caused by the inability or refusal of the Hawkinses to consummate the purchase under their contract. Shortly after the time when this contract expired, one William A. Gove, who also lived in Nebraska, came to Colorado to look after a ranch he had purchased in the valley. While in Monte Vista he met another real estate firm, known as Graves, Ahrens & Blakey. Blakey had been one of the members of the firm known as the Southern Colorado Land Company, but it had been dissolved. Graves & Co. endeavored to interest Gove in the Widman ranch, and to this end called in one of the Widmans, who offered to sell the ranch for \$15,000 on terms, with respect to deferred payments, much more favorable than those embraced in the contract with the Hawkinses. The proposition of Widman to sell was reduced to writing, and Gove carried it to Nebraska, and delivered it to Thomas G. Hawkins. The latter wrote a letter to one of the Widmans, saying he was unable to accept it. Not long after, Hawkins met Donald A. Gove, who, it will be remembered, was in Colorado when the contract between the Hawkinses and the Widmans was executed. He succeeded in interesting this Mr. Gove. He stated that if he (Hawkins) could get the ranch on the terms submitted by Widman, as embraced in the proposition delivered to William A. Gove, he would go in with him and make the purchase. Accordingly

Hawkins wired Widman that he had reconsidered his letter declining to accept the proposition submitted him, and that he would come out and close the deal. A short time afterwards Hawkins and Gove came to Colorado and purchased the ranch. This was about March 18, 1904. On this transaction the Widmans paid Graves and his associates a commission of \$1,600.

The general rule applicable to the case at bar is that in order for a real estate broker to be entitled to commission he must have accomplished all that he undertook to do under his contract of employment; that is to say, he must have found and produced a person who was ready, willing, and financially able to purchase the property which he was engaged to sell at the price and upon the terms and conditions fixed by his employer, and must make it appear that he was the efficient agent or procuring cause of the sale, and that the means employed by him and his efforts resulted in a sale. *Wheeler v. Beers*, 45 Colo. 547, 101 Pac. 758; *Lawrence v. Weir*, 3 Colo. App. 401, 33 Pac. 648; *Babcock v. Merritt*, 1 Colo. App. 84, 27 Pac. 882; *Cole v. Thornburg*, 4 Colo. App. 95, 34 Pac. 1013; *Geiger v. Kiser*, 107 Pac. 207; 23 Ency. 914. Thus tested, it is apparent that plaintiff was not entitled to a commission on the transaction declared upon. His contract of employment had expired by limitation, when the Widmans again began negotiations for a sale of their ranch. The contract of the Hawkinses with the Widmans had been abandoned at this time, and he was in no sense instrumental in bringing about the subsequent negotiations which finally culminated in a sale. They were begun and successfully carried to a termination by different parties, after the Hawkins contract had been abandoned and the contract in which plaintiff was interested had expired. The only circumstance upon which plaintiff could base any semblance of a right to a recovery is that Thomas G. Hawkins, one of the purchasers, was a party to the original contract entered into with the Widmans; but, as we have seen, this contract was abandoned, and, so far as disclosed by the record, without any collusion between the Widmans and the Hawkinses or bad faith on their part. When a broker opens negotiations, but fails to bring the prospective purchaser and owner together, and they are abandoned without fault of the owner, and the latter subsequently sells to the same party, without further effort on the part of the broker, the owner is not liable to the broker for commissions.

It is said in the brief of counsel for plaintiff that it is not disputed that a binding contract was entered into between the Hawkinses and the Widmans. It is also said that where a binding contract is entered into, and it is found that the purchaser is unable to comply with the terms thereof, the purchaser is liable for commission at the suit of the agent. If we concede that by these claims it

is meant to say that by the contract the Hawkineses agreed to purchase and the Widmans to sell their ranch, and the latter could have enforced it, and is therefore liable under the commission contract, even though the Hawkineses refused to purchase, it cannot avail plaintiff. He did not declare upon the Hawkins contract in his complaint, but on an entirely different transaction. A plaintiff must stand or fall by the case stated in his complaint. If he fails to establish the case thus stated, he cannot recover upon another.

According to the facts established by the undisputed testimony, plaintiff failed to establish a case; and it is not necessary to discuss the other questions urged upon our attention by his counsel.

The judgment of the district court is affirmed.

Judgment affirmed.

STEELE, C. J., and WHITE, J., concur.

(48 Colo. 54)

CITY AND COUNTY OF DENVER v
KEELER.

(Supreme Court of Colorado. May 2, 1910.)

1. TAXATION (§ 679*)—SALE FOR TAXES—PURCHASE BY CITY OR TOWN.

The laws of this state have never authorized a city or town to buy in property at sales for general taxes, though such power is vested in counties by Mills' Ann. St. § 8383, and Mills' Ann. St. Rev. Supp. § 3924w.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362; Dec. Dig. § 679.*]

2. TAXATION (§ 509*)—SALE FOR TAXES—QUIETING TITLE OF PURCHASER.

The city and county of Denver, by invoking the authority granted by section 60 of the "Denver Charter" (Laws 1893, c. 78, art. 7), to bid in property sold for a sewer assessment, is bound by all the limitations of the act applicable to such sale, and as section 32 expressly subordinates special assessments to general taxes, a judgment quieting the title of the holder, under a deed arising from nonpayment of general taxes levied subsequent to the assessment under which the city claimed the property as a purchaser, was right.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 943-945; Dec. Dig. § 509.*]

Appeal from District Court, City and County of Denver; Booth M. Malone, Judge.

Suit by Walter E. Keeler against the City and County of Denver. From a judgment for plaintiff, defendant appeals. Affirmed.

H. A. Lindsley and F. W. Sanborn, for appellant. F. A. Williams, for appellee.

WHITE, J. Walter E. Keeler instituted this suit against the city and county of Denver, a municipality, to quiet title to certain lands in his possession, situate in that portion of the said municipality which was formerly the city of Highlands. The trial court found the issues in favor of the plaintiff, and gave judgment accordingly. The defendant brings the case here on appeal.

June 29, 1894, the city of Highlands, a municipal corporation, by an ordinance duly enacted, levied a special assessment on the property in controversy, for its proportionate share of the cost of the construction of a sanitary sewer in a certain district created in, and by, said city. No attempt to enforce the collection of the assessment in any manner was made by the city of Highlands. July 24, 1896, that municipality was annexed to, and absorbed by, the city of Denver. No effort was made by the city of Denver to collect the said sanitary sewer tax, however, until 1901, when it certified said assessment to the county treasurer for collection. The special tax or sewer assessment remaining unpaid, the county treasurer sold the lands in question on November 23, 1901, to the city of Denver, and delivered to it a certificate of purchase. The city of Denver subsequently became, and now is, the city and county of Denver. Article 20, Const. In 1899 the usual annual levies were made, by the proper authorities, for city, school, county, and state taxes, upon the property in question for said year, and were duly certified to the county treasurer for collection. Such taxes remaining unpaid, the property was advertised, and on November 13, 1900, sold for the general taxes of 1899. December 9, 1904, no redemption having been made from this sale, a tax deed of the property was duly issued to the purchaser, who thereafter conveyed the property to the appellee herein. As to the legality of the proceedings resulting in the tax deed under which appellee claims, and the certificate of sale upon which appellant's rights are based, there is no controversy. It is likewise conceded that the special assessment made by the city of Highlands became, by the act of annexation, an asset of the city of Denver, and whatever power exists to enforce collection thereof was transferred to the latter municipality, and finally vested in the appellant. *Sess. Laws 1893, § 10, p. 455; section 3, p. 135.*

Appellee contends that the lien created by the city of Highlands by virtue of the assessment levied in 1894 for said sewer construction was divested, extinguished, and annulled by the tax deed issued in December, 1904, based upon the sale in November, 1900, for the nonpayment of the general taxes of 1899. Appellant, on the contrary, asserts that when the grantor of appellee received his certificate of sale, and deed based thereon, he took the estate conveyed subject to the right or interest of the appellant, the city and county of Denver, in and to said lands, evidenced by the certificate of sale of November, 1901, for the nonpayment of the sewer assessment levied by the city of Highlands in 1894. The view which we entertain of the matter in controversy renders it unnecessary to follow counsel in the discussion of the comparative

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

rank of tax liens, and tax titles, created by the state through its several political subdivisions, either for or through general governmental purposes or special assessments. Whether the later tax is always the prior lien, or the general tax superior to a special assessment, is not involved in this case.

The laws of this state have never authorized a city or town to buy in property, at tax sales, for general taxes, though such power is vested in counties. Mills' Ann. St. 3888; Mills' Ann. St. Rev. Supp. § 3924w. For was the city of Highlands, nor any municipality of its class, ever invested with the power to purchase, or cause to be purchased on its behalf, property sold for the purpose of paying special assessments imposed for local improvements. The authority to bid in property sold for the nonpayment of special assessments for local improvements, exercised by appellant, is given by section 60, Sess. Laws 1893, p. 224, known as the "Denver Charter." By invoking the authority granted by this provision, and becoming the purchaser at the sale, the appellant became, and is, bound by all the limitations of the act applicable to such sales. Section 32 of said charter (Sess. Laws 1893, p. 213) expressly subordinates special assessments to general taxes. That section declares: "All assessments made in pursuance of this article shall be a lien in the several amounts assessed against each lot or tract of land, and shall have priority over all other liens, excepting general taxes." Having invoked the provisions of the charter, in order to have the land bid in for the city, the appellant, a legal effect, took and holds the certificate of purchase, upon the sale of the land for the nonpayment of the special assessment, as though there were written in the certificate the words of the statute subordinating such liens to those for general taxes. Appellee holds under a deed arising from the nonpayment of a general tax, levied subsequent to the special assessment under which appellant claims.

It is therefore clearly evident that the judgment appealed from is right, and it is therefore affirmed.

Judgment affirmed.

STEELE, C. J., and BAILEY, J., concur.

Colo. 49)

JAKWAY v. RIVERS.

Supreme Court of Colorado. May 2, 1910.)

JUSTICES OF THE PEACE (§ 44*)—JURISDICTION—AMOUNT IN CONTROVERSY—REPLEVIN.

In determining the value of personal property involved in a replevin suit commenced before a justice of the peace on the question of jurisdiction, the value stated in the affidavit of replevin must be looked to.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 163; Dec. Dig. § 44.*]

2. JUSTICES OF THE PEACE (§ 141*)—JURISDICTION—AMOUNT IN CONTROVERSY.

In replevin on appeal to the county court, where there is no testimony of plaintiff or claim made by him that the property involved was worth more than set out in the affidavit, and he did not claim damages which would make his claim in excess of the jurisdiction of the justice, that plaintiff testified that he had been damaged by defendant's possession of the property prior to commencement of the suit would not affect the question of jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 473; Dec. Dig. § 141.*]

3. APPEAL AND ERROR (§ 1094*)—REVIEW—FINDINGS.

Findings of fact on conflicting evidence by the county court on appeal from a justice court in a replevin suit that the amount in controversy was within the justice's jurisdiction, and that the ownership and right of possession of the property was in plaintiff, will not be disturbed on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4322; Dec. Dig. § 1094.*]

4. REPLEVIN (§ 69*)—ADMISSIBILITY OF EVIDENCE.

In replevin, where the defense was that defendant owned the property, testimony to show that it belonged to a third person was properly excluded.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 257-279; Dec. Dig. § 69.*]

5. APPEAL AND ERROR (§ 204*)—REVIEW—EVIDENCE ADMITTED WITHOUT OBJECTION.

Though evidence should not have been admitted because incompetent on a certain ground, its reception will not be reviewed in the absence of objection on such ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.*]

6. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—RESTRICTION OF CROSS-EXAMINATION.

Where a witness testifying as to a book entry admitted that it was made long after the transaction, error in restricting his cross-examination, which would simply have gone to such fact, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

7. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS.

A finding on conflicting evidence that there was immediate delivery and continued change of possession of property sold will not be disturbed on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

8. TRIAL (§ 393*)—WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW—DUTY OF COURT.

The trial court is not obliged to make written findings of fact and conclusions of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 922; Dec. Dig. § 393.*]

9. APPEAL AND ERROR (§ 169*)—REVIEW—QUESTIONS NOT RAISED IN TRIAL COURT.

Questions not presented in the trial court cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1013-1034; Dec. Dig. § 169.*]

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

10. TRIAL (§ 367*)—TRIAL BY COURT—CREDIBILITY OF WITNESSES.

In a trial to the court it is the judge's province to determine the credibility of the witnesses and from all the evidence to make such findings of fact as in his judgment the testimony establishes.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 367.*]

Error to La Plata County Court; Chas. A. Pike, Judge.

Action by Frank L. Rivers against L. O. Jakway. Judgment for plaintiff, and defendant brings error. Affirmed.

P. G. Ellis, for plaintiff in error. Chas. A. Johnson, for defendant in error.

GABBERT, J. Defendant in error, as plaintiff, instituted an action in replevin before a justice of the peace against plaintiff in error, as defendant, to recover the possession of a team, wagon, harness, and log chain. What the outcome of the case was before the justice of the peace does not appear. The case was appealed to the county court, where it was tried before the court de novo without the intervention of a jury, with the result that judgment was rendered in favor of plaintiff, adjudging him to be the owner and entitled to the possession of the property in controversy, and that its value was the sum of \$265. The defendant brings the case here for review on error.

The first error assigned is that the court below erred in trying and deciding the case, as it does not appear it had jurisdiction. This assignment is based upon the ground that the value of the property involved was in excess of the sum of \$300, the jurisdiction of the justice of the peace before whom the suit was originally commenced. The affidavit filed by plaintiff before the justice fixed the value of the property at \$295. In determining the value of personal property involved in a replevin suit commenced before a justice of the peace, we must look to the value stated in the affidavit of replevin. From this source in the case at bar it appears the justice had jurisdiction. There was no testimony on the part of plaintiff, or claim made by him, that the property involved was worth more than set out in the affidavit of replevin, nor did he claim damages which would make his claim in excess of the jurisdiction of the justice of the peace. It is true that on cross-examination he was asked whether or not he had been damaged on account of the defendant's possession of the property prior to the time when the suit in replevin was commenced, to which he answered in the affirmative; but as he made no claim on this account, and no judgment was rendered in his favor for damages, the fact that this testimony was brought out on cross-examination is not material on the question of jurisdiction.

It appears defendant sought to show that the property replevined was worth more than the amount mentioned in the affidavit. He did introduce testimony to this effect, and for that reason claims the case should have been dismissed by the county court. Whether the question of jurisdiction could be raised in this way is not necessary to determine. The court found the value of the property to be \$265, and on conflicting testimony this finding will not be disturbed.

As we understand the next proposition urged by counsel for the defendant, it is to the effect that the testimony established the ownership and right of the possession of the property in controversy in him. That was the issue before the court. The evidence bearing thereon was conflicting. The finding was in favor of plaintiff, and will not be disturbed on appeal.

Both parties claimed to have purchased the property from the Neglected Mining Company. Plaintiff and some of his witnesses had been in the control of the affairs of this company, and counsel for defendant sought to show, on cross-examination, that they had recognized this property as belonging to the company. The court sustained objections to this cross-examination. This was not error. The defense of the defendant was that he owned the property. He was not seeking to defeat plaintiff's right by showing that the property in controversy belonged to a third party. When testimony is not material to any issue in the case, it should be excluded.

On behalf of plaintiff there was offered and received in evidence the transactions of the board of directors of the Neglected Mining Company, as shown by the minute book of that company, from which it appears that the property in controversy was turned over to plaintiff in payment of a bill which he had against the company. Conceding, for the purposes of this case, that if the proper objection had been made this testimony should not have been admitted for the reason that it would not be binding upon the defendant, a stranger to the transaction, no objection raising this question was made below, and for that reason we shall not consider it here.

Counsel for defendant complains that he was not permitted to cross-examine the witness who testified to the book and entry in question. We are inclined to think the trial court was rather strict with respect to cross-examination; but it affirmatively appears that defendant was not prejudiced by the ruling. It was admitted by the witness that the entry in question was not contemporaneous with the alleged transaction, but was written over six months after the purported date thereof. From the questions which counsel sought to propound to the witness on cross-examination, it appears that they would simply have gone to this fact, and, as the witness had already admitted that the entry

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was made long after the transaction, it appears that defendant could not have been prejudiced by the action of the court in delaying further inquiry on the subject.

It is next urged that the sale by the company to Rivers was void as against the defendant because there was no immediate delivery and continued change of possession after that transaction. That appears to have been one of the issues in the case, and, on conflicting testimony, was found in favor of the plaintiff; hence, we cannot disturb that finding on review. Plaintiff claimed to have purchased the property from the company, and that thereafter he leased it to the defendant. The defendant admits having received the property from the plaintiff, but claims that when he did so plaintiff was acting on behalf of the company. Defendant further claims that a few months later he purchased the property from the company, and therefore became the absolute owner. It will thus be seen that the question of a change of possession of the property in controversy from the company to the plaintiff was one of the issues in the case, and that here was a conflict in the testimony thereon.

At the commencement of the trial, counsel for the defendant requested the court to make written findings of fact and conclusions of law in the case, and error is assigned upon the failure of the court to comply with this request. We are not aware of any provision of the Code which imposes upon a trial court the obligation to comply with the request made. Counsel for defendant cites authorities from other jurisdictions on this subject, but they are from states having Code provisions requiring the court to make such written findings and conclusions when requested.

Other questions are also urged upon our attention; but, as they were not presented to the trial court, they will not be considered here.

In conclusion, it is not amiss to add that the issue in the case was: Which of the parties was the owner and entitled to the possession of the property in controversy? The testimony bearing on this issue was conflicting, and of such a nature that the finding of the court might have been in favor of the defendant; but it is not error for a trial court to find an issue of fact in favor of one party instead of another, when there is sufficient testimony to sustain the finding made. The trial court was confronted by the witnesses. It was his province to determine their credibility, and, from all the testimony, facts, and circumstances, make such findings of fact as, in his judgment, the testimony established. That his findings in such circumstances will not be disturbed on review is so well settled, and the grounds therefor so well understood by the bar, that it is not necessary to enter upon a discussion of the reasons

why this rule obtains, or cite authorities supporting it.

The judgment of the county court is affirmed.

Judgment affirmed.

STEELE, C. J., and WHITE, J., concur.

(48 Colo. 73)

RICE v. CASSELLS.

(Supreme Court of Colorado. May 2, 1910.)

1. CHATTEL MORTGAGES (§ 138*)—PRIORITIES—MECHANICS' LIENS.

Rev. St. 1908, § 4025, provides that persons furnishing materials to be used in the construction of a building shall have a lien upon the structure for the value of the materials so furnished. *Held*, that where materials are expressly furnished and delivered for use in constructing a specified building, and placed on the ground for that purpose, a lien attaches in favor of the persons furnishing them, and the person for whom the building is being erected, though he may not be personally liable for the value of the materials furnished, becomes a qualified owner thereof; and hence, where bricks were furnished with the express understanding that they were to be used in the construction of that part of a building which contractors using them had agreed to construct for the owner, and the bricks were actually placed on the ground in the immediate vicinity of the building, and part of them used in its construction, they were furnished on the credit of the building, the owner of the building became a qualified owner of the bricks, and a chattel mortgage by the contractor is invalid against such owner.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 138.*]

2. APPEAL AND ERROR (§ 169*)—QUESTIONS NOT RAISED BELOW.

Questions not raised in the lower court cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.*]

3. REPLEVIN (§ 77*)—DAMAGES—INJURY TO PROPERTY FROM WRONGFUL TAKING.

Injury to property as resulting from its wrongful taking and detention by defendant in a replevin action may be recovered when claimed in the complaint.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 303; Dec. Dig. § 77.*]

4. APPEAL AND ERROR (§ 1073*)—REVIEW—JUDGMENT IN REPLEVIN.

Where a materialman furnished brick for a building, some of which were used therein, and the rest retaken by the materialman, a judgment in replevin by the owners to recover the bricks retaken that they recover the value of all the brick in case those in controversy could not be returned was not ground for reversal, since the judgment was satisfied pro tanto as to the brick in the building, and defendant would only be required to respond to the requirement of the judgment in so far as it had not been satisfied.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1073.*]

Appeal from District Court, Mesa County; Sprigg Shackleford, Judge.

Action by R. B. Cassells for himself and others against P. A. Rice. Judgment for plaintiffs, and defendant appeals. Affirmed.

Carnahan & Van Hoorebeke, for appellant.
Strand M. Logan and Wheeler & Weiser, for appellees.

GABBERT, J. This is an appeal from a judgment rendered in an action of replevin instituted on behalf of the members of Mesa Lodge No. 58, I. O. O. F., against P. A. Rice to recover the possession of certain brick. The defendant claimed to be the owner and entitled to the possession of the property in controversy under and by virtue of a chattel mortgage executed by the firm of Mowrey & Klein. The verdict of the jury was in favor of the plaintiffs, upon which a judgment was rendered, to the effect that plaintiffs recover from the defendant the possession of the brick in controversy, and, in case a redelivery thereof cannot be had, that they recover from the defendant the sum of \$367.50, the value of the brick. It was further adjudged that plaintiffs recover from defendant the sum of \$19.72 damages resulting from the unlawful and wrongful taking of such brick. From this judgment the defendant brings the case here for review on appeal.

The court instructed the jury that under the testimony the plaintiffs, at the time of the commencement of the action, were the owners of, and entitled to, the possession of the brick in controversy, that they were of the value of \$367.50, and that the only matter for them to determine was the damages plaintiffs sustained on account of the unlawful and wrongful taking and detention of the brick from their possession by the defendant. There was no dispute regarding the value of the brick; and, if this instruction was correct, it will not be necessary to consider many of the other alleged errors urged upon our attention by counsel for the defendant. The undisputed testimony establishes the following facts: The lodge entered into a contract with Mowrey & Klein to construct the brickwork of a building for its use. Mowrey & Klein purchased the brick for this purpose from a Mr. Crawford, a brick manufacturer, who sold and delivered them to the contractors for the express purpose of being used in the building. Mowrey & Klein hauled them from the brickyard and stacked or piled them near the building. They commenced work, and completed the first story and about half the second, when they became embarrassed financially. Mowrey left the state, and Klein ceased work shortly after. At the time work was suspended, several thousand of the brick purchased from Crawford were upon the ground in the immediate vicinity of the building. The firm of Mowrey & Klein was indebted to the defendant, and Klein, for the partnership, executed and delivered to him a chattel mortgage on these brick. Under this mortgage he took possession of the brick and removed them to his premises. These are the brick in controversy, to obtain possession of which the replevin suit was instituted for and on behalf of the

members of the lodge. The statutes of the state provide that persons furnishing materials to be used in the construction of any building shall have a lien upon the structure for the value of the materials so furnished. Section 4025, Rev. St. 1908; section 2867, Mills' Ann. St. Rev. Supp. Under this statute and the facts above narrated, the court's instruction was correct. When materials are expressly furnished and delivered for use in constructing a specified building, and placed upon the ground for that purpose, a lien attaches in favor of the person furnishing them, and the person for whom such building is being erected, although he may not be personally liable for the value of the materials furnished, becomes a qualified owner thereof. *White v. Miller*, 18 Pa. 52; *Hickey v. Collom*, 47 Minn. 565, 50 N. W. 918.

The reason for the rule is that in such circumstances the materialman is entitled to a lien upon the structure for the construction of which the materials are sold and delivered; and, for the protection of the owner of the building under course of construction, a qualified title to such material is vested in him. Of course, it will be understood that in stating the above rule it is limited to the facts of this case. Crawford, who sold the brick to Mowrey & Klein, did so in good faith, and upon the credit of the building, for the reason that he sold them with the express understanding that they were to be used in the construction of that part of a building which the contractors had agreed to construct for the lodge. The brick were actually placed upon the ground in the immediate vicinity of the building, and part of them used in its construction. It would certainly be unjust to compel the lodge to discharge a lien which Crawford might have asserted for the brick furnished of which it never had the benefit, and at the same time it would be equally unjust to defeat the right of the materialman to a lien for the brick furnished by holding that because they had not been wrought into the structure, no lien attached. In the circumstances of this case plaintiffs had such an interest in the subject-matter of controversy of which defendant was bound to take notice when he obtained his mortgage that as against him they were the owners of and entitled to the possession of such brick, and he acquired no interest therein as against them by virtue of his mortgage.

The action was instituted by R. B. Cassells for himself and all other members of Mesa Lodge No. 58, I. O. O. F. In the complaint it was alleged that Cassells is the duly elected, installed, and acting presiding officer of the lodge, that it is a fraternal organization, duly chartered by its grand body, and that its membership is so numerous that it is impracticable to bring all its members before the court. Section 12 of our Civil Code provides that when the parties to an action are so numerous that it is impracticable

ble to bring them before the court, one or more may sue for the benefit of all, and the court may make an order that such action may be so prosecuted. It is here urged that the action cannot be maintained because no order of the court was obtained allowing the action to be prosecuted by Cassells for himself and all other members of the lodge of which he was the representative, that only actions in equity are contemplated by the provisions of the section noticed, and that as this is an action at law, no right to maintain it existed. In answer to this suggestion it is sufficient to say, no such questions were raised below, and they will not be considered here.

In their complaint plaintiffs alleged that the brick had been damaged in the sum of \$125 for and on account of the handling and rehandling thereof. On the question of damages witnesses were asked what damage was done to the brick by hauling and rehauling, rehandling, and unloading them. This was objected to on the ground that the damage thereby sought to be established is not a proper element of damage in a replevin suit. The objection was overruled. Injury to property as the result of its wrongful taking and detention by a defendant in a replevin action may be recovered when claimed in the complaint. *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107.

Part of the brick in controversy were what is known as No. 1 pressed brick. At the request of a representative of the lodge, the defendant permitted the contractor who completed the building to use them in constructing it, with the understanding that in the event of a suit the lodge would pay him for these brick at the rate of \$30 per thousand, if he was successful in maintaining his right thereto under his mortgage. It is urged that the judgment is erroneous because the value of these brick is included in the judgment, to the effect that the plaintiffs shall recover of defendant the sum of \$367.50 in case the return of the brick in controversy cannot be had. Under the agreement between the defendant and plaintiffs, whereby he delivered to the plaintiffs the pressed brick, it was necessary, so far as they were involved, to determine who was the owner thereof, as well as the value, by verdict and judgment; and, while it would have been eminently proper for the court to have entered a judgment limiting the right of the plaintiffs to the remainder of the brick, and in the alternative, the value thereof, the failure to do so is not sufficient to justify a reversal. The judgment is satisfied pro tanto by the fact that the plaintiffs have had the pressed brick, and defendant is not required to do more than respond to the requirement of the judgment in so far as it has not been satisfied.

Other errors are assigned on behalf of

counsel for the appellant; but, as stated at the outset, many of them are immaterial if the peremptory instruction of the court to return a verdict in favor of the plaintiffs was correct, because they cannot affect the result when we have determined that this instruction was correct.

The judgment of the district court is affirmed.

Judgment affirmed.

STEELE, C. J., and WHITE, J., concur.

(50 Colo. 258)

BABBITT v. BENT COUNTY BANK OF LAS ANIMAS.

(Supreme Court of Colorado. May 2, 1910.)

1. CHATTEL MORTGAGES (§ 136*)—PRIORITY.

A chattel mortgage was executed to defendant on July 23, 1902, and on July 30, 1903, the owner executed a mortgage to plaintiff on the same property subject to defendant's mortgage, both of which mortgages were duly recorded. On July 23, 1904, when the note secured by the first mortgage matured, defendant took a new mortgage on the same property. The original notes were not surrendered, and the first mortgage was not released nor extended by affidavit under the statute or otherwise. Defendant did not attempt to take possession of the mortgaged property until about 11 months after the first mortgage matured. *Held*, that defendant's prior lien was extinguished as against plaintiff's lien, defendant not having taken possession of the mortgaged property within a reasonable time after the maturity of his note, fixed by statute as 30 days.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 220-226; Dec. Dig. § 136.*]

2. ACKNOWLEDGMENT (§ 20*)—TAKING—AUTHORITY TO TAKE—DISQUALIFICATION OF OFFICER—OFFICER OF PARTY IN INTEREST.

That the acknowledgment of a chattel mortgage executed to a bank was taken before a notary who was a cashier of and stockholder in the bank would not invalidate the mortgage in the absence of fraud in taking the acknowledgment.

[Ed. Note.—For other cases, see *Acknowledgment*, Cent. Dig. § 109; Dec. Dig. § 20.*]

3. ACKNOWLEDGMENT (§ 59*)—BURDEN OF SHOWING FRAUD.

If fraud existed in connection with the acknowledgment of a chattel mortgage executed to a bank before a notary who was a cashier of and stockholder in the bank, a person relying thereon must allege and prove such fraud in order to render the mortgage invalid on that ground.

[Ed. Note.—For other cases, see *Acknowledgment*, Cent. Dig. § 335; Dec. Dig. § 59.*]

Appeal from District Court, Bent County; Henry Hunter, Judge.

Action by the Bent County Bank of Las Animas against William Babbitt. From a judgment for plaintiff, defendant appealed. Affirmed.

This cause comes here on appeal by the defendant below, William Babbitt, from a judgment in favor of plaintiff below, the Bent County Bank of Las Animas, a Colorado corporation. The contest is between the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

above parties, as to the priority of chattel mortgage liens, held respectively by them on the same property. On July 23, 1902, the Baileys, owners and in possession of the property covered by the mortgages in question, executed their two promissory notes for \$10,241.19 to the defendant, the last one of which fell due July 23, 1904, and secured the same by chattel mortgage, regularly certified and recorded, on the property described in the complaint. Before maturity \$3,000 was paid on this indebtedness, leaving a balance due thereon of \$2,569.76. On July 30, 1903, the Baileys executed their note to the plaintiff bank for \$739.30 due in six months after date, and another one for \$1, due two years after date, and secured their payment by chattel mortgage on the same property, subject to the Babbitt mortgage, which bank mortgage was duly recorded in the offices of the respective county clerks of the counties in which the property was located. The regularity of the acknowledgment of the latter mortgage, however, is questioned, as hereinafter pointed out. On July 23, 1904, when the last note, to secure the payment of which the first mortgage was given, matured, Babbitt took a new mortgage on the same property to secure new notes from the Baileys, aggregating \$3,219, one thereof for \$3,000 due in one year, and the other for \$219 due in two years. These new notes covered \$2,569.76 of the old, and \$649.24 of the new indebtedness, the latter being for advances made meanwhile by Babbitt to the Baileys, in connection with the care and keep of, and in additions to the mortgaged property. The original notes were not surrendered, nor was the first Babbitt mortgage released of record. The second Babbitt mortgage made no mention of his first one, neither was it extended by affidavit under the statute or otherwise. Each of the mortgages provided that possession of the property should remain with the mortgagors until default made. The acknowledgment of the bank mortgage was taken before P. G. Scott, notary, who was at the time the cashier, a director of and a stockholder in the bank corporation. Because of this fact defendant says the acknowledgment was no acknowledgment, and therefore that the bank's mortgage was not entitled to record, is a void instrument and creates no lien. Not until about 11 months after the first Babbitt mortgage matured did he make any attempt to take possession of the property covered thereby, the bank mortgage meanwhile being in full force and effect. When he then did so the bank commenced this suit in replevin, claiming its mortgage as first lien. Judgment below was for the bank.

Allen M. Lambright, for appellant. H. L. Lubers, for appellee.

BAILEY, J. (after stating the facts as above). There are two questions for consideration:

First. Had the bank, under its mortgage, if properly acknowledged, the first lien?

Second. Was the bank's mortgage, as acknowledged and certified, entitled to record, and is such record constructive notice to Babbitt?

On the authority of *Cassell v. Delsher*, 39 Colo. 372, 89 Pac. 773, which involves the same question, as to priorities of chattel mortgages on the same property, the second mortgage, as here, by its express terms, being subject to a prior one, the first question must be answered in the affirmative. The court in that case held in substance and effect, following the like rule, laid down in *Brereton v. Bennett*, 15 Colo. 234, 25 Pac. 310, and *Standley v. Coal & Coke Co.*, 24 Colo. 103, 49 Pac. 35, that where the prior mortgagee fails to take possession of the mortgaged property, within a reasonable time after the maturity of his note, 30 days being fixed by statute as such reasonable time, to secure the payment of which the mortgage is given, he loses the priority of his lien. As between the bank and Babbitt there is here no question of equitable cognizance, the former stands, as it may well do, upon its strict legal right. Upon the failure of Babbitt, for a period of about 11 months, either to renew or extend his first mortgage, or thereunder to take possession of the property, under the statute relative to the sale and delivery of personal property, and our decisions, clearly his prior lien was extinguished, as against a subsequent, valid, subsisting mortgage. In addition to the foregoing cases to this point we cite: *Allen v. Steiger*, 17 Colo. 552, 31 Pac. 226; *Atchison v. Graham*, 14 Colo. 217, 23 Pac. 876; *Sweeney v. Coe*, 12 Colo. 485, 21 Pac. 705; *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. 809; *Wilcox v. Jackson*, 7 Colo. 521, 4 Pac. 966; and *Cook v. Mann*, 6 Colo. 21.

Upon the claim that the acknowledgment of the mortgage to the bank was taken before a notary who was the cashier of, and a stockholder in, that corporation, and the mortgage therefore invalid, it is to be observed that on its face the mortgage was fair and entitled to record. The taking of this acknowledgment, unlike that of a married woman, where separate examination is required, was purely ministerial. The alleged infirmity is a matter outside the record, that may not be taken advantage of except for fraud. If there was fraud in fact, of which there is no intimation, it should have been averred and proven. In the absence of such averment and proof the record of the mortgage must be held to have been constructive notice to Babbitt. To say otherwise would be to overturn the purpose of the law providing for this notice. Such policy would destroy the reliability of records, and lead to mischievous dissensions, rather than to the stability and security of property rights. The rule here announced is well settled. *Brereton v. Bennett*, supra; *Bank v. Hove*, 45 Minn. 40, 47 N. W. 449; *Heilbrun v. Hammond*, 13 Hun

N. Y.) 475; *Bank v. Conway* (U. S. Cir. Ct., 11th Dist.) 1 Hughes, 37, Fed. Cas. No. 10,037.

No error appearing in the record, the judgment is affirmed.

Judgment affirmed.

STEELE, C. J., and WHITE, J., concur.

56 Or. 394)

WEBB v. WOLFARD.

Supreme Court of Oregon. May 24, 1910.)

1. BROKERS (§ 8*) — EVIDENCE OF EMPLOYMENT.

In an action to recover a broker's commission, evidence *held* to show the employment of plaintiff by defendant.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 9; Dec. Dig. § 8.*]

2. BROKERS (§ 69*)—AMOUNT OF COMMISSION.

Where a broker is engaged to sell property at a specified price but nothing is said as to his commission, the law implies a promise to pay the usual commission charged in that neighborhood for like services if a customary rate is shown to exist, and, if such rate is not shown, then the amount would be the reasonable value of the services rendered.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 55; Dec. Dig. § 69.*]

3. BROKERS (§ 88*)—ACTION FOR COMMISSION—QUESTION FOR JURY.

Evidence in an action by a broker for his commission *held* to make the question of whether the amount of the commission was fixed one for the jury.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 128; Dec. Dig. § 88.*]

4. WITNESSES (§ 269*)—CROSS-EXAMINATION.

Where the matter inquired about on cross-examination is not material or pertinent to anything testified to by the witness on his direct examination, there is no error in excluding the inquiry.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

5. BROKERS (§ 85*)—ACTION FOR COMMISSION—ADMISSIBILITY OF EVIDENCE.

In an action for a broker's commission under a personal agreement to pay plaintiff for securing a purchaser for land, defendant was permitted to show that the land had formerly belonged to his parents, and, since their death to their heirs, that suit was instituted to partition the land, that it was sold at a referee's sale, and that it was purchased by the person plaintiff claimed to have secured as a purchaser. *Held*, that it was not error on cross-examination of the purchaser to exclude a question whether he purchased the farm at the referee's sale, and the decree and referee's report in such sale were also inadmissible, as the particular interest of the several heirs in the land or as to how the sale was consummated, or whether it was consummated at all, excepting so far as the latter showed that the purchaser was ready, willing, and able to purchase, was not material.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 85.*]

6. JUDGMENT (§ 707*)—CONCLUSIVENESS—PERSONS BOUND.

A decree and referee's report in a partition suit are not competent evidence against plaintiff in an action to recover a broker's commission for selling the property partitioned,

where the plaintiff was not a party to the partition proceedings.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1230; Dec. Dig. § 707.*]

7. BROKERS (§ 88*)—ACTION FOR COMMISSION—INSTRUCTIONS.

In an action to recover a broker's commission for selling land, defendant contended that the land belonged to his father's estate. Plaintiff testified that he never knew defendant was administrator or that, when hiring him, defendant was acting in that capacity, and he also testified that, when he requested defendant to pay his commission, the latter said that the heirs would not pay anything, but that he would give him \$25. Defendant introduced evidence that the heirs of his father and mother owned the land, and that in dealing with the purchaser of the land he told him he could not make a binding contract without consulting the heirs, and that he had no authority to sell without consulting the heirs and the court. *Held*, that an instruction that if the jury found from the evidence that defendant placed the property in plaintiff's hands for sale, and that defendant was acting as agent for another person or other persons, but failed to disclose such agency to the plaintiff, he was personally bound by his contract as if he were the principal in fact, was warranted by the evidence.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 88.*]

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

Action by G. A. Webb against J. M. Wolfard. Judgment for plaintiff, and defendant appeals. Affirmed.

Plaintiff seeks by this action to recover \$300 as the agreed commission for securing a purchaser of a tract of land in which the defendant was interested. The complaint avers that for a period of more than 20 years prior to the commencement of the action plaintiff had been engaged in the business of real estate brokerage in the city of Silverton, in the vicinity of which the land sold is situated, that about May 15, 1908, the contract of employment was made, and that on September 10th following he procured and brought to the defendant as a purchaser one J. F. Short, who was ready, able, and willing to buy, and did buy, the land upon the terms stated by defendant at the time of plaintiff's employment. The answer admits that plaintiff was a real estate broker during the time stated in the complaint, but denies all other allegations. At the close of plaintiff's case, defendant moved for a judgment of nonsuit, which the court denied. A verdict was thereafter returned in plaintiff's favor for the amount demanded, and, from the judgment entered thereon, defendant has appealed.

Geo. G. Bingham (L. J. Adams, on the brief), for appellant. Louis E. Rauch (Rauch & Seitz, on the brief), for respondent.

SLATER, J. (after stating the facts as above). Defendant's motion for a judgment of nonsuit against plaintiff is based principally upon the ground that there is no evi-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dence tending to establish an agreement as to the amount of the commission which plaintiff was to receive. The evidence is brief, and directed mainly to the establishment of two principal points at issue—the employment of plaintiff, and the agreement as to the amount of commission to be paid. As to the first point, there is no room to question the sufficiency of the evidence to make a prima facie case, for plaintiff testifies unequivocally that about May 11, 1908, defendant told him to secure a purchaser for the land, comprising 315.64 acres, at \$27 per acre, but that nothing was said by either of them at that time regarding the amount to be paid as commission. Under such circumstances, the law implies a promise on the part of defendant to pay the usual or customary commission charged in that neighborhood for like services, if it were shown there was such a customary rate, or, if not, then the reasonable value of the services rendered would be the measure of defendant's liability.

One Andrew Aarhaus, an employé of plaintiff, testified that in June, 1908, the defendant called at plaintiff's office to ascertain what certain parties whom witness had taken to see the land were going to do. Plaintiff, being ill, was at his home. Defendant then told witness to find out what the commission would be. Witness telephoned defendant's inquiry to plaintiff, receiving an answer that it would be \$300, which witness communicated to defendant. The testimony then takes this form: "Q. What did Mr. Wolfard say? A. He said, as far as I can remember, that \$150 was enough. Q. Did he say he wouldn't pay \$300? A. Not that I know of." This is all of the conversation there was about the amount of the commission, but the evidence further shows that after this occurrence defendant called at least once at plaintiff's office to ascertain what the parties seeking to buy land thought of the place, and particularly regarding one Brown, who had been shown the property by witness Aarhaus. The parties referred to by witness as having been taken out to and shown the place did not include J. F. Short, who was afterwards obtained as a purchaser. Plaintiff also testifies that after bringing the place to Short's attention, some time in the month of September, defendant inquired of plaintiff where Short was, and, being told that he was in Woodburn, defendant said to plaintiff: "Webb, I want you to use your influence the best you can to have Short buy that place." To which plaintiff testifies that he replied: "I have done that. The place is a good place, and I know that Short will buy it." Does this evidence tend to support the averment that defendant had agreed to pay plaintiff the sum of \$300 as a commission? It is clear that he did not expressly do so, but that he impliedly assented thereto by seeking and accepting plaintiff's services after having been informed of the price seems

to us to be clear. While plaintiff was seeking a buyer, and before any agreement as to the compensation was made, defendant by his inquiry manifested a desire to have some amount agreed upon. When informed by plaintiff the amount that would be charged for his services, if the sum was not satisfactory to the defendant, the latter was at liberty to reject the proposal, for it must be considered to be such, and to terminate his contractual relations theretofore existing. Plaintiff was not bound to proceed in any event, but might have ceased his efforts had defendant notified him that he would not pay the amount demanded. But when he continued in his efforts to secure a buyer at the special instance and request of defendant, after the latter had knowledge of the amount that he intended to charge, as unquestionably shown by the evidence, and without any positive refusal on the part of the defendant to pay the sum named, it must, we think, be held that defendant by directing plaintiff to proceed thereby necessarily accepted the terms thereof. It is the universal rule that an offer must be accepted before it becomes a binding promise and results in a contract; but, on the other hand, when an acceptance is made, it must be identical with the terms of the offer, and, unless it contains some express limitation, it includes all of the terms of the offer. The defendant could not expect to enjoy the fruits of plaintiff's labor, with a mental reservation that he would not pay the price asked when the offer was made, but a less sum. If he accepts at all, it must be upon the terms named. Had defendant before accepting plaintiff's services positively declined to pay the amount demanded, in case a buyer was brought to him, the matter would have been left open upon quantum meruit, for the law will not imply the promise of any person against his expressed declaration, because such declaration is repugnant to any implication of a promise. 2 Wharton on Contracts, § 707; Lamson, Consol. Store-Service Co. v. Well, 8 N. Y. Supp. 336. The evidence was sufficient to go to the jury upon the question of agreed price, and there was no error in denying the nonsuit.

On cross-examination plaintiff was asked if he did not know that defendant was not the owner of that place, to which question an objection was sustained as not proper cross-examination, and error predicated thereon. The matter inquired about was not material or pertinent to anything testified to by plaintiff on his direct examination, and there was no error in excluding the inquiry.

J. F. Short testified that he first learned of the place through plaintiff; that he went to look at it, and afterwards purchased it through defendant, agreeing to pay \$27 per acre. On cross-examination he was asked if he had not purchased the farm at a referee's sale at the courthouse. This was held to be immaterial, and was excluded. Defendant was permitted upon his defense,

however, to show that the land in question had formerly belonged to his father and mother in their lifetime, and since their death to their heirs; that suit was instituted to partition the land; that it was sold at a referee's sale; and that J. F. Short bought the land at such sale, but an offer by the defendant of the decree and the referee's report in such suit was rejected. There was no error in any of these rulings. The action was based upon defendant's personal agreement to pay plaintiff for securing a purchaser for the land. It was not material to the inquiry as to what particular interest he several heirs had in the land, or as to how or in what manner the sale was consummated, or whether, in fact, it was consummated at all, excepting so far as the latter tended to show that Short was ready, able, and willing to purchase. *Kyle v. Rippey*, 20 Or. 446, 26 Pac. 308. In any event, the decree and referee's report in a partition suit would not be competent as against plaintiff, because he was not a party to such proceedings. It was material, however, to show that plaintiff had a limited or no interest in the land as bearing upon the probability of his having made the contract with plaintiff under the circumstances surrounding the case, and to that extent the defendant was permitted to offer his evidence. *Moore v. Walber*, 92 Mich. 402, 52 N. W. 742.

The court instructed the jury, in substance, that if they found from the evidence that defendant placed the property in plaintiff's hands for sale, and that defendant was acting as agent for another person or other persons, but failed to disclose such agency to the plaintiff, he was as personally bound by his contract as if he were the principal in fact. Exception thereto was taken. Defendant's counsel does not question the accuracy of the principle of law thus announced, but claims that it is inapplicable to the facts of the case. There was evidence, however, which made the instruction proper. On direct examination an inquiry directed to plaintiff, as to whether anything was said to him about defendant being administrator of his father's estate, was prefaced by the statement: "In regard to the administration of the estate the defense states the land belonged to the father of defendant." This statement doubtless had reference to something said by counsel for defendant in his opening statement to the jury, as to what would be the nature of the defense, as it is not in the answer. Plaintiff testified that he never knew defendant was administrator, or that, when hiring him, defendant was acting in that capacity. Plaintiff also testifies that when he requested defendant to pay his commission the latter said that the heirs would not pay anything, but that he would give him \$5. On the other hand, defendant was permitted to show that the heirs of his father

and mother were the owners of the land, and that in dealing with Short he told him he could not make a binding contract without consulting them, and that he had no authority to sell the place without consulting the heirs and the court. While the question of agency was not directly in issue, we think it was suggested by the defense, and the evidence offered tends to support the suggestion to such an extent that the instruction given was proper.

Finding no error in the record, the judgment is affirmed.

(56-Or. 400)

MANSFIELD et al. v. HILL et al.

(Supreme Court of Oregon. May 24, 1910.)

1. HOMESTEAD (§ 1*)—DEFINITION—EXEMPTIONS.

The term "homestead," as used in the exemption statute (B. & C. Comp. § 228), is not the designation of a particular estate, implying prohibitions and limitations not incident to ordinary titles, but only means "the home place" or "the house and adjoining grounds" where the head of the family dwells.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3327-3336; vol. 8, pp. 7679, 7680.]

2. HOMESTEAD (§ 136*)—DISPOSITION—"BUT."

B. & C. Comp. § 228, provides that the homestead shall be exempt from sale on any judicial process after the death of the person entitled thereto for the collection of any debts for which the same could not have been sold during his lifetime, but such homestead shall descend as if death [exemptions] did not exist. *Held*, that the word "but" is an adversative conjunction used in the sense of "on the other hand" or "yet," and is not intended as a prohibition against the owner's power to dispose of the homestead by will, nor was the statute intended to prescribe the sole mode by which the title might pass from the owner, but only that the descent should not be affected by the exemption clause.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 249, 250; Dec. Dig. § 186.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 926, 927.]

3. DEEDS (§ 72*)—CONVEYANCE—VALIDITY.

Where a grantor, when he executed a deed to his uncle, who was also his physician, was 38 years old, acknowledged his indebtedness to the grantee in a large sum, and stated that the conveyance was all he could do to settle, and delivered the deed, which was considered by both as a transfer of the fee and not as security, any prima facie presumption of undue influence arising out of relations of confidence and trust between the parties was rebutted.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 190-192; Dec. Dig. § 72.*]

4. DIVORCE (§ 308*)—SUPPORT OF CHILDREN—MONTHLY PAYMENTS.

B. & C. Comp. § 514, provides that, at any time after decree of divorce, the court may set aside, alter, or modify so much of the decree as may provide for the appointment of trustees for the care and custody of the minor children or the nurture and education thereof or the maintenance of either party, and section 206, relating to judgments generally, declares that, from the date of docketing a judgment, it shall be a "lien" on all the real estate of the judg-

other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ment debtor within the county, etc. *Held*, that where a divorce decree awarded judgment for attorney's fees and costs, and also provided for future monthly payments for the support of children, it became a lien from the date of docketing as to the attorney's fees and costs, but not as to the monthly payments to accrue.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 801, 802; Dec. Dig. § 308.*]

5. PARTITION (§ 19*)—RIGHT TO PARTITION—COMMON POSSESSION.

It is essential to the maintenance of a suit for partition, authorized by B. & C. Comp. § 435, that the parties be in possession as tenants in common at the time the suit is commenced.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 60-63; Dec. Dig. § 19.*]

On motion for rehearing. Modified.

For former opinion, see 107 Pac. 471.

EAKIN, J. The principal ground for the motion relates to the court's holding that the homestead law is only a statute of exemption. This point was fully discussed in plaintiff's brief and is covered in the opinion to which we adhere.

It is urged that the term "homestead" is a designation of a particular estate, implying some prohibitions and limitations not incident to ordinary titles. But the term only means "the home place," or "the house and adjoining grounds where the head of the family dwells," and the text-writers, quoted by counsel, in discussing the homestead and its incidents, do so only with reference to the conditions and limitations placed upon it by statute. Every homestead law of other states, cited by counsel, contains provisions prohibiting alienation, incumbrance, and devise. The decisions are based on these limitations, and, if they were found in our statute, they would be in point.

The provision in section 226, B. & C. Comp., that "the homestead aforesaid shall be exempt from sale on any judicial process after the death of the person entitled thereto for the collection of any debts for which the same could not have been sold during his lifetime, but such homestead shall descend as if death did not exist," contains no suggestion that it is intended as a limitation upon the owner's right to devise the property. On the contrary, the last clause is a limitation upon the exemption named. "But" is an adversative conjunction, and is used in the sense of "on the other hand" or "yet," and is not intended as a prohibition against the owner's power to dispose of it by will or to prescribe a mode by which alone the title may pass from the owner, but only that the descent shall not be affected by the previous exemption clause.

Again, counsel contend that, in holding that the deed from Mansfield to Hill is void, we overlooked the fiduciary relation existing between Hill and Mansfield. The relation suggested by plaintiffs is that Hill was the uncle of Mansfield and his physician. It is contend-

ed that this relationship is fiduciary, from which undue influence is *prima facie* presumed, and casts the burden upon Hill to prove that there was no undue influence. Assuming, without deciding, that such relationship brings the case within the rule that shifts the burden of overcoming the presumption, the evidence establishes the fact that Mansfield, at his own suggestion, and without previous consultation with Hill, executed the deed. He was 38 years old, acknowledged his indebtedness to Hill in a large sum, said it was all he could do, and delivered the deed to Hill; and it was considered by both Mansfield and Hill as a transfer of the fee-simple title, and not as a security. It is said in 29 A. & B. Ency. 122, that the *prima facie* presumption of undue influence arising from relations of confidence and trust is rebutted by any evidence going to show that everything between the parties was fair, open, voluntary, and well understood. In *Hamilton v. Holmes*, 48 Or. 453, 87 Pac. 154, where a similar question arose, it is said that a contract entered into in such a case will be upheld when it appears to be fair and honest. To the same effect is *Ab Foe v. Bennett*, 35 Or. 231, 58 Pac. 508. The evidence in this case shows that the transaction was fair and honest, and free from undue influence. As to the question of the lien of the decree in the divorce case of *Mansfield v. Mansfield*, in the circuit court of the state of Oregon for Multnomah county, for monthly payments for the support of the children, section 514, B. & C. Comp., cited by counsel, makes no provision for a lien, as is the case in some states; if the amount were a definite sum named in the decree, it would constitute a lien from the time it is docketed, under the terms of section 206, B. & C. Comp., which provides that, from the date of docketing a judgment as in this chapter provided, such judgment shall be a lien upon all the real property of the defendant within the county, etc. This monthly allowance is a continuing liability, and no part of it was due when the decree was rendered, and it may be terminated at any time, and its amount is impossible of computation. For that reason it does not come within the holding in *Taylor v. Taylor*, 47 Or. 47, 81 Pac. 367, cited by counsel, in which the amount was allowed for the support of the children in one specified sum. But the judgment in the divorce suit for attorney fees and costs became a lien from the date the judgment was docketed.

The complaint prays that "partition of said land be made according to the rights of the parties interested therein," and in the opinion we assumed that a partition was desired by both parties, and so ordered; but plaintiffs now disclaim any desire for a partition as between them and defendants, and the complaint does not allege facts entitling plaintiffs to partition under section 435, B. & C. Comp., it being necessary that the parties

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to such suit be in possession of the property, as tenants in common, at the time of the commencement of the suit, which is not alleged. *Sterling v. Sterling*, 43 Or. 200, 72 Pac. 741. Therefore, we will modify the relief granted in the opinion as follows:

It is, therefore, adjudged that the said land is subject to the lien of Frank Reiner's mortgage; that, subject thereto, J. L. Hill is the owner of an undivided one-third of said real property; that Hattie Mansfield is the owner of one-third thereof; that the will of Claude H. Mansfield is valid and devises to Mrs. Adelle M. Thompson an undivided one-third of said land subject to the lien of said mortgage, and also subject to the lien of the judgment in the said divorce suit of Hattie E. Mansfield v. Claude H. Mansfield, in the sum of \$50 attorney fees and \$419.85 costs, with interest thereon from the date thereof at the rate of 6 per cent. per annum, viz., \$701.40; also subject to the administration of the estate of Claude H. Mansfield, deceased, now pending in the county court of Marion county, Or., including the payment to Hattie E. Mansfield of the allowance of \$15 per month for the support and education of the children of the parties hereto, made by the decree in said divorce suit, said installments beginning September 23, 1905, with interest thereon from the maturity thereof at 6 per cent. per annum until the said children attain their majority or the said order is revoked; and that plaintiffs have their costs and disbursements.

56 Or. 524)

STATE v. RYAN.

Supreme Court of Oregon. May 24, 1910.)

CRIMINAL LAW (§ 1111*)—APPEAL—RECORD—CONCLUSIVENESS.

The record of the trial as certified by the judge is controlling on appeal in determining what were the rulings on objections to evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2894-2896; Dec. Dig. § 111.*]

CRIMINAL LAW (§ 1137*)—APPEAL—INVITED ERROR—RIGHT TO COMPLAIN.

Accused cannot complain of any action of the court which he invited.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 137.*]

CRIMINAL LAW (§ 1053*)—APPEAL—NECESSITY OF EXCEPTION — REMARKS OF TRIAL JUDGE.

Remarks of the trial court to which no exceptions were taken will not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2666, 2667; Dec. Dig. § 653.*]

HOMICIDE (§ 159*)—EVIDENCE—ADMISSIBILITY.

Where, on a trial for murder in the first degree, the theory of the state was that accused intended to kill a third person, and not decedent, and the state showed that at the time of the killing decedent and the third person were together, and that accused was embittered

toward the third person in consequence of trespasses committed by him on accused's land, evidence that, about two hours before the killing, accused armed with a gun, had a difficulty with the third person, and attempted to prevent him from crossing accused's field, was admissible to establish premeditation and deliberation essential to constitute murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 297, 300; Dec. Dig. § 159.*]

5. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where the court charged that, before the jury could consider any testimony as to experiments, they must find that the experiments were performed under substantially the same conditions, the error, if any, in admitting evidence of experiments made by witnesses as to the ability to see whether a person was armed with a gun, arising from the failure of the witnesses to select the proper place, was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

6. WITNESSES (§ 388*)—IMPEACHMENT—CONTRADICTORY STATEMENTS.

A witness may be impeached by proof of contradictory statements on laying the foundation therefor in the manner prescribed by B. & C. Comp. St. § 853.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1242; Dec. Dig. § 388.*]

7. WITNESSES (§ 390*)—IMPEACHMENT—CONTRADICTORY STATEMENTS.

Where a child of decedent testified on cross-examination that he had talked with his mother about accused shooting decedent, and denied that he had told her that decedent grabbed hold of accused's gun when the shot was fired, his testimony could be discredited by his mother acknowledging on oath that she had told a third person that the child had told her that decedent had grabbed the gun when the shot was fired.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1247; Dec. Dig. § 390.*]

8. WITNESSES (§ 379*)—ADMISSIONS—SILENCE.

B. & C. Comp. § 718, subd. 3, authorizing evidence of a declaration or act of another in the presence and within the observation of a party, and his conduct in relation thereto, applies to a party to the record, or one identified in interest with him, and excludes the conduct of a mere witness in respect to any declaration made or act performed by another in his presence, and the fact that a witness made no response when a person stated in his presence that the witness had made a certain statement could not be shown to impeach him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1222; Dec. Dig. § 379.*]

9. HOMICIDE (§ 300*)—EVIDENCE—INSTRUCTIONS.

Where the evidence showed a previous difficulty between accused and the employer of decedent about two hours before the homicide, which was committed while decedent was accompanying his employer to the place of the former difficulty, a charge that accused should be acquitted if he honestly believed that his life was in imminent danger at the hands of decedent or his employer, and he was not an aggressor, etc., was not objectionable as leading the jury to understand that they could consider the previous difficulty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

10. CRIMINAL LAW (§ 770*)—TRIAL—INSTRUCTIONS.

A charge in hypothetical form embodying the theory advanced by the state and shown by its evidence is proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806; Dec. Dig. § 770.*]

Appeal from Circuit Court, Umatilla County; H. J. Bean, Judge.

Michael J. Ryan was convicted of manslaughter, and he appeals. Affirmed.

S. A. Lowell and James H. Raley, for appellant. G. W. Phelps, for respondent.

MOORE, C. J. The defendant, Michael J. Ryan, was indicted for the crime of murder in the first degree, alleged to have been committed by killing Henry E. Dixon, and, having been convicted of manslaughter, he appeals. The theory of the state is that the defendant did not mean to slay Dixon, but that he intended to kill his victim's employer, Jacob Shubert, towards whom he was embittered in consequence of the latter's trespasses on his land.

It is deemed proper to describe the vicinity where the homicide occurred and to state the incidents that evidently induced it. It appears from a plat received in evidence that H. A. Neuner owned, in Umatilla county, 160 acres of land, adjoining which on the south and on the west are two quarter sections; the first being known as the defendant's "pasture" and the other as his "grain field." A lane, evidenced by wire fences, extends parallel with and four feet back from the south and the west boundaries of Neuner's land; the remaining eleven feet of the way being on the defendant's premises. Immediately north of the grain field mentioned is a farm owned by Shubert, who was in the habit of diagonally crossing Ryan's grain field to the angle of the lane. Joining Ryan's grain field on the south and his pasture on the west is another 160 acres, known as the "Dixie pasture."

The evidence introduced by the state tended to show that at dusk, a few days prior to the homicide, Dixon and his son Harry were hauling a tank of water across the grain field referred to, when Ryan, who was lying near the fence, suddenly rose and pointed a gun at them, but, discovering it was not Shubert, as he at first supposed, said: "It is a good thing you hallooed at your horses, or I would have filled you so full of lead you would not know who you were." The defendant then told Dixon to tell his employer that if he ever came through the grain field again he would shoot him, which threat Dixon transmitted as bidden.

It appears that Shubert left his farm, May 20, 1909, with a pair of small horses hitched to a light wagon, and drove to Milton, where he obtained 12 sacks of chopped barley. That evening, near 6 o'clock, as he was re-

turning and about to enter the east end of the lane, near Neuner's house, he saw Ryan pass into a house in his pasture, come out with a gun, and hasten towards the angle of the lane. Shubert tried to reach that point in advance of the defendant, but failed. When he came up, Ryan, pointing a gun at him, frightened one of the horses, compelling the driver to tie the team to a post in the south line of the fence. The defendant threatened to shoot Shubert, told him Neuner's part of the lane was too narrow to drive on, forbade him to pass along the remaining width thereof, and ordered him to turn back. Declining to obey the command, Shubert left the team, saying, "I will see you later," and went north along the way and thence westerly to his house. Ryan thereupon put his gun into the wagon, drove the team north along the lane and up a hill, set the brake, and left the horses, hitched to the vehicle, to feed. He then returned with his gun to the northeast corner of the Dixie pasture, which he entered.

Dixon, his son Harry, and Shubert went that evening through Ryan's grain field to get the team, not knowing that it had been removed. They arrived at the corner of the lane about 8 o'clock, but did not find the horses, although they discovered, by the light of a match, a wagon track at that place. They then saw in the Dixie pasture a dark object which they thought might be one of the horses recumbent; but upon approach it proved to be the defendant, who rose and, with leveled rifle, ordered them to stand back. The ground at that place sloped to the north so that Ryan stood above the others. Dixon was in front of Shubert, who, as the defendant moved to the right or left, changed his position so as to make a shield of his employé. In this position Ryan discharged his gun; the bullet passing through Dixon's thigh and piercing Shubert's knee. Both men fell when injured; but, each rising, Shubert returned to his home, and Dixon wandered into Neuner's field, where his dead body was found the next morning.

Shubert, as a witness for the state, in detailing the circumstances occurring from the time he returned to the corner, when it was quite dark, until the shot was fired, testified as follows: "Mr. Dixon struck a match to see whether or not he could see any trace of where the team might have gone to, and apparently there was a turn made at this corner. I then intended to go up the lane, and so we stood there talking about this. Mr. Dixon made the remark: 'The old man didn't seem to know he was laying himself liable for untying another man's team.' Then Mr. Dixon, before I walked away and intending to go up the lane there looking for my team, he said: 'You better call out and see if, in case he is around here, what he

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

one with your team.' So I called in a loud voice three times: 'Mike, what did you do with my team?' I done this three times in succession, but no reply was made, and as we stood and looked around Mr. Dixon observed a dark object. I should judge it was about here, designated by the letter 'E' (referring to a point on the map), that is to the best of my recollection, and he said: 'Let us go in here and see; maybe that is one of our horses.' So he took the lead, and I followed; went across the wires, went toward the object, and, as we were close upon the object, it rose up, gun pointed towards us, and proved itself to be the defendant, Michael Ryan. He hallooed: 'Stop! Or I will kill you.' The other man says, 'Put down that gun.' He says, 'We have no weapons and mean no harm.' Q. Who do you mean by the other man? A. Mr. Dixon. He says: 'Put down the gun. We mean no harm. We want to know what you done with the team.' He kept hallooing at the top of his voice, 'I will kill you,' and the other man kept telling him to put down the gun, and at the same time the defendant, Michael Ryan, was swinging in a north direction, that is, in this way, towards this way. And of course I was in back of Mr. Dixon and was swinging in the opposite direction, and moving at the same time around; and they continued to argue. As we had gone some distance that way, he made the remark to Mr. Dixon: 'You keep it of this. I have nothing to do with you.' He went on some time, and Mr. Dixon was arguing with the defendant to 'put down our gun. We mean no harm.' And he was shouting: 'I will kill you.' As we had gone a little farther, he said to him: 'Hide, you son of a bitch, or I will kill you.' Q. What did he say? A. He said 'son of a bitch.' And just a little while after this, by shifting around a little farther, he continuously hallooing, 'I will kill you,' and Mr. Dixon said, 'Shoot away then,' and as he said, 'Shoot away then,' the bullet came and went through both of us. We both dropped to the ground, and as we were on the ground Mr. Dixon, threw himself forward on the ground, apparently trying to reach the defendant by a leg and did not reach him. And Mr. Dixon got up, walked just about in the same direction as we came in; in that direction the best of my knowledge—that is, in a westerly direction—he walked away from the scene of the shooting."

The theory of the defendant's counsel is that, after taking the team up the hill, Ryan turned to the northeast corner of the Dixie pasture, where he had left a sack containing a small quantity of poisoned wheat, which had been using to kill squirrels; that, as was groping in the darkness for the sack, heard voices of persons approaching in the grain field; that, having reached the corner, they came towards him, whereupon repeatedly told them to go back; that

they persisted in advancing, and Dixon, who was a powerful man, grasped the gun; that the defendant had a paralyzed arm, and, a struggle ensuing, the weapon, which had been taken that afternoon to hunt for coyotes, was discharged.

The defendant, as a witness in his own behalf, referring to the southeast corner of his grain field and to the incidents occurring thereat on the night of May 20, 1909, testified as follows: "They came up, and when they came to the gate this man Dixon said, 'Why, the damned son of a bitch (meaning the witness) has the gate locked,' and he looked and said, 'Halloo,' and I knew he didn't see anything, and I didn't say anything. And they got out a light, a match, and examined. So finally they turned. I don't know who did see me there, and they came back. As they came back, they stopped at the fence, and they asked me what I did with the team. 'I didn't do anything with your horses,' says I. 'There is one of them,' they says, 'Shubert was driving, was mine.' I said: 'That team has started up the hill. You will find them on top of the hill.' He (probably meaning Dixon) came through the fence now, and he says: 'You are not on your own ground, and you bluffing son of a bitch, you can shoot.' I jumped up. I said: 'Keep away! You don't know whether I am on my own ground or not. I don't want any trouble with you.' They came between me and the fence. Q. When you say 'they,' who do you mean? A. Dixon and Shubert and a little boy. Q. Go on. A. They made a half moon above me. They kept crowding on me all the time. He rushed on, and I said, 'Don't come any farther.' He was then within distance where he could reach the gun, and he said, 'You bluffing son of a bitch! you shoot!' and put up his hand and grabbed the gun and leaned up in this position. The big tall fellow (Dixon) grabbed it from me, and the shot went off. We had a tussle for it, and he grabbed my feet, and I threw him to the ground, and before he gets his knees off the ground I flipped up his hands and he jerked loose. He says: 'O! You son of a bitch!' I jumped out a ways from him, and I threw the empty shell out, and something got the matter with the other one. I jerked it out again, and the next time I threw it up again it was all right; it worked. I seen this Shubert drop down. Then, after all this passed—play possum. Jumped down and jumped up as quick and said: 'O my God! I am shot! I die! I die!' He was through the fence before Mr. Dixon was." On cross-examination the defendant, referring to Shubert's return to the angle of the lane on the night of the homicide, stated upon oath: "I think he came back with a brave man all right. I am sorry he was such a fool. Q. You told that fool that you were not looking for him, didn't you? A. Yes, sir; I was not looking for either of them. I had a good shot there, and I knew it." Alluding to the approach of Shubert and Dixon, Ry-

an testified: "Yes, sir; they were coming towards me. You could distinguish better when they were coming towards me lying down that way than if I were standing up." The defendant, referring to Shubert's actions immediately after the gun was discharged, further said: "Yes, sir; he never fell. I asked this man Dixon, 'Are you satisfied?'"

Considering the exceptions relied upon for a reversal of the judgment, Shubert, as a witness for the state, having detailed the circumstances of the killing, was asked on cross-examination, "How do you account for the fact, if the shooting was downhill at you, the bullet came out higher up than when it entered?" An objection to the inquiry interposed by the district attorney was overruled, and an exception allowed; the court saying, evidently to the prosecuting officer: "He may state, and you may inquire in regard to the position. I think this question should be left to the jury." The bill of exceptions shows that the defendant's counsel, after securing this ruling in their favor, did not insist upon an answer. They contend, however, in their brief, that an error was committed in sustaining the objection. The record of the trial as certified by the judge is controlling in the particular noted and shows that the order was made to benefit the defendant, who cannot be heard to complain of any action of the court which he invited. *Caldwell Banking & T. Co. v. Porter*, 52 Or. 318, 331, 95 Pac. 1, 97 Pac. 541.

Shubert's sworn declarations regarding the occurrences leading up to the dispute between himself and Ryan early in the evening of May 20, 1909, were substantially corroborated by Neuner. The defendant's counsel, in order to discredit such evidence, called witnesses who severally testified that about noon of a clear day in September, 1909, he assisted in determining whether or not a large Winchester rifle, such as that used at the time of the homicide, carried by a person from Ryan's house to the corner of the lane, could be seen from the point occupied by Shubert and Neuner when, as asserted by them, they saw the defendant with the gun, and each of the witnesses acknowledged that he could not observe the weapon. Three of such tests were made: The first at the angle of the lane; the second east thereof; and the third in front of Neuner's house. One of them, however, admits that he saw a flash as the sunlight was reflected by some bright object, either worn or carried by one of the witnesses participating in the experiment.

The state was permitted, over objection and exception, to introduce testimony in rebuttal to the effect that in October of that year a similar test was made about noon of a fair day, and each witness declared upon oath that the weapon so conveyed could be seen from the point of observation in the lane. The defendant's counsel moved to strike out all such rebuttal testimony on the ground, *inter alia*, that the point so selected by such

witnesses was not the place designated by Shubert and Neuner. The court, replying, said: "As to the place Neuner and Shubert say they saw the gun, you may discuss to the jury. The motion is denied"—to which ruling an exception was allowed. It is maintained that in receiving the testimony so objected to, and in refusing to strike it out, the state was allowed to contradict immaterial sworn statements to the prejudice of the defendant, and that the remark of the court last quoted tended to create in the minds of the jurors a doubt respecting the testimony of Shubert and Neuner in relation to their point of observation when there was no dispute concerning the same. No exception was taken to the court's remark, and for that reason anything that was thus said will not be considered.

It will be remembered that the indictment charged murder in the first degree. If Ryan was seen hurrying with a gun to prevent Shubert from crossing his grain field, and a difficulty arose, the possession of the weapon would tend to establish premeditation and deliberation, which were ingredients of the accusation. Any testimony, therefore, relating to the defendant's planning for the encounter, was material and admissible.

The experiments made by witnesses for the respective parties would be of little probative force unless the tests were conducted from the place so occupied by Shubert and Neuner on the evening of the homicide. Shubert, in speaking of that point and referring to the plat mentioned, said, "I met Mr. Neuner in the lane about here," without placing on the map any mark or giving any distance from a fixed object to show what point he had in mind. Neuner testified on this subject as follows: "I was about 200 feet off from my house where I fixed the gate when Mr. Shubert came along past my house. * * * As he drove up I went to this corner." The only angle represented on the map as being near Neuner's house is the northeast corner of Ryan's pasture. It is impossible to locate, with any degree of certainty, from a careful reading of the transcript, the place from which the defendant was first seen carrying the gun. So, too, it cannot be determined whether or not the northeast corner of Ryan's pasture was selected by the witnesses who thus testified in rebuttal as the place from which their test was made. Reference is made by them to a field of barley at the corner of which their experiment was conducted, and from which a line of fence is projected; but we have been unable definitely to locate this point. If an error was committed in receiving such testimony, it cannot be ascertained from an inspection of the record. We do not think any prejudice could have resulted, for the court, referring to the distance a gun could be seen when carried by a person, instructed the jury in effect that, before they could consider any testimony in respect to the experiments, they must first find that the

tests were performed under substantially the same conditions, and, as the map was before the jury, they undoubtedly were aware of the several points indicated thereon by the witnesses.

Harry Dixon, who at the time of the trial was eight years old, as a witness for the state, having testified on cross-examination that he had talked with his mother about seeing the defendant shoot his father, was asked, "Did you at any time tell her that your papa grabbed hold of the gun?" referring to the weapon which Ryan used when he fired the fatal shot, and the witness replied, "No, sir." He also stated upon oath that after the homicide he went with his mother to visit Frank Dickerson, a neighbor, and there partook of dinner, but was playing with Dickerson's boys and did not eat with the other members of the family. The defendant's counsel thereupon inquired: "I will ask you if at that time and place, and those persons being present, if Mr. Dickerson did not say in your presence, while you were there, that he had just been to Pendleton, and that Ryan claimed that Dixon had grabbed the end of the gun when the shot was fired, and didn't your mamma reply then, and say, 'I have never told anybody but you, but that is what Harry told me when he came home that night,' or words to that effect?" An objection to this question was sustained and an exception saved. Frank Dickerson, the person referred to, having testified that soon after the homicide Mrs. Dixon and her son Harry dined at his house, the query last hereinbefore quoted was asked him. An objection interposed by the district attorney was sustained and an exception allowed. The defendant's counsel then stated to the court: "If permitted to answer, the witness would say, 'Yes,' and would further say that Harry was at the table and did not deny his mother's statement."

Harry Dixon might have been impeached by evidence that he had previously made statements inconsistent with his testimony at the trial; the foundation therefor having been laid in the manner prescribed. B. & C. Comp. § 853. His testimony could have been discredited if his mother had acknowledged upon oath the language sought to be imputed to her by Dickerson; but she was not called for that purpose. Our statute asserts, *inter alia*, that evidence may be given at a trial of the following facts: "A declaration or act of another, in the presence and within the observation of a party, and his conduct in relation thereto." B. & C. Comp. § 713, sub. 3. It will thus be seen that it is a party to the record in an action, suit, or proceeding, or one identified in interest with him whose admissions, by silence and acquiescence, are receivable in evidence. 1 Am. & Eng. Ency. Law (2d Ed.) 675; *Stowell v. Hall*, 108 Pac. 182. Such limitation necessarily excludes the conduct of a mere witness in respect to any declaration made

or act performed by another in his presence. In *Kilburn v. Ritchie*, 2 Cal. 145, 148 (56 Am. Dec. 326), Mr. Chief Justice Lyons, in discussing this question, says: "It is well settled that the declarations of third persons, not parties to the record, cannot be admitted in evidence, except in those cases where they have a joint interest with the plaintiff or defendant, or where some legal relation, such as that of partners, exists." To the same effect, see *Luck v. Robinson*, 30 Ga. 55, 59; *Montgomery v. Brush*, 121 Ill. 513, 524, 13 N. E. 230; *Ibbittson v. Brown*, 5 Iowa, 532, 534; *Faulkner v. Whitaker*, 15 N. J. Law, 438, 440. An exception to this legal principle seems to exist in cases in which the admissions of strangers to an action or suit are admissible when the issue substantially involves the material rights of such persons at a particular time. 1 Green. Ev. (14th Ed.) § 181. This deviation from the general rule, however, can have no application herein, for Harry Dixon is not a party to this action, nor is he identified in interest with the state or the defendant, and, such being the case, evidence of any conduct sought to be ascribed to him in consequence of his failure to deny a statement asserted to have been made in his presence and hearing was inadmissible, and no error was committed in rejecting that part of Dickerson's testimony.

It is maintained that errors were committed in giving the following instructions, to which exceptions were taken, to wit:

"The law guarantees to every man the right of self-defense. This means that a man may defend his life and may defend his person from great bodily harm. He may repel force by force, and he may resort to such force as, under the circumstances surrounding him, may reasonably seem necessary to repel the attack made upon him; and in his defense he may even go to the extent of taking the life of his adversaries or either of them. The right of self-defense is founded upon the law of nature, and is not and cannot be superseded by the law of society. Hence, if the jury finds, from the evidence in this case, that Shubert and Dixon were acting together or making a simultaneous attack upon the defendant, and that the defendant at the time he fired the fatal shot and killed the deceased, if he did fire it, had reasonable grounds to believe, and did honestly believe, that his life was in imminent danger, or that he was in danger of great bodily harm at the hands of the deceased or Shubert, and not being the aggressor, and so honestly believing, he fired the fatal shot, he was justified under the law and should be acquitted. And by "aggressor" I mean one who brings on a conflict or affray by some overt act or demonstration, calculated to precipitate the difficulty or conflict.

"I instruct you that, before you can acquit the defendant on the ground of self-defense, you must find that the defendant did not bring on and provoke the difficulty with

Shubert or Dixon, the deceased, for the purpose and with the expectation of causing Shubert or deceased to assault him and to thereupon kill him, and in this connection I charge you that if you find from the evidence beyond a reasonable doubt that the defendant intercepted Shubert at a time when he was on his way to his home, and caused by force or violence, or by threats of force and violence, Shubert to leave his team along the road at a place near where the trouble afterwards occurred, and if you further find beyond a reasonable doubt that the defendant then hid and laid in wait with the expectation that Shubert would return for his team and would seek him, the defendant, and advance toward him, either alone or accompanied by Dixon, and if you further find beyond a reasonable doubt that in this manner the defendant sought out and intentionally provoked the difficulty, then I charge you that, before the defendant could avail himself of the law of self-defense, he must have retreated or withdrawn or attempted in good faith to have withdrawn from the conflict."

It is argued that by the use of the expression "aggressor," as employed in the part of the charge first set forth, the jurors must have understood that they could consider the difficulty which occurred at the angle of the lane between Ryan and Shubert early in the evening and determine who made the first attack, and that the failure to limit the word "aggressor" to the time of the final encounter was an error. An examination of this part of the instruction will show that preceding the phrase, "and not being the aggressor," appears the clause, "at the time he fired the fatal shot," the use of which unquestionably limited the application of the word "aggressor" to the immediate occasion of the shooting. The definition of the term complained of was evidently copied from an instruction given in the case of *State v. Gray*, 46 Or. 24, 27, 79 Pac. 53, where the use of the word, under similar circumstances, was approved. No error was committed in giving this part of the charge.

The instruction last quoted placed before the jury the theory of the district attorney that, Shubert having said when he left his team at the angle of the lane, "I will see you later," the defendant expected him to return; that it did not require two hours and a half, or from 6 o'clock in the evening, when Shubert drove his team to the corner of the way, until 8:30 that night, the time of the encounter, as admitted by Ryan, for him to drive the horses north a half mile and return that distance; that armed with a loaded gun he waited the arrival of the persons whom he heard approaching at a time when he said it was very dark; that he could see Dixon and Shubert; that he knew he had a good shot from his reclining

position; and that after Dixon fell his malice was so great that he inquired of his victim, "Are you satisfied?" The last instruction, having been put in hypothetical form, embodied the theory adverted to, and no error was committed in thus charging the jury.

Other alleged errors are assigned; but, as they are not discussed in defendant's brief, and as they are deemed unimportant, they will not be considered.

It follows that the judgment should be affirmed, and it is so ordered.

(56 Or. 565)

STIVERS et al. v. BYRKETT.

(Supreme Court of Oregon. May 24, 1910.)

1. JUDGMENT (§ 138*)—COUNTERCLAIM—FAILURE TO REPLY—MISTAKES—SURPRISE—EXCUSABLE NEGLIGENCE.

Plaintiffs sued defendant on a note for the price of certain cattle and sheep August 30, 1906. On October 28th following the senior member of plaintiff's firm died, and on the 29th defendant answered pleading counterclaim for breach of warranty. On October 2, 1907, judgment was rendered in defendant's favor on the pleadings for want of a reply, and on June 29, 1908, S. was appointed administrator of the deceased plaintiff with the will annexed, and moved to set aside the default judgment and for leave to reply. The surviving plaintiff knew of the counterclaim September 23, 1907, and that the trial of the case had been set for October 1st following, but took no steps to attend the trial or send his deposition, nor was there any showing made for a postponement. The surviving plaintiff made the sale, and had knowledge of all the facts with reference thereto, and advised plaintiffs' attorney that the case, so far as plaintiff was concerned, would go by default as against a counterclaim, and the surviving widow also stated to the attorneys if a settlement could not be effected the matter should be dropped. Held, that the administrator was not entitled to a vacation of the judgment and leave to reply, on the ground that the judgment had been taken through mistake, inadvertence, surprise, or excusable neglect, as provided by B. & C. Comp. § 103.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249-251, 254; Dec. Dig. § 138.*]

2. ABATEMENT AND REVIVAL (§§ 48, 72, 74*)—DEATH OF PARTY—SUBSTITUTION OF ADMINISTRATOR.

When a party to an action dies before the litigation is terminated, the action does not abate if the cause survives, under B. & C. Comp. §§ 379, 380, but the deceased's personal representatives should be substituted under section 33, providing that no action shall abate by the death of a party, and, in case of such death, the court may at any time within a year thereafter on motion allow the action to be continued for or against his personal representatives.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 245, 377-402, 412-416, 429-444; Dec. Dig. §§ 48, 72, 74.*]

3. ABATEMENT AND REVIVAL (§ 71*)—DEATH OF PARTY—APPEARANCE OF ADMINISTRATOR—SUBSTITUTION.

Where one of the parties to an action dies pendente lite, his administrator with the will annexed has no right to appear therein unless he has either been substituted in the action or is entitled to be substituted and has applied for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

substitution within the year, provided by B. & C. Comp. § 38.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 358-376; Dec. Dig. § 1.*]

ABATEMENT AND REVIVAL (§ 72*)—DEATH OF PARTY—SUBSTITUTION OF ADMINISTRATOR.

Where one of the parties to an action dies pendente lite, the death may be suggested by either party, and a motion for substitution should be made by the party desiring to proceed with the action.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 377-402, 412-416; Dec. Dig. § 72.*]

PARTNERSHIP (§ 219*)—JOINT JUDGMENT—JURISDICTION.

B. & C. Comp. § 61, provides that if summons is served on one or more of the defendants, it not all, in an action on a joint liability, judgment may be entered against all the defendants jointly liable, so far only that it may be enforced against the joint property of all and the separate property of the defendants served. Held, that such section authorized a several judgment as to the defendants served, where there is a joint party over whom the court has not obtained jurisdiction, and hence, where, in an action by a firm, defendant pleaded a joint counterclaim, and the senior member of the firm died before the court obtained jurisdiction over him, and there was no substitution of his personal representatives, a judgment was properly rendered on the counterclaim against both plaintiffs so far as to be enforceable against the firm's property and also a several judgment against the surviving partner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 219.*]

Appeal from Circuit Court, Multnomah county; C. U. Gantenbein, Judge.

Action by W. H. Stivers, administrator of the will annexed of J. H. Glide, deceased, and another, against A. R. Byrkett. From an order denying plaintiffs' motion to vacate judgment on a counterclaim and for leave to reply, they appeal. Affirmed.

This is an appeal from the order of the court denying a motion to vacate a judgment and for leave to reply. J. H. Glide and J. H. Glide, Jr., partners, doing business as J. H. Glide & Son, at Sacramento, Cal., on August

1906, commenced an action in Multnomah county, Or., against A. R. Byrkett, to recover upon a promissory note the sum of \$1,340, with interest. Thereafter, on October 29, 1906, plaintiff J. H. Glide, Sr., died. Defendant, on October 29, 1906, answered the complaint by setting forth the contract constituting the consideration for the note, viz., that Sacramento, Cal., plaintiffs sold to defendant, to be shipped to his farm in the state of Washington, 18 head of cattle, at the price \$100 per head, represented by plaintiffs to healthy, full-bred, registered Shorthorns, 144 sheep, represented to be full-bred, registered Shropshires, and not over 2 years old, for \$340, certificate of such registration be furnished by plaintiffs, showing the pedigree of each animal, and alleged that defendant paid \$800 of the purchase price in cattle, which he sold to plaintiffs, and the

note in question was given as the balance of the purchase price; that afterward defendant sold to plaintiffs 2 heifers for \$150, which amount was to be credited on the note; that after the stock reached Portland, Or., defendant ascertained that 3 head of the cattle were affected with tuberculosis, and that the cattle were not pure-bred Shorthorns, and many other breaches of the contract are alleged; and that defendant thereupon rescinded said contract, and pleads as a counterclaim various items of expense and damages suffered by him in consequence of plaintiffs' breach, amounting to \$3,216.59, together with the value of the cattle sold by defendant to plaintiffs, \$950—total \$4,166.59; that, upon plaintiffs' refusal to receive the stock, he sold it for \$2,878.95, and credited the claim for that amount. The answer was served October 29, 1906, on Edwin Mays, who was plaintiffs' attorney in bringing the action. Afterwards, on October 2, 1907, on motion of defendant, judgment was rendered in his favor upon the pleadings, for want of a reply. On June 29, 1908, W. H. Stivers, the appointed administrator with will annexed of the estate of J. H. Glide, deceased, filed a motion, supported by affidavits, asking to have the judgment set aside, which is as follows: "Now come W. H. Stivers, administrator with will annexed of the estate of J. H. Glide, deceased, and J. H. Glide, Jr., and based upon the annexed affidavits and the allegations contained in their proposed reply, move the court that the default judgment heretofore entered against J. H. Glide and J. H. Glide, Jr., on the 2d day of October, 1907, be set aside, and that said W. H. Stivers, as administrator as aforesaid, be made a party plaintiff herein, and that they be permitted to file a reply to the various answers filed herein, which said reply is tendered herewith." The motion was denied and plaintiffs appeal.

S. B. Huston, for appellants. R. Mallory, for respondent.

EAKIN, J. (after stating the facts as above). This motion was made under the provisions of section 103, B. & C. Comp., to be relieved from a judgment taken against plaintiffs through their mistake, inadvertence, surprise, or excusable neglect. The facts set forth in the affidavit of J. H. Glide, Jr., disclose that he knew a counterclaim had been filed against plaintiffs, but that he did not know it was necessary to reply thereto; that he received notice September 23, 1907, that the trial of the cause had been set for October 1, 1907; that it was impossible for him to be at Portland, Or., at such time, for the reason that litigation was pending regarding his father's estate. But he states no facts from which the court can say that it was impossible for him to attend the trial or send his deposition. Nor was any show-

ing made to the court for a postponement of the trial. It appears from his affidavit that he made the sales to defendant out of which this action arose, and therefore the knowledge of the facts, in relation to the matters being litigated, were within his knowledge; and, as shown by the affidavit of John F. Logan, who, with Robert Galloway, was acting as attorney for plaintiffs, J. H. Glide, Jr., advised them that the case, so far as plaintiff was concerned, would go by default, as against the counterclaim of Byrnett. The affidavit of Lizzie H. Glide, widow of the deceased, and executrix of his will, states that in March, 1907, she was asked by her attorneys what should be done in the case, and she advised Robert Galloway, her attorney, that she could not obtain any further particulars regarding the matter, and advised him that, if a settlement could not be effected, the matter be dropped. Her affidavit contains no statement of facts from which the court can say that it was impossible for her to attend to the litigation. Although she was not appointed executrix of the will until October 9, 1907, yet the will contest resulted in a decree July 30, 1907, and an administrator of the estate could have been appointed in Oregon at any time to appear in the action. These conditions establish that it was not an abuse of discretion for the lower court to deny the motion.

Counsel for plaintiffs, in his brief, urges that the judgment, so far as it relates to J. H. Glide, deceased, is void and should be vacated, at least as to him, and the reply filed. When a party to an action dies before the litigation is terminated, the action does not abate if the cause is one that survives under sections 379 and 380, B. & C. Comp. But the personal representative of deceased should be substituted under section 38, B. & C. Comp., which provides that no action shall abate by the death of a party, and, in case of such death, the court may, at any time within one year thereafter, on motion, allow the action to be continued for or against his personal representatives. Stivers, the administrator in this case, has no standing or right to appear therein unless he either has been substituted in the action or is entitled to be substituted, and this is part of the relief he seeks by this motion to vacate, but his application was not made within a year from the death of his testator, and comes too late. In *Long v. Thompson*, 34 Or. 359, 55 Pac. 978, it is held that the motion for substitution must be made within the year. To the same effect is *Dick v. Kendall*, 6 Or. 166. And in *Barker v. Ladd*, 3 Sawy. 44, Fed. Cas. No. 990, it is held that this section 38 is a statute of limitations, and if the right to move for substitution is not exercised within one year it is taken away. *Matter of Borsdorff*, 17 Abb. Pr. (N. Y.) 168, 171. Therefore the administrator has no

standing to ask for substitution or to reply in the action. The death may be suggested by either party, and the motion should be made by the party desiring to proceed with the action. 5 Ency. Pl. & Pr. 841. Neither the motion, nor the affidavits, attacks the judgment, because it is void, nor is relief asked on that ground. If the judgment is void, as to plaintiff J. H. Glide, then it cannot be enforced against the estate of decedent; but it is not void as to J. H. Glide, Jr., although it purports to be a personal judgment against both plaintiffs, yet as to J. H. Glide, Jr., and the joint property. It is such an one as is provided for by section 61, B. & C. Comp., viz., that if the summons is served on one or more of the defendants, but not all, in an action upon a joint liability, judgment may be entered against all the defendants jointly liable, so far only that it may be enforced against the joint property of all and the separate property of the defendants served. Although joint liabilities are not declared by our statute to be joint and several, as in the case in Missouri (*Holton v. Towner*, 81 Mo. 360), it does, by that section, provide for a several judgment as to the defendants served, in case there is a joint party over whom the court has not obtained jurisdiction. That statute will apply equally to plaintiffs where the judgment is obtained against them. In this case plaintiffs, being jointly liable upon a cause of action set up in the answer, and but one of them being subject to the jurisdiction of the court, judgment against that one is proper.

There was no error in denying the motion. Affirmed.

(56 Or. 414)

UMATILLA WATER USERS' ASS'N v. IRVIN et al.

(Supreme Court of Oregon. May 31, 1910.)

1. CORPORATIONS (§ 283*)—DIRECTORS—ELECTION—QUALIFICATION OF VOTERS—DETERMINATION BY PRESIDENT—REVIEW.

Under B. & C. Comp. § 5062, providing that the president of a corporation shall act as inspector of elections and certify who are elected directors, the president of a corporation for such purpose is a public officer having authority to determine who are eligible to vote for directors, and for an erroneous exercise of such power no appeal lies to the meeting at large, but only to the courts.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 283.*]

2. CORPORATIONS (§ 283*)—ELECTION OF DIRECTORS—QUALIFICATION OF STOCKHOLDERS—UNPAID ASSESSMENTS.

Where a corporation, including an association of water users owning land within a government reclamation project, had agreed to collect an assessment levied by the Secretary of the Interior, and the corporation's by-laws also provided for special assessments on property specially benefited, the corporation had power to levy an assessment on its stockholders owning property within the reclamation project

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

qual to an assessment levied by the Secretary of the Interior and payable one year before the assessment levied by the Secretary of the Interior could become delinquent, and stockholders failing to pay such assessment were not entitled to vote for directors under B. & C. Comp. § 6058, providing that a delinquent stockholder shall not be entitled to vote.

[Ed. Note.—For other cases, see Corporations, sec. Dig. § 283.*]

CORPORATIONS (§ 289*)—OFFICERS—“DE FACTO OFFICER”—“DE JURE OFFICERS.”

Technically speaking, the term “de facto officer” applies only to a public officer, and then usually only to an office having a physical existence and property. A de facto officer must be one publicly exercising the functions of an office, and actually in possession of it. The expressions “officer de facto” and “officer de jure” have in many instances been applied to directors and their managing agents of private corporations, at they do not possess the relation of officers to the public; their status being rather agents of their principal.

[Ed. Note.—For other cases, see Corporations, sec. Dig. §§ 1240–1245; Dec. Dig. § 289.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1845–1851; vol. 2, p. 1852.]

CORPORATIONS (§ 289*)—BOARD OF DIRECTORS—DE FACTO BOARD.

Where an alleged de facto board of directors of a private corporation was not in the actual exercise of its functions, and had not been recognized by the public, or by those having dealings with the corporation as a legitimate board of directors, and had not been performing generally the duties of a board of directors, it was not a de facto board, and had no rights.

[Ed. Note.—For other cases, see Corporations, sec. Dig. §§ 1240–1245; Dec. Dig. § 289.*]

CORPORATIONS (§ 283*)—ELECTION OF DIRECTORS—WITHDRAWAL BY PRESIDENT.

Where the president of a corporation acting as inspector of election for directors was violently interfered with in the discharge of his duties, and prevented from issuing a proper certificate of election, and had reason to fear further violence if he attempted to continue to discharge his duties in accordance with his view of the law, he was justified in refusing to proceed or remain in attendance.

[Ed. Note.—For other cases, see Corporations, sec. Dig. § 283.*]

Appeal from Circuit Court, Umatilla County; H. J. Bean, Judge.

Suit by the Umatilla Water Users' Association against H. T. Irvin and others. Decree for defendants, and plaintiff appeals. Affirmed.

This is a suit brought by plaintiff to enjoin Irvin and others from acting as directors and officers of the plaintiff corporation.

The complaint, among other matters, alleges that H. G. Newport is president, F. A. Yates, secretary, F. B. Swayze, treasurer, A. Crawford, vice president; that Newport, Skinner, Yates, together with Crawford and Sommerer constitute the board of directors of such company; that they were duly chosen at the regular stockholders' meeting held at Armistice on January 9, 1909; that on the 15th day of January, 1909, the directors above named elected Newport, president, Crawford, vice president, Yates, secretary, and Swayze, treasurer; that they entered upon the dis-

charge of the duties of their respective offices, and have ever since and are now in possession and control of the property, funds, and records of the corporation, excepting such as the defendant may wrongfully have collected and obtained possession of; that at the annual election held by the stockholders on January 9, 1909, H. T. Irvin, president of the corporation, presided as chairman of the meeting until the canvass of votes cast for directors was partially completed. It is further alleged, in substance, that after the votes were cast Irvin, with the assistance of the directors, fraudulently proceeded to canvass the vote, and, with the purpose of depriving a majority of the stockholders of their choice for directors, of declaring himself and C. S. McNaught elected directors, and of obtaining control of the property of the corporation, refused to count or allow to be counted a large number of votes which were cast by duly qualified stockholders; that against the will of a large majority of the stockholders, and against the wish and demand of the remaining members of the canvassing board, he undertook to close such board before all the ballots were counted, and refused to further act as chairman of the meeting, declined to continue the canvass, and left the meeting; that the stockholders and directors thereupon chose a chairman pro tem., continued the meeting, and proceeded to canvass the ballots and declare the result; that thereby Newport, Crawford, Yates, Sommerer, and Skinner were elected directors; that thereafter Irvin, for the purpose of depriving the duly elected directors and officers of the control of the corporation, and hindering them from transacting business with the United States reclamation service, certified that he, McNaught, Sommerer, Crawford, and Newport had been elected directors; that about January 15, 1909, they, with the exception of Newport, held a pretended directors' meeting, and alleged to elect Irvin president, McNaught vice president, Geo. Upthegrove secretary, and F. B. Swayze treasurer; that ever since such time the defendants Irvin, McNaught, and Upthegrove have feigned to be president, vice president, and secretary, respectively, of the plaintiff company; that the defendants Crawford and Sommerer have attended the pretended directors' meetings, and have aided and assisted them in their fraudulent acts and purposes; that Upthegrove, with Irvin's help, has falsely represented to the land department and the reclamation service that he is plaintiff's secretary; that he is proceeding, and intends, to receive and collect from the stockholders of this corporation large sums of money, due from them to the corporation, for shares of stock and the assessments thereon, and will, if not prevented and restrained by order of this court, collect the same, wrongfully and without authority, to the irreparable injury of plaintiff, take from nu-

merous persons stock subscriptions and applications for water rights, and do other things which can only lawfully be done by the duly elected and qualified secretary of the corporation; that, by reason of these false and fraudulent acts, stockholders and persons wishing to deal with the corporation are hindered, delayed, and their rights jeopardized and rendered doubtful; that plaintiff will be prevented from collecting money due from stockholders and applicants for water rights and hindered from transacting business with the United States officials, and damaged in various other matters.

The answer admits that Crawford, Sommerer, and Newport are directors, and that Swayze is treasurer, and, in effect, denies every other allegation of the complaint, except it admits that defendants are acting as officers and directors, and that they intend so to act, and to collect money and generally transact the business of the corporation. Defendants then allege that on January 9, 1909, defendants Irvin, McNaught, Crawford, Sommerer, and Newport were duly elected directors, and that Irvin, as president, declared them elected, and thereafter duly certified the result, that thereafter, on notice legally given, the defendants Irvin, Crawford, McNaught, and Sommerer met as a board of directors, and elected Swayze treasurer, and Upthegrove secretary; that they have been acting as such officers ever since; that they are the duly qualified and acting officers of the corporation; that the officers of the reclamation service, the Secretary of the Interior, and the United States Land Office at La Grande have recognized the defendants as the directors and officers of the corporation and transacted all business with them as such, and refuse to transact business with any other persons; that plaintiff has a plain, speedy, and adequate remedy at law; and that a court of equity has no jurisdiction.

R. J. Slater, for appellant. J. P. Winter, for respondents.

MCBRIDE, J. (after stating the facts as above). Plaintiff in this case disclaims any attempt to try the title to the offices claimed by Newport, Yates, and Skinner, which for convenience we shall designate as the "Newport Board" and those claimed by Irvin and McNaught, who, with Crawford and Sommerer, their title being undisputed, we shall designate as the "Irvin Board."

It is contended that the Newport Board, with Yates as secretary, constitutes the de facto officers of the corporation, and that this suit is merely to prevent persons claiming title to these offices from interfering with them in the discharge of their duties. We are cited to several cases where persons in the actual, physical possession of an office, like a clerk's or other office of like character, have invoked the aid of equity to avoid being dispossessed. Other cases are cited where persons holding a regular certificate of elec-

tion and engaged in the actual performance of the duties of an office have invoked equity to prevent a claimant from ousting them by force pending proceedings by quo warranto or otherwise. But in this case the officers, whose tenure is disputed, are not plaintiffs. No member of the Newport Board is in court for himself, asking that he be protected in his position, as director or other officer. It is the corporation that asks the aid of equity to protect it from persons who, it claims, are not properly elected, and who are alleged to be interfering with its regular or de facto officers in the discharge of their duties. Both parties admit that the same person is treasurer, and plaintiff does not allege that money collected by the Irvin Board is being appropriated to any improper purpose or to any end different from that to which it might be applied if the Newport Board had collected it. Barring the confusion of having two alleged boards of directors, each claiming authority to act for the corporation, no injury is shown to have resulted to plaintiff from defendants' claim to be the actual officers of the corporation.

The cause of the peculiar situation in which the plaintiff corporation finds itself arises primarily out of a disputed election of directors held on January 9, 1909. The plaintiff corporation is an association of landholders within the irrigation district covered by that irrigation project of the United States reclamation service known as the "Umatilla Project," and had entered into a contract with the United States for the collection and payment of all charges against its stockholders made under the federal statutes for work done by the United States in connection with its system of water supply. Under some regulation of the government, assessments are made against irrigated lands by units, each unit being composed of lands in a particular locality supplied by its irrigation system and presumably organized with reference to the time when water could be supplied to that locality. The Hermiston unit was the first that the government attempted to supply with water. The reclamation authorities in the year 1908 levied an assessment of \$7 per acre upon the lands embraced in the Hermiston unit, which assessment, plaintiff alleges, would become enforceable by foreclosure on the property on December 1, 1909. After this assessment had been levied by the Secretary of the Interior, and on November 10, 1908, plaintiff's board of directors levied an assessment of \$7 per share on the land embraced in the Hermiston unit and declared it due and payable December 1, 1908. At the stockholders' meeting January 9, 1909, the right of the stockholders who had not paid this assessment to vote on the election of officers was challenged, and Irvin, president of the corporation, ruled that such stockholders could not vote and refused to count their ballots. An appeal was taken from this decision, and, by a

vote of the meeting, it was overruled. Notwithstanding this action of the meeting, the president refused to allow the ballots of such alleged delinquent stockholders to be placed in the ballot box or to be counted, but counted only those ballots which were cast by stockholders who had paid their assessment. This count would elect the Irvin Board of Directors while a count including the ballots cast by the alleged delinquent stockholders would have elected the Newport Board. There is some conflict in the evidence as to what occurred subsequent to the count, but we are satisfied that at its conclusion, as above stated, the president declared that the Irvin Board was elected; sat down, and began to write a certificate of election. The paper was taken from him by violence, and he left the room, taking the ballot box with him. A mob followed him, and demanded the box, and he finally surrendered it to a son of Mr. Newport, who was a deputy sheriff. The meeting then reorganized, and elected Mr. Newport, who was vice president, president pro tem., and proceeded to recount the vote, counting those ballots which had been rejected by the president. Under this count, the Newport Board was declared elected, and Newport, as president pro tem., issued to them a certificate of election. Irvin issued like certificates to the Irvin Board. Crawford and Sommerer, who were elected by both parties, chose finally to act with the Irvin Board. Thereafter the Irvin Board elected Irvin president and Upthegrove secretary, and the Newport Board elected Newport president and Yates secretary. Both boards elected Swayze treasurer, and both now claim to be the genuine board of directors of plaintiff. We cannot agree with counsel for plaintiff in the contention that the president has no power to decide who are eligible to vote for directors. On the contrary, we hold that he has that power, and that for an erroneous exercise of it there is no remedy except by appeal to the courts. Section 5062, B. & C. Comp., provides that the president of the corporation shall act as inspector of elections and certify who are elected directors. For that purpose he is a public officer, designated by a public statute, and in our opinion has the same authority in the matter of receiving and rejecting votes that a judge or inspector of a general election has. There is no reason given for an appeal from his decision to a vote of those present and claiming a right to vote that could not be urged in favor of the same procedure at a general election. To permit such an appeal to those present and claiming the right to vote would in effect allow persons to be judges of their own qualifications and place the election of directors at the mercy of any body of persons who saw fit to make a claim, however groundless, of the right to participate in the election.

The cases cited by counsel do not bear out

their contention. In the case of *In re Martin* (State v. Chute) 34 Minn. 135, 24 N. W. 353, there was nothing in the law or the charter of the corporation designating who should pass on the eligibility of voters, and for that reason it was held that such question was for the meeting as a whole, and that the president had no authority to decide it. The court puts its decision squarely upon the ground that no provision had been made by the charter or the by-laws, authorizing the president to act as teller or inspector or to pass on such questions. By implication, at least, they would seem to be of the opinion that with a provision of the character found in our statute the contrary rule would obtain. In *State ex rel. Ryan v. Cronan*, 23 Nev. 437, 49 Pac. 41, the court followed *In re Martin*, supra, and for the same reason. *State v. Smith*, 15 Or. 98, 14 Pac. 814, 15 Pac. 137, 386, was a quo warranto proceeding brought to oust Smith and his associates or to prevent them from acting as directors. No question was there raised as to the right of the president to pass upon the eligibility of a voter in the first instance, but it was claimed that, having decided erroneously, the court would set aside such decision on quo warranto, which it did. In the *Matter of the Mohawk & Hudson Railroad Company*, 19 Wend. (N. Y.) 185, the court held that inspectors act judicially in determining whether a vote is receivable and ministerially in receiving or rejecting. In *Commonwealth v. Woelper*, 3 Serg. & R. 29, 8 Am. Dec. 628, the court says: "It is said that the inspectors are judges, and may decide the election as they please, by the admission or rejection of votes. Their office is ministerial rather than judicial. The charter declares who may vote, and the inspectors are bound by it. To be sure, they must in some cases exercise their judgment, when a question arises on the construction of the charter. But so must every ministerial officer, when a question arises as to the extent of his powers. If an inspector refuses a vote, the injured person is not without remedy. The decision of the inspector may be examined before some competent tribunal. This is exemplified in the present prosecution, the object of which is to annul the proceedings of the inspectors." It will be noticed that the court does not deny the right of the inspector to decide in the first instance. It points out the remedy, an appeal to the courts, not an appeal to the meeting. It only holds that the decision of the inspector is not final. The court, it is true, used the expression that the duties of inspectors are rather ministerial than judicial, and in some respects this is correct. His duties partake of both characters as pointed out in *Matter of Mohawk, etc., R., supra*. In the principal case Justice Yeates dissented from the views of his two associates, and held that an inspector was a judicial officer in a broad sense.

Perhaps the truth lies between the two extremes; an inspector being a judicial officer to the extent that his decision is valid until set aside by some competent tribunal.

There is little evidence before us upon the subject of the correctness of the ruling of the president upon the qualifications of voters. Section 5058, B. & C. Comp., in effect, prohibits a stockholder who is delinquent in his assessment from voting. The record introduced in evidence shows that an assessment due December 1, 1908, had been levied, and the evidence tends to show that the secretary, at the time the ballot was being taken, examined the corporate books and informed the president who the delinquents were and that he refused to allow these stockholders to deposit their votes in the ballot box or to count them. We think that as the board of directors have power to levy an assessment their action is *prima facie* regular, and that the burden of proof is upon plaintiff to show irregularity. It is claimed that it is irregular and void because premature; that as the assessment levied by the Secretary of the Interior upon lands in the Hermiston unit was not due or delinquent until December 1, 1909, the Water Users' Association had no authority to levy an assessment upon property in that unit payable December 1, 1908. The proceedings taken by the Secretary of the Interior are not in evidence, nor have we been cited to anything in or outside of the record, which tends to show when the government assessment matures. But, taking counsel's statement as correct, it does not follow that the plaintiff's assessment should coincide in point of time with that of the government. The situation seems to be that the plaintiff association has agreed with the government to collect and pay the assessment levied by the government by itself levying one of like amount upon its own stockholders. Considering the delays incident to collection, it might well conclude to institute proceedings early enough to have the money ready when the government assessment fell due, and, while the time allowed for maturity of plaintiff's assessment seems short, we cannot say as a matter of law that it is unreasonably so. As to the lack of uniformity of the assessment, we have no means of knowing what the terms of subscription of any stockholder of the corporation may have been. The subscription contract is not submitted, nor have we any means of knowing whether other stockholders outside the Hermiston unit have paid in full for their stock, or whether, by the contract, payments were to be made by stockholders in each unit as the work progressed. The by-laws make provision for special assessments on property specially benefited, and, finding an apparently valid assessment spread on the records of the corporation by a unanimous vote of the directors, we are compelled to assume it valid until it is affirmatively shown to be void.

This being the case, we must hold in this proceeding that the president had the authority to reject, and, so far as the evidence in this case shows, properly rejected, the votes of the alleged delinquent stockholders, that his certificates of election to the Irvin Board were properly issued, and that they are *de jure* the officers of the corporation. We are aware that equity will not usually interfere to decide which of two claimants is entitled to an office, but, where the question arises as an incident to some other equitable matter, it is the duty of the court to decide it. The plaintiff claims that the Newport Board are regularly elected, and the defendants claim the same thing for the Irvin Board. No case is cited and none has been discovered where a director of a corporation holding all the evidence and indicia of regular election has been restrained in equity from peacefully exercising the duties of his office by one not *prima facie* an officer, but merely claiming to be a *de facto* officer. Technically speaking, the term "*de facto* officer" applies to a public officer only, and then usually only to an office having a physical existence and property. A county clerk, a sheriff, or a mayor usually has a place designated by law for holding his office and books and records, which indicates to the public his authority to act. In the interest of public peace and good order, the courts have wisely held that persons in the actual physical possession of such offices and records shall, as to third persons and the public, be recognized as such until ousted by proper procedure. But the officers of a private corporation do not possess such relation to it or to the public. Their status is that of agents of their principal. If they are duly elected, they are such agents, or, if their acts are recognized by the corporation, they may bind it, but, as against the persons having the *prima facie* evidence of election, they cannot assert any right, except to ask physical protection until the right to the office is decided. The Newport Board is not here contesting in any way the right of the defendants to the offices they assume to occupy, and no decision that we make here is binding upon them directly, and there is nothing in the evidence to show that any act of the defendants will injure the corporation.

Giving to the status of the Newport Board as broad a definition of *de facto* officers as the authorities recognize, in the case of officers of private corporations, it falls to reach the standard. A *de facto* officer must be one publicly exercising the functions of an office and actually in possession of it. "The expressions '*officer de facto*' and '*officer de jure*' have in many instances been applied to directors and other managing agents of private corporations. The expression '*officer de facto*' has been used to designate an agent actually occupying the position claimed by him, and exercising its incidental powers. It is said that only the rightful representa-

tives of the corporation, under a proper election or appointment, are officers de jure. The use of these expressions has been unfortunate, as it has led to confusion by reason of the application of the same terms to government officers and public officials. It has sometimes been suggested that a de facto officer of a private corporation occupies a position similar to that of a de facto government officer, or other public official, in possession of his office under color of right. But the two cases rest on different principles. Directors and other managers of a private corporation are merely agents, and the corporation can be charged with their acts only in accordance with the established doctrines of the law of agency. It is clear that, if a person assumes to act as agent for another without any authority, he does not thereby become the agent of such person either in fact or in law. An agency can never be created by the act of the agent alone. It is clear, also, that an appointment made by another person, assuming to act as agent for the common principal, does not bind the latter unless the appointing agent had authority. Hence, if a person assumes to act as agent of a corporation under an informal, and therefore unauthorized, appointment by a superior agent, the corporation will not be responsible for the acts of the person so charged, unless by application of the rules discussed in the preceding sections. The validity of acts performed by a public officer, actually in the exercise of the powers and duties of the office claimed by him, rests on a distinct rule of law. In order to secure the peaceful and orderly government of the community, the rule has been established that the right of a de facto public officer to exercise the powers of his office cannot be investigated in a collateral proceeding. It must be determined once for all times in a direct proceeding to oust the officers." 2 Morawetz on Private Corp. § 640. Here there is no evidence showing that the Newport Board is in the actual exercise of its functions, or that it is recognized generally by the public or by those having dealings with the corporation, as a legitimate board of directors, or that it is performing generally the duties of a board of directors. On the contrary, it appears that the Secretary of the Interior and the United States reclamation service, with whom a great portion of the business of the corporation is transacted, refuse to recognize it and transact business wholly with the Irvin Board, and that such board is actually engaged in collecting funds and performing the business of the corporation. It is true that the secretary of the Newport Board refuses to turn over the books and the seal of the corporation to the Irvin Board, but the possession of the seal and the old books by him does not make the members of the Newport Board de facto di-

rectors, and, so far as it appears from the testimony, their secretary is the only person who recognizes them as officers.

There is no such general recognition of the Newport Board as would entitle them to claim as officers de facto even under the liberal rule held in respect to public offices. An officer de facto is defined to be "one who has the reputation of being the officer he assumes to be in the exercise of the functions of the office, and yet is not a good officer in point of law." *Barlow v. Stanford*, 82 Ill. 298; *Parker v. Kett*, 1 Ld. Raym. 658. "A mere claim to be a public officer, and exercising the office, will not constitute one an officer de facto. There must be, at least, a fair color of right; or an acquiescence by the public in his official acts so long that he may be presumed to act as an officer by right of appointment or election." *Brown v. Lunt*, 37 Me. 423. All the authorities seem to agree that a certain degree of notoriety and recognition by the public and persons having business relations with the office are necessary to constitute one a de facto officer, and these are practically absent in this case. So far as disclosed by the evidence, the Irvin Board is the one which is recognized by the great majority of interests having business with the corporation, while the claim of the Newport Board rests on the fact that the former secretary holds possession of the old records and old seal. The subsequent action of the meeting in electing a president pro tem. and recounting the ballots had no effect upon the election. The president, who is the person designated by law to make the count and declare the result, had acted and was violently interfered with in the discharge of his duties. He might reasonably have expected further violence if he had attempted to continue to discharge them in accordance with his ideas of the law. Under the circumstances, he was justified in refusing to further preside or remain in attendance, and we cannot hold that those, whose violent acts caused him to vacate his office as inspector, could take advantage of their own lawless conduct to reorganize the meeting and recount the votes.

We agree with the court below in finding that the Newport Board, so far as disclosed by the evidence in this case, are neither de facto nor de jure directors. The decree of the circuit court is affirmed.

(13 Cal. A. 117)

In re OVERTON'S ESTATE. (Civ. 609.)

(Court of Appeal, Third District, California.)

April 1, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 197*)—ALLOWANCE TO WIDOW—DISCONTINUANCE OF ALLOWANCE—APPEAL.

Under Code Civ. Proc. § 1468, requiring the court to make a reasonable allowance for the widow out of a decedent's estate, and pro-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

viding that, when so made, the order becomes a final judgment in her favor for that amount, and section 963, subd. 3, giving an appeal from an order against or in favor of setting apart property or making an allowance for a widow or child, no appeal lies from an order discontinuing an allowance to a widow.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 197.*]

2. APPEAL AND ERROR (§ 1*)—RIGHT TO APPEAL—ORIGIN.

The right to appeal comes from the statute, and not from any unauthorized action of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1-4; Dec. Dig. § 1.*]

3. EXECUTORS AND ADMINISTRATORS (§ 197*)—ALLOWANCE TO WIDOW.

Under Code Civ. Proc. § 1466, requiring the court to make reasonable allowance for the widow out of a decedent's estate, where the court retained its power over the order by the provision, "until the further order of this court," it was its duty and within its power, on proper showing, to reduce or discontinue the allowance.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 197.*]

Appeal from Superior Court, Butte County; John E. Gray, Judge.

In the matter of the estate of Agrippa L. Overton, deceased. From an order discontinuing her allowance, the widow of decedent appeals. Appeal dismissed.

Park Henshaw, for appellant. Richard White and Lon Bond, for respondent.

CHIPMAN, P. J. On June 1, 1908, the superior court made an order allowing the surviving widow \$50 per month from the date of the death of decedent for her maintenance and support, "and to continue until the further order of this court." On November 28, 1908, H. L. Overton, on behalf of himself and certain other children and heirs at law of deceased, devisees, and legatees of the will of decedent, filed a petition praying for the discontinuance of said allowance. On December 1, 1908, the petition came on to be heard, and the court on that day made an order granting the petition "discontinuing any family allowance to the said widow in said estate." The widow appeals from this order on the ground, as stated in her brief, that under section 1466, Code Civ. Proc., the court "must make such reasonable allowance out of the estate for the widow," etc., and that, when so made, the order "becomes a final judgment in her favor for that amount"; that, no appeal having been taken from that order and the time for appeal having passed, the power of the court over its order was at an end and "the superior court was without jurisdiction to review the order."

Respondent makes the point that the order is not appealable, which we think is well taken. Subdivision 3, § 963, Code Civ. Proc., gives an appeal from an order "against or in favor of setting apart property, or making an allowance for a widow or child." No appeal

is given from an order discontinuing an allowance. If the court was without jurisdiction to make the order complained of, its power could be tested by certiorari, but not by appeal. Code Civ. Proc. § 1068. Appellant attempts to meet the point by the suggestion that, as the effect of the order is to deprive her of the allowance, it is equivalent to an order refusing to grant an allowance. We cannot so understand the Code section. It refers to the original order granting or refusing the allowance prayed for. In analogous cases the Supreme Court has denied the appealability of such orders as the one here. In *Estate of Smith*, 51 Cal. 563, an appeal from an order refusing to set aside an order of sale (an appealable order) was dismissed. Like action was taken in *Estate of Dunne*, 53 Cal. 631, where the order appealed from was an order setting aside a former order allowing an account. So, also, in *Estate of Hickey*, 121 Cal. 378, 53 Pac. 818, where the order appealed from vacated a prior order settling a final account. Likewise, so held in *Estate of Cahill*, 142 Cal. 628, 76 Pac. 383, where the order appealed from was an order refusing to vacate an order setting apart a homestead.

It is not a sufficient answer to the motion to dismiss the appeal that the lower court had no authority to make the order appealed from. The right to appeal comes from the statute, and not from any unauthorized action of the court. *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1108.

The court retained its power over the order by the provision "until the further order of this court." Upon proper showing it became its duty, and it was within its power, to reduce or discontinue the allowance. *Estate of Montgomery*, 60 Cal. 648; *In re Stevens*, 83 Cal. 322, 326, 23 Pac. 379, 17 Am. St. Rep. 252; *Estate of Freud*, 131 Cal. 667, 674, 63 Pac. 1080, 82 Am. St. Rep. 407. See *Cahill v. Superior Court*, 145 Cal. 42, 78 Pac. 467; *Bell v. Bell*, 2 Cal. App. 333, 341, 83 Pac. 814.

The appeal is dismissed.

We concur: HART, J.; BURNETT, J.

(13 Cal. A. 108)

WAYMAN INV. CO. v. WESSINGER & WAGNER. (Civ. 714.)

(Court of Appeal, First District, California. March 30, 1910. Rehearing Denied April 28, 1910; Denied by Supreme Court May 26, 1910.)

1. CONTRACTS (§ 138*)—INVALIDITY—ILLEGAL CONSIDERATION—VIOLATION OF LAW.

A contract founded on an illegal consideration, or having for its purpose a violation of law, is void and may not be enforced.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. LANDLORD AND TENANT (§ 4*)—LEASE—ILLEGALITY—RIGHT TO SUE FOR RENT.

The leasing and giving possession for an agreed rental of a building, originally constructed in violation of an ordinance establishing fire limits and regulating construction of buildings, does not involve any violation of law so as to render the lease void and unenforceable.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 4.*]

3. CONTRACTS (§ 7*)—ENFORCEMENT—EFFECT OF VIOLATION OF LAW.

That property has been acquired in violation of some law does not rob it of its character as such, nor prevent its becoming the subject of legitimate contracts which may be enforced in courts of law.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 7.*]

4. CONTRACTS (§ 137*)—ENFORCEMENT—EFFECT OF VIOLATION OF LAW.

Though illegal features are indirectly connected with the transaction involved in a suit, plaintiff may recover if his cause of action is otherwise legitimate, and he can make out his case without aid of the illegal agreement; the test being whether he requires such aid to establish his case.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. §§ 701-712; Dec. Dig. § 137.*]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by the Wayman Investment Company against Wessinger & Wagner, executors. From a judgment for plaintiff, defendants appeal. Affirmed.

Sterling Carr, for appellants. J. M. & H. L. Rothchild, for respondent.

HALL, J. Appeal from judgment in favor of plaintiff for the sum of \$300, rental for certain premises leased by plaintiff to defendants by a written lease. The lease was executed in September, 1906, and the defendants entered into possession of the demised premises, and have ever since continued in possession, but refuse to pay the agreed rental falling due March 12, 1908, solely upon the ground that the building which they leased and the possession of which they have enjoyed, and apparently still retain, was erected in violation of the provision of the ordinance establishing fire limits and regulating the construction of buildings.

It is contended by appellant that, because the erection of the building was a violation of such ordinance punishable by a fine, the consideration for the contract of lease between plaintiff and defendants was illegal, and the contract in consequence void. That a contract founded upon an illegal consideration, or having for its purpose a violation of the law, is void and may not be enforced cannot be denied. Such are the cases cited by appellant. But to the proposition that the leasing and giving possession of a building, originally illegally constructed, for an agreed rental involves any violation of law, we cannot agree. The ordinance does not in terms prohibit the leasing of such a building, and

the lease in this case was for no illegal purpose.

This case is analogous to *Sharp v. Taylor*, 41 Eng. Rep. 1153, 22 Eng. Ch. 801. The action was for an accounting between joint owners of an American vessel. The owners were British subjects, and, in violation of an act of Parliament, had caused the vessel to be registered in the name of an American owner in order that she could be used in commerce between American and British ports. The Lord Chancellor said: "The next point is that plaintiff's claim is in violation of the English ship registry acts. * * * But the answer to the objection appears to me this: That the plaintiff does not ask to enforce any agreement adverse to the provision of the act of Parliament. He is not seeking compensation and payment for any illegal voyage; that matter was disposed of when Taylor received the money; and the plaintiff is now only seeking for payment of his share of realized profits. The violation of the law suggested was not any fraud upon the revenue, or omission to pay what might be due, but, at most, an evasion of a parliamentary provision supposed to be beneficial to the shipowners of this country, an evil, if any, which must remain the same whether the freight be divided between Sharp and Taylor, according to their shares, or remain altogether in the hands of Taylor."

So in the case at bar the violation of the ordinance had been accomplished. The evil had been done before the lease was executed. It was perhaps within the power of the municipality to cause the building to be removed. But until this was done it remained the property of plaintiff, and defendants certainly had no right to take and enjoy the possession thereof under a lease and not be bound by the terms thereof. A different question would be presented if the action was by the builder to recover for having constructed the building; but to permit the defendants in this case to take and enjoy the possession of plaintiff's building without paying therefor as they agreed would be to encourage the grossest breach of fair dealing in the business world. *McDonald v. Lund*, 18 Wash. 412, 43 Pac. 348. The mere fact that certain property has been acquired in violation of some law does not rob it of its character of property, nor prevent it from being the subject of legitimate contracts which may be enforced in courts of law. *Roselle v. Beckmeir*, 134 Mo. 380, 35 S. W. 1132; *Andrews v. New Orleans*, etc., Ass'n, 74 Miss. 362, 20 South. 837, 60 Am. St. Rep. 509; *Minnesota*, etc., Co. v. *Whitebreast*, etc., Co., 56 Ill. App. 248; *Brooks v. Martin*, 69 U. S. 70, 17 L. Ed. 732; *Planters' Bank v. Union*, 83 U. S. 483, 21 L. Ed. 473. "Although there may be some illegal features indirectly connected with a transaction involved in a suit, yet the plaintiff may recover if his cause of action is otherwise le-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

gitimate, and he can make out his case without calling to his aid the illegal agreement. The test of whether the demand can be enforced at law is whether the plaintiff requires the aid of the illegal contract to establish his case." *Minnesota Lumber Co. v. Whitebreast Coal Co.*, supra.

The contract relied upon by the plaintiff in this case was entirely independent of and had no connection with the violation of the ordinance involved in the construction of the building. It is a matter of the history of San Francisco that after the great fire of April, 1906, by tacit consent of the public authorities property owners were allowed to construct buildings within the fire limits without regard to the fire ordinance. It was the only practicable method of providing facilities whereby thousands of citizens might resume useful and necessary business and callings. These defendants having availed themselves of one of such buildings to conduct their legitimate business, it would be a perversion of justice for a court of law to sanction their evasion of the payment of the agreed rent. We do not think the law requires it.

The judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

(13 Cal. A. 111)

KIEFHABER LUMBER CO. v. CONSOLIDATED LUMBER CO. (Civ. 768.)

(Court of Appeal, Second District, California. March 31, 1910.)

PAYMENT (§ 85*)—OVERPAYMENT—RECOVERY.

Within a territory, the retail lumber business of which, as between defendant, a wholesale lumber company, and N., a retail lumber company, was allotted to N., a sale to a third person was made by one who was president of N. and sales agent of defendant. The transaction was treated between N. and defendant as a retail sale, and, while the shipment was direct to the customer, the charge was made to N. The sale to the customer was made at less than the regular rate, and, in ignorance of this fact, the N. Company paid defendant's bill which was at the regular rate. *Held*, that N. was entitled to reimbursement from defendant for the excess thus paid to defendant through its error in making out the bill; the contract of sale being really a sale to N. by defendant.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 272-281, 336; Dec. Dig. § 85.*]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by the Kieffhaber Lumber Company against the Consolidated Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Middlecoff, H. M. Willis, and Percy R. Wilson, for appellant. E. C. Campbell, for respondent.

ALLEN, P. J. The facts as found by the court are these: Defendant, a corporation,

was engaged in the wholesale lumber business at Los Angeles. The Newport Lumber Company, a corporation, was engaged in the retail lumber business at Redlands in San Bernardino county. The principal amount of the capital stock of the latter company was owned by the former. The defendant company sold to the Newport Company a bill of lumber which was by the defendant shipped directly to the consumer, but charged, under a business arrangement existing between the two corporations, to the Newport Company. In billing the lumber to the Newport Company, a charge of \$446.29 in excess of the contract price at which the lumber was sold appeared. The Newport Company, without discovering such error, paid to defendant the amount of the bill as rendered to defendant. Thereafter, the Newport Company sold and assigned to plaintiff its claim on account of such excess payment so made by mistake, no part of which has ever been repaid. The court rendered judgment in favor of plaintiff, from which judgment and an order denying a new trial defendant appeals.

The issues presented by the pleadings involve not only the fact of sale and delivery of the lumber as found by the court, but the payment of the sum through mistake, as well as the assignment of the claim, if any existed. An affirmative defense was presented by defendant's answer, to the effect that any claim on account of overcharge in the transaction was not included in the sale and assignment of the assets of such company to plaintiff. The court found against defendant as to each and all of the allegations of its answer. The specifications of error all relate to the insufficiency of the evidence to support the various findings.

Considering the findings with reference to the sale and the fact that an error existed in the billing of the lumber, we find evidence in the record tending to show that one Nofziger, the active agent in the contract of sale on behalf of the lumber company, was the president of the Newport Company, as well as the sales agent of the defendant, but the retail lumber business in Redlands and vicinity as between the two corporations had been allotted as territory in which the Newport Company was to carry on its retail business; that the material connected with the controversy had been contracted by Nofziger at a fixed price less than the listed retail price at which lumber was billed to the Newport Company, and, notwithstanding the direct shipment to the consumer, the transaction was treated between the two corporations as a retail sale in the territory of the Newport Company, and, in keeping with their business transactions, the charge by defendant was made directly to the Newport Company and the Newport Company, in ignorance of the contract made with the consumer, credited

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the defendant with the list price, and charged the consumer therewith. After payment by the Newport Company to defendant, the Newport Company undertook to collect the amount of the bill, when the error was discovered, and Nofziger, admitting the mistake, directed the Newport Company to credit the consumer with the excess above the contract price and charge back to the Consolidated Company the amount of such error, and a settlement was made by the Newport Company with the consumer accordingly.

We think, under the circumstances narrated, the Newport Company, being in a sense a collection agency for the defendant, could only be held chargeable with the actual contract price of the material shipped to the consumer, and having no knowledge of the error, and being restricted in the amount of its collection from the consumer to the actual contract price, was entitled to reimbursement from the defendant of the amount of such error occasioned by defendant's act. The contract, under the circumstances, was correctly interpreted by the trial court as a sale to the Newport Company. The written bill of sale subsequently made by the Newport Company to the plaintiff comprehended a transfer of all of its assets, including this claim against defendant.

Treating the amendment to defendant's answer, in which is alleged the mistake in the bill of sale, as a pleading sufficient to raise an issue entitling defendant to a correction thereof, the court determined that it was not satisfied that such mistake existed, and found against the defendant in relation thereto, and from the evidence the court was warranted in such finding.

The record presents a case which, in our opinion, demands upon the part of defendant that it reimburse the assignee of the Newport Company, plaintiff herein, to the extent of the error so occasioned by the Consolidated Company; and we find no error in the record warranting a reversal of the judgment or of the order, and the same are affirmed.

We concur: SHAW, J.; TAGGART, J.

(12 Cal. A. 88)

ROSS v. FRANK. (Civ. 649.)

(Court of Appeal, First District, California.
March 24, 1910.)

1. SALES (§ 72*)—CONTRACT—CONSTRUCTION—"ORCHARD RUN"—"TEST ACCEPTED AT 53."

Plaintiff contracted to sell all the prunes on his trees, estimated at 35 tons, more or less, the contract reciting: "For prunes running orchard run (60 to the pound) when dried, \$95 per ton (with variations of \$1.00 per point up or down). All prunes to be good merchantable quality. Test accepted at 53." The words in parentheses were erased when the contract was executed. Held, that by the words "orchard run" was meant all the prunes in the orchard, without reference to size in grading, and the phrase "Test accepted at 53" meant that the

prunes had been tested and accepted, and that the result was 53 to the pound, and did not mean that defendant should be liable only for such prunes as conformed to the test.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 197-202; Dec. Dig. § 72.*]

2. SALES (§ 181*)—CONTRACT—EVIDENCE TO AID CONSTRUCTION.

Under a contract for the sale of prunes, evidence held to show that the parties intended the prunes to be taken as they came from the orchard, and that defendant had tested the prunes and accepted them at the test made.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 488; Dec. Dig. § 181.*]

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by J. W. Ross against George Frank, doing business under the firm name of Frank & Co. Judgment for defendant, and, from an order denying plaintiff's motion for a new trial, he appeals. Reversed.

Walter G. Fitzgerald and John P. Fitzgerald, for appellant. Will M. Beggs, for respondent.

COOPER, P. J. This action was brought by plaintiff to recover a balance claimed to be due for his crop of prunes for the year 1905 sold and delivered to defendant. The defendant recovered judgment, and this appeal is by plaintiff from the order denying his motion for a new trial.

It is conceded that the findings of the court and the judgment are the result of the construction given by the trial court to the written contract for the sale of the prunes which, with the erasures and interlineations, is as follows:

"H. C. Newby, Purchasing Agent. Gilroy, R. D. 26, and Coyote, Cal. Prune Purchasing Contract. Made in Duplicate. No. 70. Gilroy, Rural 25 Cal., Sept. 7, 19—. This contract made and entered into the above date by and between J. G. Ross and H. C. Newby of Santa Clara County, Cal. Witnesseth: That for and in consideration of the sum of One (1.00) dollars in hand paid, the receipt whereof is hereby acknowledged, the said Ross has sold to the said H. C. Newby, and said H. C. Newby has bought of the said Ross all of the French prunes now on the trees or being picked and dried from the Ross Orchard on the Soap Lake Road at Prunedale, estimated at about 35 tons more or less when dried, on the following terms and conditions: Terms, cash on delivery at the Geo. Frank & Co. Packing House at San Jose, Cal. For prunes running Orchard Run (60 to the pound) when dried, ninety-five \$95 dollars per ton (with variations of one \$1.00 dollar per point up or down), sacks to be furnished by the purchaser. All prunes to be of good merchantable quality, well dried, and delivered on or before Nov. 1st, 1905, and jointly scaled, according to the above terms, when ready to ship. Test Accepted at 53. J. George Ross, Seller. H. C. Newby, Purchaser. Re-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

marks: Purchaser to pay freight charges."

"San Jose, Cal., Sept. 9, 1905. We hereby agree and contract to receive and pay for all the prunes mentioned and named in the purchaser's contract on receipt of the same at our packing house at San Jose, Cal., according to the terms, prices and conditions herein set forth, and to furnish the sack for shipping the prunes to our packing house. Geo. Frank & Co., by Geo. Frank."

The contract was prepared upon a printed form used by defendant in making contracts for the purchase of prunes, and the words in italics were written in the contract at the time it was executed, and at the same time the words in parentheses were erased by running a pen through them, so that they were intentionally taken from the printed contract. It is said that 60 to the pound, or a test of 60, means 60 dried prunes to the pound as a basis; that "with variations of one dollar per point up or down" means \$1 per ton more when the prunes run less than the basis of 60 to the pound, and \$1 per ton less when they run more than 60 to the pound; so that prunes that would run 65 to the pound would be worth \$5 less per ton, and if they ran 55 to the pound they would be worth \$5 more per ton, with 60 as a basis. This, however, is not material except in aiding us to arrive at the meaning of the contract.

The trial court held that the phrase, "Test accepted at 53" was as matter of law a warranty that the defendant was not liable at the rate of \$95 per ton except for such portion of the plaintiff's crop as would test 53 according to the tests as herein stated. We do not so construe the contract. The contract was a sale of all plaintiff's French prunes on the trees, or being picked and dried from the Ross orchard. The words "orchard run" were *ex industria* written in the contract. The provisions as to the basis of 60 to the pound and as to variations of \$1 per point up and down were intentionally erased from the contract. By the words "orchard run" was meant all the French prunes in the orchard without any references to size in grading. It was intended that the entire crop of prunes, whether above or below the test of 53, was to be paid for at the rate of \$95 per ton. The only warranty in the contract was that the prunes were to "be of good merchantable quality well dried." It is not claimed that they did not comply with the contract in this regard. The phrase "Test accepted at 53" meant that the prunes had been tested and accepted, and that the result of the test was 53 to the pound. The agent of defendant examined the prunes, tested them, and stated the result of his test, but he purchased for defendant all the prunes of good merchantable quality well dried. The whole crop, whether 35 tons more or less, was purchased by the ton. The whole crop, whether 53 to the pound more or less, was purchased, and it was so intended. No provision was made as to a greater price for superior

prunes, or prunes that would run less than 53, nor for a less price for prunes that should run more. One price for all sizes is the express provision of the contract. The words in the contract, "and jointly scaled, according to the above terms, when ready to ship," were in the printed contract, and would apply provided the prunes had been sold on the basis of 60, "variation of one dollar per point up and down"; but, as the provision to which the words would apply was erased, the provision is without meaning as to the contract which the parties really made.

Respondent's counsel says in his brief that about the only question in the case is as to whether or not the trial court properly construed the contract, and it was proper for the court to, and the court did, admit evidence of the circumstances under which the contract was made, and the preliminary oral conversation leading up to it. We have examined the evidence so admitted, and it confirms the views so expressed as to the intentions of the parties set forth in the contract. The plaintiff testified that he went with Newby, the defendant's purchasing agent, who came to his ranch a number of times, and that he assisted Newby in making tests of the prunes; that they examined the prunes thoroughly, and, after such examination, he sold the entire crop at \$95 per ton; that the part of the contract as to a basis and as to a variation from the basis was by agreement stricken out; and that the prunes were sold for "95 per ton orchard run; that is, just as they came from the orchard without any grading." Newby, the agent, who was defendant's own witness, testified that, when he went to see plaintiff, he told plaintiff that he "would pay 3½ base; that is \$95 a ton for 55"—that plaintiff replied that "he would like to sell the fruit, but wanted \$95 a ton straight for it;" that he told plaintiff that, if the prunes would test 55, he would give him \$95 per ton for it; that he had his scales with him and went over the lot, digging down in the bins, taking about 35 tests; that the plaintiff had also taken about a similar number of tests which he had written down in a book; that he took all the tests so made by himself and all the tests made by plaintiff and averaged them; that they averaged 53; that plaintiff said he thought the prunes would hold up to the test, and that he (witness) thought so, too. The witness further said: " 'Test accepted' means that you had already tested the fruit, and this fruit we did test, as it did run 53. I scratched out the part 'variation' as we had made the test because the part I did test ran fifty-three, and I am a good tester. * * * 'Orchard run' means all the fruit in the orchard and that it is an ungraded lot of fruit. Sometimes in buying we don't take tests. I was to take the entire crop of merchantable fruit."

The defendant testified that the reason he did not receive the prunes was because they did not run 53, but ran about 63, and that,

when plaintiff came to the packing house, he told plaintiff that the prunes were not running 53, and plaintiff replied, "It did not make any difference, as they were all bought at the flat rate of \$95 per ton."

It may be further remarked that some allowance was evidently made in making the test, because Newby testified that he was willing to pay \$95 per ton for prunes that would test 55; and as he only agreed to pay \$95, according to his own testimony, they would have been worth \$97 per ton if they had held up to the test of 53, being two points up.

The order is reversed.

We concur: HALL, J.; KERRIGAN, J.

(13 Cal. A. 119)

EVANS DITCH CO. et al. v. LAKESIDE DITCH CO. et al. (Civ. 649.)

(Court of Appeal, Third District, California. April 1, 1910. Rehearing Denied by Supreme Court May 28, 1910.)

1. WATERS AND WATER COURSES (§ 152*)—APPROPRIATION OF WATERS FOR IRRIGATION PURPOSES—EVIDENCE—SUFFICIENCY.

Evidence held to justify a finding that the use of the waters of a stream for irrigation purposes by one and his predecessors in title was open, notorious, exclusive, and adverse.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

2. WATERS AND WATER COURSES (§ 152*) —ADVERSE USER OF WATERS.

The question whether the use of the waters of a stream is adverse or with implied license of the owner of the servient estate is one of fact, to be determined in the light of surrounding circumstances.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

3. WATERS AND WATER COURSES (§ 133*)—ADVERSE USER OF WATER.

One appropriating the waters of a stream under a claim of right may do so by means of an artificial and a natural channel; and in this respect there is no difference between an appropriation of water under a claim of right for the requisite time to ripen into a title by prescription, and the case of an appropriation specifically provided for in Civ. Code, §§ 1415-1421, providing for the appropriation of water.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 133.*]

4. WATERS AND WATER COURSES (§ 152*)—ADVERSE USER OF WATER.

Evidence held to justify a finding that the appropriation of the waters of a stream and the use thereof were in behalf of and for the benefit of a party suing to restrain the diversion of the waters.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

5. WATERS AND WATER COURSES (§ 152*)—ADVERSE USER OF WATER.

Under Code Civ. Proc. § 1963, subd. 11, asserting the presumption of ownership from the fact of possession, one in possession of ditches and water rights when another obstructs the flow of water is presumptively the owner of the ditches and water rights.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

6. WATERS AND WATER COURSES (§ 142*)—ADVERSE USER OF WATER.

A river divided into two channels, K. and S., between which a natural channel, opening into K., existed. An artificial channel was dug connecting S. with the natural channel, and, by means thereof, the waters of S. were diverted to K. for use below the mouth of the natural channel. The person who so used the waters owned the ditches connecting with K., together with the water rights belonging thereto. Held, that the right to the use of the water flowing through the natural channel into K. was an appurtenance to the ditches, and the water right followed the ownership of the ditches.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 142.*]

7. WATERS AND WATER COURSES (§ 140*)—PRIOR APPROPRIATORS.

A river divided into two branches, K. and S., between which a natural channel opening into K. existed. An artificial channel was dug, connecting S. with the natural channel, and, by means thereof, the waters of S. were diverted to K. for use below the mouth of the natural channel. When the water was low in S. river at the point of diversion, it would not reach the point of an attempted diversion by another. Held, that the upper appropriator of the waters was a prior appropriator as against the one who attempted to divert the waters of S.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 140.*]

8. WATERS AND WATER COURSES (§ 152*)—APPROPRIATION OF WATER—EXTENT.

Where the evidence of the amount of water appropriated by a party was admitted without objection, and a competent hydraulic engineer testified to making measurements and calculations, and he reached a conclusion as to the amount of water, and there was no conflicting testimony, the court properly acted on the evidence.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

9. EVIDENCE (§ 546*)—OPINION EVIDENCE—COMPETENCY OF EXPERTS.

In determining the competency of an expert, the trial court has a wide discretion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2363; Dec. Dig. § 546.*]

10. EVIDENCE (§ 545*)—OPINION EVIDENCE—COMPETENCY OF EXPERTS.

Where a question asked an expert is objected to on the ground that he has not shown himself qualified, the party producing the expert should go into the facts disclosing the ability of the expert to testify as such.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2360-2362; Dec. Dig. § 545.*]

11. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSION OF WITNESS.

A question calling for the opinion of a witness on a question of fact is properly disallowed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.* Witnesses, Cent. Dig. §§ 833-836.]

12. TRIAL (§ 89*)—STRIKING EVIDENCE—TESTIMONY NOT RESPONSIVE TO QUESTIONS.

An answer not responsive to the question asked is properly stricken.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 228-234; Dec. Dig. § 89.*]

13. WITNESSES (§ 245*)—ERRONEOUS EXCLUSION OF EVIDENCE.

An objection to a question previously answered is properly sustained.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 827, 828; Dec. Dig. § 245.*]

14. WATERS AND WATER COURSES (§ 152*) — APPROPRIATION—PRESCRIPTIVE RIGHTS.

To establish by prescription title to water appropriated for irrigation purposes, it is necessary to show that the use of the water was under a claim of right, and this may be shown by the acts, declarations, and relation of the parties to the controversy.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 152.*]

15. EVIDENCE (§ 273*) — DECLARATIONS — INTENT — APPROPRIATION — PRESCRIPTIVE RIGHTS—CLAIM OF RIGHT.

Where a party claimed title by prescription to water appropriated for irrigation purposes, under a claim of right, a witness with knowledge of the facts could testify that the party, during the time he used the water, had openly declared that he claimed a right to the use of it.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273; **Adverse Possession*, Cent. Dig. § 670.]

16. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

Where only one conclusion could be drawn from the facts to which a witness testified, the error, if any, in permitting the witness to state such conclusion as his opinion, was not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Evans Ditch Company and others against the Lakeside Ditch Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Lamberson & Lamberson, Frank H. Short, and C. L. Russell, for appellants. E. O. Larkin and Hannah & Miller, for respondents.

BURNETT, J. The Kaweah river, as stated by appellants, has its source in the Sierra Nevada Mountains in the eastern portion of Tulare county, and flows in a generally western direction to Tulare Lake. At a point known as "McKay Point," where the stream emerges from the foothills, it divides into two branches, the southern one of which retains the name Kaweah and the northern one taking the name of the "St. Johns river." Between these two streams there is also a natural channel called "Lane slough" emptying into said Kaweah river. About the year 1877 an artificial channel or ditch was dug connecting St. Johns river with said slough and by means thereof water was diverted from said St. Johns to the said Kaweah river. The plaintiffs are appropriators from the latter stream below the mouth of said slough, and the defendants are appropriators from the St. Johns below the point where it was tapped by said ditch. In February, 1906, the plaintiffs brought this action to secure a mandatory injunction requiring the defendants to remove all obstructions that prevent the flow of water from the said St. Johns into Lane slough and "to permit the free flow of the waters from said St. Johns

river through the same to the said Kaweah river" and for general relief. The defendants admitted that they "dammed up the said canal or ditch where the same was taken out of said St. Johns river and interfered with and prevented the flow of water through the same"; but it is claimed that they were entitled to said water, and that plaintiffs had no interest whatever in the same, and that it had been wrongfully diverted by parties who were "not in privity or acting for or on behalf of plaintiffs or any of them."

The finding of the court upon which the controversy really hinges is: "That in the year 1877 the predecessors in interest of said plaintiffs entered upon the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 2, township 18 S., range 26 E., M. D. M. in said county of Tulare, and excavated and dug and made a canal or ditch leading out of said St. Johns river at said point into the bed or channel of said Lane slough and by means of said canal or ditch and the said slough diverted from said river 99.60 cubic feet per second of the waters thereof, for the irrigation of their lands lying along the line of the respective ditches of plaintiffs; that, at the commencement of this action, plaintiffs claimed the right to use and divert 60 cubic feet per second of said waters of said river for said purposes, and plaintiffs or their grantors or predecessors in interest did each and every year after the year 1877, up to the 23d day of March, 1902 (when defendants filled up said ditch), divert and use for said purposes, under claim of right so to do, openly, notoriously, continuously, peaceably, exclusively, hostile to, and with the knowledge and acquiescence of defendants and each and all of them, and adversely to them, and each of them, 60 cubic feet per second of said waters of said St. Johns river, through and by means of said ditch or canal, and the channel of said Lane slough, at all times when there was not more than 200 cubic feet per second of water flowing in the channel of said St. Johns river at the head of said canal or ditch on said section 2."

It is contended by appellants that this finding is utterly unsupported, in that the evidence fails to show: (1) That the plaintiffs are the successors in interest of the persons who dug the ditch in question; (2) that the use of said water by plaintiffs or their predecessors was such as the statute requires in order to ripen into a title by prescription; (3) that there was any transfer of the title to the Lane slough, or the ditch or water rights connected therewith, from the original owners to plaintiffs or any of them.

Some of the other findings are assailed also; but it is recognized that said finding 5 is the vital one in controversy, and as to this finding the principal point of attack upon

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which appellants rely is shown in the following quotation from their brief: "Upon the issues made by these allegations of the complaint and the denial thereof by the defendants, the principal portion of the evidence in this case was introduced. The whole subject of the statute of limitations as applied to an adverse diversion of water was gone into, and it seems that the plaintiffs did not make a case which would comply with any of the rules laid down by this and other courts of last resort, under the statute of limitations. The actions of the plaintiffs and defendants resulted in producing nothing more than a scrambling possession which fluctuated from day to day during the irrigation season and was not limited to any particular time, except that some of the witnesses testified that when there was plenty of water for everybody they did not interfere with the running of the water through this ditch, and of course that kind of use by the plaintiffs would not be an invasion of the rights of the defendants."

But in the consideration of this pivotal question and of others less important we are confronted by a stipulation entered into by the parties and filed as a record at the beginning of the trial, as follows: "It is hereby stipulated between the parties to the above-entitled action, and for the purposes of the trial of said action, that the plaintiffs in said action are respectively the owners of the respective ditches mentioned in the complaint herein, and that the said plaintiffs and their predecessors in interest, as alleged in the complaint herein, have each severally diverted, and used, during the times mentioned in said complaint, the respective quantities of water into the said respective ditches, as alleged in said complaint, when there was that much water flowing in the said Kaweah river or Mill creek at the respective heads of the said ditches." It is not disputed that the water diverted from the St. Johns river through the aforesaid ditch dug in 1877 and the said Lane slough flowed into the Kaweah river above the heads of said ditches referred to in said stipulation, and that it continued in said river till it reached said ditches. Attaching, therefore, the ordinary signification to the plain and unambiguous language of the stipulation, it would seem to mean that the plaintiffs and their predecessors have used during the time mentioned in the complaint, to wit, "for more than 20 years last past," the water "turned into said Lane slough at or near its head in the said St. Johns river by means of head gates, dams, and other artificial structures" amounting to "as much as 60 cubic feet per second," and this was "diverted and conducted down the channel of said Kaweah river and Mill creek and turned into the heads of their respective ditches," and it "was used by plaintiffs during said time for

the irrigation of agricultural lands lying along the line of said respective ditches, and for watering live stock kept thereon and for other useful and beneficial purposes," and its use "has at all said times been made under claim of right so to do with the knowledge and acquiescence of said defendants and each of them, uninterruptedly, openly, notoriously, and hostile to said defendants and each of them and continuously and adversely to each of them."

Appellants claim, however, that this is extending the scope of said stipulation beyond the intention and construction of the parties. They say that: "If the parties had stipulated to that effect, there would have been nothing in the case to try. That was the whole point in the case; whether or not the plaintiffs had acquired the right to divert any water from the St. Johns river into Lane slough by means of this ditch, and if they had done so for 20 years there could be no doubt of their having acquired the right, but the stipulation does not purport to deal with that question in any manner whatever. That was the contested point in the case." While the language of the stipulation is unmistakable as to the use by plaintiffs and their predecessors of the quantity of water alleged in the complaint for 20 years, there is some plausibility in the contention that it was not intended by defendants to admit that this use was under a claim of right and hostile to the interests of appellants. In other words, when the parties stipulated that the plaintiffs and their predecessors "used, during the times mentioned in said complaint, the respective quantities of water into the said respective ditches, as alleged in said complaint," the expression "as alleged in said complaint" was designed to apply to the quantity of water, and not the manner in which it had been used. This harmonizes with the declaration of one of the counsel for appellants made during the trial that: "The stipulation is that the water claimed to be diverted by the plaintiffs from the Kaweah were diverted by the plaintiffs at the time and in the manner stated when there was that much water in the river. Of course, that don't include anything about authorization or anything of that kind. It includes all that this witness could testify to with reference to the diversion of water from the river because it includes all that there is in the pleadings about the diversion of water from the river." While the foregoing statement is probably not as clear as it would be if made more deliberately, it seems that the point was intended to be emphasized that the authority or right to the use of the water was the question not covered by the stipulation, and therefore a proper subject of inquiry. Respondents must also have so understood the stipulation, as they proceeded to introduce evidence to support their claim of the adverse character of the use. This

evidence, it is earnestly insisted by appellants, falls far short of meeting the requirement of the law. We feel assured, however, that, giving it the most favorable consideration, from said evidence a rational inference may be drawn that the use of said water by plaintiffs and their predecessors was open, notorious, exclusive, continuous, and under a claim of right and therefore "adverse," as that term is generally used.

The testimony showing these elements of title by prescription is given by a number of witnesses. It may be that no single witness has testified to a sufficient number of facts to warrant the conclusion of the court below, as the opportunities for observation on the part of the various witnesses were somewhat circumscribed; but in the aggregate the testimony is a sufficient foundation to support the finding. Alma Hall testified: "I am acquainted with Lane slough. My first acquaintance with it, I couldn't tell you when, but in 1877 was the first time I was there on any particular occasion. In 1877 I went up there and hauled some lumber and put a headgate in about 100 yards from the St. Johns and stayed there, I guess, about a week, cleaning out the brush and logs and things and grubbing vines. I went up there, I think, on Monday and worked until Saturday afternoon, cleaning and grubbing vines and drift and logs very near down to the Kaweah river. I was back there again in 1879. We went back to turn in some water in Lane slough or to strengthen the wing dam that was turning in the water. * * * When I got up there the wing dam had washed out in spots, so it wasn't turning any water into the slough. There was water running in there without the wing dam. I suppose it was probably a foot deep in the channel of Lane slough, something near that. I think we increased the flow of the water about one-third after we fixed the dam. Frank Duran was there in the interest of the Oakes ditch. John O'Connor was there, I suppose, for the Evans ditch. I was up there again in 1898. I was up and down it different times just passing through that county over Lane slough. I always saw water in Lane slough when there was water in the St. Johns river opposite. Some times it would be pretty small; sometimes quite a stream. The water went into the Kaweah river."

Peter L. Fenwick was intimately acquainted with Lane slough in the years 1882 and 1883 and saw the water running through it during those years. "It came from the St. Johns river. There was a time when a large stream was running through there and there were other times when the stream was very small; just owing to the quantity of water that was in the river how much would come down through the ditch. It emptied into the Kaweah river." He further declared that the headgate was never interfered with. The

wasteways were pulled out sometimes, but he did not know who did it. He testified to a conversation he had in 1883 with Mr. Johnson, the president of the Lakeside Ditch Company. He says: "They were there at the head of Lane slough at the same time I was. There was quite a little stream of water in the river, and the slough was as full as could be; they didn't do anything. I heard the parties were coming up, and I met them by Cutler's Bridge. We went up the river together. When we got up to Lane slough, one young fellow jumped down and says, 'Here, boys, is where she is going,' and went out to pull out my waste boards. I just reached down and tapped him on the shoulder and says, 'What are you going to do?' He says, 'I am going to take out these boards.' I says, 'No, don't you do it.' Says he, 'Why?' I says, 'That's my property.' Mr. Johnson came up then and says, 'Mr. Fenwick, ain't you joking?' I says: 'No, I am not. If this is your water, you go down to Visalia and make me know that this is your water, then you needn't come up here at all. I will come back and turn it to you.'" He further declared that Mr. Johnson told the young man who attempted to move the boards to let them alone, and that they never molested any of the boards while the witness was there.

James Evans testified that he was at Lane slough in 1878 in the summer time. "I think there was about $3\frac{1}{2}$ feet of water in Lane slough and probably 18 or 20 or 30 feet wide. There was a good stiff stream. There was a headgate in at that time. The headgate was 16 feet wide and about 8 feet deep. It was about 20 feet long. In 1883 I was there. I went up there to see about ditch matters, for the Burch ditch, the Watson ditch, the Evans ditch, and the Oakes ditch. There was a small quantity of water running in Lane slough. That was in October during the dry season. There was very little water in the St. Johns or anywhere in there." He testified to being there also in November, 1883, and January, 1884. On the latter date he went for the purpose of closing the headgate, as there was too much water flowing through. "I would go there after that maybe twice or three times in a month for about 12 years off and on. There would be sometimes a month or two, or two or three months, that I wouldn't go there; but I always went there in the fall of the year when the water was low. I was an owner in the Evans ditch until 1891. I was doing work for the Watson and Burch ditches. I was working for another company, the Kaweah & Mill Creek Company. I went back there usually both in the spring and fall. Between 1884 and 1891, when there was water in the river, there was water in Lane slough, and, if there was any water in the St. Johns river, Lane's slough after 1886 would draw the low water of the St. Johns, and all that water run into Kaweah river at the end of Lane Slough. I

think I was up there in the year 1885 probably 12 or 15 times. I did not observe that any one had interfered with the flow of the water in the Lane slough in any way that season. I never knew of any such thing taking place. I never heard about it. There was a dam put in above the gate in 1885 across the channel that led down to Lane slough. It cut off part of the water. The dam went clear across the stream, but the water run over the dam. The dam was put in there by consent. Mr. Dodge and Mr. Watson came and asked if they could put an obstruction in there after the gate wouldn't hold, so as to get more water down the St. Johns. They said they were short of water and there was too much water going down the Kaweah. They said the Kaweah river had a good deal more water in it than the St. Johns, and Lane slough was drawing a big stream of water, and they asked if they could put a dam across the head. The headgate wouldn't work, and they said that, if they could put a dam in at the head of Lane slough until the run of water was over, then they would take it out. Sam Evans and myself went up there when the water got down pretty low, and I took a team, and we pulled a portion of the dam out that day, and we didn't get through, so I got one of the Dokes to pull the other part of the dam out."

O. P. Majors testified that for three years from 1894 to 1897 he did work at different times for the Watson ditch and "the other ditches here, the plaintiffs in this action. I was superintendent of the Kaweah and Mill creek at the same time. I was familiar with Lane slough all the time during those three years. Sometimes Lane slough was pretty full; other times it was not. I kept water in it all the time, turned it all down Lane slough when it was low. I did that by putting in a sand dam. When we put in the sand dam in the St. Johns, why of course it all came down Lane slough except seepage. I talked with John Parr (superintendent of St. Johns River Association) at different times. He was taking water down the St. Johns. He told me he wished I would let part of it go down for a few days, then I could shut all out, and I did so, changed it there."

W. G. Pennebaker was familiar with Lane slough from 1892 to 1897, and he testified that: "Lane slough always drew water from the St. Johns whenever there was any there. No one came up there while I was there and interfered with our taking water from Lane slough on any occasion. I never knew of any dam being put across Lane slough during the time I was going to and fro from its head. I have no knowledge of it at any other time. I don't remember of ever seeing it."

There was much other testimony of similar import. The witnesses are positive as to the continuous diversion of the water from the St. Johns river for more than 20 years. What has been quoted shows conclusively that it was under a claim of right as the parties di-

verting it exercised the usual acts of ownership. The diversion was open and notorious, effected by means of artificial contrivances which not only could be seen, but were actually seen by representatives of appellants. The court below, from this long-continued use, might have presumed the knowledge and acquiescence of appellants; but it had the direct statements of the witnesses clearly revealing such knowledge and acquiescence. As the question of taxes is not involved, no element of title by prescription is wanting.

Complaint is made that the testimony as to interference is negative in its character, that from the declaration of the various witnesses for plaintiffs as to their want of knowledge or information concerning any opposition of defendants, it does not follow that the said diversion of the water was not challenged. It is not contended that the evidence is conclusive as to plaintiffs' claim; but it must be apparent that their showing, giving it full credit as we must is as complete as is practicable or as is required to support the inference that the water was diverted for at least five years under a claim of right and without any interference or opposition on the part of appellants, but with their full knowledge and acquiescence.

The question whether or not the user is adverse or with the implied license of the owner of the servient estate is one of fact to be determined in the light of all the surrounding circumstances. *Thomas v. England*, 71 Cal. 456, 12 Pac. 491. In *Franz v. Mendoca*, 131 Cal. 205, 63 Pac. 861, it is held that, "where the user of a way is shown to have been continuous for the full period of limitation, unexplained, without anything in the evidence or in the circumstances of the case to indicate the contrary, it may be presumed that it was under a claim of right and adverse to the owners of the land." See, also, *Gurnsey v. Antelope Creek, etc., Water Co.*, 6 Cal. App. 391, 92 Pac. 326, and cases therein cited.

The result is not affected by the circumstance that the diversion was made by means of an artificial and a natural channel. As said in *Lower Tule, etc., Co. v. Angiola, etc., Co.*, 149 Cal. 498, 86 Pac. 1081: "A person who is making an appropriation of water from a natural source or stream is not bound to carry it to the place of use through a ditch or artificial conduit, nor through a ditch or canal cut especially for that purpose. He may make use of any natural or artificial channel, or natural depression, which he may find available and convenient for that purpose, so long as other persons interested in such conduit do not object and his appropriation so made will, so far as such means of conducting the water is concerned, be as effectual as if he had carried it through a ditch or pipe line made for that purpose and no other."

In this respect there can be manifestly no difference between the appropriation of wa-

ter under a claim of right and for the requisite time to ripen into a title by prescription and the case of the appropriation specifically provided for in the Civil Code (sections 1415-1421).

But if we interpret said stipulation of the parties as applying only to the waters in the Kaweah river at McKay Point above the mouth of said Lane slough, as contended for by appellants, there is no ground upon which we would be warranted in reversing the judgment of the lower court. Upon this theory of the stipulation it would be necessary for plaintiffs to prove that the use of the water diverted from the St. Johns river by means of said ditch and slough was under a claim of right for the statutory period, which we have already considered, and was enjoyed by plaintiffs or for their benefit or by their predecessors in interest, or else that they were prior appropriators of said waters together with the amount of said waters so appropriated. This is required by reason of the general denials of the answer and the specific allegation as to want of privity to which we have already referred, and "that the said canal or ditch so excavated and made from the said St. Johns river to said Lane slough was not and never has been a natural water course and the plaintiffs herein have never diverted any water whatsoever from the said St. Johns river through or by means of said canal or ditch."

As to the proposition that the use was for the benefit of respondents, it is pointed out in their brief that: "On the 3d day of November, 1877, the owners of the respective ditches now owned by plaintiffs organized themselves into a corporation known as the 'Kaweah & Mill Creek Water Company,' and filed articles of incorporation thereof on said day. One of the main purposes of this corporation 'was to keep water in the Kaweah and Mill creek channel; the route to be adopted to be through Lane slough and any new cut the company may deem expedient to keep water in said Kaweah and Mill creek channel for irrigation and manufacturing purposes.' This company also acquired title on October 27, 1877, to the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 2, township 18 S., range 26 E., upon which land according to the answer the canal or ditch was dug through which the water of the St. Johns river was diverted." James Evans testified that "this land was in possession of the Kaweah & Mill Creek Water Company ever since the 11th day of May, 1882, and under its control for and on behalf of plaintiffs in this action up to the time that he left in 1891; that he came back in 1892 and was here until 1894 and it was still under their control; that said company didn't act for anybody else besides plaintiffs." Alma Hall, a witness for plaintiffs, testified that in 1877 he went up to the head of Lane slough with Mads Johnson, Frank Duran, John O'Connor, and

others in the month of November, to get water down through said slough; that they were three days. Three of them used scrapers, O'Connor for the Evans ditch and the others for the Oakes ditch. He further testified that the Kaweah & Mill Creek Water Company was turning water down for the benefit of the Evans, Watson, Fleming, Persian, Evans Extension, Oakes, and Burch ditches.

From the foregoing and other testimony, some of which we have hereinbefore quoted, the court was entirely justified in concluding that the diversion of the water and its use were in behalf and for the benefit of plaintiffs. Moreover, as suggested by respondents, "plaintiffs had possession of their ditches and water rights in March, 1902, when defendants obstructed the flow of the water into Lane slough, and are presumed to own such ditches and water rights in the absence of a showing by defendants to the contrary. Subdivision 11, § 1963, Code Civ. Proc.; McGovern v. Mowry, 91 Cal. 383 [27 Pac. 746]; Zilmer v. Gerichten, 111 Cal. 73 [43 Pac. 408]; Kellogg v. King, 114 Cal. 383 [46 Pac. 166, 55 Am. St. Rep. 74]; Utt v. Frey, 106 Cal. 396 [39 Pac. 807]." Furthermore, it was admitted that plaintiffs own the ditches connecting with the Kaweah river and Mill creek, together with the water rights thereunto belonging. But it is clear that the right to the use of the water flowing through said Lane slough into said river is an appurtenance to said ditches. The water right therefore would follow the ownership of the ditches to plaintiffs.

In this connection it is to be observed that there was evidence also that, when the water was low in the St. Johns river at the said point of diversion into Lane slough, it would not reach the head of the Lakeside ditch by seepage or otherwise. It could not have been and was not used, therefore, by appellants. Hence the respondents would be prior appropriators, and appellants stand in the attitude of trespassers.

The evidence as to the amount of water appropriated was admitted without objection, and we cannot say that the trial court was not justified in acting upon it.

L. E. McCabe, a competent hydraulic engineer, testified to making measurements and calculations, and he reached the conclusion that "with the wing dam in there would be 64.38 cubic feet per second running into the slough." This evidence was probably the best that was available, and, since no counter showing was made by defendants, the court could scarcely have disregarded the testimony of McCabe.

Certain rulings of the court as to evidence are assailed; but, even if erroneous, they are not of sufficient importance to justify a reversal of the judgment.

Alma Hall was asked on cross-examination this question: "Did you at any time attempt to take that dam out of Lane slough, and

were you prevented by these Lakeside people from doing so?" In his direct examination he had said nothing about this particular dam, and hence the ruling was probably correct; but, at any rate, he substantially answered it by stating that he did take out part of the dam during that summer, and he did not remember of seeing any of the Lakeside people up there during that year.

Burton Smith, a witness for the defendants, was asked this question: "Then, from the amount of water you saw there, you estimated it to be about seven cubic feet per second? A. Yes, sir." To the question counsel for plaintiffs objected on the ground that the witness had not shown himself qualified to measure water. The objection was sustained, and the answer was stricken out. In determining the competency of an expert witness, the trial court has quite a wide discretion, and we are not prepared to say that it was abused in the present instance, although the witness had stated that "I had been accustomed to measure the water myself and to measuring and determining the water flowing in a stream and ascertaining the amount of cubic feet per second." In view of the objection, however, that was made, appellant should have gone more particularly into the facts disclosing the ability of the witness to estimate with some degree of accuracy the amount of water carried by the stream. But again, the question seems to have related to a particular date when the stream was observed by the witness, and there is no controversy that at times no water at all was flowing into the slough from the St. Johns, and necessarily a very small quantity at other periods, and the answer of the witness would manifestly have not assisted the court in determining the maximum amount to which respondents were entitled.

The question: "Is it not a fact that from 1885 to the time you quit having anything to do with the conducting of water through Lane slough that you took through Lane slough, and were permitted to take through Lane slough, only enough water as in your judgment and in the judgment of the people representing the Lakeside Ditch Company and the St. Johns River Association was sufficient to equalize the water so that half of the water coming down the Kaweah river would run in the St. Johns river and half of it in the Kaweah river?" addressed to James Evans, manifestly called for his opinion and was properly disallowed. His cross-examination took a wide range and included every pertinent fact throwing any light upon the question whether the appropriation of the water was in pursuance of any understanding or otherwise.

The action of the court was clearly right in striking out as not responsive the answer of witness Bryan. "Well the division was made there to keep the water in the Lakeside ditch as long as the water would reach the head of the ditch," to the question, "What was the division made then?" This did not

call for the opinion of the witness as to the purpose for which the division was made.

The same suggestion will apply to William Dougherty's answer to the question: "What were you doing there at McKay Point that year?"

Alma Hall was asked the question on cross-examination: "In 1896 isn't it a fact that there was plenty of water in the Kaweah and Mill creek for all these ditches which are plaintiffs' in this action without any water in Lane slough?" An objection was sustained on the ground that it was not proper cross-examination. In support of the ruling, it is contended by respondents "that he was put on in rebuttal for the sole purpose of contradicting defendants' witnesses in regard to the interference of plaintiffs' use of the water, and this question was not properly directed to that fact"; but, whether this is so or not, the question called for an opinion of the witness, and, besides, he had previously answered it by stating that at times there was, and at other times there was not, plenty of water "without the water from Lane slough."

James Evans was asked on redirect examination: "I suppose you know that these ditch companies, plaintiffs, in this action, claimed that water all that time, claimed the right to use it?" It was objected on the ground "that the same was immaterial, irrelevant, and incompetent, and not redirect examination." The objection was overruled, and the witness answered, "Yes, sir." In order to establish a title by "prescription," it was necessary, as we have seen, that the use was under a claim of right. This would ordinarily be shown by the acts, declarations, and relation of the parties to the controversy. If the plaintiffs, during the time they were using the water, had openly declared that they claimed a right to the use of it, a witness with knowledge of that claim would be competent to testify to it. This may have been the position of Evans, and upon that assumption the question was proper. If the answer simply reflected his opinion from the acts of the parties, appellants should have shown that fact by further examination of the witness. Again, no other conclusion could have been drawn from the facts to which he testified. Hence the ruling, if erroneous, was without prejudice.

There are some other points made by appellants; but they are all of minor importance and do not justify any further attention. As already indicated, it is admitted by appellants that the decisive question in the case is the finding as to the use of the water in the requisite manner and for the statutory period to establish a title by prescription.

As we read the record, there can be no possible doubt as to this point, and the judgment and the order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(13 Cal. A. 96)

PEOPLE v. MARTIN. (No. 188.)(Court of Appeal, First District, California.
March 30, 1910.)**1. HOMICIDE (§§ 109, 126*)—JUSTIFICATION—NECESSITY.**

At common law, though the right of self-defense against imminent and immediate danger to life or limb from an aggressor existed, such right did not extend to the killing of an innocent third person.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 138, 139, 191; Dec. Dig. §§ 109, 126.*]

2. HOMICIDE (§ 115*)—JUSTIFICATION—SELF-DEFENSE—IMMINENT DANGER.

Under Pen. Code, § 197, making homicide justifiable when permitted in self-defense or in defense of a wife or husband, parent, child, master, mistress or servant, when there is reasonable ground to apprehend a design to commit felony or to do some great bodily injury, and imminent danger of such design being accomplished; and section 692, providing that lawful resistance to the commission of a public offense may be made by the party about to be injured, and section 693, authorizing resistance to prevent an offense against one's person or his family or some member thereof, or to prevent an illegal attempt by force to take or injure property in his lawful possession, the right of self-defense can only be exercised to prevent an imminent danger of an offense about to be committed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 155-157; Dec. Dig. § 115.*]

3. CRIMINAL LAW (§ 38*)—JUSTIFICATION—DURESS.

Pen. Code, § 26, excepting from the class of persons capable of committing crimes those who commit the act under threats or menaces sufficient to show that they had reasonable cause to believe and did believe their lives would be endangered if they refused, does not excuse the commission of a felony against the property of an innocent third person because the person doing the deed had reason to fear, not an immediate danger to his life, but a future and remote danger.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 43; Dec. Dig. § 38.*]

4. INFANTS (§ 67*)—CRIMES—JUSTIFICATION—DURESS—INSUFFICIENCY.

That a person committing a deed and claiming that it was done under compulsion was an infant does not affect the construction of Pen. Code, § 26, excepting from the class of persons capable of committing crimes those who commit the act under fear of danger to their lives, as to the question whether the fear must be of imminent danger or may be of remote danger.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 173; Dec. Dig. § 67.*]

5. CRIMINAL LAW (§ 507½*)—EVIDENCE—ACCOMPLICES.

Where a witness committed the act of which defendant is accused under the direction of defendant, evidence that the witness had committed various other felonies under threats from defendant, introduced to show that the act of the witness, being under fear of danger to his life, was not criminal, and that he was therefore not an accomplice, was inadmissible, where the fear under which witness claimed to have acted in the present case was not of immediate danger, but of future and remote danger.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 507½.*]

6. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in the admission of evidence of previous acts by a witness under threats from defendant was not cured by similar testimony introduced by defendant where such testimony did not cover nearly all the matters erroneously admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3138-3140; Dec. Dig. § 1169.*]

7. CRIMINAL LAW (§ 351*)—EVIDENCE—RELEVANCY.

In a prosecution for depositing and exploding dynamite near a residence, evidence of the possession by defendant at the time of her arrest 10 months after the crime of which she was charged of various poisons, none of which had any connection with the crime charged, was not admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785; Dec. Dig. § 351.*]

8. CRIMINAL LAW (§ 338*)—EVIDENCE OF OTHER OFFENSES—ADMISSIBILITY.

In a prosecution for depositing and exploding dynamite near a residence, evidence of obscene letters and writings of defendant, in no way relating to the crime charged, was improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752-757, 788, 789, 801, 855; Dec. Dig. § 338.*]

9. CRIMINAL LAW (§ 369*)—EVIDENCE OF OTHER OFFENSES—ADMISSIBILITY.

In a prosecution for depositing and exploding dynamite near a residence, evidence of the brutal treatment of a witness who committed the act under the direction of defendant, and as to defendant's guilty connection with numerous other felonies and misdemeanors, were not relevant to the question of her guilt of the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

10. CRIMINAL LAW (§ 921*)—NEW TRIAL—GROUND—ADMISSION OF EVIDENCE.

Where irrelevant testimony is admitted, and is of such character as necessarily to be prejudicial to defendant, a new trial must be granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2206-2209; Dec. Dig. § 921.*]

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Isabella Martin was convicted of having deposited and exploded dynamite near a residence, and she appeals. Reversed, and remanded for new trial.

A. L. Frick and Burton J. Wyman, for appellant. Attorney General Webb, for the People.

HALL, J. The defendant was charged, under section 601 of the Penal Code, with having, on the 19th day of March, 1907, at the county of Alameda, deposited and exploded dynamite at and near the house of Frank B. Ogden. Upon her trial she was found guilty, as charged, by the verdict of the jury, and before judgment moved for a new trial. Her motion was denied, and judgment pronounced of imprisonment for the term of her nat-

ural life. From the judgment and order she in due time appealed to this court. The record upon appeal consists of the judgment roll and a full transcript of the reporter's notes of all the proceedings before the trial court, and is contained in five volumes, consisting of 2770 pages of printed matter. The labor of this court, however, has been greatly lessened by the very systematic and lawyer-like manner in which counsel upon both sides have briefed the case. No attack is made by appellant upon the sufficiency of the evidence to support the verdict, nor upon the correctness of the instructions to the jury. Appellant relies for a reversal solely upon the rulings of the court in admitting evidence and in refusing to strike out evidence that had been admitted over defendant's objections.

The crime with which defendant was charged was not committed by her in person, but was in fact committed by John B. Martin at her instigation, and, as it is claimed, by reason of her coercion. John B. Martin was at the time of the commission of the crime 16 years of age, and though he had been reared by defendant from babyhood, he was not her child. He was the principal witness for the prosecution, and testified in detail to all the circumstances of the commission of the crime, from which it appears that defendant had for a considerable time before the commission of the crime contemplated the deed, and with the aid of the witness had made careful preparation therefor. Her motive grew out of the result of some litigation which she had had in a department of the superior court of Alameda county presided over by the Hon. Frank B. Ogden, although the action was not finally tried before Judge Ogden. The witness and defendant discussed the contemplated crime, months before its commission, at Weaverville in Trinity county, where defendant had a home and certain mining properties. Early in January, 1907, they came to Oakland, Alameda county, where defendant owned a home and other property. Under the house belonging to defendant, and in which she and the witness took up their residence, was stored a quantity of dynamite. This was by the witness taken from under the house by the direction of defendant, and placed upon a shelf to dry. Subsequently a portion of it, about twelve sticks, was made into a bomb, by the witness and defendant, for the purpose of dynamiting the residence of Judge Ogden. A long fuse was furnished by defendant and carefully prepared for subsequent use. A bicycle was rented by defendant to enable the witness to quickly escape from the scene of the intended crime. Careful preparations were made to enable an alibi to be proved for the witness in case they were suspected or charged with the crime, and on the night of the 19th day of March, 1907, the witness, at the direction of defendant, took the bomb and

fuse to the residence of Judge Ogden, about a mile distant from the residence of defendant, in which she remained, and after observing that the residence of Judge Ogden was then occupied by members of his family (wife, four children and a maid) placed the bomb upon the front porch of the house, carefully adjusted the fuse, lighted the same, mounted his wheel and rode away to his home, where the defendant awaited his coming. The explosion occurred before the witness reached his home; and though badly injuring the dwelling of Judge Ogden, did no harm to the unsuspecting members of the household sheltered therein, other than such as may have arisen from fright and nervous shock at the dastardly crime attempted against their home and possibly lives.

During the progress of the trial the prosecution was permitted to prove, not only by the witness John B. Martin, but by other witnesses as well, brutal and cruel treatment of John B. Martin by the defendant. Also the prosecution was allowed to introduce evidence by the witness John B. Martin of numerous thefts committed by him at the instigation of and for the benefit of defendant; also that the defendant, prior to the Ogden dynamiting, planned and caused the witness to carry out or attempt six different felonies, to wit, three cases of arson in 1901, and three attempts to dynamite the residence of Wm. J. Dingee in 1904. Also evidence was allowed over the objection of defendant that after the Ogden affair defendant purchased cyanide of potassium (a deadly poison) and planned to have the witness place the same in a reservoir at Weaverville used to supply drinking water; and also in 1908 planned to have the witness dynamite the residence of Judge George Samuels at Oakland. (The point that this occurred subsequent to the Ogden affair was waived.)

All this evidence, and some other of similar import, was admitted over objections of defendant, and retained over her several motions to strike out, upon the theory that it tended to prove that the witness John B. Martin was not an accomplice of the defendant in the crime for which she was on trial, and therefore his testimony as a matter of law would support a conviction without corroboration. This theory is in turn predicated upon the theory that, although the witness with his own hands dynamited the Ogden residence when over a mile distant from the person of defendant, he was guilty of no crime in so doing because, as it is claimed by respondent, he committed the act under threats or menaces of defendant, sufficient to show that he had reasonable cause to believe and did believe that his life would be endangered unless he committed the deed. It is contended that the evidence objected to was admissible as tending to show the reasonableness of such belief and the existence thereof. The entire superstruc-

ture of respondent's contention is based upon the construction placed by respondent upon section 26 of the Penal Code, which, so far as applicable to the matter under discussion, is as follows: "All persons are capable of committing crimes except those belonging to the following classes: * * * Eighth. Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused."

The vital point of difference between appellant and respondent as to the effect of this section of the Code is this: That appellant insists that the danger to the life of the person claiming the protection of the statute must be, or reasonably appear to be, imminent and immediately impending, while respondent claims that such danger is sufficient to excuse from criminal responsibility for any crime however heinous, not punishable with death, if committed under threats causing a reasonable belief on the part of the person threatened that a refusal would endanger his life either immediately or at some time in the future. To make this clear it is now necessary to state the testimony given by the witness John B. Martin as to the threats and the fear under which it is claimed he committed the crime for which defendant was convicted. We quote from the transcript: "Q. Why did you take this bomb prepared by you and Mrs. Martin, and place it on Judge Ogden's premises? A. Because I was forced to. Q. How were you forced to? A. By threats Mrs. Martin made. Q. What did she say, what threats did she make? A. She said if I didn't place the bomb in Judge Ogden's porch she would have me arrested for burning the house, take me up to Trinity county, hit me over the head with a sledge hammer, put a stick of powder under me and blow me up, and come into town and say it was an accident, and they would believe it. Q. I will ask you what was your feeling towards Mrs. Martin on the 19th day of March, 1907, Mrs. Martin, this defendant? A. I was afraid of her. I was afraid that she would kill me if I didn't carry out such deeds as she told me to." It further appeared from his testimony that this threat was made several weeks before the crime was committed, and before the bomb was made. On cross-examination the witness, in response to the question, "Then you want to be understood now, do you, that the fear which you had of what she would do if you did not explode the Ogden bomb was, not that she would kill you or attempt to kill you in Oakland, but she would get you up in Weaverville and kill you there. That is correct, is it?" answered, "It is." In other words, it was made perfectly clear and certain that the witness did not act under any fear of immediate or imminent danger of his life, but only under a fear that

at some future time and at a place hundreds of miles away from the scene of the contemplated crime his life would be in danger from the defendant. Unless such a fear—a fear of a future and remote danger to life—will exempt a person from responsibility for any crime (not punishable with death), committed against the person or property of an innocent third person, all this testimony introduced under the theory that it tended to show the existence and reasonableness of the fear under which it is claimed the witness and perpetrator of the crime acted, was inadmissible.

We do not understand respondent to claim that, at the common law, such a fear of future and remote danger to life would excuse the commission of a felony. The contention of respondent is based entirely upon the wording of section 26 of the Penal Code. At common law, the right of self-defense against imminent and immediate danger to life or limb from an aggressor existed. It only existed, however, to prevent death or bodily injury that was imminent, and could only be exercised against the person threatening the injury. It did not extend to the killing of an innocent third person. It has ever been the rule that necessity is no excuse for killing an innocent person. Blackstone says: "And therefore, though a man be violently assaulted and hath no other possible means of escaping death, but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent. But in such a case he is permitted to kill the assailant, for the law of nature and self-defense, its primary canon, have made him his own protector." 4 Blackstone (Cooley) § 30. In *Arp v. State*, 97 Ala. 5, 12 South. 301, 19 L. R. A. 357, 38 Am. St. Rep. 137, it is said: "The authorities seem to be conclusive that, at common law, no man can excuse himself under the plea of necessity or compulsion for taking the life of an innocent person."

So, too, while the statute of this state recognizes and sanctions the right of self-defense against an aggressor, the right can only be exercised to prevent an imminent danger or an offense about to be committed. Thus homicide is justifiable "when committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished." Pen. Code, § 197. "Lawful resistance to the commission of a public offense may be made: (1) By the party about to be injured." Pen. Code, § 692. "Resistance sufficient to prevent the offense may be made by the party about to be injured: (1) To prevent an offense against his person, or his family or some member there-

of; (2) to prevent an illegal attempt by force to take or injure property in his lawful possession." Pen. Code, § 693.

If the right of self-defense and forcible resistance against an aggressor exists only in the presence of imminent danger or when an offense is about to be committed, it would be an anomalous condition of the law that would justify or excuse the commission of a felony against the person or property of an entirely innocent person because the person doing the deed had reason to fear and did fear, not an imminent and immediate danger to his life, but a future and remote danger, and one that in the very nature of things could be readily averted by innocent methods.

The fact that in this case the person committing the deed, and claiming that it was done under a compulsion that excuses him from the criminality of the act, is a minor cuts no figure in the proper construction of the statute. It is general and applicable to persons of any age. While the language is not as exact as it might be, it must be given a reasonable meaning so as to effectuate the design of the Legislature and to promote justice. We would be loath to believe that the Legislature intended to excuse one from responsibility for atrocious felonies committed against the property or person of an innocent person, under a fear, by whatever threats induced, that a refusal would in the future and at some remote place endanger his life. Such a danger in the very nature of things could be easily avoided by innocent methods. It would require very explicit language to induce us to believe that the Legislature intended to lay down any such monstrous and unjust rule as that any person should be excused from responsibility for an infamous crime when committed under the fear of future and remote danger to life which in the nature of things could be easily avoided. We agree with the views expressed by the court in *Bain v. State*, 67 Miss. 557, 7 South. 408, when it said: "We can conceive of cases in which an act, criminal in its nature, may be committed by one under such circumstances of coercion as to free him from criminality. The impending danger, however, should be present, imminent and not to be avoided. * * * The social system would be subverted, and there would be no protection for persons or property, if the fear of man, needlessly and cravenly entertained, should be held to justify or excuse breaches of the law." So, too, in *People v. Repke*, 103 Mich. 459, 61 N. W. 861, it was said: "Threats of future injury do not excuse any offense. The necessity which will excuse a man for breach of law must be instant and imminent."

Respondent has cited no case that supports its contention. There are none. *Burns v. State*, 89 Ga. 527, 15 S. E. 748, a case arising under a statute similar to ours, lays down the rule directly contrary to the contention of respondent in the case at bar. The report

of the Georgia case is somewhat meager, and can only be fully understood by a somewhat careful study of the case. The decision of the court is in the form of a syllabus, preceding the statement of the case. Under the Code of that state (section 4303 [Code 1882]) it is provided that: "A person committing a crime or misdemeanor under threats or menaces, which sufficiently show that his life or member was in danger, or that he had reasonable cause to believe and did actually believe, that his life or member was in danger, shall not be found guilty; and such threats and menaces being proved and established, the person compelling by said threats and menaces the commission of the offense shall be considered a principal, and suffer the same punishment as if he had perpetrated the offense." The first part of this section excusing the person coerced is not materially different from our statute so far as it relates to the imminency of the danger. The defendant *Burns* was convicted of murder, and the principal witness against him was his step-mother. It is apparent from the statement of the points involved, and the instructions given and refused, that this witness had previously given false testimony at the coroner's inquest, and which she claimed was given under coercion, and also that she had testified to a state of facts upon the final trial which would make her an accomplice unless she acted under coercion and fear. Upon each point the trial court gave an instruction which ignored the necessity of the fear being of a present impending danger, and refused to give a requested one including this element. The court said: "According to section 4303 of the Code, in order for duress or fear produced by threats or menaces to be a valid legal excuse for doing anything which would otherwise be criminal, the act must have been done under such threats or menaces as show that the life or member was in danger, or that there was reasonable cause to believe and actual belief that there was such danger. *The danger must not be one of future violence, but of present and immediate violence at the time of the commission of the forbidden act.* Thus, where the forbidden act is perjury by a witness at a coroner's inquest, the danger of death or dismemberment at some future time, in the absence of all danger at the time of testifying, will not excuse. * * * A person who aids and assists in the commission of a crime, or in measures taken to conceal it and protect the criminal, *is not relieved from criminality as an accomplice on account of fear excited by threats or menaces, unless the danger be to life or member, nor unless that danger be present and immediate* as above announced touching fear under the influence of which perjury is committed." (Italics are ours.) We understand this case as clearly holding that a person is not relieved of the responsibility for a criminal act because he acted through fear produced by threats, unless the fear was of im-

mediate and imminent danger. The case is cited as authority for this doctrine in the commissioners' note to the Penal Code of Georgia (adopted in 1895) under section 41, which is a re-enactment of section 4303, and also in the notes to *Arp v. State*, in 19 L. R. A. 359. We think the Georgia case is directly in point, and is grounded in sound reason and enlightened justice.

Inasmuch as it is clear that the witness John B. Martin had no fear of immediate and imminent danger to his life, but only a fear that defendant, at some future time and at some remote place, would kill him, all the evidence now under consideration, admitted as tending to show the existence and reasonableness of such fear, was improper. None of it should have been admitted, and all of it should have been stricken out.

Neither were the errors thus committed cured by the subsequent introduction by defendant of the testimony of Johnlon to the effect that John B. Martin had confessed to him to committing some of the same crimes and implicating the defendant therein. The circumstances under which this testimony was introduced bear little resemblance to the facts in the case of *People v. Silvers*, 6 Cal. App. 69, 92 Pac. 506, cited by respondent; but aside from this the Johnlon testimony did not cover anywhere near all the matter erroneously admitted.

Other evidence equally objectionable, tending to show the possession by defendant at the time of her arrest (which occurred about 10 months subsequent to the commission of the crime for which she was being tried) of various poisons, none of which had any connection with the crime committed at the Ogden residence, was admitted over the objection of defendant.

Evidence of obscene letters and writings of defendant in no way relating to the dynamiting of the Ogden house was admitted. This evidence was very prejudicial to defendant, as it tended to show her to be a most depraved and vicious woman. However depraved or vicious she might be, she was entitled to be tried only for the crime charged against her; and upon the issue presented by her plea of not guilty only such testimony as was relevant to such issue should have been admitted.

The evidence as to her brutal treatment of the witness John B. Martin, and as to her guilty connection with the numerous felonies and misdemeanors, had no relevancy to the question as to whether or not she was guilty of the crime of dynamiting the house of Judge Ogden. It is not pretended that it tended to prove that she committed the crime for which she was being tried. Its ostensible purpose was to prove that John B. Martin was not criminally responsible for his acts in placing and exploding the bomb at the Ogden home. But as we have shown, it was not ad-

missible for this purpose. Its character was such as to greatly prejudice the defendant with the jury. The defendant had the right to have all such irrelevant matter excluded from the jury. When, as in this case, irrelevant testimony has been admitted, and is of such a character as necessarily to be prejudicial to defendant, a new trial must be granted. *People v. Carpenter*, 136 Cal. 393, 68 Pac. 1027; *People v. Williams*, 127 Cal. 216, 59 Pac. 581; *People v. Arlington*, 123 Cal. 356, 55 Pac. 1003; *People v. Lynch*, 122 Cal. 503, 55 Pac. 248.

Complaint is also made that defendant was compelled to answer questions upon cross-examination not relating to matters about which she had testified in chief. In some respect this complaint seems to be well founded, but as to most of the questions the answers were such as to preclude any inference of prejudice thereby. In view of the necessity for a new trial, we only feel it necessary upon this point to call attention to the rule for cross-examination of defendant as laid down in *People v. Gallagher*, 100 Cal. 466, 35 Pac. 80; *People v. Arrighini*, 122 Cal. 121, 54 Pac. 501, and *People v. Schmitz*, 7 Cal. App. 359, 94 Pac. 407, 419.

The judgment and order are reversed, and the action remanded for a new trial.

We concur: COOPER, P. J.; KERRIGAN, J.

(18 Idaho, 167)

FOORE v. SIMON PIANO CO.

(Supreme Court of Idaho. May 2, 1910.)

(Syllabus by the Court.)

1. ATTACHMENT (§ 109*)—AFFIDAVIT—SECURITY.

Under the provisions of sections 4302 and 4306, Rev. Codes, an attachment may be had against a defendant not residing in this state in an action upon a judgment or upon a contract express or implied, and in such case it is not necessary to show by the affidavit for attachment that the plaintiff has no security for the debt.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 240; Dec. Dig. § 109.*]

2. PROCESS (§ 40*)—SUMMONS—INDORSEMENT OF ATTORNEY'S NAME.

Where a summons or an alias summons is published by order of the court, and the name of the attorney for the plaintiff as indorsed on the summons does not appear in the summons as published, the omission is not fatal to the jurisdiction and does not invalidate the service by publication. The provision of subdivision 5, § 4140, requiring that "the name of plaintiff's attorney, with his post office address or residence must be indorsed on the summons," is directory and not mandatory.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 40.*]

3. JUDGMENT (§ 17*)—JURISDICTION OF COURT—CONSTRUCTIVE SERVICE.

Where constructive service of summons has been had by publication against a nonresident defendant, and property within the state has been attached under a writ of attachment reg-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

larly issued in conformity with the requirements of the statute, the jurisdiction of the court attaches in rem to the extent of the property attached, and a judgment entered under the constructive service of summons is valid and binding to the extent of the rem.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 17.*]

ATTACHMENT (§ 171*)—NOTICE OF ISSUANCE OF WRIT—PURPOSE.

The notice of the issuance of a writ of attachment required to be given by the clerk under the provisions of section 4304, Rev. Codes, is intended for the protection and benefit of other creditors of the defendant, and a failure to give the notice is not available to the defendant in the attachment proceeding and does not enable him to avoid the attachment or subsequent execution sale thereunder.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. §§ 492-504; Dec. Dig. § 171.*]

ATTACHMENT (§ 173*)—EXCESSIVE LEVY—COLLATERAL PROCEEDING.

The question as to whether or not an excessive levy has been made under a writ of attachment is one to be presented to the court from which the writ issued and in which the action is pending, and cannot be raised by the defendant after an execution sale and in a collateral or independent action.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 173.*]

APPEAL AND ERROR (§ 225*)—QUESTIONS NOT RAISED IN LOWER COURT.

The question as to whether or not several lots or tracts or parcels of land have been sold together under one bid, instead of separately, as required by section 4484, Rev. Codes, is a question properly to be presented to the court from which the execution issued and on a motion to set aside the sale for the irregularity. It cannot be raised for the first time on appeal either in the same or a collateral proceeding.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 225.*]

CORPORATIONS (§ 642*)—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS IN THE STATE—“DOING BUSINESS IN THIS STATE.”

The provisions of section 10, art. 11, of the state Constitution, and of section 2792, Rev. Codes, prohibiting a foreign corporation doing business in this state without first filing its articles of incorporation and designating an agent, do not apply to a foreign corporation doing interstate business or a corporation that sells an article in another state to a citizen of this state and which thereafter finds it necessary to resort to the courts of this state for the collection of the debt.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 642.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2155-2160; vol. 8, pp. 7640, 7641.]

CORPORATIONS (§ 656*)—FOREIGN CORPORATIONS—RIGHT TO TAKE TITLE TO REALTY.

Section 2792, Rev. Codes, which prohibits noncomplying foreign corporation from taking title to realty within this state prior to filing its articles, does not apply to a foreign corporation which bids in real estate at execution sale for the collection of a judgment due the corporation and which judgment arises out of an interstate transaction.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 656.*]

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by William E. Foore against the

Simon Piano Company. Judgment for defendant, and plaintiff appeals. Affirmed.

This action was instituted by the appellant, who was plaintiff in the lower court, to procure the cancellation of a default judgment entered against him on the 6th day of January, 1905, and in favor of the respondent in this case, the Simon Piano Company. Plaintiff also prayed for the cancellation of sheriff's deed that had been executed and delivered under execution sale and to quiet his title to the lands sold in satisfaction of the judgment. On the 30th day of June, 1904, the appellant was a resident of Alberta, Canada, and was at that time the owner of 320 acres of timber land situated in Shoshone county and which was subsequently sold under the execution involved in this case. Prior to the departure of appellant for Alberta, he had been a resident of Coeur d'Alene City, Kootenai county, and while residing at the latter place, and on the 9th day of December, 1902, he purchased from the respondent corporation an automatic music machine, called an "Apollo." This Apollo was purchased under a conditional sale contract by the terms of which title remained in the piano company until the final payment should be made. On the 30th day of June, 1904, the Simon Piano Company, a foreign corporation, filed its complaint in the district court of the First judicial district of this state in and for Shoshone county, against the appellant herein, in which complaint it alleged that the defendant therein was indebted to the plaintiff in the sum of \$110.05, together with interest thereon from the 7th day of June, 1904, at the rate of 7 per cent. per annum. This action was prosecuted for the collection of the alleged balance due from the appellant herein to respondent on the conditional sale contract for the Apollo. On the same date an affidavit for attachment was made and filed with the clerk, and a summons and writ of attachment were issued, and the writ of attachment was levied on the real estate involved in this present action. On July 16th following, the summons was returned, the officer stating thereon that it had not been served for the reason that after diligent search and inquiry defendant could not be found within Shoshone county. Thereafter and on the 11th day of October, affidavit for publication of summons was made and filed, and an order for publication of summons was thereupon made by the probate judge, and thereafter a summons, designated as "an alias summons," was duly published in the "Idaho Press," a newspaper printed and published in Shoshone county. The summons as published did not show the name of the attorney for the plaintiff as the same had been indorsed on the summons. Notice of the issuance of the writ of attachment was not posted or published by the clerk of the

district court as required by the provisions of the statute. Section 4304, Rev. Codes. Judgment by default was entered in that action against the appellant herein and in favor of the Simon Plano Company for the amount demanded, and execution was issued and levied on a tract of land comprising 320 acres, which was sold in one body to satisfy the judgment and was bid in by the plaintiff in that case, the Simon Plano Company. The plaintiff in the attachment suit had not complied with the foreign corporation laws of this state at the time of the prosecution of its action, nor did it until some time after the execution sale. The appellant appears to have had no actual notice of the pendency of the action or of any proceedings had thereunder until the month of June, 1906, and after the execution of the sheriff's deed. On September 26, 1906, appellant filed his complaint in this action to set aside the judgment and cancel the deed. The case went to trial on February 5, 1909, and was submitted, and findings and judgment were made and entered in favor of the respondent. This appeal was thereupon prosecuted.

Gray & Knight, J. L. McClear, and William K. Schissler, for appellant. Kerns & Ryan, Franklin Pfirman, and Samuel R. Stearns, for respondent.

AILSHIE, J. (after stating the facts as above). We shall consider the errors assigned in the order in which they are presented in the brief.

1. Failure to find on all material issues.

The findings of the court cover all the issues that were essential to the final determination of this case. It was unnecessary for the court to find on questions which would not influence or affect the judgment to be entered. *Brown v. Macey*, 13 Idaho, 451, 90 Pac. 339.

2. Falsity of the affidavit for attachment.

It is contended by appellant that the affidavit for attachment in the original action was false and that the court had no jurisdiction to issue the writ. On this question there was a conflict of evidence, and the trial court found in favor of the defendant, and that the sum alleged in the affidavit was in fact due at that time. This sufficiently disposes of that question. It is doubtful, however, if the truth of the affidavit in that respect could be inquired into at this time and in this manner.

3. Attachment cannot be had by vendor who retains title.

It is contended by appellant that under the conditional sale contract the plano company retained title to the Apollo until the final payment should be made, and that under the statute of this state he could not have a writ of attachment until he had exhausted his security, or the same had become valueless without any fault of the company. *Mark Means Tsf. Co. v. McKenzie*, 9 Idaho, 165,

73 Pac. 135; *Barton v. Groseclose*, 11 Idaho, 227, 81 Pac. 623; *Peasley v. Noble*, 17 Idaho, 686, 107 Pac. 402. This position is correct as to a resident defendant, but is not applicable to the facts of the present case. This was an action against a nonresident, and the attachment was sought on the ground that the defendant in the case was a nonresident of the state. Under the provisions of our statute (sections 4302 and 4303, Rev. Codes) an attachment may be had "against a defendant not residing in this state" in an action upon a "judgment or upon contract, express or implied," and in such case it is not necessary to show that the plaintiff has no security. In other words, the provisions of subdivision 2 of both sections 4302 and 4303 do not apply to a nonresident defendant. *Kerns v. McAulay*, 8 Idaho, 568, 69 Pac. 539; *Ross v. Gold Ridge Mining Co.*, 14 Idaho, 687, 95 Pac. 821; *Kohler v. Agassiz*, 99 Cal. 9, 83 Pac. 741. In *Kohler v. Agassiz* the Supreme Court of California, in passing upon the requirements of section 537 of the Code of Civil Procedure of that state, which is in the same language as section 4303 of our Revised Codes, said: "As against a nonresident defendant, the affidavit need not show that the payment of the claim is not secured by mortgage lien or pledge. * * *"

4. Name of attorney in published summons.

It is next insisted by appellant that the alias summons as published did not contain the name of the attorney for the plaintiff as the same had been "indorsed on the summons." Subdivision 5 of section 4140 of the Revised Codes provides as follows: "The name of the plaintiff's attorney, with his post office address or residence must be indorsed on the summons." It is conceded that the summons published did not show the name of the attorney for the plaintiff as required by this provision of the statute. We think this requirement of the statute is directory rather than mandatory. The name of the attorney indorsed on the summons is not properly a part of the summons itself. Its only purpose is to advise the defendant of the name of the attorney who appears for the plaintiff and his residence or post office address. It is no part of the cause of action. The language of the statute would imply that the name is to be written across the back of the summons instead of appearing on the face thereof. The statute does not require the indorsements on the summons to be published. It only requires the summons to be published. It would be a proper practice, and is one that should be followed, to have the name of the attorney appear at the bottom of the published summons; but the failure to do so is not jurisdictional and is not fatal to the service. *People v. Wrin*, 143 Cal. 11, 76 Pac. 646; *McKnight v. Grant*, 13 Idaho, 629, 92 Pac. 989, 121 Am. St. Rep. 287.

5. Was the judgment in the attachment suit void?

We answer this question in the negative. It is argued by appellant that the judgment obtained by the piano company against appellant here amounted to taking his property in violation of the fourteenth amendment to the federal Constitution, in that it deprives him of his property without "due process of law." This contention is without merit for the reasons hereinbefore set forth. While no personal service was had on the defendant in that action, a constructive service was had, and the attachment proceeding laid hold upon the property, and the action in rem against the seized property was in conformity with the statute. The court acquired jurisdiction over the property thus seized, and, while it could enter no personal judgment against the defendant, it could reach out with its process and subject the property within its jurisdiction to the payment of the indebtedness shown to exist. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Kerns v. McAulay*, 8 Idaho, 558, 69 Pac. 539.

6. Failure of clerk to give notice of attachment.

It is contended by appellant that the failure of the clerk of the district court to give notice, by posting and publishing, of the issuance of the writ of attachment, as provided by section 4304 of the Revised Codes, was fatal to the attachment, and that no jurisdiction was therefore acquired in the attachment proceeding. The statute does not require that this notice issue contemporaneously with the writ of attachment. On the contrary, it provides as follows: "Two days after issuing such writ and delivering it to the proper officer, the clerk must post at the front door of the court house, and cause to be published in some newspaper, * * * a notice," etc. This notice is not issued to the defendant in the attachment proceeding, nor is it for his benefit. The notice is not essential to give the writ validity and binding force. This notice is required solely in the interest of creditors of the defendant. The closing sentence of section 4304 indicates clearly this intention and provides the things to be done by any creditor who shall desire to "pro rata with the attaching creditor." The statute requires that notice of the attachment be served upon the county recorder, and that a copy thereof be also delivered to the party in possession of the property, or, if there is no one in possession, that it be posted on the land. Section 4307, Rev. Codes. This is the notice required to be given for the benefit of the defendant in the attachment proceeding whose property is seized. The presumption of law is that the party in possession is the representative of the defendant who is the owner of the land, and that notice to him that the land is attached will reach the owner. *Pennoyer v. Neff*,

supra. The defendant in the attachment proceeding is in no way injured or prejudiced by failure to post and publish the notice of attachment. Creditors of the defendant in the attachment proceeding, for whose benefit the notice is required to be given, are not complaining, and we take it that they are the only persons to be affected by failure to give such notice.

7. Excessive levy.

It is argued by appellant that the writ was levied on an excessive amount of property, and that it was so disproportionate in value to the amount of the debt sought to be secured that it availed the writ. This contention cannot be sustained. The evidence does not disclose the value of the property at the time of the levy, and the only evidence as to the value of the land at the time of the sheriff's sale is the return on the execution which shows that the highest and best bid received was \$296.57. The fact that the appellant testified at the trial of this present action that the land was then worth from \$10,000 to \$15,000 is not sufficient to invalidate a levy made four years prior to that time. The mere fact that a large amount of property was sold to satisfy a small indebtedness is of itself not sufficient to avoid the sale, especially when attacked in this collateral way.

8. Validity of execution sale.

Appellant contends that this entire tract of land, comprising 320 acres, or eight 40-acre tracts according to government survey, was all sold in one body and on one bid. He insists that under the provisions of section 4484 of the Revised Codes this sale was void. The provisions of that section are as follows: "When the sale is of real property, consisting of several known lots or parcels, they must be sold separately, or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold." This question was not presented by the pleadings and does not appear to have been raised in any manner in the lower court. It is now too late to raise it in this court. We may suggest, in passing, that it seems to us that the proper remedy would have been to have moved in the attachment suit in the lower court for an order vacating and setting aside the sale on the grounds indicated if the judgment debtor felt aggrieved by reason of the sale having been made in the manner pointed out, and to have there called the trial judge's specific attention to the failure to pursue the statutory method. The sheriff's return on the execution recites that he "sold the whole" tract of land therein described to the Simon Piano Company, and that it was the highest and best bidder. This does not necessarily negative the idea that it may have been offered or even sold in separate lots or tracts, or that if so offer-

ed no bids were received for the separate lots. It is clear that the judgment debtor did not avail himself of the right granted him by section 4484 of the Code and "direct the order" in which the property should be sold. He had a right under the statute to require the sale to be made of specific tracts and to specify the order in which they should be sold.

9. Rights of foreign corporation to buy property at execution sale to satisfy judgment.

It is insisted by appellant that since the Simon Piano Company, which is a foreign corporation, had failed to comply with the corporation laws of this state prior to the purchase of this real estate at execution sale, it is therefore precluded by section 2792, Rev. Codes, from taking and holding title to this land. The first thing to determine is whether or not the corporation was at the time this debt was contracted "doing business" within the state of Idaho within the meaning of the Constitution (section 10, art. 11) or within the purview of section 2792, Rev. Codes. There is a conflict in the evidence as to whether the sale of the Apollo was made in Spokane in the state of Washington or at Coeur d'Alene City in this state. The court finds that the sale was made in Spokane, and this finding is amply justified by the evidence. It does not appear from the evidence that the corporation had any office in this state at that time, or that it had any agency established within the state. It rather appears that such sales as it was making at that time were made through the Spokane office, and delivery was made there, and such sales were clearly interstate transactions. In *re Kinyon*, 9 Idaho, 642, 75 Pac. 268; In *re D. C. Abel*, 10 Idaho, 288, 77 Pac. 621; *Belle City Mfg. Co. v. Frizzell*, 11 Idaho, 1, 81 Pac. 58; *Toledo Computing Scale Co. v. Young*, 16 Idaho, 187, 101 Pac. 257. Under the provisions of the statute (section 2792, Rev. Codes) it is only corporations that are "doing business in this state" without first filing their articles of incorporation and complying with the statute that are prohibited from taking and holding title to realty acquired prior to the making of such filings. The mere purchase at execution sale of real property in satisfaction of a judgment procured on an interstate transaction is not in itself "doing business in this state." 19 Cyc. 1280, and note, also 1314; *Elston v. Piggott*, 94 Ind. 14; *Meddis v. Kenney*, 176 Mo. 200, 75 S. W. 633, 98 Am. St. Rep. 496. The Legislature has not undertaken to prohibit a corporation engaged in interstate business from taking title under judicial process in the collection of a debt where the corporation was not otherwise "doing business" in this state within the meaning of the Constitution and statute.

The judgment should be affirmed, and it is so ordered. Costs awarded to respondent.

SULLIVAN, C. J., and STEWART, J., concur.

(18 Idaho, 243)

DIAMOND BANK v. VAN METER et al.

(Supreme Court of Idaho. May 20, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 414*)—TRANSFER OF CAUSE—NOTICE.

Under the provisions of Rev. Codes, § 4808, an appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same or some specific part thereof, and serving a similar notice on the adverse party or his attorney.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2137, 2138; Dec. Dig. § 414.*]

2. APPEAL AND ERROR (§ 414*)—TRANSFER OF CAUSE—NOTICE—"ADVERSE PARTY."

"Adverse party," as used in this section of the statute, means every party who has an interest in conflict with the reversal of the judgment, or whose rights might be adversely or injuriously affected by a reversal of such judgment, irrespective of whether such party be plaintiff, defendant, or intervener.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2137, 2138; Dec. Dig. § 414.*]

For other definitions, see Words and Phrases, vol. 1, pp. 224-227; vol. 8, pp. 7567, 7568.]

3. APPEAL AND ERROR (§ 414*)—TRANSFER OF CAUSE—NOTICE.

Where a joint judgment is rendered against two or more parties, and an appeal is taken by one of the parties against whom such joint judgment is rendered, then all other parties against whom such joint judgment has been rendered are adverse parties, and notice of appeal must be served upon each in order to give this court jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2137, 2138; Dec. Dig. § 414.*]

4. APPEAL AND ERROR (§ 430*)—DISMISSAL—FAILURE TO SERVE NOTICE OF APPEAL.

Where H. and C. execute a mortgage upon real property, and the property is afterward transferred to K., who assumes and agrees to pay such mortgage, and K. thereafter transfers said property to M., who assumes and agrees to pay such mortgage, in an action to foreclose such mortgage, all of said parties are made defendants, and a joint judgment is rendered against all foreclosing said mortgage and directing a deficiency judgment to be entered, and M. appeals from such judgment, the appeal will be dismissed upon failure to serve the notice of appeal upon H., C., and K., notwithstanding the fact that judgment by default was entered against them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2173; Dec. Dig. § 430.*]

Appeal from District Court, Twin Falls County; Edward A. Walters, Judge.

Action by the Diamond Bank against Lu Van Meter and others. Judgment for plaintiff, and defendants appeal. Dismissed.

M. J. Sweeley, for appellants. W. A. Babcock and Stockslager & Bowen, for respondents.

STEWART, J. This is an action to foreclose a real estate mortgage. The complaint alleges that on July 1, 1906, at the city of Twin Falls, state of Idaho, R. H. Holtzman and John N. Claar made their certain promissory note dated on that date for the sum of \$2,800, payable to the order of Lon Warden on or before 15 months after date; that, to secure the payment of said note, said Holtzman and Claar on July 2, 1906, executed and delivered to Warden a mortgage on certain real property situated in the then county of Cassia, now county of Twin Falls, state of Idaho; that such mortgage was acknowledged and recorded as provided by law in Cassia county, and afterward transcribed into the records of what is now Twin Falls county; that on August 13, 1906, and before the maturity of said note, for valuable consideration and in due course of business, Warden sold, assigned, indorsed, and delivered said note to the plaintiff; that at the time of the sale and assignment of such note the mortgage was also delivered to plaintiff, who is now alleged to be the legal owner and holder thereof; that on August 4, 1906, Holtzman and Claar sold and conveyed the mortgaged premises to Job K. Hart subject to said mortgage, and said Job K. Hart covenanted and agreed to assume and pay the said note and mortgage as part of the consideration and purchase price of said premises; that Job K. Hart and wife on May 23, 1907, sold and conveyed the mortgaged premises to Lu Van Meter, and the said Lu Van Meter covenanted and agreed as part of the consideration for said conveyance and as part of the purchase price of said premises to assume and pay said note and mortgage; that Baker A. Van Meter is the husband of Lu Van Meter.

Service was made upon the defendants, and they all defaulted except the defendants, Lu Van Meter and husband, who filed an answer, which, in substance, admitted that the plaintiff was a foreign corporation, and denied that at the time the note was transferred to plaintiff, and at the time this action was commenced, it was not doing business in the state of Idaho, and denied that the plaintiff is in the state of Idaho for the sole purpose of bringing this action. The answer admits the conveyance of the mortgaged property as alleged, and denies that either Hart or the defendant Lu Van Meter assumed or agreed to pay the mortgage. The answer then alleges payment of the mortgage by Lu Van Meter through process of garnishment. The cause was tried to the court and a decree rendered, which, among other things, adjudges: "It is hereby ordered, adjudged, and decreed that the plaintiff, the Diamond Bank, a corporation organized and existing

under the laws of the state of Missouri, do have and recover from the defendants, R. H. Holtzman, John N. Claar, Job K. Hart, and Lu Van Meter, the sum of \$1,882.50, principal, interest and attorney's fees, and costs of court. * * * It is ordered, adjudged, and decreed that all and singular the mortgaged premises mentioned in the said complaint and hereinafter described, or so much thereof as may be sufficient to raise the amount due to plaintiff for the principal and interest, attorney's fees, and costs of this suit, and expenses of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction by the sheriff of the county of Twin Falls in the manner prescribed by law and according to the course and practice of the court; * * * that the defendants and all persons claiming, or to claim, from or under them, and all persons having liens subsequent to said mortgage by judgment or decree upon the land described in said mortgage, and their personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs or personal representatives, and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of said notice of the pendency of this action with the recorder, as aforesaid, be forever barred and foreclosed. * * * And it is further ordered, adjudged, and decreed that if the moneys arising from the said sale shall be insufficient to pay the amount so found due to the plaintiff, as above stated, with interest and costs, and expenses of sale, as aforesaid, the sheriff specify the amount of such deficiency and balance due to the plaintiff in his return of said sale, and that, on the coming in and filing of said return, the clerk of this court docket a judgment for such balance against the defendants, R. H. Holtzman, John N. Claar, Job K. Hart, and Lu Van Meter, and that the said defendants pay to the said plaintiff the amount of said deficiency and judgment with interest thereon at the rate of seven (7%) per cent. per annum, from the date of last-mentioned return and judgment, and that the plaintiff have execution therefor."

From this judgment the defendant Lu Van Meter appeals. The notice of appeal was served upon the plaintiff, and was not served on the defendants Holtzman, Claar, or Hart. The respondents move to dismiss the appeal upon the ground that notice of appeal was not served upon the defendants Holtzman, Claar, and Hart; they being adverse parties. Rev. Codes, § 4808, provides: "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party, or his attorney." If Holtz-

man, Claar, or Hart were adverse parties to appellant then this appeal must be dismissed. "Adverse parties," as used in this statute, has been variously defined. Such definitions, however, have been based apparently on the particular facts of each particular case.

In *Aulbach v. Dahler*, 4 Idaho, 522, 43 Pac. 192, this court said: "Adverse parties on whom notice of appeal must be served are such parties as the reversal of judgment would affect." In *Titiman v. Alamance Min. Co.*, 9 Idaho, 240, 74 Pac. 529, this court refers to *Aulbach v. Dahler*, and said: "The term 'adverse party' as used in that section was construed by this court in *Aulbach v. Dahler*, supra, to mean every party whose interest in the subject-matter would be affected by a modification or reversal of the judgment or order appealed from, irrespective of whether he is a plaintiff, defendant, or intervener." And the court cites *Jones v. Quantrell et al.*, 2 Idaho (Hash.) 153, 9 Pac. 418; *Coffin v. Edgington*, 2 Idaho (Hash.) 627, 23 Pac. 80; *Lydon v. Godard*, 5 Idaho, 607, 51 Pac. 459; *Lewiston Nat. Bank v. Tefft*, 6 Idaho, 104, 53 Pac. 271. The court then refers to the case of *Senter v. De Bernal*, 38 Cal. 637, as the leading case in California, construing a section of the California Code identical with section 4808 of the Revised Codes of this state, and quotes from that case as follows: "Every party whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken is, we think, an adverse party within the meaning of these provisions of the Code, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervener." In the *Titiman v. Alamance Min. Co.* opinion the court further refers to *Aulbach v. Dahler*, and says that it construes the term "adverse party," and holds that, as separate judgments were entered against the defendants on whom the notice of appeal was not served, they could not be affected by a modification or reversal of the judgment entered against the appellant (defendant), and announces this to be the general rule announced in other Idaho cases passing upon this question. In the case of *Nelson-Bennett Co. v. Twin Falls, etc., Co.*, 13 Idaho, 767, 92 Pac. 980, this court again reviews this question, and says: "The statute intends that a notice of appeal should be served upon all parties who have an interest in conflict with a reversal of the judgment, or whose rights would be adversely affected by a reversal of such judgment." That is, if a reversal of the judgment could affect or change the liability of a party to the judgment upon a retrial of said cause to his injury, then such party is an adverse party and must be served with the notice of appeal. In the case of *Doust v. R. M. Bell Tel. Co.*, 14 Idaho, 677, 95 Pac. 209, this court again considered a

motion to dismiss an appeal upon the alleged ground that adverse parties were not served, and the court said: "The transcript shows that the telephone company and said Crane were sued jointly, and a joint judgment was rendered against them for over \$800. That being true, a reversal or modification of this judgment would adversely affect said Crane. He is therefore an adverse party. In order to give this court jurisdiction of the case on appeal, it is necessary that the transcript should show that the notice of appeal has been served on each and every of the adverse parties, and, unless the record shows proper service of the notice of appeal, the appeal will be dismissed on motion. *Anderson v. Knott*, 1 Idaho, 626; *Tootie v. French*, 3 Idaho (Hash.) 1, 25 Pac. 1091; *Adams v. McPherson*, 3 Idaho (Hash.) 718, 34 Pac. 1095; *Moe v. Harger*, 10 Idaho, 194, 77 Pac. 645. This court has held in numerous cases that all parties against whom a joint judgment has been rendered are adverse parties, and that the notice of appeal must be served upon each of them in order to give this court jurisdiction. *Jones v. Quantrell*, 2 Idaho (Hash.) 153, 9 Pac. 418; *Coffin v. Edgington*, 2 Idaho (Hash.) 627, 23 Pac. 80; *Lydon v. Godard*, 5 Idaho, 607, 51 Pac. 459; *Lewiston Nat. Bank v. Tefft*, 6 Idaho, 104, 53 Pac. 271; *Titiman v. Alamance Min. Co.*, 9 Idaho, 240, 74 Pac. 529; *Baker v. Drews*, 9 Idaho, 276, 74 Pac. 1130; *Nelson-Bennett Co. v. Twin Falls Land & Water Co.*, 13 Idaho, 767, 92 Pac. 980." The case of *Lewiston Nat. Bank v. Tefft*, 6 Idaho, 104, 53 Pac. 271, is very similar in principle to the case now under consideration. That was an action to foreclose a mortgage executed by *Albert P. Tefft* and *Carrie M. Tefft*. A joint judgment was rendered against both of said defendants. From this judgment and decree *Carrie M. Tefft* appeals. Other parties were made defendants, some of whom appeared and others made default. *Carrie M. Tefft* and *Mary E. Osborn*, two of the defendants, appealed. A motion was made to dismiss the appeal on the ground that notice of appeal was not served upon *Albert P. Tefft* against whom the joint judgment was rendered; and in the opinion in that case the court held that *Albert P. Tefft* was an adverse party, and should have been served with the notice of appeal. On rehearing the court says: "The petitioner claims that as *Tefft* has been released from all liability under the judgment of foreclosure, and the deficiency judgment against him had been satisfied, he was no longer interested in the appeal, was not an adverse party, and therefore entitled to service of the notice of appeal. The release of the defendant *Tefft* from all liability under the judgment of foreclosure as well as the deficiency judgment was based upon the validity of the judgment. If, upon appeal, the judgment of foreclosure was reversed, set aside, or invalidated, the consideration for the release failed, and the plaintiff's right of action against

Tefft was thereby revived under the provisions of section 4498 of the Revised Statutes of Idaho. * * * The reversal or modification of the judgment upon appeal revived the liability of the defendant Tefft upon the original contract."

If a judgment is joint and is reversed, then the cause stands for retrial and is in the same position as though never tried, and leaves all the parties to the suit in such position that they may urge as defenses any defense they may have. If, however, a judgment is several and grants relief against each defendant separately, then a reversal as to one defendant could not affect the judgment rendered against the other defendant. In the case at bar the judgment is joint and the same relief is granted against each of the defendants; that is, the court decrees the foreclosure and sale of the property mortgaged, and directs that, if sufficient is not realized from such sale to pay the judgment, then a judgment for such deficiency is directed to be entered against each of said defendants. If upon the appeal of Lu Van Meter the judgment should be reversed and upon retrial she should succeed in defeating the allegations of the complaint as to her assumption of and agreement to pay the mortgage, then, of course, even though the mortgage be foreclosed, a deficiency judgment could not be entered against her and the deficiency judgment would then only stand against Holtzman, Claar, and Hart, and in this respect certainly these three defendants would be adverse to the plaintiff upon this appeal and injuriously affected by such reversal. In other words, one of the issues presented by the pleadings as they now stand is whether Lu Van Meter assumed and agreed to pay the mortgage upon the property conveyed to her. Of course, if she did assume and agree to pay such mortgage and the property mortgaged is insufficient to pay the judgment, and Hart pays such deficiency judgment, then, under the decree as it now stands, Van Meter would be liable to Hart for the amount thus paid; but, if on reversal Van Meter should be successful upon this particular defense, then Hart could not recover from Van Meter the amount paid upon the deficiency and to that extent would be affected, and injuriously so, by a reversal of such judgment. Pursuing this inquiry farther, if the appeal of Van Meter should be sustained and the cause reversed, upon a reversal Van Meter would be permitted to amend her answer and urge other defenses than those at present contained in her answer, and upon such defenses might succeed in defeating the foreclosure of the mortgage entirely, and leave the makers of the note wholly responsible upon a personal judgment.

In the case of Jaekel v. Pease, 6 Idaho, 131, 53 Pac. 399, this court held: "The first assignment of error cannot be sustained. Under our Code if, in a suit to foreclose a mortgage, a foreclosure should be denied, the

plaintiff is, nevertheless, entitled to judgment for the amount of the mortgage debt shown by the pleadings and proof to be due him, against the defendants personally liable therefor." We think, therefore, there can be no question but that Holtzman, Claar, and Hart are adverse parties to the appellant upon this appeal under the provisions of Rev. Codes, § 4808, upon whom notice of appeal must be served. A safe rule to apply in determining whether a party to a judgment is adverse is, if the judgment be reversed and the cause again tried, could a judgment be entered which would injuriously affect the liability of such person by changing or increasing his liability or rights as fixed by the former judgment. If so, then such person is an adverse party within the meaning of the statute. Applying this rule to the facts of this case, it is apparent that Holtzman, Claar, and Hart are adverse parties.

Counsel for appellant, however, contends that these parties defaulted, and, because of such default, they were not entitled to any notice of any proceedings in the action after such default has been entered. In support of this contention he cites Rev. Codes, § 4892, in part as follows: "After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned in the action for want of bail." This section, however, does not modify or change the mandatory provisions of section 4808, *supra*, which requires that a notice of appeal shall be served on the adverse party or his attorney. The service of the notice of appeal is jurisdictional, and this court cannot acquire jurisdiction of an adverse party upon appeal, unless it appear that such party has been served with the notice of appeal. In the case of Tittman v. Alamance Min. Co., *supra*, in referring to the case of Aulbach v. Dahler, 4 Idaho, 522, 43 Pac. 192, this court said: "The court in that case did not intend to, and did not, change the rule as laid down in any of the above-cited cases. While the latter part of the opinion in that case might be construed to mean that it was not necessary to serve the notice of appeal on a defaulting defendant, it was not intended to hold that it was not necessary to serve the notice of appeal on a defendant who would be affected by a modification or reversal of the judgment even though he be in default." And in the case of Nelson-Bennett Co. v. Twin Falls, etc., Co., *supra*, this court said: "Where a default is entered and the rights of the defendant cannot be prejudicially affected by further proceedings in the case, he is not entitled to any notice of such further proceedings."

It is clear, therefore, that if a reversal of the judgment would adversely or injuriously affect a party to such judgment, whether such party was in default or appeared in the ac-

tion, the statute requires such party to be served with notice of appeal. In this case Holtzman, Claar, and Hart not having been served with the notice of appeal, and they being adverse parties, the appeal must be dismissed. Costs awarded to respondent.

AILSHIE, J., concurs. SULLIVAN, C. J., concurs in conclusion.

(18 Idaho, 282)

ATKINSON v. BOARD OF COM'RS OF ADA COUNTY.

(Supreme Court of Idaho. May 25, 1910.)

(Syllabus by the Court.)

1. STATES (§ 119*)—COUNTIES (§§ 150, 153½*)—CONTRACTS OF STATE AND MUNICIPALITIES—RAILROAD ENTERPRISES.

The act of the Legislature approved March 16, 1909 (Sess. Laws 1909, p. 238), providing for the formation of railroad districts and the voting of bonds and purchase or construction of railroads by such districts and providing for operating or leasing the same, is in violation of the provisions of section 4 of art. 8 of the state Constitution, and contrary to the spirit of sections 2 and 3 of article 8 and section 4 of article 12 of the Constitution.

[Ed. Note.—For other cases, see States, Dec. Dig. § 119; Counties, Dec. Dig. §§ 150, 153½.*]

2. CONSTITUTIONAL LAW (§ 38*)—PERFORMING PROHIBITED ACTS BY INDIRECTION.

That which the Constitution directly prohibits may not be done by indirection or by a general legislative act which is meant and intended to include and accomplish the purposes and objects specifically or impliedly prohibited.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 36; Dec. Dig. § 38.*]

3. RAILROADS (§ 1½, * New, vol. 9, Key No. Series)—POWERS OF PUBLIC AUTHORITIES.

It was never anticipated or intended by the framers of the Constitution that counties or other political subdivisions would or could enter into the business of railroad building, but, on the contrary, the specific prohibitions found in the Constitution manifest a clear purpose and intent to prohibit the state or county, or any subdivision thereof, from entering into any such enterprise.

4. RAILROADS (§ 1½, * New, vol. 9, Key No. Series)—GOVERNMENTAL POWERS—RAILROAD BUILDING.

The building of a railroad is not within itself an exercise of governmental power, but is purely a business enterprise, and, if it is to be engaged in by the state or any of its political subdivisions, it must be done by virtue of the proprietary powers of the state or political subdivisions thereof, and not under the police or general welfare powers of the state.

Mandamus by Reilly Atkinson against the Board of Commissioners of Ada County. Demurrer to the complaint sustained, and action dismissed.

Karl Paine and B. S. Crow, for plaintiff. D. O. McDougall, Atty. Gen., C. P. McCarthy, Pros. Atty., and J. H. Peterson and O. M. Van Duyn, Assts. Atty. Gen., for the defendant.

AILSHIE, J. This is an original action commenced in this court praying for the issuance of a writ of mandate against the commissioners of Ada county, requiring and compelling them to make an order calling an election for the purpose of voting on the formation of a railroad district in the manner authorized and provided for by the act of March 16, 1909 (Sess. Laws 1909, p. 238). The real question involved in this proceeding is the constitutionality of this statute. The act is intended to authorize the formation of railroad districts by a vote of the resident landowners of the districts. It provides for the manner of organizing the district, the election of directors, the voting of bonds, the selection and acquiring rights of way, and the building and constructing of lines of railroad and operating or leasing the same. The act appears to have been very carefully drawn, and conforms very closely to the provisions of the irrigation district laws of this state, providing substantially the same method of formation of the district, of levying and collecting assessments, determining benefits, and other incidents and details of the irrigation act.

Sections 2, 3, and 4 of article 8 of the state Constitution read as follows:

"Sec. 2. The credit of the state shall not, in any manner, be given, or loaned to, or in aid of any individual, association, municipality or corporation; nor shall the state directly or indirectly, become a stockholder in any association or corporation.

"Sec. 3. No county, city, town, township, board of education, or school district, or other subdivision of the state shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state.

"Sec. 4. No county, city, town, township, board of education, or school district, or other subdivision, shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual, association or incorporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

liability of any individual, association or corporation in or out of this state."

Section 2 prohibits the state in any manner ever becoming interested with any individual, association, or corporation in any business enterprise, and it likewise prohibits the state in any manner loaning its credit to the aid of such an enterprise or becoming a stockholder therein; while section 4 makes substantially the same prohibition against any county, city, town, township, board of education, school district, or other subdivision of the county or state, ever lending its credit, either directly or indirectly, to any business enterprise in aid of any individual, association, or corporation. Section 4 of article 12 reiterates substantially the same thing with reference to counties and municipal corporations as is provided against in section 4 of article 8. Section 4 of article 12, however, specifically authorizes cities and towns to contract indebtedness for "school, water, sanitary and illuminating purposes," thereby excluding all other purposes not governmental in their character.

It is argued by the plaintiff in this case that under the authority of *Nampa, etc., Irrigation District v. Brose*, 11 Idaho, 474, 83 Pac. 499, holding the district irrigation law of this state valid and constitutional, that it must necessarily and logically follow that the present act authorizing railroad districts is also constitutional. The foregoing case is clearly not decisive of the question now before the court. There is a wide difference between the subject of and necessity for irrigation in this state and railroad building. Water when secured becomes appurtenant to land, and in vast sections of this state it is absolutely essential to life and habitation that it be secured by means of canals and ditches. When water is conveyed to a tract of land, it is unnecessary that it be carried further in order to be useful or marketable. It needs nothing further than application to the soil. It has, in fact, already become attached to and the chief value of the land, and will be fully as useful if not another acre be watered as if thousands adjoining be watered. But a railroad is an entirely different utility. A railroad from one man's farm to another would be of no use, nor would it in many cases be of any use from one side of a county or district to the other. It is a medium of transportation and commerce, and, in order to be of any use or value whatever, must tap centers of population, production, and manufacture. A railroad, in order to be of use or value, must extend from some place to somewhere. The act in question authorizes the building of "railroads," but the result under the act must necessarily be that a district can only build a part of a road—a branch line or feeder to a main or trunk line. As a court, we cannot be ignorant of that which is common knowledge. With the wisdom of legislation we have nothing to do, but it is our

duty to look to the results an act will and is intended to accomplish, and determine whether those results will be violative of the Constitution. If each community is to be authorized to form a district and bond itself to build a stub or branch line to connect with the main transcontinental trunk lines, will they not be absolutely at the mercy of the trunk line? And will it not result in the district building the branch line for the use of or donation in whole or in part to the main line, and thereby doing indirectly the very thing section 4 of article 8 of the Constitution forbids and prohibits. No one anticipates or expects that a district as authorized by this act either can or will operate a line of railroad extending through or across such district only. It is to all purposes and intents an inducement or subsidy to a main or through line. If it is constitutional to build such a line of road by a district, it would be constitutional to authorize its sale, and thereby "indirectly * * * aid * * * a corporation" in violation of the Constitution.

In *Wyscaver v. Atkinson*, 37 Ohio St. 80, the Supreme Court of Ohio had under consideration an act passed by the Legislature in 1880 "to authorize certain townships to build railroads and to lease or operate the same." That act provided that townships falling within a certain class might vote bonds and construct a line of railroad and do the things necessary and incident thereto. The court held the act to be in violation of section 6 of article 8 of the Constitution of Ohio, which reads as follows: "The General Assembly shall never authorize any county, city, town or township, by vote of its citizens or otherwise, to become a stockholder in any joint-stock company, corporation or association whatever, or to raise money for, or loan its credit to, or in aid of any such company, corporation or association." In considering this question, the Supreme Court said: "Was it contemplated that a complete and independent railroad should be constructed by the township? We think not, and therefore, without speculating as to the manner in which it was intended that the result should be accomplished, it is quite evident, to our minds, that the legislative intent, as well as that of the trustees of the township, was that the proposed road should in some manner and by some means become consolidated or connected with other roads, as part of a more extended line of railway, in order to make it at all subservient to the public welfare, and that in no other way could it be made of public utility. The purpose and effect of the statute is to unite the means and credit of the township with those of other parties in order to promote a common enterprise, to wit, the construction of a continuous line of railway, which could not be accomplished without such combination of interests."

The court quoted with approval from the

opinion in *Walker v. Cincinnati*, 21 Ohio St. 54, 8 Am. Rep. 24, as follows: "The mischief which this section interdicts is a business partnership between a municipality or subdivision of the state and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders, nor furnish money or credit for the benefit of parties interested therein. Though joint-stock companies, corporations, and associations only are named, we do not doubt that the reason of the prohibition would render it applicable to the case of a single individual. The evil would be the same, whether the public suffered from the cupidity of a single person or from several persons associated together." The learned justice who wrote the opinion in *Wyscaver v. Atkinson*, after quoting the above extract from *Walker v. Cincinnati*, added the further comment: "And I will add that it makes no difference whether the scheme for the union of public and private money or credit originates with the party or parties representing the public or the private interests. In short, the thing prohibited is the combination in any form whatever of the public funds or credit of any county, city, town, or township with the capital of any other person, whether corporated or unincorporated, for the purpose of promoting any enterprise whatever." In *McDonald v. Doust*, 11 Idaho, 24, 81 Pac. 63 (69 L. R. A. 220), this court said: "Acts inconsistent with the spirit of the Constitution are as much prohibited by its terms as are acts specifically enumerated and forbidden therein." This position is reinforced by the further fact that railroad building is not within itself an exercise of governmental power, but is purely a business enterprise and must be justified, if at all, under the proprietary powers of the state or political subdivision. Previous action of the Legislature and the people with reference to this provision of our Constitution is a pertinent and proper subject of inquiry. In March, 1905, the Legislature by joint resolution submitted to the people a proposition to so amend section 4, art. 8, Const., as to authorize a "county, city, village, municipality or other subdivision of the state" by vote of the people to "make donations to any railroad or other works of internal improvement" to an amount not exceeding 10 per cent. of the assessed valuation of such county. That amendment was defeated by an overwhelming vote of the people. In this respect we have a positive declaration from the people against any participation by the counties or any of their

subdivisions in railroad building in and of "any individual, association or corporation."

It is said that this provision does not prohibit the county or other subdivision building and owning a road in its entirety. It is true that the prohibition against absolute ownership is not in so many words to be found in the Constitution, but it is clear from the context and the language employed in sections 2, 3, 4, art. 8, and section 4, art. 12, that it was never contemplated that the counties or other political subdivisions would or could go into railroad building, and so the framers of the Constitution forbade donations or ownership in part. They evidently appreciated the fact that a railroad to be of any value to the people of Idaho must extend further than across a county or even across the state—that it must reach the markets, not merely at one end of the line, but at both ends. If the people want to authorize the formation of railroad districts, they can readily do so by adopting an amendment to the Constitution, but, until they do so, we are constrained to hold such acts in conflict with the Constitution. The act in question is, in our opinion, violative of the spirit and intent of the Constitution (sections 2, 3, 4, art. 8, and section 4, art. 12), and cannot be upheld.

The demurrer to the complaint is sustained, and the action will be dismissed. No costs awarded.

SULLIVAN, C. J., and STEWART, J., concur.

(18 Idaho, 85)

RASCOOT v. ROYAL NEIGHBORS OF AMERICA.

(Supreme Court of Idaho. April 16, 1910.)

(Syllabus by the Court.)

1. INSURANCE (§ 723*)—MUTUAL BENEFIT INSURANCE—WARRANTIES.

Where an applicant for fraternal benefit insurance specifically warrants the literal truth of the answers given to the questions submitted, the statements made in the application are treated in law as warranties, and not as mere representations.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1860; Dec. Dig. § 723.*]

2. INSURANCE (§ 723*)—WARRANTIES—ANSWERS EXPRESSING APPLICANT'S OPINION.

The warranty as to the truth of an answer which by its nature expresses only the opinion or judgment of the applicant should not extend further than to insure the honesty and good faith of the party answering the question, and that it was in truth and in fact his honest opinion or judgment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1859, 1860; Dec. Dig. § 723.*]

3. INSURANCE (§ 724*)—WARRANTIES—WAIVER.

Where a fraternal benefit society received an application from a woman for insurance which warranted the literal truth of the answers given by her, and she represented, and at the time honestly believed, that she was not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pregnant, when in fact and in truth she was, and the contract provided that the society would not become liable in such a case and that it would not consider such an application until at least two months after confinement, and the society collected and received dues, assessments, and premiums from the insured for a period of nearly five years thereafter, during which time the applicant was in good health, the insurance society will be held to have waived the right to insist on a breach of the contract for the falsity of the answer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1866; Dec. Dig. § 724.*]

4. INSURANCE (§ 697*)—MUTUAL BENEFIT SOCIETIES—AGENCY OF LOCAL CAMP.

Where a local camp of a fraternal benefit society receives and collects the dues and assessments and insurance premiums from its members, and transmits them to the officers of the superior or head organization, which issues the benefit certificates, and has supervision and right of expulsion of members, the local camp should be regarded and treated as the agent of the superior or head department of the society.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 697.*]

5. INSURANCE (§ 724*)—MUTUAL BENEFIT SOCIETIES — REPUDIATION OF OBLIGATION — PUBLIC POLICY.

It is contrary to sound public policy and detrimental to the best interests of society at large to allow a fraternal benefit society to issue to an applicant a benefit certificate, and thereafter continuously collect and receive from the applicant his dues and assessments for a number of years and induce him to continue his payments and keep up his membership and dues, under the belief that his savings are being devoted to the purchase of protection for his family and dependent ones, and then, after his death, to allow the society to repudiate the contract on the ground that the policy never went into effect because of some temporary cause or disability which existed at the time of the delivery of the policy, and of which the applicant had no knowledge, and which was wholly obviated, and did not in any manner contribute to the cause of death, increase the risk, or lessen the life expectancy of the applicant, and which cause or condition would not have avoided the policy or been a breach of the contract had it occurred after the contract went into force and operation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1866; Dec. Dig. § 724.*]

6. INSURANCE (§ 723*) — CONSTRUCTION OF CONTRACT—"SOUND HEALTH."

An agreement or stipulation in a contract of insurance made with a married woman that the policy shall not go into effect unless it is delivered to her "while in sound health" is not violated by reason of the applicant being pregnant at the time of the delivery of the policy [citing Words and Phrases, vol. 7, p. 6554; vol. 8, p. 7802].

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 723.*]

7. INSURANCE (§ 723*) — APPLICATION—"PERSONAL AILMENT."

A statement made by a married woman who applies for insurance in a fraternal benefit society that she has not consulted with a physician "in regard to a personal ailment" within the last seven years does not cover a single attendance by a physician upon the applicant some three years prior thereto when she was confined and gave birth to a child. Confinement in childbirth is not a "personal ailment" with-

in the meaning of such a provision in the contract.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 723.*]

8. EVIDENCE (§ 215*)—ADMISSIBILITY—ADMISSIONS.

In an action for recovery on a life insurance certificate, it is error for the trial court to exclude the proofs of death which have been furnished by the beneficiary, where the same are offered in evidence on the trial by the insurance society.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 215.*]

9. TRIAL (§ 109*)—SCOPE OF OPENING STATEMENT — REFERENCE TO ABANDONED DEFENSES.

Where an amended answer has been filed in a case which omits and abandons certain affirmative defenses pleaded in the original answer, the trial court should not permit the counsel for the plaintiff in his opening statement to read and comment upon the defenses contained in the original answer, and which have been omitted and abandoned in the answer on which the case is to be tried.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 109.*]

(Additional Syllabus by Editorial Staff.)

10. INSURANCE (§ 723*)—APPLICATION—"DISEASE" AND "UN SOUND HEALTH."

Pregnancy is not per se a condition of unsound health, nor a disease, within the meaning of such terms used in an application for a policy of insurance.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 723.*]

For other definitions, see Words and Phrases, vol. 3, p. 2100; vol. 8, p. 7639.]

Appeal from District Court, Bonner County; W. W. Woods, Judge.

Action by Victor R. Rasicot against the Royal Neighbors of America. Judgment for plaintiff, and defendant appeals. Affirmed.

The plaintiff commenced this action in the district court to recover upon a benefit certificate for \$1,000 issued by the defendant, the Royal Neighbors of America, to plaintiff's wife, Emeline Rasicot. About May 14, 1902, Emeline Rasicot was elected as a beneficiary member of Dewey Camp No. 1037 of the Royal Neighbors of America, located at Little Falls, Minn. Under date of April 25th she answered the prescribed list of questions, and made application for a benefit certificate in the society. This application appears to have been witnessed and filed by the camp recorder on June 4th, and on the same date she was given the medical examination, and answered the list of questions submitted by the camp physician. On June 28th the society issued its benefit certificate for the sum of \$1,000, payable to Victor R. Rasicot, husband of the insured. The insured afterwards removed to Idaho and transferred her membership to Lakeside Camp No. 2373, located at Sand Point, Idaho, and thereafter kept up the regular payment of all dues and assessments until the date of her death, February 7, 1907. The beneficiary, Victor R. Rasicot, made the necessary proofs of death and demanded

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

payment on the certificate. The society refused payment, and this action was accordingly instituted. The defendant filed an answer, denying generally the allegations of the complaint and setting up four separate affirmative defenses. The first defense pleaded the by-laws of the society, and the application made by Emeline Rasicot for insurance, and alleged that certain of her answers were false and untrue, and that, by the provisions of the application and benefit certificate, she had warranted the literal truth of every answer given, and that the policy was therefore void and never became effective by reason and on account of the falsity and untruth of her answers. The second affirmative defense alleged that under the stipulations and agreements of the application and certificate it is essential to the validity of the policy or certificate that it should be delivered to the applicant while she was in sound health, and that in truth and in fact she was not in sound health at the time of the delivery of the certificate, and that, therefore, the policy never took effect. The third and fourth defenses are each to substantially the same effect, and allege that the insured died from a criminal and self-inflicted abortion and miscarriage, and that, under the terms of her certificate, no recovery could be had in such a case. The defendant subsequently filed an amended answer, containing more specific denials of the allegations of the complaint, and later it filed a second amended answer on which the case was finally tried.

The defendant omitted from this last answer the third and fourth defenses relating to the charge that the insured had died from a self-inflicted operation. This answer contained a further allegation as to the falsity of a further question propounded by the company and answered by the applicant. The answer as it finally stood alleged that the applicant had given false and untrue answers to questions 17, 18, 25 (in two particulars), 28, 33j, 33v, and 33i; the questions and answers being as follows:

"(17) Are you now of sound body and mind, in good health, free from disease or injury, of good moral character, exemplary habits, and a believer in a Supreme Being? Yes.

"(18) Have you within the last seven years consulted any physician or physicians in regard to personal ailment? If so, give dates, ailment and physician's or physicians' name and address. No."

"(25) Have you ever had any disease of the following named organs, or any of the following named diseases or symptoms: Fistula? No.

"(26) Have you ever had any disease of the following named organs, or any of the following named diseases or symptoms: Rheumatism? No."

"(28) Have you ever had any disease of the urinary or genital organs? No."

"(33j) Is your menstruation regular and healthy? Yes."

"(33v) Have you now or ever had any disease of the breast, ovaries, or uterus? No."

"(33i) Are you now pregnant? No."

The application contains the following provision in several different forms and in different paragraphs and subdivisions thereof: "I have verified each of the foregoing answers and statements, from 1 to 33, both inclusive, adopt them as my own, whether written by me or not, and declare and warrant that they are full, complete, and literally true, and I agree that the exact literal truth of each shall be a condition precedent to any binding contract issued upon the face of the foregoing answers, and I hereby constitute and make the officers of the local camp and of the Royal Neighbors of America, who have aided in making this application, my agents for such purpose. I further agree that the foregoing answers and statements, together with the preceding declaration, shall form the basis of the contract between me and the Royal Neighbors of America, and are offered by me as a consideration for the contract applied for, and hereby made a part of any benefit certificate that may be issued on this application, or a substitute therefor issued at my request, and shall be deemed and taken as a part of any such certificate. That this application may be referred to in any said benefit certificate as the basis thereof, and that they shall be construed together as one entire contract; and I further agree that if any answer or statement in this application is not literally true, or if I should fail to comply with and conform to any and all of the laws of said Royal Neighbors, whether now in force or hereafter adopted, that my benefit certificate shall be void."

When it came to the trial, the chief controversy revolved about the answer to question 33i. On this question special findings were submitted to the jury, and the questions submitted and the answers thereto are as follows: "(1) State whether or not the deceased, Emeline Rasicot, was pregnant at the time she made application for a policy of insurance with the defendant, to wit, on June 4, 1902. Answer: We, the jury, answer, 'Yes.' State whether or not the said deceased, Emeline Rasicot, if you answer that she was pregnant on June 4, 1902, or June 28, 1902, knew of her condition as to pregnancy on either of said dates, and, if so, on what date. Answer: We, the jury, answer that she did not know her condition on the 4th day of June, 1902, and did not know such condition June 28, 1902." The jury at the same time returned a general verdict in favor of the plaintiff for the sum demanded by his complaint.

Edwin McBee, for appellant. B. S. Bennett, for respondent.

AILSHIE, J. (after stating the facts as above). At the outset it must be conceded that, under the terms of this contract, the answers given by the applicant for insurance

are viewed by the law in the nature of warranties rather than as mere representations. 3 Joyce on Insurance, § 1944; Bacon on Benefit Societies, § 194; Hoover v. Royal Neighbors of America, 65 Kan. 616, 70 Pac. 595; Beard v. Royal Neighbors of America, 53 Or. 102, 99 Pac. 83, 19 L. R. A. (N. S.) 798; Supreme Lodge Knights and Ladies of Honor v. Payne (Tex. Civ. App.) 110 S. W. 523. It has been found as a fact that the insured was pregnant at the time she made application for insurance, and at the time the benefit certificate was issued to her. It is also established that she did not know of her pregnancy at the time, and that her answer was in good faith and honestly made. Viewing these facts alone, if we should follow the inflexible technical rule of warranties which has been adopted by many courts, the inquiry would end here, and we would hold that the breach itself avoided the contract, and that the subsequent conduct of the society could not be considered. Joyce on Insurance, § 1970; McDermott v. Modern Woodmen of America, 97 Mo. App. 636, 71 S. W. 833; Hoover v. Royal Neighbors of America, 65 Kan. 616, 70 Pac. 595; Beard v. Royal Neighbors of America, 53 Or. 102, 99 Pac. 83, 19 L. R. A. (N. S.) 798; and authorities above cited.

We are of the opinion, however, that there are rules of law and principles of equity that must be applied to the insurer as well as to the insured, and that its treatment of the contract for a number of years after the effects and consequences of the breach had disappeared is a subject requiring our consideration. The benefit certificate was issued to the insured on the 28th day of June, and thereafter, and on the 25th day of November of the same year, she gave birth to twins, both of whom were healthy and normal. No unusual or unfavorable condition of health resulted from her confinement. She continued to be a member of Lakeside Camp No. 2373 located at Sand Point, and continued the regular payment of dues and assessments from time to time, and was in fairly good health until shortly before the date of her death in February, 1907. In the meanwhile she bore at least one child after the birth of the twins. It should at this point be observed that there is no provision of the contract or policy of insurance which attempts to suspend or avoid the contract after it is once entered into on account of subsequent pregnancy. The provision of the contract confronting us is a stipulation against pregnancy existing at the time of the application for the insurance. It is conceded in this case that the death of the insured did not result from any condition of the insured which existed at the time of making the application or of the issuance of the policy; nor, indeed, is it contended that the pregnancy of the insured at the time of the issuance of the policy in any way contributed to the ultimate cause of death or in any way aug-

mented the subsequent risk or diminished her life expectancy. In the application question 33¹ is followed by a star, and at the foot of the application blank is the following note: "If applicant is pregnant, application will not be accepted by Supreme physician. Examination should be postponed until at least two months after confinement." It appears that under the by-laws, rules, and regulations of the society in a case of this kind the application is withheld until a period of two months after the confinement of the applicant, and thereupon the physician makes the examination and takes the applicant's answers to the questions, and, if they prove satisfactory in other respects, the application is accepted and the certificate is issued. In this case no fraud was practiced whatever. Although the society contends that the policy never went into effect and that the contract never became binding, still it received and accepted dues and assessments from the insured for a period of more than four years continuously succeeding her confinement, and also covering a subsequent period of gestation and confinement, and the society is presumed to have had notice through the local camp of the existence of the facts and the happening of the contingency which would have avoided the contract. The local camp of which the insured was a member collected and received the dues and assessments from its members, and was charged with the duty of looking after the health and conduct of its members and of expelling or suspending its members for any violation of the laws of the order or breach of their duties as members of the society. The local lodge was therefore the agent of the society which issued the benefit certificate, and the appellant, after the lapse of more than four years, is chargeable with notice of the existence of the condition on the part of the insured which would have avoided the risk and prevented the contract becoming effective and operative. Modern Woodmen v. Breckenridge, 75 Kan. 373, 89 Pac. 661, 10 L. R. A. (N. S.) 136, 12 Am. & Eng. Ann. Cas. 638; Order of Foresters v. Schweitzer, 171 Ill. 325, 49 N. E. 506; Supreme Lodge K. of H. v. Davis, 28 Colo. 252, 58 Pac. 505; Modern Woodmen of America v. Lane, 62 Neb. 39, 83 N. W. 943; Modern Woodmen of America v. Colman, 68 Neb. 600, 94 N. W. 814, 96 N. W. 154; Supreme Lodge K. P. v. Wellenvoss, 119 Fed. 671, 56 C. C. A. 287; Pringle v. Modern Woodmen of America, 76 Neb. 384, 107 N. W. 756. Under these facts and circumstances the doctrine of waiver should be applied to the society.

In Supreme Lodge K. of H. v. Davis, supra, the court said: "In a mutual benevolent order, composed of a supreme lodge and subordinate lodges, an officer of a subordinate lodge charged with the duty of notifying the members of assessments made by the supreme lodge for the purpose of paying insurance certificates of deceased members, and of

collecting and forwarding to the supreme lodge such assessments, is an agent of the supreme lodge, notwithstanding a rule or by-law of the order recites that such officer in collecting and forwarding assessments shall be the agent of the members of the subordinate lodge, and the supreme lodge is charged with all knowledge possessed by the agent in making the collection." In *Trotter v. Grand Lodge Legion of Honor*, 132 Iowa, 513, 109 N. W. 1099, 7 L. R. A. (N. S.) 569, the court said: "The rule that courts will give effect to any act or circumstance from which it may fairly be argued that the insurer has waived the right to strict and literal performance by the insured, or upon which an estoppel against forfeiture may be founded, applies to fraternal or lodge insurance. And whether a waiver of forfeiture of a certificate of insurance will be found in any particular case depends, not on the intention of the insurer, against whom it is asserted, but on the effect which its conduct or course of business has had upon the insured, and this rule is applicable where the insurer acts under a mistake." In *Pringle v. Modern Woodmen of America*, 78 Neb. 384, 113 N. W. 231, *Pringle* held a benefit certificate which contained a clause to the effect that it should become null and void if the insured should at any time be convicted of a felony. While holding the certificate, the insured was convicted of felony and sentenced to the state penitentiary, where he was confined for about six months and died. The beneficiary sued on the contract to recover the amount of the policy. It appeared that the insured had continuously kept up the payment of his dues and assessments. The Supreme Court of Nebraska, in speaking through Mr. Justice Barnes, said: "The local camp and its clerk being the agents of the association, the conclusive presumption, in the absence of fraud, is that they seasonably communicated the fact of *Pringle's* conviction to the head camp. Indeed, the clerk testified that the governing body knew of the fact, and his statement stands unchallenged, except by the evidence of one C. W. Hawes, the head clerk of the association. A like state of facts has often been held to amount to waiver of a similar forfeiture clause."

The state is vitally interested in the thrift and frugality of its citizens, and in encouraging the citizen in providing for his family and looking to their protection and comfort in the event of his demise. To allow him when acting honestly and from the most laudable motive to be led on under the belief that he is devoting his savings to the purchase of a legacy for his dependent ones, and then, when the beneficiary comes to make demand for that paltry recompense, to tell him that the courts, the final arbiters of his rights, will not listen to the equity of the case, would be doing violence to the principles of fair dealing, and would be likewise contrary to the best interests of the public at large, which

we term "public policy." Had the insured been in any manner advised that her policy was not in force, she would perhaps have procured one that would have been valid, and this would have been to the benefit of her family and in the interest of society as well, and the state itself must feel an interest in having her take such precautions, and in that sense the construction of such contracts becomes a matter of public policy. The insurer cannot suffer half so much from such a policy and such a construction as the individuals interested, and society at large must in the end of necessity suffer from the cold-blooded, technical rule that seems to prevail in so many jurisdictions. This ought to be the rule in order to prevent organizations soliciting membership, receiving insurance applications, and accepting dues and assessments for years, and then, after the applicant is perhaps too old to procure insurance elsewhere, tell the insured that he made a false answer in some one of the numerous questions propounded by the society, and that consequently his policy has never been in force. Such a contract is clearly violative of the interests of society at large and of the welfare of its citizens, and ought to be discouraged. The more than 200 questions contained in one application blank run the gamut of the applicant's ancestry from his grand ancestors down to date, and ask him about every disease and pathological condition for which the medical world has been able to invent a name, and then, if forsooth he misses a guess on any one of them, he is chargeable with expert knowledge and warranting the correctness of his answers, and must lose his protection on the venture of a guess. In such a game the insured has only a chance in hundreds, and the result must follow that he only thinks he is insured. It amounts to mental insurance and nothing more. The insurance society in such case could exist for the sole and only purpose of collecting dues and assessments with no insurance liability.

Some courts have held, and we think the rule sound, that, notwithstanding the stipulation of warranty in such contracts, answers which merely express the opinion or judgment of the applicant cannot be classed among the facts, the truth of which is insured by the applicant—that he only warrants his honesty and good faith as to such answers. *Rupert v. Supreme Court U. O. F.*, 94 Minn. 293, 102 N. W. 715; *Ranta v. Supreme Tent of Maccabees*, 97 Minn. 454, 107 N. W. 156; *Royal Neighbors of America v. Wallace*, 73 Neb. 409, 102 N. W. 1020; *Royal Neighbors of America v. Wallace*, 5 Neb. (Unof.) 519, 99 N. W. 256. "It would be solemn nonsense," says the Supreme Court of Minnesota in *Ranta v. Supreme Tent of Maccabees*, "to hold that an ordinary applicant insures the exact reality of physical conditions and causes at a time when the greatest pathologists might differ, or even when they might be impossible of definite determina-

tion." This rule seems to us more in consonance with reason and justice than the rule of strict literal warranty contended for by appellant. The application contained the stipulation that any certificate which might be issued to the applicant "shall be delivered to me while in sound health and in pursuance of the by-laws of the order." It is also contended that the insured was not in "sound health" at the time of delivery because of pregnancy. Pregnancy is not per se a condition of "unsound" health, nor is it a "disease" or "ailment" within the meaning of those terms used in this application and policy. The term "sound health" has been frequently defined by the courts, and, so far as we are advised, it has never been held that this term used in an insurance policy or certificate covered every slight ailment or indisposition of health of a temporary character which does not tend directly to shorten the life or undermine the constitution of the insured. *Packard v. Metropolitan Life Ins. Co.*, 72 N. H. 1, 54 Atl. 287; *Morrison v. Wisc. Odd Fellows' Mutual Life Ins. Co.*, 59 Wis. 162, 18 N. W. 13; *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894; *Manhattan Life Ins. Co. v. Carder*, 82 Fed. 986, 27 C. C. A. 344; 7 Words and Phrases, 6554. So far as we are informed, this term of itself and standing alone has never been held to cover or include a case of pregnancy. Appellant must therefore rest its case on the falsity of the representation that the insured was not pregnant.

Appellant attempted to show that the answer to question 18 was false, for the reason that the insured had consulted a physician within the period of seven years immediately preceding her application. On this point there was a sharp conflict in the evidence except with reference to one visit by a physician, who it is admitted attended her on April 5, 1899, the date of her last previous confinement. The appellant had notice that the applicant was a married woman, and that she had already borne five children, and that she had been confined on April 5, 1899, which was only about three years prior to this application. It might have assumed that either a physician or a midwife attended her on this confinement. The attendance, however, of a physician at the time of a normal case of confinement, is clearly not a "consultation" or treatment of a "personal ailment" of the female confined. Childbirth is a physiological fact which occurs in the regular course of nature, and neither signifies nor entails disease or ailment in the usual and ordinary use of those terms.

On the trial of the case, the plaintiff introduced the physician who attended the insured during her last sickness, and examined him as to the nature of her illness and the cause of death. He testified that she died following an operation performed by him, and testified to the general nature and char-

acter of her condition and the cause for which the operation was performed. He said: "The object of it was to remove the right tube and the right ovary and drain for an abscess in the pelvis." He also testified to signing the death proofs, and identified the paper containing the proofs made by him. The defendant thereafter offered to introduce in evidence the death proofs made by this physician. The plaintiff objected, and the objection was sustained by the court. This ruling is assigned as error. The court should have admitted this exhibit in evidence. It is a uniform rule almost without exception that such proofs are admissible when offered by the insurer. 3 *Elliott on Evidence*, §§ 2386-2389; *Insurance Co. v. Newton*, 22 Wall. 32, 22 L. Ed. 793; *Beard v. Royal Neighbors of America*, 53 Or. 102, 99 Pac. 83, 19 L. R. A. (N. S.) 798. The defendant was not prejudiced by the exclusion of this exhibit. The exhibit has been preserved in the record, and is before us. Answer No. 11 is the particular portion of the exhibit that defendant offered in evidence and to the rejection of which counsel took their exception. It is an answer to the question: "State the remote cause of death." The answer given by the physician is as follows: "Exposure and cold. Patient had a recto vaginal fistula which may predisposed to the pelvic inflammation 1st symptoms, severe abdominal pains, tenderness of whole abdomen, vomiting and constipation, Tympanitis then located pelvic cellulitis uterus became filled was forming in right side filling up Douglas pouch." This answer was substantially the same as that given by the doctor when on the witness stand. His explanation at length as given on the witness stand was clearer and more complete than the answer given in the death proofs. This is evidently due, however, to the fact that he was asked more questions. The purpose of this proof should not be lost sight of. The defendant was not seeking to prove that the answers given in the death proof showed that the insured had died from a disease or malady or cause not covered by the policy of insurance. The purpose must have been either to impeach or discredit the physician who was then testifying, or, what is more probable, to show by inference that the insured had fistula at the time she made application for insurance. Death took place, however, nearly five years after the application was made, and, while she was afflicted with fistula at the time of her death, the inference that she had this trouble at the time she made application for insurance would be very remote and at most only *prima facie*. These facts were substantially all before the jury, and we are satisfied that the appellant was not prejudiced by the erroneous ruling of the court.

Appellant assigns as error the action of the court in permitting the plaintiff to in-

roduce evidence showing that defendant had never paid back or tendered the dues and assessments that had been paid on this benefit certificate. We do not think the admission of this evidence was prejudicial or reversible error. Of course, it was immaterial in view of the fact that the defendant had not tendered it into court or pleaded a return or tender of the premiums paid.

When the case was called for trial and prior to the introduction of any evidence, the attorney for the plaintiff read the pleadings to the jury, and thereupon proceeded to make a statement to the jury, and in doing so commented upon the allegations contained in the first answer of defendant, whereupon counsel for defendant made objection to any comment being made on the original answer. This objection was overruled. Further along in counsel's statement he again made reference to that part of the defendant's original answer, in which it had alleged that the insured came to her death by a self-inflicted criminal operation. Counsel for defendant again objected, and the objection was overruled by the court. This action of counsel for the plaintiff and the ruling of the court is assigned as error. Without going into any discussion of the evils and dangers of such a practice, it is sufficient to say that we do not approve of the same, and that the court should have sustained the objection and admonished counsel to refrain from commenting on any allegations contained in the pleadings that were not then at issue and on which the case was to be tried. *Owens, Lane & Dyer Co. v. Pierce*, 5 Mo. App. 576; *Stratton v. Nye*, 45 Neb. 619, 63 N. W. 928; *Griffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545. We cannot reverse the judgment in this case, however, on account of this error for the following reason: Counsel for appellant have not preserved in their statement and bill of exceptions any statement that was made by the counsel for the plaintiff which it claims was prejudicial, and nowhere in the record does it appear what language counsel used. The comment made by counsel may have in no respect been prejudicial, and, in the absence of any positive showing in the record as to what it was, we must assume that nothing prejudicial to the appellant's rights was said in this connection.

Many other errors are assigned on the admission and rejection of evidence and the giving and refusing to give instructions to the jury. It is unnecessary to give all these assignments of error specific and detailed consideration here, for the reason that what we have already said covers and disposes of the entire case. We find no error that will either require or justify a reversal of the judgment in this case. The judgment is eminently just, and the defense was highly technical and wholly unconscionable.

The judgment is affirmed, with costs in favor of the respondent.

SULLIVAN, C. J., and STEWART, J., concur.

(18 Idaho, 115.)

SPOFFORD v. SPOFFORD.

(Supreme Court of Idaho. April 23, 1910. Or. Petition for Rehearing, June 3, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1008*)—REVIEW—EVIDENCE.

Where the trial court has heard and determined a case solely on depositions and documentary evidence, and an appeal is taken from the judgment on the ground that it is not supported by the evidence, the appellate court will examine and weigh the evidence the same as if the case were being tried de novo.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

2. DIVORCE (§ 46*)—CRUELTY—PROVOCATION.

Where a decree of divorce is asked by the husband on the grounds of cruelty by the wife, and such cruelty is alleged to have consisted in the wife's hostile demonstrations and lecturing, nagging, and hectoring the husband on account of what she deemed to be undue attentions and intimate relations on the part of the husband toward other women, and the evidence discloses that he had been so indiscreet in his conduct toward others as to arouse suspicion on the part of his wife, the conduct of the wife in her protests and outbursts of feeling will not be viewed with the same severity and rigidity by the law as it would be in a case where no such apparent provocation existed.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 145-159; Dec. Dig. § 46.*]

3. DIVORCE (§ 46*)—CRUELTY—EVIDENCE.

The party to the marital contract who by his acts and conduct induces suspicion from the other spouse, and thereby provokes remonstrance, protests, and hostile demonstrations from the other party to the contract, must expect when the crisis comes to exercise a degree of patience and forbearance which the law would not otherwise expect of him under more favorable circumstances.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 145-159; Dec. Dig. § 46.*]

4. DIVORCE (§ 130*)—CRUELTY—SUFFICIENCY OF EVIDENCE.

Evidence in this case examined, weighed, and considered, and held not sufficient to justify the granting of a divorce.

[Ed. Note.—For other cases, see *Divorce*, Dec. Dig. § 130.*]

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by Judson Spofford against Julia R. Spofford. Decree for defendant, and plaintiff appeals. Affirmed.

Eugene O'Neill and H. G. Redwine, for appellant. Black & Wernette, for respondent.

ALLSHIE, J. This action was instituted by the husband against the wife, praying for a decree of divorce on the grounds of cruel and inhuman treatment. The plaintiff alleged that the defendant for a couple of years

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pursued a course of abuse, nagging, and hectoring the plaintiff until she drove him to the verge of nervous prostration, and impaired his health both physically and mentally. The defendant answered, denying the allegations of the complaint. The case was referred to a referee to take the proofs and report the same to the court. The trial court heard and determined the case solely on depositions; and under the rule heretofore announced by this court it is incumbent on us to examine and weigh the evidence on appeal the same as if the case had never been passed upon by the trial court. *Roby v. Roby*, 10 Idaho, 139, 77 Pac. 213; *Stoneburner v. Stoneburner*, 11 Idaho, 603, 83 Pac. 938.

The trial court denied the plaintiff a decree of divorce, and this appeal is from the judgment and an order denying a motion for a new trial, and the appellant has assigned 217 errors. Most of these go to the admission and rejection of evidence; but the whole question resolves itself down to the sufficiency of the evidence to support the findings and judgment of the trial court. We have examined the record in this case, consisting of more than 600 pages, with patience and care for the purpose of determining not only the facts it establishes, but also the correctness of the rulings of the court in the admission and rejection of evidence. Since the proofs were taken in this case before a referee, the evidence which was excluded is incorporated in the record as well as the evidence alleged to have been improperly admitted being in the record. We shall, therefore, judge and determine the rights of the parties upon the whole record as it appears before us, giving weight to that which was proper to be considered and excluding such, if any there be, as was improperly admitted.

We shall not attempt to set forth in this opinion the evidence produced on either side of the case, nor shall we attempt to analyze the proofs offered. To do so would serve no useful purpose whatever, and to incorporate a statement of the proofs in this opinion would be of no interest or consequence to any one. We shall content ourselves with stating briefly some of the conclusions that must inevitably be drawn from the record in this case.

At the time of their marriage, the plaintiff, who is appellant here, was about 56 years old, and the defendant about 47. They intermarried at Trenton, N. J., on September 25, 1902, and lived together harmoniously until about August, 1905. In the year 1905 the appellant was engaged in promoting an electric railway project between Lewiston and Grangeville in this state, and during the meanwhile the parties were residing at Lewiston. In August of that year, plaintiff and respondent, in company with respondent's brother and his family, organized a camping party and invited a family named Twombly. The Twomblys were from Illinois. A few days after they went into camp, Mrs. Spofford became

greatly displeased over the conduct of her husband towards Mrs. Twombly, and remonstrated with her husband about the matter. Appellant had in the meanwhile been paying Mrs. Twombly some attentions and courtesies which tended, perhaps, to arouse his wife's suspicion and to annoy one of her nervous and apparently jealous disposition. In a couple of days the respondent left the camp and went to their hotel in Lewiston and did not return. Appellant remained with the camping party for some two weeks, and in the meanwhile was in daily association with Mrs. Twombly and went fishing with her a time or two. In course of a month the Twomblys went East.

Some time after the Twomblys went East, there came to Lewiston a Mrs. Monteith and her sister, Miss Wills, who became intimate with the Spofford family. Mrs. Spofford soon became jealous of her husband's attentions to these women. The result of the wife's jealousy of the attentions her husband paid to these several women was many protestations, lectures, and, as the husband testifies, hostile demonstrations on the part of the wife, often extending far into the night and disturbing his rest and peace of mind and breaking down his health. This, he says, became so bad and trying he could no longer endure it, and he accordingly left his wife and declined to live with her any longer.

Under the circumstances of this case, the acts proven against the respondent cannot be held to constitute extreme cruelty within the meaning of the statute. Section 2849, Rev. Codes. By this we do not mean to say that respondent's conduct in this regard is commendable, or that a man must forever endure it with patience. The appellant, however, has not been free from blame and censure. He has pursued a course of conduct toward other women which was calculated to arouse suspicions on the part of the wife and to kindle the fires of jealousy. It is fair to say that the record entirely fails to show that appellant has been criminally intimate with any of these women; it rather inclines us to the belief that he has not; but he has been indiscreet and unwise in his conduct, and he certainly owed it to his wife as well as to himself to "avoid the appearance of evil." It is fully as essential to domestic happiness and tranquillity that the parties to the marriage contract so conduct themselves that each may be above suspicion from the other as it is to in fact be innocent of the suspicioned act.

The wife in this case is not a woman of rugged health. She was, on the contrary, of a nervous and excitable temperament. Her jealousy was easily excited. The attentions and courtesies paid by her husband to Mrs. Twombly, Mrs. Monteith, and Miss Wills, and a couple of other women whose names have appeared occasionally in the record, was liable to arouse her suspicions and anxiety; and this, in connection with his apparent neglect of his wife at the same time, was calcu-

lated to disturb the peace of the home. In the meanwhile, these several women were carrying stories back and forth between the husband and wife, were telling the husband various and sundry stories about the wife and the things she had said about his conduct and what she would do with reference to exposing and humiliating him, and also things he should have done or said. In the midst of this state of affairs, it is not to be wondered if the wife should on some occasions so forget herself as to administer a rebuke to her husband, and perhaps do and say some things which, standing alone, would appear cruel or wholly unjustifiable. It is true that such a course of procedure never improves the conditions; it rather tends to aggravate them. But that fact does not lessen the strain of human nature in the parties and their natural tendency to relieve their minds by words and acts. The party to the marital contract, who by his acts and conduct thus invites a remonstrance, protest, or demonstration from the other party to the contract, must expect to exercise a degree of patience and forbearance which the law and good morals would not expect of him under more favorable circumstances.

"Whenever one has well-grounded suspicions," says Mr. Justice Allen, in *Masterman v. Masterman*, 58 Kan. 748, 51 Pac. 277, "that the other is bestowing his attentions elsewhere, and that he finds more congenial society with another than with his wife, the seeds of discord are sown, and the rancorous weeds of jealousy and distrust are sure to grow, and overshadow and wither the flowers of domestic felicity. * * * Shall the wife be censured because the pangs of jealousy, excited by the husband's conduct, force from her violent, though natural, expressions of injured feeling, in his presence? Her conduct is to be viewed and approved, or censured, according to the state of circumstances as they were presented or made known to her. She is presumed to have the feelings of a woman, and to act in accordance with the natural instincts and promptings of her sex." See, also, *Wheeler v. Wheeler*, 18 Or. 261, 24 Pac. 900; *Johnson v. Johnson*, 14 Cal. 459; *Beckley v. Beckley*, 23 Or. 226, 31 Pac. 470; *Ennis v. Ennis*, 92 Iowa, 107, 60 N. W. 228; *Stoneburner v. Stoneburner*, 11 Idaho, 603, 83 Pac. 938.

If we were in the business of advising matrimonial discordants, we would tell this aged and doubtless well-meaning couple that, in our judgment, neither one is free from fault, and that a mite of charity and a little forbearance and a portion of the courtesies and attentions they must have practiced in other days, mutually administered, would in their case adjust what is now only an aggravated case of jealousy induced by suspicious conduct.

After an examination of the whole record, we find no error which requires a reversal of

the judgment, and we are satisfied that the trial court properly denied a divorce in this case.

The court by special order permitted typewritten transcript and briefs to be filed, instead of printed transcript and briefs, as required by the rules. We will, therefore, allow the respondent the sum of \$20, which may be taxed as costs for typewriting her brief. The transcript has been prepared by the appellant, and the cost of that, if it has not already been paid, is a charge against the appellant. It is also ordered that the respondent recover from appellant the sum of \$250 to pay attorney's fees for services rendered on this appeal. This is in conformity with the practice heretofore pursued in this court. *Roby v. Roby*, 10 Idaho, 139, 77 Pac. 213; *Stoneburner v. Stoneburner*, 11 Idaho, 603, 83 Pac. 938.

Judgment affirmed, with costs in favor of respondent.

SULLIVAN, C. J., and STEWART, J., concur.

On Petition for Rehearing.

PER CURIAM. A petition for a rehearing has been filed in this case and is supported by a somewhat exhaustive brief and a review of the pleadings and evidence in the case. Counsel for the petitioners seem to think that the court has mistaken the allegations of defendant's answer for evidence in the case. Counsel also devote some time in their petition and brief to a discussion of the rules of pleading and the fact that under the statute affirmative allegations in the answer are deemed denied.

We have devoted more than a week to an examination of a voluminous record in this case and to an analysis of the evidence introduced, and after doing so we reached the conclusion which has not been altered or modified by the petition and brief for rehearing. We have given more careful consideration to the evidence given by appellant himself than perhaps any other part of the record, and our conclusions rest perhaps more largely on the evidence given by appellant on direct and cross examination than upon any other evidence in the case. It is doubtful, indeed, if the appellant's own testimony as modified by him on cross-examination would be sufficient to entitle him to the decree prayed for. It has been said that "hard cases are the quicksands of the law," and we are forcibly reminded of the significance of this epigram by the facts and circumstances of this case.

Counsel assert that the appellant will not live with respondent any more, even though he does not procure a divorce. That may be true, but for that condition we are not responsible. If divorces were to be granted to all those who have entered the marital state and afterward make like assertions, the courts would be busy with that class of litigation

to the exclusion of other matters. We fully agree with appellant that the respondent's conduct has been harsh and sometimes unjust and not of such a character as was calculated to promote harmony and add to the marital felicity. On the other hand, the appellant himself has not added a large moiety to the peace and happiness of the connubial state, in the matter of his conduct toward respondent since these misunderstandings arose. As it appears to us, the charges and counter charges here amount to merely an accumulation of those little disagreements, misunderstandings, misapprehensions, indiscretions, and outbursts of feeling and passion which the other party might have better overlooked and could have easily avoided or prevented.

We have not pretended to hold, nor do we wish to be so understood, that cruelty on the part of the wife may not become as much a cause for divorce in favor of the husband as if the cruelty were committed by the husband. Nor do we hold that cruelty may not consist of "acts and conduct" as well as "actual physical violence." When, however, either party seeks a divorce from the other on the grounds of cruelty which consists merely in words and conduct as distinguished from physical violence, the occasion for the words and conduct and the circumstances under which they were provoked must be taken into consideration and duly weighed before arriving at the conclusion that they constitute such cruelty as will justify a decree of divorce.

We quite readily agree with counsel for appellant that this case presents some deplorable aspects and is calculated to provoke sympathy from one who will carefully examine the facts and circumstances as they are disclosed by this record. When viewed, however, by the unbiased mind, of one who is not by force of employment partisan in his view of the parties and circumstances, that sympathy must necessarily go out in a measure toward both of the parties to the case.

We say again that we would not be justified in reversing the judgment in this case and ordering a decree of divorce.

The petition is denied.

(41 Mont. 153)

**JOHNSON v. BUTTE & SUPERIOR
COPPER CO., Limited.**

(Supreme Court of Montana. April 25, 1910.)

1. CORPORATIONS (§ 499*)—ACTIONS—NATURE OF CORPORATION.

When a corporation sues or is sued, it occupies the same position as a natural person sui juris, as to the rules of evidence and questions of procedure.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1910; Dec. Dig. § 499.*]

2. EVIDENCE (§ 208*)—ADMISSIONS—PLEADING.

Rev. Codes, § 5248, makes a mining corporation liable for injuries to its employes by the

negligence of a superintendent, foreman, shift-boss, engineer, or craneman. Section 7887 provides that evidence may be given of the act, declaration, or omission of a party, as evidence against him. *Held*, that where, in an action for injuries to a miner by the alleged negligence of his shift-boss, defendant filed a verified answer as required by section 6565, which, after denying that decedent was injured while engaged in his duties as defendant's servant, or that the person by whose negligence he was injured was in fact, or was acting as, shift-boss for defendant, alleged that decedent was injured through the fault and negligence of one of defendant's employes "who was then and there decedent's fellow servant," such allegation was admissible against defendant as proof that decedent was injured by the negligence of one of defendant's employes, notwithstanding the rule authorizing the pleading of inconsistent defenses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 713-725; Dec. Dig. § 208.*]

3. EVIDENCE (§ 262*)—PLEADINGS—ADMISSION OF PART OF PLEADING.

Plaintiff was entitled to the admission of a paragraph of defendant's answer as an admission without offering the entire answer under Rev. Codes, § 7871, providing that when a part of an act, declaration, or writing is offered, the whole on the same subject necessary to make the same intelligible may be offered by the adverse party.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1019; Dec. Dig. § 262.*]

4. MASTER AND SERVANT (§ 285*)—INJURIES TO SERVANT—CAUSE OF ACCIDENT—QUESTION FOR JURY.

In an action for injuries to a miner by the fall of certain timber from above, evidence *held* to require submission to the jury of the question whether the timber was not caused to fall by the negligence of another servant in charge of the shift at the time of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1016; Dec. Dig. § 285.*]

5. MASTER AND SERVANT (§ 182*)—MINING—REGULATION—STATUTES—"SHIFT-BOSS"—"SHIFT"—"BOSS."

The word "shift-boss," as used in Rev. Codes, § 5248, making the operator of a mine liable for injuries caused by the negligence of a shift-boss, is formed by uniting the words "shift" and "boss." The word "shift" means a set of workmen working in turn with other sets, or the time during which a particular set of men work; and the noun "boss" means a master workman or superintendent, a director or manager, one who oversees or gives direction. So the compound word as used in the act means a master workman who directs the work of a set of men engaged on a particular shift.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 371, 372; Dec. Dig. § 182.*]

For other definitions, see Words and Phrases, vol. 7, p. 6485; vol. 1, p. 847.]

6. TRIAL (§ 165*)—MOTION FOR NONSUIT—CONSIDERATION OF EVIDENCE.

On motion for a nonsuit, the evidence will be considered in the light most favorable to plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 372; Dec. Dig. § 165.*]

7. MASTER AND SERVANT (§ 287*)—INJURIES TO MINER—SHIFT-BOSS—QUESTION FOR JURY.

In an action for injuries to a miner by the fall of a piece of timber, evidence *held* to require submission to the jury of the question whether the employe who caused the timber to fall was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a shift-boss, for whose negligence the master is made liable by Rev. Codes, § 5248.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1069; Dec. Dig. § 287.*]

8. MASTER AND SERVANT (§ 182*)—INJURIES TO SERVANT — SUPERINTENDENT — SHIFT-BOSS — NEGLIGENCE—STATUTES—CONSTRUCTION.

Rev. Codes, § 5248, provides that a mining corporation shall be liable for injuries to one of its employes caused by the negligence of a superintendent, foreman, shift-boss, engineer, or craneman. *Held*, that it is not essential to the master's liability under such section that the negligence of the superintendent, shift-boss, etc., should obtain in the performance of a nondelegable duty owing by the master, but that the statute was intended to create a liability for the negligence of such superior servant resulting in injuries to another servant, though the negligence was occasioned while the superior servant was performing ordinary labor, not superior in grade to that of the servant injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 371, 372; Dec. Dig. § 182.*]

9. DEATH (§ 10*)—ACTION FOR INJURIES—SURVIVAL.

An action for injuries to a servant survives under the statute and may be prosecuted either by his heirs or personal representatives; but, by whomsoever prosecuted, it is the action which he had for the injuries and which accrued to him at the time he was injured, as distinguished from the damages which he or his estate suffered by reason of his death therefrom.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 10.*]

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by Charles J. Johnson, as administrator of the estate of Fred Simila, deceased, against Butte & Superior Copper Company, Limited. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Maury & Templeman and J. O. Davies, for appellant. Kremer, Sanders & Kremer, for respondent.

HOLLOWAY, J. Fred Simila was employed by the defendant company as a miner, and was working in a shaft at the Black Rock mine, when a piece of timber fell upon him inflicting injuries from which he subsequently died. The administrator of his estate brought this action, and in his complaint alleges that one James Goggin was employed by the defendant company as a shift-boss at the time when and the place where Simila was injured, and that Simila's injuries were occasioned by the negligence of Goggin which caused the timber to fall. The answer of the defendant admits its corporate existence, and admits that Simila was in its employ; but denies that Simila was injured at all while engaged in the discharge of his duties as a servant of the defendant company. There is a specific denial that Goggin was in fact, or was acting as, a shift-boss for the defendant company, and a denial that through any act of his Simila was injured. There is then a general denial of all the allegations of the complaint not specifically admitted or denied,

and certain affirmative defenses are pleaded, the second of which only requires notice here; and the gist of that defense is found in the following declaration: "That the said Simila was injured through the fault and negligence of one of defendant's employes, who was then and there a fellow servant of the said Simila." Upon the trial the plaintiff offered in evidence the paragraph of the answer from which the above language is quoted, but an objection to the offer was sustained. At the close of plaintiff's case the defendant moved for a nonsuit. The motion was granted, a judgment rendered and entered dismissing the action, and from that judgment the plaintiff appealed. The evidence introduced and offered on behalf of the plaintiff is presented in a bill of exceptions.

1. It is urged that the trial court erred in excluding from the jury's consideration the second affirmative defense set forth in defendant's answer.

This action invokes an act of the Ninth Legislative Assembly (Laws 1905, p. 51; Rev. Codes, § 5248), which holds a mining corporation liable for injuries to one of its employes when such injuries are caused by the negligence of a superintendent, foreman, shift-boss, engineer, or craneman. While it is true that the affirmative plea that Simila was injured through the negligence of one of defendant's employes who was then a fellow servant of Simila would not alone support the plaintiff's allegation that Simila was injured through the negligence of James Goggin, and that Goggin was a shift-boss, it would, however, tend to prove that Simila was injured through the negligence of an employe of the defendant company, and relieve the plaintiff from the necessity of proving that the particular act which caused Simila's injury was a negligent act, and that the person who caused it was an employe of the defendant. If this portion of the answer had been admitted, plaintiff would then have had to prove only: (a) That Simila was injured while in the discharge of his duties as an employe of the defendant; (b) that the particular individual whose act caused the injury was James Goggin; (c) that James Goggin was a shift-boss; and (d) the extent of Simila's injury and the damages resulting therefrom, to make out a *prima facie* case. There is ample evidence in the record to support the first and fourth of these facts.

When a corporation is suing or being sued, it does not occupy a position different from that of a natural person who is *sui juris*. The same rules of evidence are applicable, and, so far as questions of procedure go, the corporation is treated as a natural person. 5 Ency. Pl. & Pr. 61. Section 7887, Rev. Codes, provides: "Evidence may be given upon a trial of the following facts: * * * The act, declaration or omission of a party, as evidence against such party." The gen-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

eral rule governing the admissibility of pleadings as evidence is stated as follows: "Where parties allege matters of fact in their pleadings, these pleadings may be offered in evidence against such parties as admissions of the facts so alleged. Such written statements are admissible on the same principle as oral admissions." Jones on Evidence, 274; 16 Cyc. 968; 2 Ency. L. & P. 173; Am. & Eng. Ency. Law (2d Ed.) 719; Abbott's Trial Brief, Civil Jury Trials, 295. This court has recognized the right of the defendant to interpose inconsistent defenses, under the provisions of section 6549, Rev. Codes; but it has never gone to the extent of saying that such defenses may be so far inconsistent that, if the allegations of one are true, the allegations of the other must of necessity be false. Generally speaking, our Code requires pleadings to be verified (Rev. Codes, § 6563); but, in permitting a defendant to set forth in his answer as many defenses as he has, it was never intended to sanction or encourage perjury. In states, where the pleadings are required to be verified, the general rule is: "The defendant may plead inconsistent defenses, provided they be not so incompatible as necessarily to render one or the other absolutely false." Clarke v. Lyon County, 7 Nev. 75; Seattle Bank v. Jones, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177; 1 Ency. Pl. & Pr. 857; Bliss on Code Pleading, § 343. There are some authorities which hold that if an answer contains inconsistent defenses, as, for instance, a denial that the plaintiff was injured through the negligence of any one, and an affirmative plea that he was injured through the negligence of a fellow servant, then the affirmative plea is not admissible in evidence to prove the issue made by the complaint and the denial, as the practical effect of this would be to deny to a defendant the right to interpose such inconsistent defenses. Pomeroy's Remedies & Remedial Rights (2d Ed.) 724; 1 Elliott on Evidence, § 236. But so far as we are able to determine from the means at hand, these authorities are treating of cases arising in states where the pleadings are not required to be verified. It appears to us to be the acme of absurdity to say that the casual admission of a defendant, made on the street, may be put in evidence against him, but that his solemn admission, made deliberately and under oath, in a pleading, which calls for a true statement of the facts, may not be used against him. If by the second affirmative defense the defendant sought to charge that Simila's injuries were caused by a fellow servant, it would seem that it would have been sufficient to say so, without volunteering the information that the act which caused the injury was a negligent one. Adopting the rule as stated in Clarke v. Lyon County, above, it is manifest at once that the reason for the contention made by Pomeroy and Elliott fails when applied to the pleadings under our Code, and that there is not any reason whatever why admissions

in a pleading ought not to be used in evidence against the pleader.

In passing, we may say that it is very doubtful whether the answer in this case is open to adverse criticism. The denial is that Simila was injured "while engaged in his duties as defendant's servant."

It was not any objection to the offered evidence that the plaintiff did not embrace in his offer the entire answer. Section 7871, Rev. Codes, provides: "When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing, which is necessary to make it understood, may also be given in evidence." In Abbott's Trial Brief, Civil Jury Trials, 299, the rule is stated as follows: "A party may read in evidence a mere extract from his adversary's pleading, however brief, provided he does not omit a part of a sentence or clause which qualifies that part which he reads, so as to pervert the sense or render it uncertain." From the allegations of this affirmative defense, plaintiff was seeking to show that Simila's injury was caused by a negligent act, and that the person whose negligence caused the injury was an employé of the defendant company. The plaintiff would not have been bound by the allegation that the person who caused the injury was a fellow servant of Simila. We quote again from Abbott's Trial Brief, 298, the following: "A party who puts in evidence his adversary's pleading is not thereby estopped from denying or disproving statements contained in it."

Our conclusion is that the trial court erred in excluding the evidence offered.

2. But counsel for respondent insist that, assuming this evidence had been admitted, plaintiff would still have failed to make out a prima facie case upon which to go to the jury. Simila and five other men were engaged in sinking a shaft. They were 75 or 80 feet below the 1,200-foot level. They had drilled holes preparatory to blasting, and Goggin had taken their tools to a place of safety, 18 or 20 feet above where the men were working. The timber which struck Simila was used by the defendant to protect the regular sets of timbers from the effect of the blast, and before it fell it was resting upon the mining timbers, 15 or 20 feet above the bottom of the shaft. Simila was bending over cleaning out the drill holes preparatory to charging them, when this piece of timber fell and struck him on the head, inflicting injuries from which he died on the following day. There was not any one who saw the timber when it commenced to fall; but just before it struck Simila Goggin called out from up the shaft, "Look out below!" There is some evidence that at that time Goggin

himself was 15 or 20 feet above the bottom of the shaft. By a process of elimination, plaintiff sought to show that Goggin was the only person who could have caused the timber to fall; and this he did by showing the whereabouts of every other man employed in or about the shaft at the time the accident occurred, and by showing that there was not any other employé of the defendant company near the timber when it fell. There is some evidence, however, that soon after the accident the cage came down the shaft and Goggin was on the cage. This might tend to show that he could not have been near the timber when it fell; but the weight of the evidence was for the jury. It seems to us that this is sufficient circumstantial evidence to make out a prima facie case identifying Goggin as the person who caused the timber to fall. It appears reasonably certain that Goggin was the only person who could have explained the circumstances which caused the timber to fall, and he had died before the case was tried.

3. It became, then, incumbent upon the plaintiff to show that Goggin was a shift-boss at the time of the accident. The evidence tends to show that Davis was superintendent at the mine; that McLeod was foreman, and that McLeod visited the place where this sinking was in progress, at least once during every shift and stayed about 10 minutes each time. Touching the character of Goggins' employment, the witness Devaney testified: "Mr. Goggin had charge of the work when the foreman was away. Five men were under him. I do not remember how long he had charge of the men. Mr. Goggin gave orders to the men, as to their work, when the foreman was not present, if any orders were given. That had been going on all the time I was there. I could say that I had been there as much as a month, and a little more when this injury took place. Of these six men, when the foreman was up and not present, Mr. Goggin was the boss. * * * Goggin and I were engaged in ordinary mining together as partners. Mr. Goggin and I worked as partners while the others worked as partners on that shift. We were all engaged in the same character of work. The work that we were engaged in was sinking. * * * Q. Mr. Devaney, Mr. Goggin was there working as an ordinary miner. You say he was bossing while McLeod was not there. He was pusher, was he not? A. Supposed to be; yes, sir. A pusher does the work of a miner, right there with us; handles tools and mines, and supposed to work a little harder than the rest of us. I am familiar with the custom of the camp down here for 17 years. It is a custom of miners recognized by the Butte Miners' Union. When I said he was bossing, I mean that he set the pace and was pusher on that shift. He did the work with me. * * * As to whether or not he was bossing on that shift, I will say that he would dictate to us what to do.

He dictated to the other men on that shift what they should do. When he was dictating what they should do, they were doing the work for the Butte & Superior."

Fillerup, a witness for plaintiff, testified to substantially the same thing, and, in addition, that the other men obeyed the orders given by Goggin and would have lost their positions had they refused to do so.

The witness Johnson testified as follows: "Mr. Goggin was bossing on that shift on which I was working, Jim Goggin. I worked there three months. Mr. Goggin had been bossing there during all of that time. I do not know just exactly how long I had worked there after Simila was hurt, but about five or six days after. * * * Mr. Goggin gave the orders to the other five men that were on that shift. The balance of the men carried out the orders as he gave them; that was before Simila died. * * * Well, Mr. Goggin said what we were going to do in that work. Then he helped us to do it. He helped us do the work with Devaney as his partner."

At the time the act of 1905 was under consideration by the Legislature, the word "shift-boss" had a well-defined and well-understood meaning. It is a compound word, formed by uniting the words "shift" and "boss." The word "shift," as used in that act, means "a set of workmen who work in turn with other sets, as a night shift" (Webster's International Dictionary); or the time during which a particular set of men work. The noun "boss" means a master workman or superintendent, a director or manager. Webster's International Dictionary. "A boss is one who oversees or gives direction." *Applebee v. Albany Brewing Co.*, 58 Hun, 605, 12 N. Y. Supp. 576. The verb "boss" means to hold mastery over, to direct or superintend. Webster's International Dictionary. The word "shift-boss," as used in the act of 1905, means a master workman who directs the work of the set of men engaged upon a particular shift.

It is the rule in this state, recognized for many years, that upon a motion for a nonsuit the evidence will be deemed to prove every fact which it tends to prove; that is to say, the plaintiff is entitled to every legitimate inference which can be drawn from the evidence, or, to state the same thing in another way, the plaintiff is entitled to have his evidence considered in the light most favorable to him. If, then, the evidence which is set forth above tends to show that Goggin was placed in a position where his duties included the giving of directions to the men on his shift, the character of his employment was a question of fact for the jury to resolve, and that, too, without reference to the particular designation given him by his master or by other workmen; for, if he exercised the authority of a shift-boss with the consent of his master, he was one in fact, whether he was called a miner, a pusher, a superintendent, or a shift-boss.

As touching the character of Goggin's employment, we think the evidence sufficient to go to the jury.

4. A most serious question is presented upon this appeal, by the contention made by counsel for respondent that, conceding Goggin was the employé whose negligent act caused the injury to Simila, and conceding further that in giving orders to the other men engaged with him Goggin was a shift-boss within the meaning of the statute, still the evidence shows that at the time the timber was dislodged Goggin must have been engaged in the work of an ordinary miner, namely, removing the tools to a place of safety. We agree with counsel that this is the only fair inference deducible from the evidence, and this fairly presents the question: May the mining company be held responsible, under the act of 1905, for damages resulting from the negligence of a shift-boss, when such negligent act was not connected with the work of directing the men under him, but was committed in doing the work of an ordinary miner?

Counsel for respondent cite cases which they maintain tend to support their theory that "the negligence clearly must be in the performance of a nondelegable duty owing by the master. If the vice principal in the performance of a delegable duty is guilty of negligence, then the reason for the rule is absent, and there is no liability which attaches to the master." One of these cases is *McAuley v. Norcross*, 155 Mass. 584, 30 N. E. 14; but the decision in that case does not have any bearing upon the question now before us, as the court held that the evidence was sufficient to go to the jury, as tending to show that the negligent act was that of a superintendent in the course of his superintendence. Another case cited is *Colorado Coal & Iron Co. v. Lamb*, 6 Colo. App. 255, 10 Pac. 251. This case was decided upon the principles of the common law and the provisions of the coal mines act, approved February 24, 1883 (Laws 1883, p. 102), as amended by the act of April 8, 1885 (Laws 1885, p. 134). The principles of the common law and the provisions of the Colorado act are so far different from our act of 1905 that the Colorado decision cannot possibly throw any light upon the question before us. The other cases relied upon are all from Massachusetts, beginning with *Cashman v. Chase*, 156 Mass. 342, 31 N. E. 4, and concluding with *Hall v. Wakefield & S. St. Ry. Co.*, 178 Mass. 98, 50 N. E. 668. An examination of these cases discloses that every one is decided under the employer's liability act of Massachusetts, approved May 14, 1887 (Laws 1887, c. 270), which holds the master liable for injuries sustained by a servant: 2) By reason of the negligence of any person in the service of the employer intrusted with and exercising superintendence, whose principal duty is that of superintend-

ence." Under that statute the Massachusetts court has uniformly held that "the employer is not answerable for the negligence of a person intrusted with superintendence, who at the time of and in doing the act complained of is not exercising superintendence, but is engaged in mere manual labor, or the duties of a common workman." It would seem difficult to understand how any different conclusion could be drawn from the plain language of that statute; and it is equally difficult for us to apply the doctrine of those cases to the present action, which invokes our liability act of 1905, which omits the very pertinent words found in the Massachusetts act, viz., "and exercising superintendence." Under the Massachusetts statute, in order to hold the master liable for the negligence of the superintendent, "the negligence complained of must occur not only during the superintendence, but substantially in the exercise of it." *Fitzgerald v. Boston & A. R. Co.*, 156 Mass. 293, 31 N. E. 7. The employer's liability acts of England, New York, and Alabama contain the same provision as that quoted from the Massachusetts statute, and the courts construing these acts have experienced great difficulty in determining whether a particular act was, or was not, done in the exercise of superintendence. Under the rules of the common law this plaintiff would not have any standing in court upon the showing made, for the negligence of Goggin would be held to be the negligence of a fellow servant, for which the master is not liable. *Goodwell v. Montana Central Ry. Co.*, 18 Mont. 293, 45 Pac. 210.

In enacting the statute of 1905, the Legislature must have had some definite purpose in view. We can gather the legislative intent only from the language employed and the evils which it was sought to cure. It is manifest at once that one purpose was to deprive the master of the defense of negligence of a fellow servant, when the negligent act was that of a shift-boss; and the fact that the English, Massachusetts and Alabama statutes had been in force for many years before 1905, and that difficulties had been encountered in applying them, the omission by our legislative assembly of the words found in those statutes is at least significant. If our Legislature had intended that the only negligent act of a shift-boss for which the master will be held liable is one done in exercising direction or control over the men under him, it would have been an extremely simple matter to have said so by adding the words of the English, Massachusetts, New York, or Alabama statutes, or other words of like import. But this was not done. Our Legislature boldly declares that the mining company is liable for the negligence of a shift-boss which causes injury to any employé, if the employé himself was without contributing negligence on his part. If the Legislature did not intend that the courts

should accept and act upon this statute as it is written, then the Legislature, and not the courts, should amend the act and make it clearly express the legislative will.

It would be idle to say that by this construction the mining company would be liable for the negligent act of a shift-boss when not engaged in the discharge of his duties, for the all-sufficient reason that when not on duty he is not a shift-boss. He is only a shift-boss when on shift. If a mining company sees fit to impose upon an employé the duties of a shift-boss, and in addition thereto duties which are usually performed by an ordinary miner, it cannot be permitted thereby to change the grade of employment, or to so far confuse the character of employment that those for whose benefit the statute was enacted will be unable to determine when they are, or are not, afforded the protection which the law intended. To say that the mining company is only responsible for such negligent acts of its shift-boss as come within the definition of nondelegable acts or duties would render the statute a dead letter, for in the absence of statute the master would be liable for such acts, and if his liability is now precisely the same, and he can invoke the same defenses as before, then our Legislature acted in vain in attempting to afford protection to workmen which they did not enjoy before. But this was not the purpose of the act. The Legislature intended that the mining company should be liable for the negligent acts of its shift-boss, whether the acts were done in the discharge of delegable or nondelegable duties, so long as they were done in the due course of his employment, whatever that might be.

While this action is prosecuted by the administrator, it is in fact Simila's action—the common-law action which he had for the injuries which he received, and which accrued to him at the time of his injuries, and remained available to him until the instant of his death. *Dillon v. Great Northern Ry. Co.*, 88 Mont. 485, 100 Pac. 960. By virtue of our survival statute, the right of action did not cease at the death of Simila, but may be prosecuted either by his heirs or personal representatives; but, by whomever prosecuted, it is still the action which Simila had. Whether his heirs, if any there be, have a cause of action under the provisions of our statute, modeled after Lord Campbell's act, for damages which they sustained, as distinguished from the damages which he or his estate suffered, need not be considered here. The only reason for invoking the statute of 1905 is to prevent the defendant from interposing the defense that Simila was injured through the negligence of a fellow servant, conceding that the person who caused the injury was a shift-boss.

We think the case should have gone to the jury for a determination upon the merits.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

BRANTLY, C. J., and SMITH, J., concur.

(41 Mont. 272)

MOYSE v. NORTHERN PAC. RY. CO. et al.
(Supreme Court of Montana. May 3, 1910.)

1. MASTER AND SERVANT (§ 179*)—INJURY TO SERVANT—FELLOW SERVANTS—STATUTES.

Rev. Codes, § 5251, making every railroad company liable for damages to any employé, caused by negligence of any other employé, etc., abolishes the fellow servant rule without defining the relation of master and servant, but leaves it for the court to determine when the relation exists.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 179.*]

2. MASTER AND SERVANT (§ 192*)—FELLOW SERVANTS—WHO ARE.

The test of the applicability of the fellow servant doctrine to any given case is not whether the injury was received by the servant during working hours, or when he was at work after working hours, but whether, at the time of the injury, the servant was doing something which it was his duty or he had a right to do under the contract, and, if he was so acting, the doctrine applies.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 379-381; Dec. Dig. § 192.*]

3. MASTER AND SERVANT (§ 88*)—INJURY TO SERVANT—SCOPE OF EMPLOYMENT.

A freight conductor who was required to be within call, and who was expected to occupy the caboose of his train at night while awaiting the call to go on duty, and who had the right to do so as a privilege under his contract, and who so occupied it, was, while so occupying it, in the discharge of his duties, though his pay stopped on his registering on his arrival, and would not begin until he was called to make his return trip, and the railroad was bound to provide him a reasonably safe place and to maintain it in that condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 160; Dec. Dig. § 88.*]

4. MASTER AND SERVANT (§§ 111, 311*)—INJURY TO SERVANT—NEGLIGENCE.

A freight caboose, occupied by the conductor in the discharge of his duty, was placed on a yard track terminating at an excavation. The track graded sharply toward the excavation. There was no device to prevent escaping cars from falling into the excavation. A yard crew while at work in making up his train placed cars on the track, but failed to properly secure them by brakes, and they moved toward the excavation, and caused the caboose to fall into it, injuring the conductor. *Held*, that the railroad and the yard foreman, whose duty it was to see that proper precautions were observed, were liable for the injuries received.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215-217, 1236; Dec. Dig. §§ 111, 311.*]

5. MASTER AND SERVANT (§ 311*)—INJURY TO SERVANT—LIABILITY OF FOREMAN OF EMPLOYER.

The foreman of a railroad yard, required to give the general direction of operations in the yard, is not responsible for an unguarded excavation at the end of a side track, because it

was a primary duty of the railroad to take precautions with reference thereto.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1236; Dec. Dig. § 311.*]

6. MASTER AND SERVANT (§ 311*)—INJURY TO SERVANT—LIABILITY OF FOREMAN OF EMPLOYER.

Where the foreman of a railroad yard, required to direct the movements of cars and observe the precautions attending the performance of that duty, was not actively on duty at the time of an accident, caused by failing to properly secure cars placed on an inclined side track, terminating at an excavation, he was not liable for injuries to a freight conductor occasioned thereby, either on the ground of personal neglect of duty or as an intermediate agent of the railroad.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1236; Dec. Dig. § 311.*]

7. MASTER AND SERVANT (§ 332*)—INJURY TO SERVANT—NEGLIGENCE—INSTRUCTIONS.

Where, in an action against a railroad and its employees for injuries to a conductor, the complaint charged conjunctively the omission to guard an excavation at the termination of a side track in a railroad yard, and the manner of handling cars on such side track by the employees, and the jury found against all the defendants, instructions formulated on the theory that if the jury found fault in the first respect only, they should find against the company only, while if they found fault in the second respect, they should find against all defendants, were not erroneous, as authorizing a recovery on a showing of negligence in either respect.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 332.*]

8. MASTER AND SERVANT (§ 180*)—INJURY TO SERVANT—FELLOW SERVANTS—STATUTES.

Rev. Codes, § 5251, making a railroad liable for injuries to any employee caused by the negligence of any other employee, etc., has no application to a charge of a violation by a railroad of a primary duty not within the scope of the employment of employees.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-368; Dec. Dig. § 180.*]

9. NEGLIGENCE (§ 119*)—COMPLAINT—EVIDENCE.

Though several acts of negligence are alleged in the complaint, proof of all is not required, and a recovery is sustained on any one or more of them.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

10. MASTER AND SERVANT (§ 320*)—INJURY TO SERVANT—ISSUES, PROOF, AND VARIANCE.

A complaint in an action for injuries to a conductor while occupying his caboose, standing on a side track in a railroad yard, which alleges that the railroad and its employees negligently permitted cars to be on the track without setting the brakes, and that they negligently drove the cars towards and against the caboose, is sustained by evidence that the cars escaped after they were left standing on the track, and ran against the caboose, and moved it so that it fell into an excavation at the end of the track.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 320.*]

11. MASTER AND SERVANT (§§ 216, 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

A freight conductor, occupying his caboose while on a side track in a railroad yard while the yard crew was engaged in making up his train, assumes the risks of dangers incident to the handling of cars under the circumstances

known to him, but he does not assume the risk arising from the negligence of the yard crew in handling cars in the yards.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 567-573, 574-600; Dec. Dig. §§ 216, 217.*]

12. DAMAGES (§ 216*)—PERSONAL INJURIES—INSTRUCTIONS.

In an action for a personal injury, an instruction directing the jury to award plaintiff such sum on account of the reduction of his capacity to earn money by reason of his injuries as will purchase an annuity equal to the difference in the amount he could earn annually were it not for his injuries, keeping in mind any diminution in his earning capacity on account of advancing years or other causes, if the injury had not occurred, and an instruction that the annuity tables were not to be considered as an absolute basis for their calculations, but should be used by them only so far as the facts correspond to those from which the tables were computed, properly charged on the measure of damages for loss of earning capacity.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by E. E. Moyses against the Northern Pacific Railway Company and others. From a judgment for plaintiff, defendants appeal. Affirmed as to two of the defendants, and reversed and remanded with directions to dismiss the action as to the third defendant.

Wm. Wallace, Jr., John G. Brown, and R. F. Gaines, for appellants. Miller & O'Connor and T. J. Walsh, for respondent.

BRANTLY, C. J. Action by plaintiff for damages for personal injuries. On August 17, 1906, the plaintiff was in the employ of the defendant company as a conductor. The defendant Doyle was the yard foreman of the company, in charge of other employees in the actual discharge of his duties in directing the movement and disposition of cars in the yards of the company at Butte. Defendant Whalen was also in the employ of the company as foreman having general charge of the yards. At the time of the accident plaintiff was in a caboose of the company which stood on a side track in the yards. The main and side tracks extend east and west. To the west from the point where the caboose was standing, there was an excavation, about 22 feet in depth and 40 feet in width. The grade of the tracks inclined sharply to the west, so that a car left standing on any of them without having the brakes properly set would of its own weight move toward the excavation. The main line and one of the other tracks crossed the excavation upon a trestle, but the track upon which the caboose was standing ended at its brink. There was at this point no block or other device to prevent a car standing thereon, if it happened to escape, from being precipitated into the excavation. In addition to the foregoing facts it is al-

leged that the plaintiff was in the caboose in the discharge of his duties; that the defendant company and its foreman Whalen in the exercise of reasonable care could have known, and in fact did know, of the existence of the excavation and the facts stated above, but nevertheless failed to obstruct the said track, or to exercise reasonable or any care to prevent a car proceeding along it from falling into the excavation; that while the caboose was standing on the track the defendant company, through its employes Whalen and Doyle, being then engaged in the discharge of their duties, moved a train of cars upon and along the track toward the caboose and toward the excavation; that they negligently permitted these cars to be upon the track without setting the brakes sufficiently to prevent them from descending by their own weight at a dangerous rate of speed toward and against the caboose, and that they negligently drove the cars against the caboose where the plaintiff then was, with great violence, disconnecting the brakes thereon, and driving it along the track and into the excavation, whereby plaintiff was injured. The answer of the company admits that plaintiff sustained certain injuries while in the caboose, but denies that he was at the time in the discharge of his duties as employé of the company. It alleges affirmatively that he was guilty of contributory negligence and that he assumed the risk. The separate answer of defendants Whalen and Doyle interposes the same defenses. As to the affirmative defenses there is issue by reply.

The evidence discloses the following: Plaintiff was at the time of his injury 41 years of age; he was in good health, and had been in railway service for 17 years, during the last 4 of which he had been a conductor on the Montana division of the defendant company's railroad. He resided with his family at Livingston. He ran freight trains from Livingston to Helena, Butte, and Billings. On August 16th he brought train No. 56 from Livingston, arriving at Butte at 11:45 p. m. On reaching the yards he "registered in"; that is, he delivered his waybills at the telegraph office of the company, and signed the register after noting the time of his arrival, etc. Upon registering in his pay ceased until he was "called" to make his return trip. It began again 30 minutes before the hour stated for departure in the call. The brakemen were also off active duty as soon as they had set the hand brakes on the cars and had disconnected the engine. From that time the train, including the caboose, was in charge of the yard crew. By "yard crew" is meant the foreman in charge and his assistants. The term "called" means that, when the train is ready to leave, the call boy tells the crew to get ready to take charge of the train, and informs them of the time of starting. It is custom-

ary for a train crew, when away from home terminals, to sleep in their caboose. It is provided with a "bunk" under the cupola, which is occupied by the conductor, and a "bunk" in the body of the car, fitted up with cushions, which the brakemen occupy. The cushions serve for mattresses. All the members of a crew furnish their necessary bed clothes. This custom had been observed by train crews for 17 years. After the yard crew takes charge of a train they place the caboose at any convenient place in the yard selected by the foreman, unless there is a siding especially designated for it. There was no such siding in the Butte yards. After the train crew had retired to the caboose on the night of the 16th, but while they were still awake, the yard crew took the train away and switched the caboose over to the track upon which it stood at the time of the accident. This is designated by the witnesses as track No. 4, to the north. On the morning of the 17th the plaintiff was informed at the telegraph office that his train would not be ready to leave until early in the morning of the 18th. He and the rest of the crew, two brakemen, spent the day in the city, returning to the caboose about 5 o'clock. At that time an empty gondola car was standing on the track, 5 or 6 car lengths east of the caboose. The latter was standing about 12 car lengths east from the excavation. A car length is about 36 feet. The excavation had been made by the Butte Electric Street Railway Company through the yards of the defendant company, to provide a crossing for the electric cars under the tracks of the railroad, the intention being to erect a trestle viaduct for all the tracks of the latter. Prior to the beginning of this work the tracks had rested on a solid embankment. The viaduct had been completed in part, but was not of sufficient width to accommodate all the tracks of the railroad company. As already stated, some of them, including the one occupied by the caboose, ended at the brink of the excavation. A week before the 16th, on a prior trip to Butte, the plaintiff had noticed the excavation, and that men were at work in the construction of the viaduct. The telegraph office of the company was some 50 feet west of the excavation, and upon going to the office to register in, on the evening of the 16th, the plaintiff must have passed over the excavation on the completed portion of the viaduct, or have gone around it upon the public road. He must also have pursued one or the other of these courses in order to reach the office on the morning of the 17th, when he went to inquire as to the hour when his train would leave. On the evening of the 17th the crew went to bed in the caboose, about 7 o'clock. At that time the caboose and the gondola were standing as in the morning, held by the hand brakes. The brakes hold cars so placed if they are set securely and are not disturb-

ed by impact by other cars. The yard crews were to make up two trains that night, one of which was No. 58. About 7:45 two other cars were put upon track No. 4, to the east of the gondola and against it. One was a gondola and the other a flat car loaded with steel. They were left standing, held by the hand brakes only. About 9:45 four other cars, loaded with copper, were pushed upon the track from the east by the yard crew and put against the car loaded with steel. The cars thus set together were automatically coupled and were left standing, apparently held securely by the brakes. The yard crew then went to secure other cars. Upon their return a few minutes later all the cars left by them, including the empty gondola and the caboose, had disappeared. The six cars which had been coupled together had in some manner been released and gotten under way, and, colliding with the gondola and caboose, had driven them to the excavation, with the result that the west end of the caboose was precipitated into it. The plaintiff was awakened by the impact, but, supposing that it was produced by the crew in making up his train—hard bumps of that character being not unusual—he did not give it serious attention until the car began to gather speed. He then called to the brakemen and attempted to escape, but was too late. He reached the platform as the car began to descend into the excavation, and as he held on by the hand bars he was struck by something upon the hip, receiving the injury of which he complains. Whalen was the immediate superior of Doyle. Trains were moved and cars were placed according to Whalen's directions. Whalen usually went off active duty at 7 o'clock in the evening. At the time of the accident he was at his home, having gone off duty at the usual time. The rules of the company contained the following:

"Rule 13. Employés of the company must devote themselves to its service, attending during the prescribed hours of the day or night, and residing wherever required.

"Rule 14. No employé will be allowed to absent himself from duty without permission from the head of the department in which employed."

"Rule 16. Yardmasters report to the trainmaster, assistant superintendent, or superintendent; perform work ordered by agents; and are in charge of yard work, yard engines and crews, and trains and engines while in yards."

Unless a member of a train crew was laid off, or was absent by permission, he was, under rules 13 and 14, required to be within call at all times and ready for duty. So the plaintiff interpreted these rules and it is not questioned that his view of their meaning was correct. The plaintiff had verdict and judgment. The defendants have appealed from the judgment and an order denying their motion for a new trial.

The complaint is framed upon the theory that the defendant company is liable to the plaintiff, as one of its employés, for injuries received while engaged in the discharge of his duties, through the negligence of other employés, and that the other defendants are liable because they were personally guilty of the acts of negligence which caused the injury. It declares upon the statute which abolishes the fellow servant rule. Rev. Codes, § 5251. The acts charged as negligence are the handling of the cars by the yard crew in making up the train in such manner as to permit them to escape and collide with the caboose, driving it into the excavation, and the omission by defendants to provide some device, at the brink of the excavation, to prevent the caboose from being precipitated therein, if from any cause it escaped.

The first contention made by counsel is that the evidence is insufficient to justify the verdict, for that it appears that at the time the plaintiff was injured he was not engaged actively in the discharge of duties for which he was employed by the company, but was a mere licensee upon its property, to whom it and its employés owed no duty other than to refrain from doing him a willful or wanton injury; and hence that no liability can be predicated upon the statute. In support of this contention counsel argue that, while one is in the employ of another under a contract, he is, in a popular sense, an employé during the entire period covered by the contract; yet the rights and duties incident to the relation of master and servant, in a legal sense, do not subsist, except during the time which, under his contract, he must actively devote to the duties of his employment. To make the statement in another way: Unless the servant is at a particular time under the control of the master, giving his time and attention to the particular duties he is employed to do, he is pro hac vice a stranger, to whom the master, as such, owes no duty whatever, except such as he must observe toward any other stranger under the social compact.

While the statute has to do exclusively with those persons who sustain toward each other the relation of master and servant, it does not undertake to define who those persons are, but merely imposes certain rights and liabilities upon them, leaving it to the courts to determine when persons have assumed the relation. Dresser's Employer's Liability, § 8. It is not always easy to determine exactly when the relationship, once established, ceases, and the servant may be said for the time being to be his own master. In *Northwestern Packet Co. v. McCue*, 17 Wall. 508, 21 L. Ed. 705, the question arose upon the evidence as to whether the employment of the deceased had ended at the time he received the injury. The court said: "It was for the jury to say from the nature of the employment, the manner of engaging hands, the usual modes of transacting such

business, and the other circumstances of the case, whether the service had or had not ended at the time of the accident." On this subject Mr. Dresser says: "If a general rule were to be laid down, it might perhaps be that the employment begins when the servant enters premises or trains in the control of his master, for the purpose of reaching the particular place where he is to work. The length of time before or after the hour for beginning work is not a guide." Dresser, *Employer's Liability*, § 13.

The facts and circumstances which appear from the statement of the evidence before us furnish support for the inference that, during the entire time when the plaintiff was away from his home terminal, he was, except when notified that his services were not wanted, subject to be called on duty. He was required to be within call, and, as he understood the rules, was subject to discipline if he was not. It is also a fair inference that though he was not under his contract required to occupy the caboose at night, he was nevertheless expected to do so, and not only this, but that he had a right to do so, because it was under all the circumstances a substantial privilege accorded to him under the contract, which the company was not at liberty to withdraw at will. If these inferences are permissible, and we think they are, then the conclusion seems inevitable that he was in the caboose in the course of his employment, and that the members of the yard crew were his fellow servants, for whose negligence the company is liable under the statute. The cases differ greatly as to whether, under such circumstances as are presented in this case, the relationship of master and servant subsists, and whether or not the servant is entitled to all the benefits of such relationship. As is said in the note to *Taylor v. Bush & Sons Co.*, 12 L. R. A. (N. S.) 853, they arise in a variety of circumstances. Some of them involve the fellow servant doctrine, others the assumption of risks, and still others involve consideration of the question whether the master has used ordinary care to furnish a reasonably safe place for the servant to be while at work. In all the cases, however, the essential question to be determined is: Did the relationship of master and servant actually exist at the time of the injury?

In *St. Louis, A. & T. Ry. Co. v. Welch*, 72 Tex. 208, 10 S. W. 529, 2 L. R. A. 839, the plaintiff was the foreman of a bridge gang in the employment of the defendant. At the time of the accident he was asleep in a car provided by the company for that purpose, which was lying upon a side track. Other employes of the defendant, in operating one of its freight trains, negligently ran it upon the side track, and struck the car in which the plaintiff was with such violence that plaintiff was seriously injured. The court, after sustaining the contention made

by the defendant that the plaintiff was a fellow servant of the employees operating the train, said: "The plaintiff at the time of the accident was asleep on a car belonging to the company, provided by it for that purpose, which was placed upon its side track. He was liable to be called upon at any moment to go out with his gang upon duty upon the road. We think he must be held to have been upon duty at the time he received the injury. That the accident occurred when he was resting from his labors we think makes no difference. He was subject to the call of the company at the time, and his case differs from that of other servants who engage for certain hours of employment, and who are injured during the intervals in which the master has no claim upon his [their?] services."

In *International & G. N. R. Co. v. Ryan*, 82 Tex. 565, 18 S. W. 219, the plaintiff was employed by the railway company by the day as a carpenter. He was on a car of the defendant on his way, with other members of the working crew to which he belonged, from the station where the crew had been at work, to another where similar work was to be done. They had orders to stop in the yards at San Antonio, an intermediate station, to do some repair work. The car was standing on a side track in the yards. The plaintiff, having spent a portion of the evening in the city, had returned to the car, and was engaged in writing a letter. Another employe, in charge of a switch engine, negligently ran it into the car and seriously injured him. The court held that the plaintiff and the employees in charge of the switch engine were fellow servants. It disposed of the contention that he was not in the employ of the defendant, by saying: "In this case we think it is evident from the facts testified to by the appellee that he was, in contemplation of law, in the employment of the company at the time of the collision. His presence in the car on the side track at the time of the collision can be explained in no other way, under the proof. It was only by reason of the fact that he was an employe of the company that he was in the car on the side track at the time he was injured."

In *Dishon v. Cincinnati, N. O. & T. Ry. Co.* (C. C.) 126 Fed. 194, the court discussed somewhat at length the reason which furnishes the basis of the fellow servant rule, and reviewed exhaustively the cases in which it has been invoked and applied in order to relieve the master from liability. The facts in the case show that deceased was in the employ of the defendant as a section hand. He boarded with the section boss at the company's section house. On the evening of the accident after he had finished his work and eaten his supper, he started with two others to go to the railway station on the opposite side of the track. There was an opening between cars standing on a side track which he

had to cross. He had passed through this on his way from work. He and his companions undertook to pass between the cars. One of them passed through in safety; the deceased then attempted to pass through, but while he was making the attempt, the opening was closed by the cars being shoved back by an engine manipulating the cars on the track. The result was that he was crushed and killed. The court held that the death of the deceased was caused by the negligence of his fellow servants, a risk which he assumed when he entered the employment of the defendant. Touching the question involved here it is said: "There is no good reason for holding that the assumption of risk exists when the servant is doing one thing required of him by the contract, and does not exist when he is doing another thing so required, or that it exists when he is doing a thing required of him by the contract, and does not exist when he is doing a thing which he is simply authorized to do by the contract. Any stopping short, therefore, of making the assumption by the servant of the current risks of his employment as wide as the action on his part contemplated by the contract discredits the principle and reasoning on which the fellow servant doctrine is based and that doctrine itself. Hence it is never a test of the application of the fellow servant doctrine to any given case, whether or not the injury was received by the servant during working hours or when he was at work after working hours. The sole test of its application thereto is whether at the time of the injury the servant was doing something which it was his duty or he had a right to do under the contract. If he was so acting, the doctrine applies; if not, it does not apply." This case was subsequently reviewed by the Circuit Court of Appeals. 133 Fed. 471, 66 C. C. A. 345. The judgment was affirmed on the ground that it appeared that the deceased was guilty of contributory negligence in attempting to pass between the cars as he did. The appellate court intimated that, in view of its decision in the case of *Ellsworth v. Metheny*, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389, the conclusion of the Circuit Court that the deceased was still in the course of his employment was erroneous. It did not, however, question the soundness of the rule announced by the Circuit Court as to the test by which the question when the relation of master and servant ceases must be determined. It may be admitted that the conclusion of the Circuit Court that the deceased was acting within the scope of his duty when injured was erroneous. We are inclined to think it was. Nevertheless, the rule, as stated, is, in our opinion, a just one, and is fully sustained by the great number of cases cited and examined. Even the briefest notice of these cases would extend this opinion beyond any reasonable limit. We content ourselves by reference to the opinion itself, and to the note to *Taylor v. Bush & Sons Co.*, supra, wherein will be

found a great number of cases illustrating the conflicting views of the courts. It may be observed of the case of *Ellsworth v. Metheny* that while the appellate court held that the deceased was not at the time of his death in the discharge of the duties of his employment, and hence was not entitled to recover on the theory that he was a servant of the defendant, it held that the case should have been submitted to the jury upon the question whether the defendant had been guilty of negligence in installing a dangerous apparatus in a place where his employees had a right to be as licensees by his implied consent, without properly guarding it. The apparatus consisted of a highly charged electric wire strung on brackets along the wall of a dark entry in a mine in which the deceased was working. The entry was not in the part of the mine where deceased was at work, but the men, with the knowledge of defendant, were accustomed to use it when they came from their rooms during refreshment and rest at the noon hour. The deceased had passed through it to the room of a fellow workman. On his return he came in contact with the wire and was killed. We have referred to this case because counsel for defendants have cited it in support of their contention, and also because of the further contention made by them that the plaintiff was in the caboose as a mere licensee.

The conclusion we have reached, that the plaintiff was in the caboose for the purpose of being within call by the defendant company to go on duty, and was therefore in the discharge of his duties, involves the conclusion, also, that he was not there as a mere licensee, and that the rule of liability declared by the statute applies to the case made by the evidence. It is not at all conclusive that the pay of the plaintiff ceased when he registered in on his arrival at Butte. In the light of the evidence, under the contract of employment it was within the contemplation of both parties that he should hold himself subject to the order of the company after his pay had ceased; and it seems clear that a contract including a stipulation of this kind, express or implied, is not open to any legal objection.

Under the circumstances disclosed, the obligation was upon the company to use ordinary care to provide a reasonably safe place for the use of plaintiff, and to maintain it in that condition. The evidence furnishes ample support for the conclusion that it failed to discharge its obligation in this regard; for, though it may be conceded for present purposes, that it was not required to provide a block or other device to prevent escaping cars from falling into the excavation and that the yards were otherwise in a reasonably safe condition, it was nevertheless bound to see that the yard crew took ordinary precaution to maintain this condition, and not to allow cars to escape and collide with the caboose so as to expose the plaintiff to additional peril. The evidence tends to show that but for

the escape of the loaded cars, which the ordinary precaution of securely setting the brakes would have prevented, the accident would not have occurred. For this lapse of duty the defendant company is liable, as is also the defendant Doyle; for, for the time being, he stood in the place of the company, and it was his personal duty to see that the proper precautions were observed. But we are of the opinion that a separate motion for nonsuit, made on behalf of Whalen, should have been sustained. It is true that he was foreman of the yards and had general direction of the operations there, as the immediate superior of Doyle. Yet he was off duty at his home at the time of the accident. He was not, under the evidence, responsible for the unguarded condition of the excavation. It was a primary duty of the company to take precaution with reference to it; and under the rule he was not required to do anything further than to direct the movement of cars and observe the precautions attending the performance of that duty. And since he was not actively on duty in this regard at the time of the accident, he cannot be held either for personal neglect of duty, nor as an intermediate agent of the company.

Contention is made that the charge of the court was erroneous in that, while two acts of negligence are charged conjunctively, in the complaint, to wit, the omission to guard the excavation, and the negligence of the employees in handling the cars, it instructed the jury that plaintiff could recover upon a showing of fault in either respect. This point was not made in the trial court; but, even so, the defendants cannot complain. Let it be conceded that two separate causes of action are stated. The instructions were formulated upon the theory that if the jury found fault in the first respect only, they should find against the company only; but if they found fault in the second respect, they should find against all of the defendants. Since the finding was against all of the defendants, we presume that they found negligence in the handling of cars. Viewed in its first aspect, the complaint charges the violation of a primary duty only, which did not fall within the scope of the employment of the yard crew, as we have already pointed out in determining the liability of Whalen. To this aspect of the case the statute has no application, because the fault was not that of a fellow servant of plaintiff. In its second aspect the case falls under the statute. Advantage of this fault, if it be such, should have been taken by special demurrer. It is not a valid objection to the judgment, so far as concerns the company, that the jury were permitted to find upon either view of the case. Although several acts of negligence are alleged in the complaint, proof of all is not required. A recovery will be sustained upon proof of any one or more of them. 14 Ency. Pl. & Pr. 345; 29 Cyc. 587; *Hoskins v. Northern Pacific Ry. Co.*, 39 Mont. 394, 102 Pac. 988. Upon the

evidence the jury may or may not have concluded that the company was negligent in omitting to block the track. Whether it did or not is not material. Their finding that there was negligence in the handling of cars is sufficient to sustain the verdict.

A similar contention is made with reference to the allegations that the defendants negligently permitted the cars to be upon the track without setting the brakes, and that they negligently drove the cars toward and against the caboose. The contention is really based upon a technical objection to the form of the statement in the complaint. The evidence tends to show that the cars escaped after they were left standing on the track. This sustains the allegation from any point of view. If the defendants left the cars in such an insecure condition that they escaped and collided with the caboose, the result was that they negligently drove them and thus caused the collision. They put the effective cause of the accident in motion. It was one and the same cause whether the cars moved of their own weight or were moved by an engine.

It is said that the plaintiff knew and understood the danger of the situation, and therefore, by going to sleep in the caboose, he assumed the risk. There is no merit in this contention. That the place was not safe is apparent. He assumed the risk of all dangers ordinarily incident to the handling of cars under the circumstances as he saw them. Among these was a likelihood of injury due to the bumping of cars against the caboose during the making up of a train; but he had no cause to think when he went into the caboose that the yard crew would omit to observe ordinary precautions to secure the cars by means of the brakes, and thus add to the perils which he did assume. He was entitled to assume, looking to all the conditions as they actually were, that the place was reasonably safe. It was not apparent to him, nor was he bound to know, that the yard crew were going to be so negligent in the course of their employment that he would certainly be injured if he remained in the caboose. The true test to be applied is not whether the injured servant exercised reasonable care to discover the dangers, but whether the danger was known or plainly observable. *Choctaw v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; *McCabe v. Montana Central Ry. Co.*, 30 Mont. 323, 76 Pac. 701; *Anderson v. Northern Pacific Ry. Co.*, 34 Mont. 181, 85 Pac. 884. The evidence fairly presented a case for the jury on this point.

Fault is found with the charge of the court in many particulars. We have given our attention to them, but find no prejudicial error in any of them. Nor do we find that the court omitted any instruction which it should have given. Most of counsel's criticisms are predicated upon the assumption that the theory of the case adopted by the trial court, as to the liability of the defendants upon any

aspect of it, was erroneous. What has been said in the discussion of the principal contention disposes of all of these criticisms.

As to the measure of damages, the court gave, among others, the following instruction: "If you find for the plaintiff, and should further find that the capacity of the plaintiff to labor or earn money has been reduced by reason of his injuries, you should award him such sum on that account as will purchase an annuity equal to the difference in the amount he could earn annually in view of his injuries and the amount he could have earned annually were it not for his injuries, keeping in mind, however, any diminution in his earning capacity that may ensue on account of his advancing years or from other causes if the injury had not occurred." It is said that the jury were here told that, having determined the yearly loss of earnings by plaintiff by reason of his impaired capacity, the cost of an annuity for a like amount was the standard by which they should measure the amount of their verdict. As an abstract statement of law there is no fault to be found with the instruction. What it would cost to buy an annuity for the amount which a person in the condition in which plaintiff appeared to the jury to be at the time of the trial, is as nearly an exact standard as can be laid down. Of course, in ascertaining the amount of the annuity, the jury must take into consideration probable diminution of earning capacity due to causes other than the injury itself, such as advancing age, the apparent present state of plaintiff's health, the apparent permanence or lack of permanence of his disability, his habits of life, and the possibility that his employment would have been continuous, and the like. These are the conditions referred to in the latter part of the instruction, and, if any fault is to be found with it, it lies in the fact that these conditions are not enumerated with more particularity. In a later instruction, however, given at the request of the defendants, after referring to the evidence touching the use they might make of mortality and annuity tables, the court carefully called the attention of the jury to these particular conditions, saying to them that these tables were not to be considered as an absolute basis for their calculations, but must be used by them as a guide only so far as the facts before them corresponded to those from which the tables were computed. This brings the instructions within the rule as laid down in *Bourke v. Butte Electric Ry. Co.*, 33 Mont. 267, 83 Pac. 70, as explained in *Lewis v. Northern Pacific Ry. Co.*, 36 Mont. 225, 92 Pac. 469, and *Robinson v. Helena Light & Ry. Co.*, 38 Mont. 22, 99 Pac. 837.

Other alleged errors have been examined, but none of them have been found sufficiently meritorious to require special notice.

The judgment and order are affirmed as to

the defendants railway company and Doyle; as to the defendant Whalen they are reversed, and the cause is remanded, with directions to the district court to dismiss the action as to him.

SMITH and HOLLOWAY, JJ., concur.

(58 Wash. 453)

NOON et ux. v. MIRONSKI.

(Supreme Court of Washington. May 24, 1910.)

1. LANDLORD AND TENANT (§ 134*)—USE OF PREMISES—RESTRICTIONS.

In the absence of special restrictions in the lease, the lessee may put the premises to any use he pleases, not materially different from that in which they are usually employed, to which they are adapted, and for which they were constructed.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 482-486; Dec. Dig. § 134.*]

2. LANDLORD AND TENANT (§ 134*)—USE OF PREMISES—RESTRICTIONS.

A lease of a storeroom for the purpose of conducting a bakery therein does not prevent the use by the lessee of the room for selling groceries.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 482-486; Dec. Dig. § 134.*]

3. LANDLORD AND TENANT (§ 134*)—USE OF PREMISES—RESTRICTIONS.

A lease of a storeroom for the purpose of conducting a bakery therein, which binds the lessee to pay rent, to keep the interior of the premises in good repair and in a wholesome condition, and not to make alterations without the consent of the lessor, is not ambiguous, and does not prevent the lessee from conducting a grocery business on the premises.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 482-486; Dec. Dig. § 134.*]

4. CONTRACTS (§ 168*) — CONSTRUCTION — RIGHTS ACQUIRED.

Where a contract by its conditions and legal effect invests a party thereto with a right, it is the same as if the right had been expressly stipulated in the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 751; Dec. Dig. § 168.*]

5. WITNESSES (§ 25*)—FEES.

Where plaintiff did not make the wife of defendant a party, though she was a competent party, the wife, subpoenaed by the husband as a competent witness, was entitled to fees recoverable from plaintiff, defeated in the action.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 50; Dec. Dig. § 25.*]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Thomas A. Noon and wife against J. C. Mironski. From a judgment for defendant, plaintiffs appeal. Affirmed.

Byers & Byers, for appellants. Elias A. Wright, for respondent.

DUNBAR, J. The appellants leased a storeroom in the city of Seattle to the respondent for the purpose of conducting a bakery. The respondent conducted a bakery

for some time, and finally began to sell some groceries in connection with the bakery; at least, this is the allegation of the complaint, and for the purposes of this case we may assume it to be true. The respondent was notified to quit keeping groceries for sale, and there was some discussion backwards and forwards between them on the subject. The appellants gave him notice to vacate the premises, and, upon his failure to do so, brought suit of forcible entry and detainer, and, upon the failure of the respondent to file a bond, he was evicted, and possession of the premises given to appellants. The respondent then filed his amended answer, in which he denied keeping groceries, excepting with the assent of the appellants. A reply was interposed, and the case went to trial. Appellants introduced their evidence in chief and respondent introduced his evidence, and evidence was introduced in rebuttal, when the respondent interposed a motion for an instructed verdict on two grounds: First, that the attempted restriction in the lease for bakery purposes was not exclusive, and that the respondent was entitled to conduct any lawful business in the storeroom. The second ground for the motion was not considered by the lower court, and will not be here. This motion was by the court granted, and the jury instructed to return a verdict for the respondent. Thereafter the respondent filed a cost bill in which, among other items, he taxed a witness fee for Pauline Mironski, wife of the respondent. Appellants filed their motion to strike from the cost bill the item taxed as a fee for the wife of respondent, and this motion was by the court denied. The errors assigned are the refusal of the court to deny the motion in regard to the costs, and in sustaining the motion for an instructed verdict.

That portion of the lease upon which the appellants base their claim is as follows: "That the lessor, in consideration of the covenants of said lessee hereinafter set forth, does by these presents lease and demise unto the said lessee the following described property: * * * For the purposes of conducting a bakery therein." This is all that is said in regard to the restriction. There is in every lease, in the absence of express covenants to the contrary, an implied obligation on the part of the lessee to use the property lawfully and for lawful purposes, and to so use it as not unnecessarily to injure it, or to unnecessarily injure the inheritance. But in the absence of special restrictions in the lease the rule does not extend further. The general rule is announced in 18 Am. & Eng. Enc. Law, at page 634, as follows: "During the existence of the lease, a lessee is for all general purposes the owner of the demised premises, and may, in the absence of restrictions in the lease, put the premises to such use or employment as he pleases, not materially different from that in which

they are usually employed, to which they are adapted, and for which they were constructed; but, of course, he must not use the premises in such a manner as to constitute waste, nor create a nuisance to the injury of the lessor with respect to adjoining property. The tenant has no right to introduce into the premises disreputable or disorderly characters, such as would tend to convert an ordinarily respectable tenement into a bawdy house or one frequented by disorderly characters, and such use of the premises may be enjoined as not within the contemplation of the parties at the time of making the lease. * * * Under this rule, which is established by universal authority, it is plain that the restriction expressed in the deed would not prevent the use and occupation of this room for the purpose of selling groceries; for the grocery business is not so materially different from the bakery business that it would in any manner tend to injure the premises leased or bring it into disrepute in any possible manner; and, being a storeroom, it would fall squarely within the rule that it might be employed for any lawful purpose and for the purposes for which the room was constructed.

It is, however, contended by the appellants that the court erred in taking the case from the jury; that, when the language of the contract is indefinite or ambiguous, it is the duty of the court to adopt the construction and practical interpretation which the parties themselves have placed upon the contract, and to enforce that construction where the language of the contract is ambiguous; and that evidence must necessarily be received to explain the ambiguity. But on this proposition we have to say that this contract in our opinion is not ambiguous. All that the lessee agreed to do was to pay the stipulated rent in the manner stipulated; that he would keep the interior of the premises in good repair at his own expense, and return peaceable possession of the same at the expiration of the lease, to pay certain charges for gas, etc., and to keep the premises in a clean and wholesome condition in accordance with the requirements of the law and the ordinances of the city. All that he agreed not to do was to make alterations to the premises without the written consent of the lessor. So that the matter complained of was not included within the restrictions imposed upon the lessee, and, there being no other restrictions expressed in the lease, it will be presumed that they were all the restrictions within the minds of the contracting parties. If the contract by its conditions and legal effect invests a party with a right, it is the same as if the right had been expressly stipulated in the instrument.

As to the proposition that the court erred in allowing witness fees to the respondent's wife, the appellants insist that, while probably not a necessary party to the action, she

was at least a competent party defendant, and therefore ought not to be entitled to fees as a witness. But, if she was a competent party, it was within the power of the appellants to have made her a party to the suit, and, not having done so, they cannot now complain that the respondent, even though her husband, saw fit to subpoena her as a witness in the case, and, being so subpoenaed as a competent witness, there would seem to be no reason why she should not be entitled to her fees the same as any other witness.

No error appearing, the judgment will be affirmed.

RUDKIN, C. J., and MOUNT, CROW, and PARKER, JJ., concur.

(58 Wash. 698)

MORGAN v. MORGAN.

(Supreme Court of Washington. May 26, 1910.)

APPEAL AND ERROR (§ 1009*)—DISPOSITION OF CAUSE—REVERSAL—QUESTIONS OF FACT.

A decree for defendant in a suit to set aside a deed for fraud, etc., will not be reversed on appeal, where the circumstances were sufficient to overcome plaintiff's case and show that defendant obtained the deed honestly and for a valuable consideration, though plaintiff's evidence was sufficient to sustain her complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Department 2. Appeal from Superior Court, Chehalis County; Ben Sheeks, Judge.

Action by Maggie Morgan against Thomas Morgan. Judgment for defendant, and plaintiff appeals. Affirmed.

Bridges & Bruener, for appellant. W. H. Abel, for respondent.

MOUNT, J. This action was brought by the appellant against the respondent to set aside a deed to certain real estate in the city of Aberdeen. The complaint alleged that the deed was executed and delivered by the appellant to respondent without knowledge of the execution or delivery thereof, and that it was procured by fraud and without any consideration. These allegations were denied by the respondent, and the case was tried upon these issues to the court without a jury. At the conclusion of the evidence of both plaintiff and defendant, the trial court dismissed the action, and the plaintiff has appealed.

The case presents only questions of fact. We have carefully examined the evidence taken at the trial, and, while that of the plaintiff is sufficient to sustain the allegations of her complaint, if believed by the court, the evidence of respondent, if true, and circumstances in the case, are sufficient to overcome the plaintiff's case and to show that respondent obtained the deed honestly and for a valuable consideration. We do not feel justified,

therefore, in setting aside the decree upon the evidence before us.

The judgment appealed from must be affirmed.

RUDKIN, C. J., and DUNBAR, CROW, and PARKER, JJ., concur.

(58 Wash. 492)

CITY NAT. BANK OF LAFAYETTE v. MASON et al.

(Supreme Court of Washington. May 27, 1910.)

BILLS AND NOTES (§ 497*)—ACTIONS—BURDEN OF PROOF.

In an action by an indorsee on a note, where there was evidence that the payee obtained it and a waiver of warranty of goods for the price of which the note was given by fraud, the burden shifted to the plaintiff to show that it was a holder in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1675-1687; Dec. Dig. § 497.*]

Department 1. Appeal from Superior Court, Pierce County; John A. Shackelford, Judge.

Action by the City National Bank of Lafayette against S. L. Mason and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded for new trial.

Lorenzo Dow, for appellants. Raymond J. McMillan, for respondent.

MORRIS, J. Respondent, claiming to be the holder, seeks recovery upon a promissory note given by appellants to J. Crouch & Son, as part of the purchase price of a stallion. The answer sets up fraud and misrepresentations in the obtaining of the note; that its consideration was the purchase of the stallion for breeding purposes; that there was an express warranty that the stallion was fit for breeding purposes; that at the time of the sale and warranty the horse was diseased in his reproductive organs, and was incapable of begetting colts; that the disease was of a latent nature, unknown to appellants, and such as an inspection of the horse by them would not determine, but that the defect was fully known to the vendors; that this diseased condition was fraudulently concealed from appellants; and that they purchased the horse and executed the note upon full reliance upon the warranty. Facts are then set forth to show the breach of the warranty, the diseased condition of the horse long prior to the sale, the knowledge of the vendors as to this condition, and that the note was transferred to plaintiff by J. Crouch & Son with full notice of the defense.

The evidence fully establishes the fact that the horse was diseased and worthless for breeding purposes. The court, however, was of the opinion that appellants had waived the warranty by signing a writing which purports to be such a waiver, and took the case

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

away from the jury upon plaintiff's motion, and entered judgment. We think this was error. There is, to our mind, sufficient evidence to submit the question of fraud in the obtaining of both the note and the so-called "waiver." Plaintiff relied upon a prima facie case, and gave no evidence of the manner, time, or consideration of its purchase of the note. If, however, there was any evidence to show that J. Crouch & Son obtained the note and the waiver of warranty by fraud, then the burden shifted to the plaintiff to show it was a holder in due course. As before intimated, we think the evidence of fraud on the part of J. Crouch & Son was sufficient to carry the case to the jury, and that the court erred in not so ruling.

Reversed and remanded for new trial.

RUDKIN, C. J., and CHADWICK, FULLERTON, and GOSE, JJ., concur.

(53 Wash. 486)

BUCKLES v. REYNOLDS.

(Supreme Court of Washington. May 27, 1910.)

1. APPEAL AND ERROR (§ 1060*)—HARMLESS ERROR—IMPROPER ARGUMENT OF COUNSEL.

Where, in an action for negligent death, defendant relied on contributory negligence, and the evidence on the issue was conflicting, the closing argument of plaintiff's counsel that the plea of contributory negligence had always been and always would be put forth as the only plea when one was sued for negligent death, though improper, was not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.*]

2. WITNESSES (§ 275*)—CROSS-EXAMINATION—EXTENT.

Where, in an action for the death of a person struck by an automobile, defendant testified on direct examination as to the speed at which he had been in the habit of running his machine, and fixing, variously, 4, 12, and 15 miles an hour, questions on cross-examination as to the speed at particular times in excess of the speed fixed on the direct examination were properly allowed to test his accuracy of recollection.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 275.*]

3. APPEAL AND ERROR (§ 971*)—WITNESSES (§ 267*)—CROSS-EXAMINATION—DISCRETION OF TRIAL COURT.

The extent of the cross-examination of a witness is governed largely by the discretion of the trial court, and, unless prejudice has resulted, appellate courts will hesitate to control the discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3854; Dec. Dig. § 971.* Witnesses, Cent. Dig. § 923; Dec. Dig. § 267.*]

4. PARTIES (§ 75*)—DEFECT OF PARTIES—OBJECTIONS—GENERAL DEMURRER.

Under Rem. & Bal. Code, §§ 259, 261, authorizing a demurrer to the complaint on specified grounds, etc., a general demurrer to the complaint in an action by a widow for the negligent death of her husband does not raise the question of defect of parties under section 183, authorizing the widow and children of a decedent to sue for his negligent death, arising from

the failure of the complaint to show that she had a sole interest in the recovery.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 116; Dec. Dig. § 75.*]

5. PARTIES (§ 75*)—DEFECT OF PARTIES—OBJECTIONS—GENERAL DEMURRER.

Where the defect of parties appears on the face of the complaint, the objection must be taken by demurrer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 115; Dec. Dig. § 75.*]

6. PARTIES (§ 75*)—DEFECT OF PARTIES—OBJECTIONS—GENERAL DEMURRER.

Where the defect of parties does not appear on the face of the complaint, the objection must be taken by answer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 115; Dec. Dig. § 75.*]

7. APPEAL AND ERROR (§ 187*)—OBJECTION BELOW—NECESSITY—DEFECT OF PARTIES.

Where the objection to defect of parties is not taken either by demurrer or answer, the objection cannot be urged on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1184-1189; Dec. Dig. § 187.*]

Department 1. Appeal from Superior Court, Pierce County; John A. Shackelford, Judge.

Action by Nellie Buckles against John W. Reynolds. From a judgment for plaintiff, defendant appeals. Affirmed.

Will H. Thompson, for appellant. W. W. Langhorne and Hayden & Langhorne, for respondent.

CHADWICK, J. This was an action to recover damages for the death of respondent's husband, claimed to have been caused by the negligence of defendant in driving his automobile. The defense, after admitting the ownership of the machine, the collision, and death of plaintiff's husband, was a general denial and the affirmative defense of contributory negligence. The evidence is conflicting, and it is admitted that, upon the disputed question of fact, we would be bound by the verdict of the jury but for the misconduct of counsel in making his closing argument to the jury. The theory of appellant is that an examination of the evidence will show that the defense of contributory negligence was so strongly maintained that, but for the argument of counsel made after the defense had closed and could not be heard further, and the neglect of the court to reprimand counsel or warn the jury so as to destroy the force of his intemperate remarks, the verdict could not have been otherwise than for the defendant. Hence defendant is entitled to a new trial. The argument and ruling of the court complained of is as follows: "Attorney for Respondent: In this case the plaintiff, Nellie Buckles, who is the widow of John W. Buckles, sued to recover the sum of \$25,000 for damages she alleges she sustained by reason of the death of her husband. Now, if he was killed through the negligence of John W. Reynolds, then

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

John W. Reynolds is responsible for any loss that she may have sustained through his death. If that accident, or if the death of Buckles, was caused by any act, or if he did anything, that proximately contributed to his own death, then, under the law, as given you by his honor on the bench, Nellie Buckles cannot recover in this case. Now, I don't dispute that proposition for an instant, but I do dispute, gentlemen, some of the conclusions that the learned counsel has drawn from the charge of the court as given you in this case, and I do intend to dispute with all the energy I have got certain deductions he made from the evidence in this case. Whenever a man is sued for damages, whenever he is sued—if he ever occasioned loss to any one, whenever he is sued for damages by reason of occasioning the death of another, the old time-worn plea—Attorney for Appellant (interrupting): I object to that. (Continuing): That always is made—(Interrupting): I object to counsel making any such a statement as to what is done with the other cases. The Court: Exception noted. Proceed with the argument. (Continuing): Whenever a man is sued because of his act that occasioned the death of another, the old time-worn plea is put forth, always has been put forth, always will be put forth, because the only plea that can be put forth is that the man that was killed was guilty of contributing—was guilty of negligence; he contributed to his own death. That is the only plea that can be put forth when a man is sued for damages. Now, what is contributory negligence that will bar a man or his legal representatives from recovering damages in an action of this kind?"

That the argument was unfair and not based upon the evidence, but upon the pretended experience of counsel, and that the court should, in ruling upon the objection, have warned the jury to disregard the offensive remarks, may be admitted; but for this court to say as a matter of law that the jury, which we must presume was made up of men of fair intelligence, was misled thereby, would be to presume that the jury had disregarded all the evidence, and followed the argument of counsel to the exclusion of all else, as well as the instructions of the court. Few verdicts would be sustained if courts indulged the presumption that juries had been misled by the intemperate excesses of counsel in oral argument. We must rather indulge the hope, if not the presumption, that they will dispassionately consider remarks that are not sustained by the evidence, especially so when the court has instructed them, as he did in this case, that it was the duty of the jury to follow the rules of law laid down by the court. There is no fixed rule upon this question.

"We doubt not that many cases may arise in which the misconduct of counsel, in going outside of the evidence in his argument, may be such as to compel a reversal. No one can

doubt the impropriety of such conduct. In doubtful cases it may be that which turns the scale, and determines the verdict. And a court, especially a trial court, should be exceedingly careful to restrain such misconduct, and punish the offender personally, and by setting aside every verdict which it has reason to believe has been affected thereby. But to hold that every such misconduct should be visited by a reversal of the judgment would be unjustifiable rigor, and oft-times doing as much or greater wrong than the misconduct itself. Who does not know that in the excitement of an argument there occasionally fall from the lips of counsel statements of matters not in evidence? Familiar with all the facts and history of the case, it is not strange that he sometimes refers to facts not proven. Should the client suffer by loss of his verdict, for every such offense of his counsel? Clearly there would be no justice in that. All that can safely be laid down is that whenever in the exercise of a sound discretion it appears to the court that the jury may have been influenced as to their verdict by such extrinsic matters, however thoughtlessly or innocently uttered, or that the statements were made by counsel in a conscious and defiant disregard of his duty, then the verdict should be set aside. In this case the trial court overruled the motion to set aside the verdict. Doubtless it appeared to it that there was no intentional wrong, and that the matter was not of itself sufficient to have influenced the minds of the jury. * * *" *Winter v. Sass*, 19 Kan. 556.

In *Chicago & A. Ry. Co. v. Johnson*, 116 Ill. 206, 4 N. E. 381, the remark that "for more than 20 years he had stood as an humble advocate of the people against monopolies such as this" was held to be culpably out of place, but not of itself sufficient to warrant a new trial.

In *Henry v. Centralia & C. R. Co.*, 121 Ill. 264, 12 N. E. 744, the remarks complained of were as follows: "This railroad will benefit the public, and each of us, if built. If you fix the damages too high, the company will not pay them, and the railroad will not be built. We will never get railroads if they have to pay such damages for right of way." The court said: "But it is not to be assumed that every misstatement of law or of fact will have the effect of exciting improper prejudices. The instructions of the court and the good sense of a competent jury are a sufficient protection against ordinary errors of statement and false arguments of counsel."

In *Texas & Pac. Ry. Co. v. Raney* (Tex. Civ. App.), 23 S. W. 340, the court said: "In his closing argument counsel for appellee used this language: 'The defendant is a corporation that has neither soul nor feeling, and the only way you can reach it is through the pocket.' * * * While we do not approve this language, and see nothing in the

record to justify its use, yet it will not do to set aside verdicts for every extravagant remark made by counsel in the heat of argument. The jury must be presumed to be men of discretion, and when the trial judge, who is in the best position to decide, concludes they have not been improperly influenced by remarks of this kind, we will not overrule his judgment unless the record makes it appear reasonably probable that an erroneous result has been thereby produced. *Radford v. Lyon*, 65 Tex. 477."

In *Ranger v. Seattle Electric Co.*, 52 Wash. 401, 100 Pac. 842, counsel said of a witness: "Gentlemen of the jury, I once occupied the position upon the bench now occupied by his honor. I have known Dr. Williams for 15 years. He has come before us as a witness. I would not believe him under oath." This court said, after crediting the jury with the possession of ordinary common sense: "The lawyer speaks for his client, and the jury, in recognition of this fact, presumably treats his argument from this view point. Indeed, experience and observation teach that fairness of counsel in the presentation of a cause is usually more persuasive with the jury than is an effort to secure a verdict by means of intemperate speech."

Appellant testified on direct examination as to the rate of speed he had been in the habit of running his machine, fixing, variously, 4, 12 to 15, and 7 miles an hour. On cross-examination he was asked: "Q. Now, what is there that attracted your attention, and makes you remember the rate of speed you were going down Market street on that day and at that time? A. How is that? Q. What is it that recalls to your memory so that you can definitely fix the rate of speed you were going down Market street at that time? A. I had driven the car quite a lot—by the way the engine was running. Q. Now, do you remember an occasion of when you run your automobile in the public streets at a time when they were holding an automobile race, the automobiles going into Olympia, that being the point of arrival? A. Yes, sir. Q. You remember running your automobile, running your automobile down the main street in Olympia on that day? Mr. Thompson: We object. It cannot have anything to do with this case. The Court: Objection overruled and exception allowed. Q. Now, Mr. Reynolds, how fast did you run your automobile down the main streets of Olympia that day? A. It has been so long ago I haven't thought about it. I would not know hardly how—perhaps 20 miles an hour. Q. What is your best recollection of that? A. 20 miles an hour. Q. Down the main streets

of Olympia? A. Yes, sir; that is down pretty near to the Mitchell Hotel. Q. Don't you think it was a little faster than 20 miles, Mr. Reynolds? A. Well, no. Q. Don't you think it was nearer 40? A. No, sir. Q. It was 20 miles an hour, wasn't it? A. Yes, sir. Q. You know that was a rate prohibited by law, don't you? Mr. Thompson: I object. The Court: I think the objection should be sustained. This examination about the speed was permitted to show his accuracy of recollection about speed. (The objection sustained.) Q. You think you were not going down the streets of Chehalis on this day as fast as you went down the streets of Olympia at the time you speak of? A. No, sir. Q. You were not going that fast that day? A. No."

We think the testimony was proper, on the theory suggested by the trial judge, and, when it became evident that counsel might go beyond a proper limit, the examination was promptly checked. A wide latitude is usually and should be given upon cross-examination, the extent of which must be governed largely by the discretion of the trial court. *Williams v. Spokane & Northern R. Co.*, 42 Wash. 597, 84 Pac. 1129. Therefore, unless it seems most likely that prejudice resulted to the opposite party, courts should hesitate to control the discretion of the trial judge in matters of this kind.

It is contended that the court erred in overruling a demurrer to the complaint in that it did not show that respondent had a sole interest in the recovery. Counsel relies upon section 183, Rem. & Bal. Code. We do not consider this question to be properly before us. The demurrer was a general demurrer; that is, that the complaint did not state facts sufficient to constitute a cause of action. It has been held, under sections 259, 261, Rem. & Bal. Code, that a demurrer in this form does not raise the question of defect of parties. *Birmingham v. Cheatham*, 19 Wash. 657, 54 Pac. 37. If the defect appears on the face of the complaint, the objection must be taken by demurrer. *Hale v. Crown Paper Co.*, 105 Pac. 480. If it does not appear on the face of the complaint, such objection must be taken by answer. *First National Bank v. Hamor*, 49 Fed. 45, 1 C. C. A. 153. And if not taken either by demurrer or answer, the objection cannot be urged on appeal. *Ralph v. Lomer*, 3 Wash. St. 401, 23 Pac. 760; *Hannegan v. Roth*, 12 Wash. 695, 44 Pac. 636; *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844, 85 Am. St. Rep. 966; *Rothchild Bros. v. Mahoney*, 51 Wash. 633, 90 Pac. 1031.

Finding no reversible error in the record, the judgment of the lower court is affirmed.

RUDKIN, C. J., and GOSE, MORRIS, and FULLERTON, JJ., concur.

(58 Wash. 461)

CALDWELL BROS. & CO. v. COAST COAL CO.

(Supreme Court of Washington. May 26, 1910.)

1. SALES (§ 22*) — CONTRACT — PROMISE AND ACCEPTANCE.

Plaintiff offered to sell a coal bunker and washer to deliver the washer "f. o. b. Seattle," and the bunker "f. o. b. Tacoma." Defendant's acceptance, however, called for delivery of both at Tacoma. There was evidence that defendant orally accepted plaintiff's proposal, and thereafter plaintiff tendered the machinery, and defendant accepted a part of it and paid a substantial part of the price, and in an action for the balance defendant by a cross-complaint sought to recover damages for alleged breach of the contract on plaintiff's part. *Held*, that a sufficient acceptance in the terms of the offer was shown, notwithstanding the variance as to the place of delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 39-43; Dec. Dig. § 22.*]

2. SALES (§ 180*) — PERFORMANCE — PARTIAL DELIVERY.

Plaintiff contracted to manufacture and sell to defendant a coal bunker and a coal washer for \$3,070. After the appliances were completed, defendant paid plaintiff \$1,999 on the contract price, and the parties agreed that the bunker should be considered as fully paid for, but the washer, being tendered, was refused for alleged insufficiency. *Held*, that such payment did not affect the contract, nor limit plaintiff's right to recover the balance of the contract price on proof that the washer complied with the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 469-472; Dec. Dig. § 180.*]

3. EVIDENCE (§ 242*) — DECLARATIONS OF AGENT.

After a refusal of a coal washer by the buyer for alleged nonconformity to specifications, evidence of a statement by the seller's managing agent that the washer was not in accordance with the contract was mere narrative of past transaction, amounting only to an expression of an opinion by the agent, and inadmissible as a declaration against interest binding on the principal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 893-907; Dec. Dig. § 242.*]

4. SALES (§ 261*) — CONTRACT — CONSTRUCTION — WARRANTY.

A proposal for a coal bunker and washer designated it as "one 400-ton coal bunker and washer," and the second letter of proposal as "a locally built washer of the Howe type." In the order it was designated as "one 400-ton Howe type coal washer," and in the acceptance as "one 400-ton Howe coal washer." The specifications designated it as "one standard vertical type Howe washer, capacity 400 tons per day," and required that it be built according to specifications and blueprint furnished. These provided in detail the manner of its construction and size, and were prepared and agreed on by the parties. *Held*, that the contract did not warrant that the washer when constructed would wash 400 tons a day, and a construction according to the plans and specifications constituted a fulfillment of the seller's contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727-735; Dec. Dig. § 261.*]

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by Caldwell Bros. & Co. against the Coast Coal Company. Judgment for plaintiff, and defendant appeals. Affirmed.

F. S. Blattner and L. B. Da Ponte, for appellant. Shank & Smith, for respondent.

PARKER, J. This action was commenced to recover the sum of \$3,070, the contract price of a coal washer and a coal bunker. A trial in the superior court without a jury resulted in findings and judgment in favor of the plaintiff for the sum of \$1,071, from which the defendant has appealed.

The facts admitted by the pleadings and found by the trial court are in substance as follows:

The contract sued upon is evidenced by certain letters of proposal and acceptance thereof, as follows:

"October 30th, 1907. Coast Coal Co., Tacoma, Wash.—Gentlemen: Complying with the request of Messrs. Dorr and Coffin, we are pleased to quote you on, and furnish specifications and drawings for one 400-ton coal bunker and washer. You will note that the specifications call for both flight and bucket elevators. This matter will be left to your option. We might also add that this equipment has been figured as nearly complete as has been possible, but, owing to the fact that it will be hard to determine the exact speed necessary for your washer to run until the nature of the work to be performed has been determined, we have left out two pulleys and the length of belt necessary to drive washer. The price of this equipment f. o. b. Tacoma is \$3,435.00. We trust that you will favor us with this order, and we assure you that the same will receive our careful and prompt attention. Very truly yours, The Caldwell Brothers Co., by F. M. Caldwell."

"Nov. 1, 1907. Coast Coal Co., Tacoma, Wash.—Gentlemen: We beg to submit you, in addition to our proposition submitted to you on October 30, the following: We to furnish you all material named in our specifications accompanying our above named letter with the exception of the Jeffries-Howe washer, they to be supplemented by a locally built washer of the Howe type and furnished with a No. 3 Gardner duplex regular fitted pump for \$3,070.00. All the material with the exception of the washer f. o. b. our store Tacoma. The washer to be f. o. b. Seattle. We trust that either one or the other of these propositions will meet your approval, and that you will favor us with your order which will receive our careful and prompt attention. Yours truly, The Caldwell Bros. Co."

"Tacoma, Washington, Nov. 5, 1907. Caldwell Bros. Co., Tacoma, Washington—Gentlemen: We accept your proposition of November 1st, to furnish us with one 400-ton Howe coal washer and coal bunker, according to specifications and blueprint, furnished f. o.

b. Tacoma, \$3070. Terms upon same, \$1000.00 upon receipt of shipping receipts, \$1000.00 thirty days and \$1070 sixty days from date of shipping receipt. Coast Coal Company, Very truly yours, by Joseph K. Dorr, Secretary."

The respondent performed its part of the contract by manufacturing the coal bunker and delivered it to appellant, and by manufacturing the coal washer and tendering it to appellant. Prior to the trial, appellant paid to respondent \$1,999 upon the contract price, leaving unpaid a balance of \$1,071. By agreement between the parties the bunker was to be considered as fully paid for. The washer having been tendered to and refused by appellant, respondent holds it for appellant and to secure the balance due upon the contract price. We will note other facts as may be necessary in our discussion of the errors assigned.

It is first contended by learned counsel for appellant that the contract evidenced by the letters and acceptance is not complete, in that the offer of respondent was to deliver the washer f. o. b. at Seattle, and to deliver the bunker f. o. b. at Tacoma, while the acceptance was for delivery of both at Tacoma, and was therefore not an unqualified acceptance of the offer. There might be some merit in this contention if the acceptance depended entirely upon the writing above quoted. But there was evidence tending to show that, in addition to the written acceptance, the appellant orally accepted the proposal of respondent, and, in addition, both parties have treated and acted upon the contract as consummated—the respondent by manufacturing and tendering the machinery, and the appellant by accepting a part of it and paying a substantial part of the contract price. The appellant has also by its cross-complaint sought to recover damages for an alleged breach of the contract on the part of the respondent. We think it clear that the contract must be regarded as having been entered into, even though there may originally have been some uncertainty as to the place of delivery.

Several contentions are made in behalf of appellant based upon the theory that the balance due respondent if any is dependent upon the reasonable value of the washer; the trial court having excluded evidence of and refused to consider its reasonable value. It is argued that since the original contract was for a lump sum as the price for both the washer and bunker, upon settlement of a part of the controversy, appellant became liable in any event only for the reasonable value of the remainder, to wit, the washer. There is nothing in the record indicating that by this understanding between the parties, eliminating from the controversy all matters except the washer and the unpaid balance of the contract price, they thereby intended that these matters should be determined other than by the terms of the contract. If respondent has performed its part of the contract in the

manufacture and tender of the washer, it is entitled to the whole of the balance of the contract price. The fact that the parties agreed that the contract in so far as the delivery of the bunker and the payment of the \$1,999 is concerned should be regarded as a settlement of that portion of the contract does not show that the balance due, if any, is to be determined by the reasonable value of the washer. We think that the reasonable value of the washer was in no way involved, and that the court properly excluded such question from consideration in determining the rights of the parties. The question was still one of contract price, and not of reasonable value.

During the trial, counsel for appellant offered to prove by the testimony of Mr. Spike, the appellant's manager, that in a conversation with him some time after the completion and tender of the washer and after this controversy arose Mr. Mather, the respondent's manager, had stated: "That the coal washer which had been built was not in accordance with the contract or the specifications which had been entered into between plaintiff and defendant, and for that reason the defendant took and paid for the other articles which are mentioned in this contract, and that Caldwell Bros. Company would not require defendant to receive or take the washer." Objection by counsel for respondent to this offer was sustained, and the ruling thereon is here claimed as error. It is plain from the record that the defense was not made upon the theory that the parties had agreed to a full settlement of the controversy by the delivery of the bunker and payment of \$1,999 upon the contract price. So this evidence is only material, if at all, as an admission tending to show that the respondent had not complied with the contract in the manufacture of the washer. This is the theory upon which counsel for appellant contends that the evidence was admissible. He argues that it was an admission against the interest of respondent made by its agent, and hence binding upon it. It seems to us that this is nothing more than an attempt to prove statements of an agent amounting only to an expression of an opinion as to the rights and obligations of his principal after the transaction out of which such rights and obligations arose, and also after such rights and obligations had become a subject of controversy. In 16 Cyc. 1008, it is stated: "It is to be observed that in the law of agency it is no part of an agent's duty to prejudice his principal by narrative statements construing or otherwise affecting his principal's rights or liabilities, or to discuss the propriety of his conduct even in relation to the subject-matter of the agency. On these grounds, rather than that of irrelevancy, rests the broad general rule that an agent's narrative of a past transaction does not affect the principal." *Weideman v. Tacoma Ry. & Motor Co.*, 7 Wash. 517, 35 Pac. 414. We are of

the opinion that the statements of Mather sought to be proven were not admissible as admissions against respondent.

It is contended by appellant that the proof shows that the washer was not a 400-ton washer, and therefore not according to the contract. This contention is based upon the assumption that the contract amounted to a guaranty that the washer was capable of washing 400 tons of coal per day, that the evidence shows that it would not wash that amount per day, and that the court should have so found; while respondent contends that the evidence would in no event warrant such a finding, and also that the contract did not amount to a guaranty as to the capacity of the washer. It will be noticed that there are no specific words of guaranty in the contract, and the contention that there was a guaranty of the nature claimed rests wholly upon the language of the contract designating or naming the washer. In the first letter of proposal it was designated as, "One 400-ton coal bunker and washer." In the second letter of proposal it was designated as, "A locally built washer of the Howe type." In the order it was designated as, "One 400-ton Howe type coal washer." In the letter of acceptance it is designated as, "One 400-ton Howe coal washer." In the specifications it is designated as, "One standard vertical type Howe coal washer, capacity 400 tons per day." According to the terms of the contract, the washer was to be constructed according to specifications and blueprint furnished. These it appears from the record provide in detail the manner of its construction and its size. The specifications and blueprint were prepared and agreed upon by the parties before and at the time of entering into the contract, and no contention is made by appellant that the washer was not constructed in strict compliance therewith. Under such circumstances, we think the court was fully justified in declining to hold that there was a warranty or a breach thereof as to the capacity of the washer.

When the parties to a contract designate the article to be manufactured in the manner here involved, and then proceed to agree upon detailed specifications and drawings as to the size and manner of construction of such article, we think the contract itself shows that the manner of so designating the article was nothing more than the use of a trade-name or term for it, and the question of whether or not it is constructed in compliance with the terms of the contract is to be determined by the detailed specifications and drawings, and not by the mere name they may choose to call it, or the manner by which they may designate it, and that such designation does not amount to a warranty as to its capabilities. 30 Am. & Eng. Ency. of Law (2d Ed.) 148; Kleeb v. Bard, 7 Wash. 41, 34 Pac. 138; Diebold Safe & Lock Co. v. Huston, 55 Kan. 104,

39 Pac. 1085, 28 L. R. A. 53; Seltz v. Brewer's Refrigerating Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 887; 17 Am. & Eng. Ency. of Law (2d Ed.) 12.

We are of the opinion that the learned trial court correctly determined the rights of the parties, and its judgment is affirmed.

RUDKIN, C. J., and DUNBAR, MOUNT, and CROW, JJ., concur.

(58 Wash. 436)

HOWELL et al. v. WINTERS.

(Supreme Court of Washington. May 21, 1910.)

1. ASSAULT AND BATTERY (§ 2*)—CIVIL LIABILITY—DEFINITION—"ASSAULT."

An "assault" is an attempt, with unlawful force, to inflict bodily injuries on another, accompanied with the apparent present ability to effectuate the attempt if not prevented, the apprehension created in the mind of the assaulted person being more important in determining whether there was an assault than the undisclosed intention of the assaulter; and an instruction that an assault is an action or conduct on the part of defendant, and, for instance, if the jury believe plaintiff's testimony that defendant shook his fist in front of her face angrily and unlawfully, when he was in such proximity to her, as that he could, or might have, struck her, also near enough to produce a feeling on her part that she might be struck, that would be an assault, substantially defined an assault.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 57-62; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 1, pp. 532-538; vol. 8, p. 7582.]

2. ASSAULT AND BATTERY (§ 43*)—TRIAL—INSTRUCTIONS.

In an action for damages for assaulting plaintiff while she was in defendant's store returning goods, an instruction that defendant would have the right to request plaintiff to depart, but that her failure to comply with his request would not justify assaulting her, though he might, after proper request, use sufficient force to eject her, was proper, and sufficiently explained defendant's right to remove plaintiff from his store.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 1; Dec. Dig. § 43.*]

Department 1. Appeal from Superior Court, Chehalis County; Ben Sheeks, Judge.

Action by Julia Howell and others against John Winters. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. H. Abel, for appellant. Morgan & Brewer, for respondents.

RUDKIN, C. J. On the 7th day of July, 1909, the plaintiff Julia Howell visited a store conducted by the defendant, John Winters, and his brother, in the city of Hoquiam, for the purpose of returning a corset purchased by her husband a few days before, and securing a return of the purchase price. The defendant and his brother denied that the purchase was made in their store, and refused to accept the corset or refund the money. In the controversy that arose between the parties over the return of the mon-

ey, the plaintiffs contend that the defendant assaulted the plaintiff Julia Howell, and used vile and opprobrious language towards her, for which damages were sought in this action. The jury returned a verdict in favor of the plaintiffs in the sum of \$1,200. On motion for a new trial the court required them to remit the sum of \$700 from the verdict, and, the remission being made, a judgment was entered for the residue, from which this appeal is prosecuted.

In its charge to the jury the court defined as assault as follows: "An assault is an action, or conduct, on the part of the defendant—for instance, if you believe her testimony that he shook his fist in front of her face angrily and unlawfully, when he was in such proximity to her, as that he could, or might have, struck her, also near enough to produce a feeling on her part that she might be struck, that would be an assault. Then, of course, if he did strike her, that would be an assault and battery. She may recover in case you only find assault, or in case you find assault and battery, if you find it was made unlawfully and under the circumstances I have mentioned." Upon this instruction the first error is assigned. It may well be doubted whether an erroneous definition of the term "assault" would be prejudicial in this case, for all the testimony on the one side tended to show an actual battery, while the testimony on the other side tended to refute either an assault or a battery. But, regardless of this, we think the definition as given is substantially correct. An assault was formerly defined by our statute as "an attempt in a rude, insolent, and angry manner unlawfully to touch, strike, beat, or wound another person, coupled with a present ability to carry such attempt into execution." Ballinger's Ann. Codes & St. § 7055, (Pierce's Code, § 1572). This section was repealed by the new Criminal Code, and, so far as we are able to discover, the term "assault" is not defined in the latter act. We must therefore look to the common law for a definition. Cooley defines the terms thus: "An assault is an attempt, with unlawful force, to inflict bodily injuries on another, accompanied with the apparent present ability to give effect to the attempt if not prevented. Such would be the raising of the hand in anger, with an apparent purpose to strike, and sufficiently near to enable the purpose to be carried into effect; the pointing of a loaded pistol at one who is in its range; the pointing of a pistol not loaded at one who is not aware of that fact and making an apparent attempt to shoot; shaking a whip or the fist in a man's face in anger; riding or running after him in threatening and hostile manner with a club or other weapon; and the like. The right that is invaded here indicates the nature of the wrong. Every person has a right to complete and perfect im-

munity from hostile assaults that threaten danger to his person—"A right to live in society without being put in fear of personal harm." Cooley on Torts (3d Ed.) 278. See, also, Commonwealth v. White, 110 Mass. 407; Mallard v. Mallard, 83 Minn. 453, 86 N. W. 445; Morgan v. O'Daniel (Ky.) 53 S. W. 1040. The presence or absence of an assault depends more upon the apprehension created in the mind of the person assaulted than upon the undisclosed intentions of the person committing the assault.

It is next contended that the court refused to define or explain the right the appellant would have to remove the respondent Julia Howell from his store. In this connection the court charged the jury as follows: "I will instruct the jury that he would have a right to request her to depart, but the fact that she did not comply with the request would not justify him in making an assault. He might, after proper request, use sufficient force to put her out of the store; he would have a right to do that, but he would have no right to make an assault of the kind I have described nor an assault and battery as I have described." It seems to us this charge is correct, and was ample and sufficient for the guidance of the jury. Furthermore, if an assault or an assault and battery was actually committed, there is no pretense that it was committed in the removal of this woman from the store.

It is lastly contended that the verdict is still excessive, but, if we accept the testimony on the part of the respondents as true, the verdict as reduced by the trial court is sustained by competent and sufficient testimony. The judgment is therefore affirmed.

FULLERTON, GOSE, CHADWICK, and MORRIS, JJ., concur.

(58 Wash. 494)

GUNTHER et al. v. HUNEKE, Judge.

(Supreme Court of Washington. May 27, 1910.)

1. STATUTES (§ 161*)—CONFLICTING STATUTES—ACTS PASSED AT SAME SESSION.

Where two conflicting acts were adopted at the same session of the Legislature, the later act controls.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 231; Dec. Dig. § 161.*]

2. INTOXICATING LIQUORS (§ 25*)—LOCAL OPTION—UNITS OF DECISION—STATUTES—APPLICABILITY—"BODIES CORPORATE."

Const. art. 11, §§ 4, 11, requiring the Legislature to establish a system of county government and to provide by general law for township organization, etc., do not take away from the Legislature the control of townships organized under laws relating to township organization in all the affairs thereof by general law, and the local option law (Act March 12, 1909; Laws 1909, c. 81), providing that the part of each county outside of cities or fourth class towns shall be a unit, and may vote on the question of the sale of intoxicating liquor within the boundaries thereof, applies to all counties, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

prevails over Act March 3, 1909 (Laws 1909, c. 47) amending Act March 23, 1895 (Laws 1895, c. 175), providing that townships are bodies corporate with power to determine whether licenses for the sale of intoxicating liquors shall be granted, and the local option law is applicable to a county which has adopted township organization.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 31; Dec. Dig. § 25.*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1603.]

3. STATUTES (§ 154*)—LEGISLATIVE POWER—BINDING SUBSEQUENT ACTION OF LEGISLATURE.

The provisions of an act that no statute which shall thereafter become a law shall be construed as altering, amending, or repealing any of the provisions of the act unless expressly so provided, do not prevent the same or a subsequent Legislature from enacting an inconsistent law necessarily repealing the act, though no reference is made to the act.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 221; Dec. Dig. § 154.*]

Department 2. Action by Theodore Gunther and others against William A. Huneke, as Judge of the Superior Court for Spokane County. There was a judgment of dismissal, and plaintiffs applied for a writ of review, which was issued. *Affirmed.*

Richardson & Laughon and R. M. Webster, for plaintiffs. Fred C. Pugh and Donald F. Kizer, for defendant.

MOUNT, J. An action was brought in the superior court of Spokane county to enjoin an election about to be held for the purpose of determining whether licenses shall be issued for the sale of intoxicating liquors in Spokane county outside of incorporated cities and towns, under the provisions of the act of March 12, 1909, commonly known as the "Local Option Law." The lower court sustained a general demurrer to the complaint, and dismissed the action. It appears that the election is to be held on May 31, 1910, and that there is no adequate remedy by appeal. A writ of review was therefore issued.

It appears from the complaint that the county of Spokane, outside of incorporated cities and towns, has adopted township organization under the act of March 23, 1895 (Laws 1895, c. 175); that at the regular annual town meeting held in March, 1910, each of the townships in said county determined for itself the question whether licenses should be granted for the sale of intoxicating liquors therein for the current year; that two of such townships determined that such licenses should be granted, while all the rest of such townships determined that licenses should not be granted in the respective townships; that afterwards a petition was filed asking for an election to determine whether licenses shall be granted for the sale of intoxicating liquors outside of cities and towns, under the provisions of

the act of March 12, 1909. This election is to be held on May 31st, and this action seeks to enjoin such election. The question in the case is whether these townships are controlled in regard to the sale of intoxicating liquors by the act of 1895, and the amendments of 1909, relating to township organizations, or whether they are controlled by the local option law of 1909 (Laws 1909, p. 153). The act of 1895, as amended on March 3, 1909 (Laws 1909, p. 74), provides that these townships are bodies corporate with power: "Tenth. To determine whether license shall be granted for the sale of spirituous, malt or intoxicating liquor in said town; and unless a majority of the electors present and voting at the annual town meeting shall vote by ballot in favor of granting a license in their town for the year then next ensuing, no such license shall be granted to sell liquor in said town for that year." Section 1 of the local option law provides units of territory, for the purposes of an election upon the question whether the sale of intoxicating liquors shall be permitted in any county, among others, as follows: "That portion, considered as a whole, of each county containing any such city, cities or fourth class towns outside of its or their boundary lines. Each subdivision of territory as above shall be a unit to itself, and may vote as such upon the question of the sale of intoxicating liquor within its boundaries." Laws 1909, page 153. The clause "such city, cities or fourth class towns" refers to cities of the first, second, third, and fourth class, and unclassified cities of more than 1,000 population. It is apparent that, if the local option law applies to counties which have adopted township organization, then the election may be held, and the portion of the county outside of excepted cities and towns is controlled by such law in regard to the right to issue such license, for the act is a general act, and such counties are not excepted.

It is argued by counsel for the relators that, because the Constitution of the state provides for township organization of counties, and that the business of the several townships shall be conducted in the manner provided by the act authorizing such organization, therefore, when organized, such townships become constitutional divisions, and each may determine for itself the conduct of its local affairs in accordance with the act creating it. This position is sound where there is no conflict between general laws and the one relating to such townships. The Constitution provides, at section 4 of article 11: "The Legislature shall establish a system of county government which shall be uniform throughout the state, and by general laws shall provide for township organization, under which any county may organize whenever a majority of the quali-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fied electors of such county voting at a general election shall so determine, and whenever a county shall adopt township organization, the assessment and collection of the revenue shall be made, and the business of such county, and the local affairs of several townships therein, shall be managed and transacted in the manner prescribed by such general law."

Section 11 of the same article provides: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." These provisions make it plain that townships as well as counties, cities, and towns are subject to general law, and the management of the business thereof is subject to control by the Legislature, which is of necessity supreme, and which may alter or amend at will by general law, either directly or by implication, any general or local law or regulation. It is said that the term "such general law," as used in the section first quoted, refers only to laws relating to township organization, which is no doubt true, but these words do not mean that general laws applicable to the whole state, without specifically excepting such townships, are not as controlling therein as the same are in counties or cities of other classes. These constitutional provisions do not in any manner take away from the Legislature the control of such townships in all of the affairs thereof by general law. Both the township act and the local option act are general laws. By the former act it is provided that each township shall have power to determine whether licenses shall be issued for the sale of intoxicating liquors therein. By the latter act it is provided that the portion of each county outside of certain cities and towns shall be the unit, and shall decide upon the question of the sale of intoxicating liquors within its boundaries. There is no exception of counties where township organization has been established, and no exception of such townships. The two acts, if they cover the same territory, are in direct conflict upon this question and cannot stand together. The local option law is the latest enactment and must control. *Pierce v. Commercial Investment Company*, 30 Wash. 272, 70 Pac. 496; *Tatum v. Georgia*, 79 Ga. 176, 3 S. E. 907; *Cooper v. Shelton*, 97 Ky. 282, 30 S. W. 623.

It is argued by relators that the local option law does not relate to counties where township organization has been adopted, because at the time of the passage of the local option act there were two forms of county government, one by organized townships, and the other without such organized townships; and also because the amendment to the act of 1895, conferring upon

townships the right to control the sale of intoxicating liquors, was passed at the same session of the Legislature which passed the local option act; and also because an amendment to the township organization act provided, "that no act which shall hereafter become a law shall be construed as in any manner altering, amending or repealing any provisions of this act unless such act expressly so provides." Laws 1909, page 80.

There is much force in all these reasons, but the Legislature could not have been ignorant of the fact that Spokane county had adopted the township organization. The local option law, while passed at the same session as the amendment to the township organization act, was passed after those amendments. The local option law is a general law, and applicable to all the counties of the state without exception. It is a later act, and must prevail over previous enactments upon the same subject. The amendment of the township act, to the effect that no act which shall hereafter become a law shall be construed as altering, amending, or repealing any of the provisions of this act, unless expressly so provided, could not, of course, prevent the same or a subsequent Legislature from enacting an inconsistent law, which would necessarily repeal a former enactment even though no reference was made to the former law. What one Legislature may do, the same or another Legislature may directly or indirectly undo. This amendment amounted to no more than the general rule, which is that repeals by implication are not favored. But where two provisions are entirely inconsistent, as the ones under consideration appear to be, one must necessarily fall.

In view of the fact that the local option law applies to all the counties of the whole state without any exception, there seems to be no escape from the conclusion that all counties are included within its provisions. The lower court, therefore, properly sustained the demurrer to the complaint, and the judgment must be affirmed.

DUNBAR, CROW, and PARKER, JJ., concur.

(58 Wash. 465)

BUSSELL v. GILL, Mayor.

(Supreme Court of Washington. May 26, 1910.)

1. MUNICIPAL CORPORATIONS (§ 48*)—SPECIAL CHARTERS—CONSTITUTIONAL PROVISIONS.

Const. art. 11, § 10, providing that any city containing a population of 20,000 or more shall be permitted to form a charter for its own government consistent with and subject to the Constitution and laws of the state, was intended to secure to all such cities complete local self-government in municipal affairs, subject only to the restrictions mentioned, so that charter provisions adopted under such authority

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

should be sustained unless in direct conflict with the Constitution or laws.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 127, 128; Dec. Dig. § 48.*]

2. MUNICIPAL CORPORATIONS (§ 67*)—LOCAL SELF-GOVERNMENT—PUBLIC PLANS COMMISSION—VALIDITY—MEMBERSHIP.

Seattle City Charter Amendment March 8, 1910, creating a municipal plans commission, consisting of 21 members, all of whom are required to be citizens of the city, to be chosen partially from the city council and boards and partially by the mayor from nominees submitted by 14 different associations, clubs, public service corporations, etc., located and doing business within the city, was not unconstitutional as violating Const. art. 11, § 10, guaranteeing local self-government, because the membership of such nominating organizations included nonresidents of the state and of the United States; the commissioners to be appointed being appointive, and not elective, officers, and themselves required to be citizens of the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 162; Dec. Dig. § 67.*]

3. CONSTITUTIONAL LAW (§ 63*)—DELEGATION OF LEGISLATIVE POWER — PUBLIC PLANS COMMISSION

Under Seattle City Charter Amendment March 8, 1910, creating a municipal plans commission, and prescribing their duties, such commission is only authorized to employ men of national reputation to prepare and submit final plans for the extension and improvement of the city, the plans to be adopted by vote of the people, and hence the commission having no power to originate plans, and only being authorized to reject those suggested by a two-thirds vote, the act did not delegate legislative power to the commission in violation of the Constitution or any general law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 108-114; Dec. Dig. § 63.*]

4. CONSTITUTIONAL LAW (§ 70*)—JUDICIAL POWERS—INVASION OF PROVINCE OF LEGISLATURE.

It is no concern of the courts whether the Legislature has provided the wisest or best method of accomplishing its object.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 131; Dec. Dig. § 70.*]

5. MUNICIPAL CORPORATIONS (§ 67*)—LOCAL SELF-GOVERNMENT—INVADING POWERS OF LOCAL AUDITING OFFICERS.

Seattle City Charter Amendment March 8, 1910, creating a municipal plans commission to be composed entirely of citizens of the city, some of whom were to be appointed by the mayor from eligibles nominated by different associations, corporations, etc., whose membership might include nonresidents, and even aliens, and which authorized the commission to approve the vouchers for expenditures, made necessary and provided for, to carry out the purpose intended, was not objectionable as giving nonresidents a voice in the spending of the money raised by the tax authorized by the act.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 162; Dec. Dig. § 67.*]

6. CONSTITUTIONAL LAW (§ 205*)—MUNICIPAL PLANS COMMISSION — GRANT OF SPECIAL "PRIVILEGES AND IMMUNITIES."

Seattle City Charter Amendment March 8, 1910, creating a municipal plans commission to be formed from members of various city boards and by appointment by the mayor from eligibles nominated by 14 different associations, clubs, and corporations in

the city, all of the members to be citizens of the city, was not in violation of Const. art. 1, § 12, prohibiting the passing of any law granting to any citizen, class of citizens, or corporation, other than municipalities, privileges or immunities which, on the same terms, shall not equally belong to all citizens or corporations, on the theory that the privilege of nomination granted to the organizations mentioned was not granted to the members of other similar organizations; the right to make such nominations not being one of the "privileges or immunities" granted by the Constitution.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 591-624; Dec. Dig. § 205.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5599-5606.]

Department 2. Original proceedings for a writ of certiorari by Wallace A. Russell against Hiram C. Gill, as mayor of Seattle, to review a final judgment rendered for respondent. Affirmed.

Milo A. Root, for petitioner.

CROW, J. This is an original proceeding instituted in this court by petition for a writ of certiorari to review the final judgment of the superior court of King county, entered in an action commenced by Wallace Adam Russell against Hiram C. Gill, as mayor of the city of Seattle, to enjoin him from appointing members of the municipal plans commission. The trial court sustained a demurrer to the complaint, and the cause was dismissed.

The complaint attacks the validity of article 25, an amendment to the city charter, adopted March 8, 1910, creating a municipal plans commission, which article, omitting immaterial sections, reads as follows:

"Section 1. That there be and hereby is created a commission to be known as a 'Municipal Plans Commission,' which shall consist of twenty-one members. It shall be the duty of said commission to procure plans for the arrangement of the city with a view to such expansion as may meet probable future demands. These plans shall take into consideration the extension of the city and city works into adjacent territory; improvement and changes in public utilities and lines of transportation by surface, underground and water; the location, widths and grades of arterial highways necessary for the best treatment of the city, the development of the water front with its sea wall and wharves, the location of public buildings and municipal decorations, and such further extensions of and additions to the park and boulevard system of the city as it may, in conjunction with the park board, find advisable.

"Sec. 2. The members of such commission shall be citizens of the city of Seattle and shall be chosen in the following manner, to-wit: Three shall be elected from the city council by its members; one shall be elected from the board of public works by its members; in the same way one member shall be elected from the King county commissioners;

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

one from the Seattle board of education and one from the Seattle park commission. The other members shall be appointed by the mayor in the following manner, to wit: Each organization hereinafter named shall nominate two of its members and the mayor shall appoint one of the two so nominated. The interests representing the water front owners, steam railway companies, street railway companies, and marine transportation companies shall organize, respectively, by mass meetings, at which a chairman and secretary shall be elected, and such officials shall certify to the mayor the two names elected at such meetings. The call for such meetings shall be given publicity in the press of the city. The Pacific Northwest Society of Civil Engineers. The Washington State Chapter of American Institute of Architects. The Seattle Chamber of Commerce. The Seattle Commercial Club. The Manufacturers' Association. The Central Labor Council. The Seattle Clearing House Association. The Seattle Bar Association. The Seattle Real Estate Association. The Carpenters' Union. The water front owners. The steam railway companies. The marine transportation companies. The street railway companies. In case of failure of any of said organizations or interests to nominate, then these members are to be appointed by the mayor, and each shall be chosen for his known qualifications with respect to the interests which shall have failed to certify its nominations."

"Sec. 7. There shall be furnished to said commission suitable quarters for the carrying on of its investigations, together with such engineering and clerical assistance as may be necessary, and the commission shall, as soon as practicable after its organization, employ one or more, but in no case to exceed three, men of national reputation recognized as authorities in city planning to prepare a comprehensive plan under its direction and subject to its approval and adoption, embracing in its scope the entire area of the city, and such contiguous territory, as is comprehended in section one (1) of this resolution. The final plans shall be submitted to the commission for approval, and shall be regarded as approved, unless rejected by a two-thirds vote of said commissioners within thirty (30) days after the same shall have been filed with the commission. The municipal plans commission shall hold regular meetings; at least one such meeting every two weeks. Upon the conclusion of the sittings of said commission, it shall submit its findings in full to the mayor and the city council of Seattle in printed form, together with plans. Said report shall be presented to the mayor and city council not later than September 30, 1911, and they shall cause the recommendations of the commission to be submitted to the people at the next general or special city election.

"Sec. 8. That if a majority of the voters voting thereon shall favor the adoption of

said city plan so reported, it shall be adopted and shall be the plan to be followed by all city officials in the growth, evolution and development of said city of Seattle, until modified, or amended at some subsequent election.

"Sec. 9. There is hereby created a fund to be known as 'Municipal Plans Commission Fund,' which shall consist of a tax levy to be made during the year 1910 as other taxes are levied, of one-fourth ($\frac{1}{4}$) of a mill on the dollar, but no other or further levy or payment into said fund shall ever be made. The municipal plans commission shall have exclusive power to pay out moneys from such fund for any and all purposes specified in section one (1) hereof, and shall, on or before the 10th day of August of the year 1910, prepare and submit to the city council for approval and adoption, an estimate of the amount of money which may be required for its purposes, in conformity with chapter 138 of the Laws of the State of Washington, Session 1909.

"Sec. 10. All expenditures on account of work done shall be made upon vouchers approved by a majority vote of the Municipal Plans Commission and signed by its president and secretary. Each voucher shall, when accompanied by a detailed statement of such expenditures, be certified to the city comptroller, who shall issue a warrant therefor to the city treasurer, and the same shall be paid by the treasurer out of any money in the municipal plans commission fund not otherwise appropriated. Said commission may anticipate the revenues to be paid into said fund under the tax levy herein provided for by the issuance of its warrants against said fund to provide money for the necessary expenses of said commission prior to the availability of the funds to be raised by such levy. No expense against such fund shall be incurred after September 30, 1911, nor in excess of the levy provided, and any surplus remaining in said fund after said date, not lawfully appropriated or obligated for, shall be by ordinance transferred into the general fund."

Fourteen different organizations mentioned in the charter amendment are each authorized to nominate two persons as eligibles for appointment on the commission. The complaint alleged that the membership of these several organizations includes persons who are nonresidents of the state of Washington and of the United States, and the relator now contends that, as the charter amendment in effect permits nonresidents to participate in the municipal affairs of the city of Seattle by exercising the high privilege of choosing persons to be selected as public officers, it is necessarily void. The Constitution of this state (article 11, § 10) provides that: "Any city containing a population of twenty thousand inhabitants or more shall be permitted to frame a charter for its own government consistent with and subject to the Constitution and laws of this state."

The object of this constitutional provision was to secure to all such cities complete local self-government in municipal affairs, subject only to the restrictions mentioned, and charter provisions adopted under the authority so conferred should not be held invalid, unless it appears that they are in direct conflict with the Constitution or laws of the state.

In *Hilzinger v. Gillman*, 105 Pac. 471, this court said: "Both the Constitution and the general law recognize that large, growing cities should be empowered to determine for themselves, and in their own way, the many important and complex questions of local policy which arise, and it is only when some act in the execution of that policy conflicts with the general law or contravenes the Constitution that the act can be questioned." The city of Seattle framed its charter, and the amendment now under consideration was adopted, by proper procedure and vote. It expressly directs that all members of the municipal plans commission shall be citizens of the city. It is therefore apparent that the various organizations mentioned cannot, if they would, by any nominations they may make, impose upon the mayor the duty or necessity of appointing nonresidents. Although nonresident members of the several organizations may have a voice in nominating two candidates as eligibles for appointment, we fail to see how, in the absence of an express constitutional inhibition, that fact invalidates the charter amendment. The commissioners thus selected will be appointive not elective officers. No resident of Seattle is deprived of any of his rights as a citizen or elector. The people by their own vote have authorized this method of selection. The commissioners will be legally appointed officers, irrespective of the incidental fact that the number of eligible persons from whom the mayor may appoint them is restricted by the charter amendment. The commission will employ men of national reputation to prepare and submit final plans. It cannot originate plans. It can only reject those suggested by a two-thirds vote. The commission itself originated with the people, who adopted the charter amendment, and will cease to exist after September 30, 1911; no provision being made for its continuance. Plans for improvements and works can only be adopted by a vote of the people. No legislative power is delegated to the commission in violation of the Constitution or any general law. The evident purpose of the amendment is to secure experienced, capable and representative citizens to serve upon the commission, and select men of national reputation to prepare and submit comprehensive plans. The commissioners from the various organizations must be appointed by the mayor. The commission will be an advisory body only. Proposed plans are subject to a final vote of the people. It is therefore manifest that the authority conferred originates with the people, and that the plans

prepared and suggested can only be validated or adopted by them. They have reserved a supervisory control in themselves, and are deprived of no constitutional right. It is no concern of ours whether the amendment has provided the best or wisest method for selecting the commission. It was adopted by the people under the authority of the Constitution. The commissioners are not vested with legislative powers. They will make no levies of taxes, and the advisory functions which they are to perform do not conflict with any restrictions of the Constitution or laws of the state. *Miller v. City of Louisville (Ky.)* 99 S. W. 284.

Relator further insists that the amendment is void because it confers authority upon the commissioners to approve vouchers for all expenditures incurred, and requires the comptroller to issue warrants upon the city treasury for the amount of such vouchers, to be paid out of the municipal plans commission fund. He insists that nonresidents by nominating eligibles for appointment will have a voice in the expenditure of the money raised by the tax authorized. We find no merit in this contention. The municipal plans commission will be composed of residents of the city. Authority to approve vouchers for expenditures is lawfully conferred upon it. In *State ex rel. Printing Company v. Riplinger*, 30 Wash. 281, 70 Pac. 748, this court sustained a similar charter provision, which compelled the comptroller of the city of Seattle to issue warrants upon the city treasurer solely upon the certification of the library board without any action of the city council. The rule there announced is controlling here. Section 12, art. 1, of the state Constitution, provides that: "No law shall be passed granting to any citizen, class of citizens or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Relator insists that the amendment under discussion violates this section, as it grants a privilege to each of the fourteen organizations mentioned and to their members, which is not granted to the members of other similar organizations; such privilege being the right to participate in the selection of members of the commission. This contention cannot be sustained. In *State v. Vance*, 29 Wash. 435, 457, 70 Pac. 34, 41, a similar attack was made upon the jury law of 1901, which authorized the bar of the county to nominate four electors, two of whom were to be appointed as jury commissioners by the superior court; but the validity of the act was sustained. While it is true that some argument was predicated upon the fact that the members of the bar are officers of the court that argument was not necessary to the conclusion reached. Discussing the term "privileges and immunities," this court said: "These terms, as they are used in the Constitution of the United States, secure in each state to the citizens of all states the

right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from. Cooley, Constitutional Limitations (6th Ed.) 597. By analogy these words as used in the state Constitution should receive a like definition and interpretation as that applied to them when interpreting the federal Constitution. The right simply of recommendation, which it might be said has been conferred by the act under consideration, and by the order of the court made in accordance with the provisions of that act, is not in its very nature such a fundamental right of a citizen that it may be said to come within the prohibition of the Constitution, or to have been had in mind by the framers of that organic law."

The demurrer to the complaint was properly sustained. The judgment is affirmed.

RUDKIN, C. J., and DUNBAR, PARKER, and MOUNT, JJ., concur.

(58 Wash. 439)

TURNER et ux. v. CREECH et ux.

(Supreme Court of Washington. May 21, 1910.)

1. TRIAL (§ 393*)—FINDINGS—FORM.

It is not good practice for the court to merely mark the several paragraphs of the findings, submitted by each party, "found" or "revised," as such practice is liable to lead to contradictory and confused findings; but the trial court's findings should properly be prepared after they have been settled, so that they will come before the appellate court in a concrete form, as it should not be compelled to recast the findings in order to harmonize them and determine the trial court's theory.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 393.*]

2. BOUNDARIES (§ 3*)—CONFLICTING ELEMENTS—RELATIVE IMPORTANCE OF QUANTITY.

Defendants owned the south $43\frac{1}{2}$ feet of lots 1 and 2, block 6, of a certain addition, and all of the lots in which were platted 50×130 feet. Defendants purchased from the owner of the remainder of the lots $6\frac{3}{4}$ feet along their north line, the survey commencing at the northeast corner of lot 1, in block 6; thence southerly along the easterly line of the lot 80 feet to the beginning; thence westerly 100 feet to the westerly line of lot 2; thence southerly along such line $6\frac{3}{4}$ feet; thence easterly 100 feet to the easterly line of lot 1; and thence northerly $6\frac{3}{4}$ feet to the beginning point. It was the intention of the parties that defendant should have 50 feet of the lots and grantors 80 feet. The lots were in fact only 128.2 feet long, instead of 130 feet. Defendants were put in possession, built a fence on the line agreed upon, and extended their house over the strip conveyed, so that the house and fence would have to be moved if the strip conveyed was allowed to be diminished by the mistake as to distance. *Held*, that the primary intent of the parties was to convey $6\frac{3}{4}$ feet, and that the

quantity called for would control; the circumstances being equivalent to the practical location or agreement as to boundaries, so that the grantor could not recover any part of the strip conveyed.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 41; Dec. Dig. § 3.*]

3. BOUNDARIES (§ 49*)—LOCATION BY COMMON GRANTOR.

The location of a line by a common grantor is binding upon his grantees.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 247; Dec. Dig. § 49.*]

4. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASERS—NOTICE—POSSESSION.

Possession of land is notice to a purchaser as to the extent of possessor's claim of ownership.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

5. BOUNDARIES (§ 3*)—RELATIVE VALUE OF BOUNDARIES OF SURVEY—BEGINNING POINT.

The beginning point of a survey is no more important than any other point therein.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 3.*]

6. DEEDS (§ 93*)—CONSTRUCTION—INTENT.

The whole deed, as well as the acts of the parties, should be looked to to determine the intent of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. § 93.*]

7. BOUNDARIES (§ 49*)—LOCATION—PRACTICAL LOCATION.

The practical or agreed location of a boundary line may result from long acquiescence or by acts of the parties in locating it and placing valuable improvements on the property with reference to it before the line is disputed.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 243-248; Dec. Dig. § 49.*]

Department 1. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by R. C. Turner and wife against John S. Creech and wife. From a judgment for plaintiffs, defendants appeal. Reversed, with directions to enter decree for defendants.

John C. Hogan, for appellants. Boner & Boner, for respondents.

CHADWICK, J. In June, 1901, appellants, Creech and wife, were the owners of the south $43\frac{1}{2}$ feet of lots 1 and 2, block 6, Weatherwax & Benn's addition to Aberdeen. This tract was occupied as a dwelling place, and was inclosed with a fence. The lots were platted each 50 by 130 feet. The remainder of the lots was owned by one Harriet Dutcher. Appellants in that year purchased from Mrs. Dutcher $6\frac{3}{4}$ feet, lying along their north line. The tract was surveyed and staked, and appellants' fence was put upon the line as marked by the surveyor and agreed upon by the parties. The description in the deed is as follows: "Commencing at the northeast corner of lot one (1) in block six (6) in Weatherwax and Benn's addition to the town, now city, of Aberdeen; thence southerly along the easterly line of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said lot one (1) eighty (80) feet to point of beginning; thence westerly parallel with Fifth street, one hundred (100) feet to the westerly line of lot two (2) in said block six (6); thence southerly along the westerly line of said lot two (2) six and two-thirds ($6\frac{2}{3}$) feet; thence easterly parallel with said Fifth street one hundred (100) feet to the easterly line of said lot one (1); thence northerly along the easterly line of said lot one (1) six and two-thirds ($6\frac{2}{3}$) feet to point of beginning." Thereafter appellants extended their dwelling house so as to cover a part of the $\frac{2}{3}$ -foot strip. On May 4, 1905, Mrs. Dutcher sold and conveyed to respondents the portion of the lots 1 and 2 then owned by her, describing it as the northerly 80 feet of lots 1 and 2. Respondents entered into possession of the land and have ever since, and are now, occupying it as a home. At the time respondents moved onto the land, it was inclosed by a fence; the two lots making two tracts, one 50 by 100, and the other 80 by 100. In June, 1908, the city of Aberdeen undertook the permanent improvement of Fifth street, which abutted on the north of the Turner property, and at that time the city surveyor determined that the Turner property encroached $1\frac{8}{10}$ feet upon Fifth street. These figures were accepted by the respondents, and they shortly thereafter began this action to eject appellants from the north $1\frac{8}{10}$ feet of their tract, upon the theory that, inasmuch as Mrs. Dutcher had intended to reserve 80 feet to herself at the time she made the deed to the $6\frac{2}{3}$ feet, the shortage in the lots should fall upon these appellants. Appellants, answering, denied the ownership of respondents, and set up title in themselves. They also pleaded a mutual mistake, in that Mrs. Dutcher and these appellants believed, at the time their deed was executed, that the lots were 130 feet long, and not $128\frac{2}{10}$, as would result if the figures of the city engineer are accepted. The court found that, although the official plat shows the lots to be 130 feet long, they are in fact $128\frac{2}{10}$ feet; that Mrs. Dutcher intended to, and did, retain the northerly 80 feet for herself, and intended to convey to appellants only the land lying between her 80 feet and the property then owned by her; that both supposed this strip to be $\frac{2}{3}$ feet; but that in fact it was $1\frac{8}{10}$ feet less than the estimated width. At the request of appellants, the court also found that, according to the official plat as recorded in the office of the auditor of Chehalis county, the lots were 130 feet in length; that, after parting the land, Samuel Benn and wife, who were then the owners, conveyed the whole of said lot in three distinct parcels, each $43\frac{1}{3}$ feet wide, the grantor of these appellants acquiring the southerly $43\frac{1}{3}$ feet; that Mrs. Dutcher thereafter acquired the northerly $86\frac{2}{3}$ feet.

The findings of the trial court are confus-

ing, if not actually contradictory of the facts upon which the decree must rest if sustained. This consequence is not unusual where each party submits findings, and the paragraphs are severally marked "found" or "refused," by the court. Dual findings upon the same subject are bound to follow, and they but lead to confusion, and contradictions are almost sure to creep in. Proper practice demands that findings of fact and conclusions of law come to us in some concrete form. This court cannot, and it should not be put to the burden of winnowing out, recasting, or rewriting the findings of trial courts in order to harmonize them so that we may follow the theory of the trial judge. A complete and perfected set of findings should be prepared after they have been settled by the court.

Error is assigned in that the court refused to permit one E. N. Simms, a son of Mrs. Dutcher, now deceased, to testify as to the intent of his mother at the time she executed her deed to appellants; that erroneous conclusions of law were drawn from the facts found; and that the court erred in making certain findings proposed by respondents and rejecting other findings proposed by appellants. As we view the case, it is unnecessary to discuss any other than the second assignment of error. Mrs. Dutcher was the common grantor of these parties, and it will not be denied that they are bound by her conduct. At the time the deed to the $6\frac{2}{3}$ feet was executed, the parties were acting in the utmost good faith; neither one doubting the exact location of their lines. It was the intent of the one to take 50 feet and the other to retain 80 feet. The equities up to this point were equal. But the parties went further and employed a surveyor who marked the boundaries of the land, and, indeed, at that time the original corner stakes were at the northeast corner of lot 1 and also at the southeast corner. The surveyor ran his lines from these points and marked off 50 feet from the southeast corner and 80 feet from the northwest corner. In describing it, for convenience he fixed the northeast corner as the place of beginning; but the fact remains that a certain tract of land was laid out and agreed upon. Mrs. Dutcher put her grantees in possession. She permitted them to build a fence on the line agreed upon, and the house to be extended over the strip conveyed; so that, if it is now diminished in quantity, not only the fence, but the wall and eaves of the house, would have to give way to the new line. Clearly Mrs. Dutcher could not recover in ejectment; and, if she cannot, the respondents, having notice of the claims of appellants, cannot recover. The location of a line by a common grantor is binding upon the grantees. *McGhee v. Stone*, 9 Cal. 600; *Ross v. Turner*, 5 Yerg. (Tenn.) 338; 5 Cyc. 940. Possession is notice. *Dennis v. N. P. Ry. Co.*, 20 Wash. 320, 55 Pac. 210; *Kuhl v.*

Lightle, 29 Wash. 137, 69 Pac. 630; Peterson v. Philadelphia, 33 Wash. 464, 74 Pac. 585.

Some point is made over the description in that it commences at the northeast corner of lot 1 and runs thence southerly 80 feet to the point of beginning. We have already said enough to show that, in our judgment, this can make no difference. The beginning point of a survey is of no higher dignity or importance than any other. *Davis v. Smith*, 61 Tex. 18. The case falls within the rule of practical location or agreed boundaries. To discover the true intent of a deed, we must look to the whole of it, as well as the acts of the parties. Reference to the whole description will show that the primary intent of the grantee was to buy, and of the grantor to sell, 6½ feet, and the fact that the true northeast corner of lot 1 was 1⅞ feet south of the point fixed by the surveyor will not be allowed to overcome the acts of the parties. "A surveyor cannot be allowed to fix private rights or lines by any theory of his own. * * * It is not his business to decide questions of law, or to pass upon facts that belong to the tribunal dealing with 'the decision of facts.'" *Jones v. Lee*, 77 Mich. 35, 43 N. W. 853; *Miller v. Mills Co.*, 111 Iowa, 654, 82 N. W. 1038. The conveyance of the strip 6½ feet by 50 was the essence of the contract, and the quantity of the land to be conveyed will control in such cases, although the call of the deed might not include the whole tract. 3 Am. & Eng. Enc. Law, 790, 791. Practical or agreed location of a boundary line may result from long acquiescence in its location, or when drawn and acted upon by the parties, as where valuable improvements are placed with reference to it and before it is denied by either party. 5 Cyc. 930 et seq. In *Flynn v. Glenn*, 51 Mich. 580, 17 N. W. 65, it was held that purchasers of town lots have a right to locate their lot lines according to the stakes set by the plat of the lots, and that no subsequent survey can unsettle such lines; Mr. Justice Cooley saying: "The question afterwards is not whether the stakes were where they should have been in order to make them correspond with the lot lines as they should be if the platting were done with absolute accuracy, but it is whether they were planted by authority, and the lots were purchased and taken possession of in reliance upon them. If such was the case, they must govern, notwithstanding any errors in locating them."

For the reasons herein assigned, the judgment of the lower court is reversed, with instructions to enter a decree upon the findings heretofore found in favor of appellants.

RUDKIN, C. J., and FULLERTON, GOSE, and MORRIS, JJ., concur.

(53 Wash. 501)

CITY OF SEATTLE v. DENCKER.

(Supreme Court of Washington. May 28, 1910.)

1. LICENSES (§ 7*)—TAXING OCCUPATIONS—POWER OF STATE.

The state may tax all or any occupations or business carried on within its boundaries, imposing the burden upon some and passing by others, and only considerations of general policy determine such selections; there being no restriction unless it be imposed by the Constitution.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15; Dec. Dig. § 7.*]

2. LICENSES (§ 7*)—TAXING OCCUPATIONS—POWER OF STATE—REASONABLENESS.

Though the state may tax some occupations or business and not others, this determination must not be exercised arbitrarily or fraudulently, and, while the policy of the enactment may not be questioned by the courts, the discretion exercised by the lawmaking power must be natural and reasonable and consistent with the general principles of law and the fundamental principles of the government.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15; Dec. Dig. § 7.*]

3. LICENSES (§ 7*)—AUTOMATIC SELLING DEVICES—CITY ORDINANCE—VALIDITY.

A city ordinance providing for the licensing of automatic devices for selling goods is invalid, where no police power or regulation is involved as to the article sold.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 9; Dec. Dig. § 7.*]

4. LICENSES (§ 7*)—TAXING OCCUPATIONS—POLICE POWER—SIMILAR EMPLOYMENTS—DISCRIMINATION.

There is a vital distinction between the power to tax occupations under the form of a license which by reason of the character of the occupation is subject to police regulation and the power to tax what are termed useful trades and employments under the guise of a license. The license required of the latter class can carry with it only such fee as is necessary to make compensation for the regulation services, and cannot be perverted into a tax. This is especially true where the attempt is made to discriminate between occupations alike in principle, but differing only in mode of operation in some trifling particular.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 8, 9; Dec. Dig. § 7.*]

5. MUNICIPAL CORPORATIONS (§ 626*)—ORDINANCES—UNJUST DISCRIMINATION.

An ordinance having the effect of making, under the same circumstances, an act done by one person penal, and, if done by another, not so, cannot be sustained.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1380; Dec. Dig. § 626.*]

6. MONOPOLIES (§ 5*)—DEFINITION.

A monopoly exists when the manufacture and sale of any commodity is restrained to one or a certain number.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 4; Dec. Dig. § 5.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4570-4574.]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

John P. Dencker was convicted of the violation of a city ordinance relating to the sale of goods by automatic vending machine, and he appeals. Reversed and dismissed.

Lyter & Folsom and I. L. Blair, for appellant. Scott Calhoun and Ralph S. Pierce, for respondent.

DUNBAR, J. This is an appeal from a judgment of the superior court for King county after trial upon conviction of the violation of an ordinance of the city of Seattle relating to the sale of goods by automatic vending machine, which ordinance reads as follows:

An Ordinance Licensing Certain Automatic Devices, and Providing a Penalty for Violation.

"Be it ordained by the city of Seattle as follows:

"Section 1. That it shall be unlawful for any person to maintain, keep, conduct, manage, have in his possession or control for use, any automatic device, for the sale of goods of any kind or character, where money or any representative of value is used to operate the same, or where gain or trade is the object, without being licensed so to do by the city of Seattle.

"Sec. 2. The license required by this ordinance shall be secured by paying the required amount to the city treasurer, receiving a receipt therefor and presenting such receipt to the city comptroller, who shall issue such license as the receipt calls for.

"Sec. 3. The schedule of amounts to be paid for licenses, is as follows: Where a deposit of one (1) cent or slug representing the same in trade, is required to operate the device, one (1) dollar per year for each device; where a deposit of five (5) cents or slug representing the same in trade, is required to operate the same, five (5) dollars per year for each device; where a deposit of ten (10) cents or slug representing the same in trade, is required to operate the same, ten (10) dollars per year for each device; where a deposit of twenty-five (25) cents or slug representing the same in trade, is required to operate the same, fifteen (15) dollars per year for each device.

"Sec. 4. The provisions of this ordinance shall not be held to include or apply to the sale of gas, or other commodities, through payment meters, or the installation and use of telephones with slot machine devices, public service corporations, operating under franchises granted by the city of Seattle, or to the sale of candles or similar commodities, by automatic devices in theaters or other such places of public assembly where an admission fee is charged for admission."

The defendant is the manager of the Northwestern Automatic Vending Machine Company, a Washington corporation, which is engaged in the business of selling cigars at retail by means of vending machines, owns and operates a great many of these machines in the city of Seattle, and has invested a large sum of money in said machines. The machines are placed in hotels where cigars

are required by the patrons, are under the general supervision of the clerks of the hotels, and as a rule a certain percentage is given to the hotel men for operating the machines. Under the ordinance in question the license fee required for the operation of the machines varies from \$30 to \$95, according to the number of devices; the fee being based on the denomination of the coin required for operation and the number of devices, and not on the amount of business done. Each machine has a device for five, ten, and twenty-five cent pieces. The cigars are at all times exposed to view under their proper labels and prices, so that the purchaser can at all times see what he is getting for his money, and he gets just what he pays for. If he drops in a five-cent coin in the device calling for a coin of that denomination, and presses the plunger, he gets a five-cent cigar; if a ten-cent coin, a ten-cent cigar, and, if a twenty-five-cent coin, either a two-for-a-quarter or a three-for-a-quarter cigar, according to his selection. There is no more opportunity for the customer being cheated or defrauded in dealing with this device than by any other one.

The question for determination here is the validity of the ordinance. It is conceded that this ordinance is a revenue measure; that the only ground of difference between licensed and unlicensed sales in this ordinance is in the mode of sales, whether by device or hand. It is conceded that none of the other retail merchants of that occupation is taxed by licenses for the sale of cigars; that if the sale is by this device the license is imposed; and that, if it is by hand in the ordinary way, no license is required. In the discussion of this question there are certain fundamental principles which may be conceded, viz., that it is a well-known attribute of sovereignty to tax occupations for the purpose of raising revenue, and that such tax may be imposed in the form of a license fee; that the state may tax all or any occupations or business carried on within its boundaries, imposing the burden upon some and passing by others; that only considerations of general policy determine such selections; and that there is no restriction unless it be imposed by the Constitution. This determination, however, must not be exercised arbitrarily or fraudulently, and, while the policy of the enactment may not be questioned by the courts, the discretion exercised by the law making power must be natural and reasonable, and consistent with the general principles of law and the fundamental principles upon which our government is founded. When these principles are violated to the extent of depriving the citizen of natural or constitutional rights, it is the duty of the court to intervene in his behalf. A wilderness of authority might be cited on this interesting and fruitful subject of litigation, for from the beginning of not

only our government, but of all government, the contest has been waged between legislative powers and individual rights. But from the best considered cases the general principles above announced can be deduced.

Tested by these principles, can this ordinance be sustained? We think not. It is plain that there is no police power or regulation involved, a power which is the sustaining principle in 99 out of 100 of the cases cited; for there is no claim that the business discriminated against here affects in any way the public morals or the business interests of the community, except as it affects the interest of others engaged in the same business, but purely in the way of competition. The article that is sold does not in any way involve the police power. Hence it is a matter of no public concern whether it be sold by device or by some other method. And here it is well to note a vital distinction, founded on sound and just principles of law, between the power to tax occupations under the form of a license which by reason of the character of the occupation is subject to police regulation, and the power to tax what are termed useful trades and employments under the guise of a license. It is well settled that the license required of employments of the latter character can carry with it only such fee as is necessary to make compensation for the regulation services, and cannot be perverted into a tax. Especially is this true when the attempt is made to discriminate between occupations alike in principle, but differing only in mode of operation in some trifling particular.

The respondent relies largely upon the case of *St. John v. New York*, 201 U. S. 633, 28 Sup. Ct. 554, 50 L. Ed. 896, where the Supreme Court of the United States sustained an act prohibiting the sale of adulterated milk, where in certain respects it provided different prohibitions and penalties as to producing and nonproducing vendors of milk; the enactment making it a penal offense for a person to vend milk that contained more than a certain amount of water and less than a certain amount of milk solids. The objection urged to the law was that it was a discrimination between the vendor and the producers of the milk, and that such discrimination had no basis in right or public policy. In discussing the case the court said: "It has been decided many times that a state may classify persons and objects for the purpose of legislation. We will assume the cases are known and proceed immediately to consider whether the classification of the law is based on proper and justifiable distinctions, considering the purpose of the law and the means to be observed to effect that purpose. By referring to section 20, it will be observed that adulterated milk, as there defined, includes not only that to which something has been added, but milk from which the cream has been removed, or which

is deficient naturally in certain substances, or taken from cows fed on certain things, or cows in certain conditions when milked. In other words, the purpose of the law is to secure to the population, adult and infant, milk attaining a certain standard of purity and strength. All other milk is declared to be 'unclean, impure, unhealthy, adulterated, or unwholesome.' It is not contended that such purpose is not within the power of the state, but, it is contended, that the power is not exercised on all alike who stand in the same relation to the purpose. * * * Legislation to be practical and efficient must regard this special purpose as well as the ultimate purpose. The ultimate purpose is that wholesome milk shall reach the consumer, and it is the conception of the law that milk below a certain strength is not wholesome, but a difference is made between milk naturally deficient and milk made so by dilution. It is not for us to say that this is not a proper difference, and, regarding it, the law fixes its standard by milk in the condition that it comes from the herd. It is certain that, if milk starts pure from the producer, it will reach the consumer pure, if not tampered with on the way. To prevent such tampering, the law is framed and its penalties adjusted. As the standard established can be proved in the hands of a producing vendor, he is exempt from the penalty. As it cannot certainly be proved in the hands of other vendors so as to prevent evasions of the law, such vendors are not exempt." It would be difficult to discover in principle any similarity between that case and the one at bar. The court in that case, as in nearly all the cases, starts out with the discussion as to what is the purpose of the law. The purpose of the law in the case just cited was to prevent the adulteration of milk, which the state undoubtedly had a right to do under its plain police powers, for the protection of the health of the citizen. But, as we have before said, this case is stripped of any police feature, and, if we were to start an investigation to determine the purpose of this act, it could only end in a report that there was no such beneficent purpose as was stated by the court in that case, but that the purpose, if it had any, was to benefit the regular retail cigar merchants by suppressing a business of the same kind, but differing simply in the mode of the delivery of the cigars; or, in other words, to prevent honest competition in the cigar trade. The further reason upon which the court decided that case, viz., that it was more difficult to detect fraud when the milk was in the hands of the vendor than when it was in the hands of the original producer, is also absent in this case. As the testimony shows and as the model of the machine indicates, there is no more opportunity for fraud or deceit in selling cigars under this system than in selling them in any other way.

The case of *City of Chicago v. Bowman Dairy Company*, 234 Ill. 294, 84 N. E. 913, 17 L. R. A. (N. S.) 684, 123 Am. St. Rep. 100, also largely relied upon by the respondent, is practically the same kind of a case. Probably the circumstances of that case bring it a little nearer to the case at bar. There an act was sustained which required dealers selling cream and milk in bottles or glass jars to have the capacity of the bottles or jars permanently indicated upon them, and prescribed a penalty for having in their possession bottles or glass jars of capacity less than that indicated on the outside; while the act did not apply to vendors of milk through other agencies. But that case, as the other, was sustained on the doctrine of the police power of the state. Even so, we are doubtful if that case could be indorsed by this court under the decision in *Spokane v. Macho*, 51 Wash. 322, 98 Pac. 755, 21 L. R. A. (N. S.) 263, where it was held that in an ordinance to regulate and license employment agencies a section making it a misdemeanor for the keeper of an employment agency to make willful misrepresentations or to willfully deceive any person seeking employment, and take a fee for such employment, is unconstitutional, since it is not general and impartial in its operation, but operates upon one class to the exclusion of others in respect to a penal act common to all classes of business, and exceeds the reasonable limit of police regulations. In that case it was stated that it is a fundamental proposition that an ordinance must be fair in its terms, impartial in its provisions, and general in its application; citing *Dillon, Mun. Corp.* 322, and *McQuillan, Mun. Corp.* 193. It was also said: " * * * When exercising its power to regulate a business, the municipality may classify subjects of legislation, but the law must treat alike all of a class to which it applies, and must bring within its classification all who are similarly situated or under the same condition"—citing *State v. Sheriff of Ramsey County*, 48 Minn. 236, 51 N. W. 112, 31 Am. St. Rep. 650, where the court said: "The classification must be based on some reason suggested by a difference in the situation and circumstances of the subjects treated, and no arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar." A much worse discrimination would be a discrimination between citizens of the same class engaged in the same business, where there is no reason suggested by a difference in the situation and circumstances of the subjects treated; for not only is the business in this case similar and identical, but it is purely and simply a difference in the mode of transacting the business, a mode which cannot possibly affect any principle or affect deleteriously the consumer or purchaser of the article sold. The general principle announced by Mr. Dillon, in his work on Corporations (volume 1, p. 322), seems to be specially applicable here: "As it would

be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect cannot be sustained. Special and unwarranted discriminations or unjust or oppressive interference in particular cases is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation." The Montana Legislature passed a law imposing a license tax of \$25 per quarter on every laundry business other than that of a steam laundry wherein more than one person was employed or engaged, and but \$15 per quarter upon steam laundries. This law was sustained by the state court of Montana, but was afterwards declared unconstitutional by that eminent jurist Judge Knowles of the United States Circuit Court, in *Re Yot Sang*, 75 Fed. 983. In the course of the opinion it was said: "Unless there is something so different in the conducting of a laundry by steam to that of the carrying on of that business by any other means, the law providing a different and more excessive license for the conducting of such business other than by steam is unequal and unjust. * * * It may be said that the state may have wished to encourage steam laundries. If so, it had no right to do it at the expense of any person carrying on such business other than by means of steam. Such an argument would imply that it was in the power of a state to force a man who conducted a business in one mode to abandon the same in order that he who conducted such business in another mode should be encouraged and built up." The court concluded that, where the same business is conducted by different modes, it was unjust and in violation of the rule that each man should have the protection of equal laws to place upon one a greater burden than upon the other. It is stated by counsel for appellant as a matter of history that, since the determination of this case in the United States court, it has been accepted as the law of the state, and that there have been no prosecutions under the statute. However this may be, we are satisfied that the decision of the United States court expresses the true principles governing such cases. In the case of *City of Covington v. Dalheim*, 126 Ky. 26, 102 S. W. 829, the court, in passing upon the constitutionality of an act which imposes a tax on a certain class of grocers without the imposition of the same tax on others, held that the tax must apply to all grocers in the city, and that the act was unconstitutional, saying: "It is competent for the city to select any of the enumerated classes as subjects for license taxes. But it is not competent for it to tax some members of a class set apart by the legislature and not tax others of the same class." And the principle announced in that case was reaffirmed by the court of appeals of Kentucky in the case of *Read v. Graham*, 102 S.

W. 860. These last three cases which we have mentioned seem to be exactly in point on the question under discussion.

It is very well suggested by counsel for appellant that it would be just as reasonable to discriminate against a merchant who used a patent carrier for the transmission of money and change, instead of a cash boy. The same rule might apply to a thousand different improvements that have a tendency to cheapen products by reason of the fact that they are labor saving machines, and do away with the necessity for so many clerks and employes. It is a legitimate business, and it makes no difference to the public whether the cigar is delivered by means of this automatic device or in the ordinary way. A strict or puritanical conception of the business of selling cigars might be that it was harmful to the health of the consumers, but the mode of selling them would not enter into that thought. Nor can the objection that it is particularly attractive be urged, for handsome girls are ordinarily employed around hotels for the purpose of selling cigars, and no doubt many susceptible men are induced to buy more cigars than they otherwise would by reason of the employment of this delivery agency. Fairly considered, this seems to be a tax on invention, for invention in most cases, as in this, lessens the expense of the business, and thereby necessarily cheapens the product. This was one of the arguments advanced in favor of sustaining the validity of this ordinance, viz., that the machine could be manufactured and operated for less money than a retail cigar store could be equipped and operated. It would seem that the reduction in price of an article of commerce would savor of the quality of a blessing rather than of a curse, when the welfare of the consumer is taken into consideration; and to hold otherwise would reverse the general rule that legal restraints may be imposed upon the few for the benefit of the many. The tendency of this kind of an ordinance is to foster monopolies, for a monopoly exists when the manufacture and sale of any commodity is restrained to one or a certain number. It is said that it has three inseparable consequences—the increase of the price, the badness of the wares, the impoverishment of others. Hence it naturally follows that monopolies are odious to the law, and the law will concern itself to restrain rather than to nourish them. If this ordinance can be sustained, there is no limit to the arbitrary, capricious, or tyrannical imposition of taxes, and the constitutional guaranty that "no law shall be passed granting to any citizen, class of citizens or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations," becomes a dead letter. Discrimination to the extent exhibited in this ordinance discourages enterprise, paralyzes

progress, is a deprivation of liberty, and is entirely inconsistent with the true principles and the genius of our government. None of the cases cited, from either this or any other court, numerous as they are, go to the extent of discriminating against a simple mode of doing business, which is conceded to be lawful and fair, and which in no way involves the principles of police power or regulation.

The judgment will be reversed, with instructions to dismiss the action.

RUDKIN, C. J., and CROW, MOUNT, and PARKER, JJ., concur.

(58 Wash. 426)

HOERLING et ux. v. LOWRY.

(Supreme Court of Washington. May 21, 1910.)

1. DEEDS (§ 70*)—VALIDITY—FRAUD.

Where plaintiffs deed their land for 32 lots in another city which they have never seen, on representations that they were worth \$100 per lot and that a buyer could be procured immediately for 20 of the lots at that price, when the lots were in fact worth about \$1 each, and the purchaser from plaintiffs refused to complete his contract, there was such fraud as to render the deed of plaintiffs voidable.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 179; Dec. Dig. § 70.*]

2. BROKERS (§ 91*)—RELATIONS TO THIRD PERSONS—AGENT FOR BOTH PARTIES.

Where an agent acted for both parties in procuring an exchange of land, the contract of exchange was voidable.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 134; Dec. Dig. § 91.*]

Department 1. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by Henry Hoerling and wife against R. L. Lowry. From a judgment in favor of defendant, plaintiffs appeal. Reversed and remanded, with instructions.

Hayden & Langhorne, for appellants. Reynolds & Stewart, for respondent.

MORRIS, J. Appellants, prior to May 17, 1909, were the owners of a lot in Chehalis, upon which had been erected a 14-room dwelling. This property was valued at about \$3,000, and had a rental value of about \$60 per month. On May 17, Henry Hoerling, who with his wife was a resident of Tacoma, went to Chehalis for the purpose of selling this property. He there met S. V. Lowry, a brother of the respondent who is in the real estate business, and after some conversation it was agreed that Lowry should act as Hoerling's agent in the sale of the property. Lowry finally suggested a trade of this property for 32 improved lots in Sea View addition to Port Angeles. These lots were represented as worth \$100 each, cleared, close to the center of the city and available as business property. They were owned by respondent. Hoerling, however, seem-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and anxious to turn his property into cash, and refused to consider a trade. Lowry then informed him that he had a purchaser for 20 of these lots at \$100 each, who would pay cash, and suggested that a trade be made, Hoerling to deed the Chehalis property to the owner of the Port Angeles lots who would then make a deed to Hoerling of the 12 lots, and Hoerling could then make a deed of the 20 lots to the purchaser, known to Lowry, and receive his \$2,000. It was further suggested that all the deeds be deposited in a bank, and that Hoerling's deed would not be delivered until he had received the \$2,000. Hoerling, not quite satisfied with his proposition, left the office and later returned with two sons-in-law, to whom the proposition was repeated, and the name of the purchaser of the 20 lots disclosed as Martin Galogaly. The proposition was then accepted, and it was agreed that the next morning the papers would be drawn up and the deal closed. The next morning a meeting was held at S. V. Lowry's office to close up the deal, when Martin Galogaly casually drops in, and, after listening to the conversation, becomes so much impressed with the future prospects of Port Angeles and the value of these particular Sea View addition lots, that he offers to purchase 20 of them for \$2,000. He had never been at Port Angeles, and knew nothing about the location of these lots except as he was then and there informed. However, he expresses his willingness to close up the transaction at once, and pays down \$50, the balance to be paid in five days. A deed is then drawn from Hoerling to R. S. Lowry for the Chehalis property, a deed from R. S. Lowry and E. G. Lowry to Hoerling for the Port Angeles lots, which deed seems to have been executed in bank the day before, and a deed from Hoerling to Galogaly for the 20 lots. These deeds upon their execution were deposited in a bank, to await the payment by Galogaly to Hoerling of the \$1,950 due upon the Port Angeles lots. On the 21st S. V. Lowry presents to the bank a written order for the delivery of the deed to the Chehalis property, and upon receipt of same has it promptly recorded. Hoerling denies that he knowingly signed such an order. The five days lapse, and the \$1,950 not being paid, Hoerling returns to Chehalis, and, believing that he had been defrauded out of his property, after commencing this action to cancel and set aside his deed to respondent.

It is not strange that, in an action of this character, there should be some conflict in the testimony; but the facts heretofore related we believe to be abundantly established. Other facts, we believe established, are these: Galogaly never had any intention of paying the remaining \$1,950. It is apparent from his testimony that he had no money;

in fact, he says he expected to borrow it; but so far as the record discloses, he does not seem to have made a very earnest effort to do so. He seemed to lose all his interest in the transaction after the execution and delivery of the deed from Hoerling to Lowry. The Port Angeles lots are situated about seven miles from the business center of the city. There is some conflict as to their situation, and values are given from 50 cents a lot to \$75. R. L. Lowry purchased them about two years ago at \$1 per lot. We think from the record he would not have been justified in paying more. We do not deem it necessary to recite the facts further, nor to refer to any authority upon which to base our conclusion that this transaction was so tainted with fraud, both in law and fact, as to render it voidable. S. V. Lowry was the agent of both parties; he represented appellants in finding a purchaser for their property; he represented his brothers in seeking to effect an advantageous trade for the Port Angeles lots; he was not in a position to give appellants the benefit of an honest discretion in advising an exchange of their property for his brothers' vacant lots; such a dual relation on his part under the general equitable rule would make the contract influenced by him voidable. We see no facts in this record which would suggest any exception to such rule, or suggest that this is not a proper case for its application.

We might refer to other well-recognized principles of law that apply to cases of this character. They will, however, readily suggest themselves to those who read the law. Appellants were entitled to the relief they sought.

The judgment is reversed and the cause remanded, with instructions to enter the decree prayed for.

RUDKIN, C. J., and CHADWICK, FULLERTON, and GOSE, JJ., concur.

(58 Wash. 445)

TACOMA EASTERN R. CO. v. SMITHGALL et ux.

(Supreme Court of Washington. May 23, 1910.)

1. EMINENT DOMAIN (§ 243*)—NECESSITY OF APPROPRIATION — CONCLUSIVENESS OF DETERMINATION.

Where, in proceedings to condemn land for a railroad right of way, the court determined that the public interests required the taking, an answer alleging that the appropriation was sought for other and ulterior purposes was irrelevant.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 627; Dec. Dig. § 243.*]

2. EMINENT DOMAIN (§§ 79, 80*)—PROPERTY SOUGHT TO BE TAKEN—DESCRIPTION—STIPULATIONS.

Ordinarily, one seeking to condemn land should describe in his petition the property sought, but where an unanticipated claim for damages is interposed the petitioner may lessen

or obviate the claim by stipulation or waiver, whereby the damages claimed may be avoided and the rights of the owner fully protected.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 205, 210; Dec. Dig. §§ 79, 80.*]

8. EMINENT DOMAIN (§§ 79, 80*) — PROPERTY SOUGHT TO BE TAKEN—DESCRIPTION—STIPULATIONS.

Where, in proceedings to condemn land for a railroad right of way, the owner showed damages resulting from the inability to develop a water power on his land for utilization in operating a quarry, in consequence of the construction of the proposed road, the railroad could stipulate to agree with the owner for a joint use of the right of way for the development and utilization of the water power, and thereby avoid paying damages therefor.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 205, 210; Dec. Dig. §§ 79, 80.*]

4. WATERS AND WATER COURSES (§ 52*) — RIPARIAN RIGHTS.

An upper riparian owner may not impound all the waters flowing in a stream for 14 hours out of every 24, without the consent of a lower riparian owner or a condemnation of his rights.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 44; Dec. Dig. § 52.*]

5. EMINENT DOMAIN (§ 152*)—COMPENSATION—PERSONS ENTITLED—TITLE TO THING APPROPRIATED.

Where, in proceedings to condemn land for a right of way, the owner claimed damages from the destruction of a natural reservoir site on his land, in which the waters of a river flowing through his land could be impounded and thereby increase the power capacity of the river, an instruction that the owner, before impounding the waters, must obtain the consent of the lower riparian proprietors, or acquire their rights, before he could recover such damages, was proper.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 403; Dec. Dig. § 152.*]

Department 1. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Proceedings by the Tacoma Eastern Railroad Company to condemn the lands of Herman Smithgall and wife for a right of way. From a judgment awarding damages, petitioner appeals. Reversed, and new trial ordered.

Hayden & Langhorne, for appellant. A. H. Garretson, for respondents.

RUDKIN, C. J. This proceeding was instituted by the Tacoma Eastern Railroad Company to condemn and appropriate a right of way, 100 feet in width, through certain lands owned by the defendants, for railroad purposes. The jury returned a general verdict in favor of the defendants in the sum of \$1,822.66, accompanied by the following special findings: "First. What do you find to be the damage to the land in question, by reason of the taking of that part thereof by these proceedings in the ordinary natural state, irrespective of the proposed reservoir and the flow of water and granite quarry thereon located? Second. What damages do you find in addition to the taking of the land

in question by the plaintiffs herein, as asked for in addition to what the defendant would suffer, were the land in its natural condition devoid of water and the granite quarry thereon? Third. What damages do you find the plaintiff is entitled to recover by reason of the taking of the land by the plaintiff in these proceedings on account of the granite quarry, irrespective of the land in general and the flow of water? Fourth. Do you consider in the making up of the estimate that the value of said granite quarry is largely increased, owing to the natural flow of water upon the premises, sought to be taken by the plaintiff herein, and the reservoir facilities for the storing thereof? If so, what increased amount do you place upon said quarry by reason of water facilities over and above what the normal value of the quarry would be without the use of said water for working purposes?" Answers to special interrogatories: "(1) \$283.50. (2) \$539.16. (3) None. (4) Yes. \$1,000.00." A motion for a new trial was denied, and from a judgment on the verdict this appeal is prosecuted. The facts, so far as deemed necessary to a proper understanding of the errors assigned, will appear in the course of the opinion.

On the 30th day of August, 1909, an order was entered, adjudging that the contemplated use was a public one, and that the public interests required the prosecution of the enterprise. Thereafter, and at the opening of the trial before the jury, the respondents tendered and filed an answer containing the following allegations: "That the land herein sought to be condemned is not being taken by the petitioners, for the sole reason that they require the same for a more appropriate right as to interfere with, delay and in part destroy the efficiency and use of respondents' land for the purposes hereinafter mentioned. And is therefore unreasonable, unnecessary and not a proper taking of the land as contemplated by its right of eminent domain. That the respondents believe and allege that the said line is being located and built in large part as to destroy the efficiency and use of a valuable water power, now being and existing on the respondents' land. In that they have run their lines against the protest of these respondents, through and across respondents' proposed reservoir site on said land, and that if petitioners are permitted to carry out their plans, it will destroy in large part, the efficiency of the water power thereon existing. In that it would destroy the reservoir site, preventing the proper storage of water in the reservoir therein contemplated. That the respondents have upon this property a valuable quarry of merchantable granite, which can, by the proper use of the aforesaid water now existing upon said land, be quarried, mined, worked, finished and polished, and that ample power for the same can be so maintained as to make said

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

quarry very valuable to the respondents, if unmolested as contemplated by the railroad company, petitioner herein. That the railroad company has already sufficient right of way, and is now operating its line over said road, as selected by its engineers as the best and most practical route for its road. That at nowhere in its petition has the said railroad company declared its intention of abandoning its former route, and that to run a second line through the land cuts it into three separate strips, in a semicircular form, leaving the said land in an unsightly, inconvenient and almost worthless condition for agricultural purposes, and, as respondents believe, for the sole purpose of injuring these respondents, without any proper recourse in damages or otherwise. That respondents believe and aver the fact to be that their damages in the aforesaid action, by reason of the aforesaid allegation, cannot be adequately ascertained by the jury for the reason that the said land is remote from the place of trial, so that the jury cannot personally inspect the same, and that the procuring of witnesses to testify in this cause is burdensome and expensive by reason of the fact that no one from this county can reasonably be had to go and view and estimate the damages without great loss of time and heavy expense of travel. And therefore this action heaps upon the respondents burdensome costs and expenses, which should be carefully considered by the jury in making up their estimate of damages."

A motion to strike this answer was interposed, but the motion was denied, and the court permitted counsel for respondents to read the answer to the jury in the course of his argument, and to comment on its provisions, over the objection and protest of the appellant. Upon these rulings the first error is assigned. In *Seattle, etc., R. Co. v. Murphine*, 4 Wash. 448, 30 Pac. 720, and *State ex rel. Ami Co. v. Superior Court*, 42 Wash. 675, 85 Pac. 669, we held that no answer is contemplated or required in proceedings of this kind, and that it is not error to strike such an answer from the files. Of course, it does not follow from this that the refusal to strike an answer in a condemnation proceeding is prejudicial error, for if the answer contains nothing improper it can do no harm. But whether an answer is proper or improper in this class of actions the answer in question was utterly irrelevant and should have been stricken. It presented no issue, and its manifest purpose and tendency was to create a prejudice in the minds of the jury. The court had already decreed that the contemplated use was a public one, and that the public interests required the prosecution of the enterprise, and with these questions the jury had no concern. A claim before the jury that the appropriation was sought for other and ulterior purposes was entirely out of place. In *Fort St. Union Depot Co. v. Jackson*, 92 Mich. 33, 52 N. W. 790, counsel

for the property owner was permitted to argue to the jury that the taking of the property was unnecessary, but in reversing the judgment the appellate court said: "It is contended, however, by counsel for respondents, that the presentation of the question by argument of counsel could not have influenced the jury as they found the question of necessity in favor of the petitioner. I think that question is well answered by the learned circuit judge. He says: 'It was not sufficient to say that the jury found for the petitioner upon the question of necessity. This does not in any way meet the question. The petitioner was entitled to a just consideration of the question of compensation or damages to be awarded. The natural and inevitable effect of the arguments made is manifest. It would be difficult to conceive of an argument more effective, the certain and inevitable effect of which would be to influence the jury, and cause them to award the most extravagant and exorbitant damages.' The court again remarks: 'As we have seen, the jury, although judges of the law and fact, have no right to disregard well-recognized legal principles, and counsel who appear before them are governed by the same responsibility which governs them in court.' It is the duty of the court to interfere where matters foreign to the issue are rehearsed before the jury, prejudicial to the interests of a party. *Cronkite v. Dickerson* [51 Mich. 177] 16 N. W. 371; *Bond v. Railroad Co.* [62 Mich. 648] 29 N. W. 482 [4 Am. St. Rep. 885]; *Sullivan v. Deiter* [86 Mich. 404] 49 N. W. 261."

The argument applies with far greater force in this state, for with us the question of necessity is determined by the court, without the aid or intervention of a jury. For this error the judgment must be reversed, but in view of a retrial of the action the remaining assignments will be briefly considered. A reference to the special findings of the jury will show that the general verdict is made up of three items. The first two relate to the value of the property taken and damages to the remainder of the tract. The third claim or item arises out of the following facts: The proposed right of way extends for a distance of a half mile or more through the respondents' land, along or in close proximity to the banks of a stream called Tilton river. The river has a fall or drop of about 110 feet on the respondents' land, and flows sufficient water at its lowest stage to generate 60 electrical horse power. It is further claimed that there is a natural reservoir site on the land, in which the waters of the river can be impounded for 14 hours out of every 24, by the construction of a dam at moderate cost, thus increasing the power capacity of the stream to 145 horse power; that there is an undeveloped granite quarry on the respondents' land, across the river from the proposed right of way, containing large quantities of granite, suitable for building, paving, and other pur-

poses; that this quarry can be operated to advantage and at a profit by the utilization of the water power in question; that the reservoir site will be destroyed by the construction of the proposed railroad grade, and that the value of the quarry will be thus impaired. As soon as these facts were made to appear, or rather as soon as this claim was advanced by the respondents, the appellant, by permission of the court, filed the following stipulation or waiver: "The Tacoma Eastern Railroad Company, the petitioner in the above-entitled action, hereby stipulates and agrees to and with the defendant in said action, that said defendants may have the right to dam the waters of the Tilton river at a point on said river, below where the present located line of the Tacoma Eastern Railroad Company crosses the said Tilton river in the southeast quarter of the northwest quarter (S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$) Sec. 8, Tp. 13 N., R. 5 E. W. M., said dam to be built at the head of the falls, which are situated in said river below this point, said dam not to exceed eighteen (18) feet in height above the lowest point in said river at the place where said dam is proposed to be located. Said Tacoma Eastern Railroad Company does hereby consent to the backing up and impounding of the waters of said river over and upon its right of way and stipulates that the construction and operation of said line of railroad will in no way interfere with the use and enjoyment of said reservoir to be constructed by said respondents. And petitioner agrees to and with the said Herman Smithgall and his said wife, respondents in this action, that the final decree in this case shall contain a provision wherein and whereby all the agreements contained in this stipulation shall be embodied therein, and shall be and become part and parcel of the final decree to be entered in this action."

In view of the foregoing stipulation, the appellant requested the court to instruct the jury as follows: "I instruct you that the stipulation or agreement offered and received in evidence whereby the Tacoma Eastern Railroad Co. agrees to so construct its proposed line of railway over respondents' alleged reservoir site as not to interfere with the proposed use of the same is binding on the railroad company, and is to be considered by you along with all the other facts in the case, and if you find, from the evidence, that respondents will not suffer any damages by reason of the agreement of the railroad company to so construct its road over said reservoir site as not to interfere with the use of the same, then you should not allow any sum on that account." The court gave a portion of the instruction, but refused the part we have italicized, and upon this ruling the second error is assigned. Ordinarily the condemning party should describe in its petition the property it desires to take, but cases will often arise where an unanticipated claim for damages interposed by the landowner

may be lessened or entirely obviated by a stipulation or waiver on the part of the condemning party. The law does not favor the taking or damaging of property for a public use beyond the necessities of the case, and if damages may be avoided by a waiver or stipulation definite and certain in its terms, which will fully protect the rights of all parties concerned, there is no reason why such a stipulation should not be received and acted upon. *Lieberman v. Chicago, etc., R. Co.*, 141 Ill. 140, 30 N. E. 544; *Oregon Ry., etc., Co. v. Owsley*, 3 Wash. T. 38, 13 Pac. 186; *Spokane V. L. & W. Co. v. Jones*, 53 Wash. 37, 101 Pac. 515.

The respondents objected to the offer of the stipulation, claiming that the appellant was attempting to pay the damages sustained by stipulation rather than in money, but such is not the case. The stipulation simply limited the estate taken, and permitted a joint use of the right of way by both parties. We are therefore of opinion that the requested instruction should have been given, for if no damage resulted to the reservoir site under the stipulation none should be returned by the jury.

The appellant further requested the following instruction: "I instruct that before the respondents, Herman Smithgall and wife, would have the right to place a dam across the waters of the Tilton river, back up, or divert the waters of said river, they would have to obtain the consent of the lower riparian proprietors or acquire their rights by purchase, as it is the law in this state that the owner of land on the bank of a stream has a natural right to the use of the waters which flow in the stream adjacent to his land as it is wont to run without diminution or alteration." And its refusal is assigned as error. Under the common law and the law of this state every riparian owner has a right to have the waters of a natural water course flow through his land in their accustomed channel, without unnecessary diminution or pollution by an upper riparian owner, and it seems to us that a riparian owner may not impound all the waters flowing in a stream for 14 hours out of every 24, without the consent of a lower riparian owner, or a condemnation of his rights. The lower riparian owner may require the use of the water at all times during the 24 hours of the day for some lawful purpose, and if so, a use such as is asserted here by the respondents would be an unlawful interference with his rights. The instruction requested or one of similar import should have been given.

Other errors are assigned as to the amount of the recovery, but in view of a retrial of the action we do not deem it necessary to discuss them. For the errors above indicated, the judgment is reversed and a new trial ordered.

FULLERTON, CHADWICK, GOSE, and MORRIS, JJ., concur

(68 Wash. 429)

EVANS v. OREGON & W. R. CO. et al.
(Supreme Court of Washington. May 21, 1910.)

1. CONTRACTS (§ 237*)—MODIFICATION—CONSIDERATION.

Where a subcontractor found on entering on the work that it would be unprofitable and was about to abandon it, the promise of the principal contractors to pay him additional consideration was based on a sufficient consideration; the principal contractors having the election to hold the subcontractor answerable in damages or to make a new contract with him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1122; Dec. Dig. § 237.*]

2. CONTRACTS (§ 354*)—INCONSISTENT FINDINGS—JUDGMENT NOTWITHSTANDING VERDICT.

Where a subcontractor sued for additional compensation promised to him in case he would complete the work he had undertaken, and the court instructed the jury that they must find that there was some consideration for the contract, and that one promise is a good consideration for another promise, a special finding that the consideration for the promise of additional compensation was the fact that the principal contractors were under bond to complete the work within a stated time did not require a judgment for defendants notwithstanding the verdict on the ground that the special finding was inconsistent with the instructions, since the sufficiency of the consideration was for the court, and not for the jury, and the special finding stated a sufficient consideration.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 354.*]

3. APPEAL AND ERROR (§ 880*)—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR.

In an action by a subcontractor against a railroad company and the principal contractors, the principal contractors are not injured by the granting of a nonsuit in favor of the railroad and continuing the case against the principal contractors.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3584-3590; Dec. Dig. § 880.*]

4. CONTRACTS (§ 247*)—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action by a subcontractor against the principal contractors on a promise of additional compensation if the subcontractor would complete the work, evidence held to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1139; Dec. Dig. § 247.*]

5. APPEAL AND ERROR (§ 882*)—REVIEW—ESTOPPEL TO ALLEGE ERROR.

Defendants cannot contend on appeal that it requires clear, positive, and convincing evidence to establish the rescission of a written contract, where the court, at their instance, instructed that a preponderance of evidence was sufficient to establish that fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3002; Dec. Dig. § 882.*]

Department 1. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by J. S. Evans against the Oregon & Washington Railroad Company and others. From a judgment for plaintiff against defendants M. W. Dibble and another, they appeal. Affirmed.

Ellis, Fletcher & Evans, for appellants.
L. H. Schellbach and Hayden & Langhorne, for respondent.

GOSE, J. Prior to August 12, 1907, the appellants entered into a contract with the respondent Oregon & Washington Railroad Company for grading a part of its roadbed in Lewis county. On that date the appellants entered into a written contract with the respondent, Evans, by which they sublet to him a portion of the work. The respondent, Evans, commenced work under his contract, but, finding that the compensation agreed upon was inadequate, abandoned the work. The following day, at the instance of the division engineer of the railroad company, a Mr. Abbott, Evans and Abbott went to see the appellant Dibble, and informed him that Evans was dissatisfied, and had quit work. Evans then complained of the refusal of the appellants to pay a certain bill, and further said to them that he did not want to resume work because he had struck gumbo, and could not make anything. Abbott insisted that he should go on with the work, and stated in the presence of the appellant Dibble that, if he would continue and complete the work, "we will see that the bills are paid and you get a reasonable wage." Dibble was present, but said nothing further than to discuss the bill. The respondent Evans then resumed and completed the work, and, upon the refusal of the parties to pay a portion of the bills and his wages, brought this suit against his corespondent and the appellants to enforce the oral contract. At the close of his testimony, a motion for a nonsuit was granted as to the railroad company and denied as to the appellants. There was a verdict and judgment in favor of the respondent Evans against the appellants, and they have appealed.

The first point suggested by the appellants is that the oral contract, if made, was without consideration, and not enforceable. It is insisted that neither the promise to do, nor the doing of that which the promisor is by law or subsisting contract bound to do, is a sufficient consideration to support a contract in his favor. We cannot assent to this view of the law. We think the better rule is that, where a party has breached his contract and refused to perform it, it is optional with the adverse party to sue him for damages or waive the breach, treat the contract as abrogated, and enter into a new contract with the delinquent party. It would seem to be elementary that parties competent to contract can abrogate or rescind the contract and enter into a new contract touching the same subject-matter to be performed, in the same or a different way, upon a different consideration. In the case at bar the appellants had contracted to do certain work, and it was important to them that the work that Evans had agreed to perform should go forward. When he abandoned the work, they had the election to

hold him answerable in damages or to make a new contract with him. They chose the latter course, and cannot now be heard to say that the contract was nudum pactum. This position has abundant support in the authorities. "Where the contractor refuses to perform his contract, and the builder promises to pay him additional compensation in consideration of the continued performance of the contract, the authorities are not in accord on the question whether the promise for additional compensation is supported by a sufficient consideration. The prevailing rule seems to be, however, that such a promise is valid as an abandonment of the original contract and the creation of a new contract." 30 Am. & Eng. Enc. Law (2d Ed.) p. 1197. "The release of one from the stipulations of the original agreement is the consideration for the release of the other; and the mutual releases are the consideration for the new contract, and are sufficient to give it full legal effect." *Rollins v. Marsh*, 128 Mass. 116. In *Rogers v. Rogers & Bro.*, 139 Mass. 440, 1 N. E. 122, it was held that where one party has agreed to sell and the other has agreed to buy certain goods at a stipulated price, and the seller delivers a part of the goods but refuses to deliver the remainder except at an advanced price, the agreement of the purchaser to pay the increased price is binding upon him upon the delivery of the goods. In *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723, in an opinion by Judge Cooley, it was held that, where an ice company had contracted to deliver ice to a brewing company at a given rate, and, owing to a shortage in ice, refused to complete the contract unless a higher rate was paid, a note given by the brewing company for the ice at the increased price was based upon a sufficient consideration. In *Foley v. Storrie*, 4 Tex. Civ. App. 377, 23 S. W. 442, the plaintiff had agreed to deliver to defendant 1,000 cords of wood at \$4 per cord. Owing to the advance in wages, the plaintiff found that he could not make a profit on the contract, and so advised the defendant. Thereupon it was agreed that the defendant would pay \$5 per cord. The plaintiff then delivered 100 cords, and brought suit to recover the price on the new contract. It was held that the new contract was enforceable, and that "the parties had the right to rescind their contract or to modify it by mutual agreement." In *Coyner v. Lynde*, 10 Ind. 282, the defendant agreed with the plaintiff, the original contractor, to complete a portion of his contract for the construction of a part of a line of railroad at the price plaintiff was to receive, and to pay plaintiff a premium for the privilege of the contract. Later the defendant ascertained that the contract price was inadequate, and determined to abandon the work. The plaintiff, to induce the defendant to continue the contract to completion, agreed to release him from the payment of the premium, and the defendant

completed the contract. It was held that, when a party abandons his contract, the adverse party has his election to sue or make a new agreement, and, if in the new agreement he makes new or additional promises dependent upon the fulfillment of the contract, and the party abandoning the contract in consideration of the new promises completes the work, the promise is binding. In *Munroe v. Perkins*, 9 Pick. (Mass.) 298, 20 Am. Dec. 475, the plaintiff undertook to construct a cartway for the sum of \$900. After beginning the work, he ascertained that the price was inadequate, and determined to abandon the contract. Whereupon the defendant orally agreed to release him from the contract and pay him by the day, if he would complete the work, which he did; and, in an action to recover upon the second contract, it was held binding. The same principle is announced in *Cooke v. Murphy*, 70 Ill. 96; *Abbott v. Doane*, 163 Mass. 433, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. Rep. 465, and *Wilhelm v. Voss*, 118 Mich. 106, 78 N. W. 308. The rule contended for by the appellants was criticised by this court in *Brown v. Kern*, 21 Wash. 211, 57 Pac. 798, the court saying that it was not in accord with ethics, and ought not to be in accord with the law, to allow a creditor to compromise a debt for a less sum than the amount due, receive a sum of money on the compromise, and then permit him to repudiate the compromise and retain the benefits. We think the view we have expressed is supported by the reasoning of this court in *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117. It must be conceded, however, that the courts are not agreed upon this question, and judges of the highest ability have announced the view urged by the appellants. The view we have taken will permit greater freedom in contracting, and is, we think, more in harmony with the fundamental conception of contracts.

The court instructed the jury that they must find "that there was some consideration for the contract," and that "one promise is a good consideration for another promise." The respondent Evans did not except to this view of the law. The following interrogatory was propounded to the jury: "If you find from the evidence that there was an oral agreement entered into between the railroad company and Dibble-Hawthorne Company and the plaintiff, wherein the said defendants agreed to pay the plaintiff all past bills incurred, all future bills to be incurred in the prosecution of the work, and a reasonable wage to himself, state what the consideration for such promise was to the defendants Dibble and Hawthorne." The jury answered: "The fact that Dibble and Hawthorne were under bond to complete the work within a stated time." The appellants insist that the answer is in conflict with the instructions of the court, and that their motion for a judgment notwithstanding the verdict should have been granted. The con-

ention is untenable, for three reasons: (1) f the parties made an oral contract, the sufficiency of the consideration was a legal question for the determination of the court, and not a fact for the consideration of the jury; (2) the answer to the interrogatory necessarily implied that the minds of the parties met and that the oral contract was made, thus falling within the instruction that "one promise is a good consideration for another"; and (3) the consideration found was a sufficient consideration and within the evidence.

It is insisted that the court erred in substituting the case to the jury as to the appellants, and withdrawing it as to the railroad company, and that there is not sufficient evidence of the oral contract to support the verdict. The respondent is not complaining of the action of the court in granting the consult in favor of the railroad company. Obviously he is the only party injured thereby. In addition to the facts stated, there was evidence tending to show that, after making the alleged oral contract, the appellants kept the time of the men employed by Evans; that they did not do so before that time; and that they thereafter paid five bills or supplies, such as milk, hay, meat, and powder, which Evans had contracted in the prosecution of the work, aggregating over 500. They were not required to pay these bills under the written contract. The appellants stoutly denied making the oral contract, but admitted paying the bills mentioned, explaining that they did so, not as a duty, but at the request of Evans, when there was money due him. There is sufficient evidence, direct and circumstantial, to support the verdict. On the other hand, the jury might properly have found for the appellants. The issue was sharply drawn, and was determined adversely to the appellants upon sufficient evidence, and they must abide the result.

The authorities cited in the reply brief, holding that it requires clear, positive, and convincing evidence to establish the rescission of a written contract, have no application here; the court, at the instance of the appellants, having instructed that a preponderance of evidence was sufficient to establish that fact.

The judgment is affirmed.

RUDKIN, C. J., and FULLERTON, HADWICK, and MORRIS, JJ., concur.

12 Nev. 395)

STATE v. MARTEL. (No. 1,814.)

Supreme Court of Nevada. June 1, 1910.)
CRIMINAL LAW (§ 1172*)—INSTRUCTIONS—
HARMLESS ERROR.

The court instructed that a witness is presumed to speak the truth, but such presumption may be repelled by the manner in which he tes-

tified, the character of his testimony, or by contradictory evidence, but that the jury were the sole judges of his credibility, and that, "if any witness examined before you has willfully sworn falsely as to a material matter, you may disregard the entire evidence of such witness." Held, that the court's failure to add to the part above quoted the qualification, "except in so far as it is corroborated by other credible evidence," could not have prejudiced accused, in view of the fact that the great preponderance of the evidence showed guilt; the instruction as given not precluding the jury from considering the weight of a witness' testimony, though they believed him to have sworn falsely on a material matter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154–3163, 3169; Dec. Dig. § 1172.*]

Norcross, C. J., dissenting.

Appeal from District Court, Nye County.

William Martel was convicted of having burglar's tools in his possession with intent to enter a store, and he appeals. Affirmed.

J. H. Morris, for appellant. R. C. Stoddard, Atty. Gen., and L. B. Fowler, Deputy Atty. Gen., for the State.

SWEENEY, J. The defendant, William Martel, was indicted by the grand jury of Nye county, state of Nevada, for the crime of having in his possession instruments and tools with felonious intent to break and enter into a merchandise store in Tonopah, Nev. It appears from the evidence that the defendant, appellant herein, with two associates, were overheard planning the burglarizing of some building, and, upon being shadowed by the night officers of Tonopah, were arrested about midnight in the doorway of Ryan & Stenson's clothing store in Tonopah, Nev. Upon being apprehended and brought to the jail, the defendant was searched, and upon him were found two burglar or pick-lock keys, one file for making the same, black handkerchief mask wrapped around a Colt's six-shooter, which revolver was taken apart, some of which parts were concealed in his boot leg and others concealed in his underclothing; also cartridges and a razor fastened to his underclothing under his arm. Defendant was tried before a jury, found guilty, and sentenced by the court to serve a term of three years in the Nevada state penitentiary. From the judgment and order denying his motion for a new trial, defendant appeals.

Appellant assigns as error the following instruction given by the court: "You are the sole judges of the effect and value of the evidence introduced in this case. Your power, however, of judging in this regard, is not an arbitrary power, but it is to be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce a conviction in your minds against a less number, or against a presump-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion or other evidence satisfying your minds. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified, by the character of his testimony, or by contradictory evidence. You are the sole and exclusive judges of his credibility. If any witness examined before you has willfully sworn falsely as to any material matter, you may disregard the entire evidence of such witness."

Appellant maintains that the court erred in giving the above instruction, because in the last three lines of said instruction the district court omitted to add the following phrase: "Except in so far as it is corroborated by other credible evidence." While we believe the court could have with propriety added the phrase omitted and complained of, yet, in the present case, in view of the overwhelming preponderance of evidence conclusively proving defendant's guilt, we do not believe the omission of the same is prejudicial to the defendant's rights. *Turner v. State* (Miss.) 50 South. 629. The instruction as given, without the words complained of, did not preclude the jury from regarding the weight of any evidence given of any witness, even though they believed him to have sworn falsely on some material matter. Neither is there anything in the instruction given as would preclude the jury from considering the testimony of other witnesses corroborative of the same testimony which may have been given by a witness who might have testified falsely in some respect as to some material matter.

Other instructions given and complained of were thoroughly covered by other instructions given by the court. We believe it is unnecessary to consider them for the reason this court has repeatedly held that, where instructions cover the law, it is not error to refuse to give other instructions which have been covered by instructions previously given by the court of its own motion or otherwise. Other objections raised we have considered and find devoid of merit.

The judgment of the lower court is affirmed.

It is so ordered.

TALBOT, J., concurs.

NORCROSS, C. J. (dissenting). I am unable to concur in the affirmation of the judgment. In the giving of the instruction quoted in the prevailing opinion, I think the qualifying words, "except in so far as it is corroborated by other credible evidence," should have been added. In this particular case, however, the error was without prejudice for the reason that the defendant was the only witness in his own behalf, and was not corroborated by any evidence except in certain particulars by evidence offered upon

the part of the state, and in these particulars the evidence was without conflict.

I think, however, the court committed reversible error in this case in refusing all of the instructions requested upon the part of the defendant.

The gist of the offense charged was the felonious intent. Defendant's requested instructions Nos. 12 to 15, inclusive, were designed to impress upon the minds of the jurymen that the mere finding upon the person of defendant of tools and implements adapted to purposes of burglary was not alone sufficient to establish the criminal intent. The only instruction given by the court upon the subject of intent was of a most general character, and is as follows: "In every crime or public offense there must exist a union or joint operation of act and intention or criminal negligence. The intent or intention with which an act is done is manifested by the circumstances connected with the perpetration of the offense and the sound mind and discretion of the accused. As to the intent or intention with which the act charged is alleged to have been done, you must arrive at it from all the testimony in the case and from all the acts, conduct, and circumstances as shown by the evidence introduced before you. Criminal intent is usually proven as a deduction from declarations or acts."

Where an instruction, requested by the defendant, correctly states the law, it should not be refused by the court unless already allowed, substantially, in other instructions to be given. It cannot, I think, be said that the refusal to give these instructions was not prejudicial to defendant. The record shows that the jury had some difficulty in reaching a verdict and at one time reported that they were unable to agree upon a question of fact. An agreement was finally reached, and a verdict of guilty returned with a recommendation of mercy to the court. While the evidence was all circumstantial, it may be that a verdict of guilty would have been returned had these instructions been given; but that is a matter upon which courts are not permitted to speculate. The refused instructions went to a material point in the case, and were not, in my judgment, sufficiently covered by other instructions given.

(28 Okl. 155)

ST. LOUIS & S. F. R. CO. v. BEACH.
(Supreme Court of Oklahoma. May 10, 1910.)

(Syllabus by the Court.)

CARRIERS (§ 134*)—LOSS OF FREIGHT—ACTION FOR DAMAGES—EVIDENCE.

Evidence examined, and held not sufficient to charge the defendant with liability for the lost shipment.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 588-592, 607; Dec. Dig. § 134.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Error from Jackson County Court; E. E. Gore, Special Judge.

Action by B. F. Beach against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Flynn & Ames and R. A. Kleinschmidt, for plaintiff in error. Everett Petry, for defendant in error.

KANE, J. This was an action to recover damages for a shipment of meat lost in transit. The petition alleges, in substance, that on or about the 22d day of January, 1907, the plaintiff delivered to the defendant, at Stephenville, Tex., one box of meat to be delivered by the above-named defendant to this plaintiff at Altus, Okl.; that said meat was never delivered at Altus to the above-named plaintiff. There was judgment for plaintiff below, to reverse which this proceeding in error was commenced.

The evidence introduced at the trial tends to show that the box was delivered to the Ft. Worth & Rio Grande Railway Company at Stephenville, Tex., on the 22d day of January, 1907. Paragraph 6 of the bill of lading issued by said company reads as follows: "It is further stipulated and agreed that in case of any loss, detriment or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred by the terms of this contract, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage." The shipment did not arrive at destination at all. There was no evidence as to where the loss occurred, whether on the line of the Ft. Worth & Rio Grande Railway Company, the St. Louis & San Francisco Railroad Company, or other carrier. The petition of plaintiff alleges that the shipment was delivered to the defendant, and that it failed to transport the same to destination. In order to avoid the effect of variance between the evidence and the pleading the plaintiff endeavored to show that the Ft. Worth & Rio Grande Railway Company and the defendant company are in fact the same; that the St. Louis & San Francisco Railroad Company was liable for the shipment notwithstanding there was no evidence introduced showing that the shipment was lost while under its control.

For this purpose Cage Beach was called, who testified as follows: "Q. State your name, please? A. Cage Beach. Q. Where do you reside? A. Altus, Okl. Q. Did you, during the latter part of 1906, and the first part of the year 1907, bear any relation to the St. Louis & San Francisco Railroad Company? A. I was emigration agent for the Frisco for about four years. Q. What privileges, if any, of the railroad did that give you? By Mr. Stevens: Objected to as

immaterial. (Objection overruled. Defendant excepts.) A. Free transportation. Q. Over what railroad? A. Frisco System. Q. I will ask you if, on that transportation, you were allowed to travel over the Ft. Worth & Rio Grande? By Mr. Stevens: Objected to as incompetent, irrelevant, and immaterial. (Objection overruled. Defendant excepts.) A. Yes, sir. Q. I will ask you to state, if you know, from your relation with the Frisco Railroad Company, whether or not that railroad that runs from Ft. Worth, Tex., to Brownwood, Tex., and passes through Stephenville, Tex., is a part of the St. Louis & San Francisco Railroad. By Mr. Stevens: Objected to as incompetent, irrelevant, and immaterial, the proper foundation not laid, and the witness not shown to be qualified to answer. (Objection overruled. Defendant excepts.) A. Yes, sir; it is controlled by the Frisco System. By Mr. Stevens: The defendant moves to strike out the answer of the witness for the reason that the same is incompetent, irrelevant, and immaterial, and gives a conclusion of the witness, and is not the statement of any fact. (Motion overruled. Defendant excepts.) Q. I will ask you to state, if you know from your relation with the Frisco Railroad, whether or not they have a direct line of transportation and travel from Stephenville, Tex., to Altus, Okl.? By Mr. Stevens: Objected to as incompetent, irrelevant, and immaterial, witness not shown to be qualified to answer, and for the further reason that the question calls for a conclusion of the witness. (Objection overruled. Defendant excepts.) A. Yes, I rode over the Frisco System from here to Stephenville, Tex. By Mr. Stevens: I move to strike out the answer for the reason that the same is incompetent, irrelevant, and immaterial, not responsive to the question, and gives a conclusion of the witness. (Motion sustained on the ground that the answer is not responsive.) Q. I will ask you to state, if you know, as a fact whether or not the Frisco Railroad has a continuous line of railroad from Stephenville, Tex., to Altus, Okl.? By Mr. Stevens: Objected to as incompetent, irrelevant, and immaterial, witness not shown to be qualified to testify, and calls for a conclusion of the witness; not the best evidence. (Objection overruled. Defendant excepts.) A. Well, I will only answer it in this way: That I was an employe of the Frisco Railroad Company at that time, and my employers always represented to me that that was their system that I traveled over from here to Stephenville, Tex., and I had no transportation over any other road, only as they requested it for me. By Mr. Stevens: Objected to as incompetent, irrelevant, and immaterial, for the reason that the same is not responsive to the question, and that the same gives the result of hearsay testimony and investigation, and does not state any fact within

the knowledge of the witness, and we move the court to strike the entire answer from the record for that reason. (Motion will be sustained until it is shown what particular agents made the representations. Motion to strike out will be sustained.) Q. In what capacity were the parties acting that made these representations to you? By Mr. Stevens: Objected to as incompetent, irrelevant, and immaterial, and the proper foundation not laid. (Objection overruled. Defendant excepts.) A. S. A. Hughes, general emigrant agent; Charlie Janau, he is the chief clerk of the general passenger agent in A. Hilton's office; also the traveling passenger agent, Charles Sellers. By Mr. Stevens: The defendant objects to the testimony and moves to strike it out for the reason and upon the ground that it is hearsay, incompetent, irrelevant, and immaterial; that the authority of the respective parties named is not shown which would permit them to make any statement binding upon the defendant. (Objection overruled. Defendant excepts.) Q. State whether or not the parties just named represented to you that the continuous line of railroad from Stephenville, Tex., over which they furnished you— By Mr. Stevens: Objected to as incompetent, irrelevant, and immaterial, and the proper foundation not laid; the authority of the parties named not shown to be such as to bind the company. (Objection overruled. Defendant excepts.) A. They represented it as the Frisco System, but under different management from the St. Louis office as to transportation."

M. A. Snyder, as a witness for plaintiff, testified as follows: "Q. State your name? A. M. A. Snyder. Q. Where do you reside? A. Altus, Okl. Q. What is your occupation? A. Railroad agent. Q. For what road? A. Frisco. Q. I will ask you whether or not the Ft. Worth & Rio Grande is a part of the Frisco? A. To the best of my recollection, it is. Q. I will ask you whether or not the St. Louis & San Francisco Railroad has a continuous line from Stephenville, Tex., to Altus, Okl.? A. The Frisco System has. Q. That is all. Cross-examination by Mr. Stevens: Q. The Ft. Worth & Rio Grande Railway Company is an independent line under a separate and distinct management, is it not? A. To the best of my recollection. Redirect examination by Mr. Petry: Q. The Ft. Worth & Rio Grande is a part of the Frisco System, is it not? A. Well, not, so far as operating is concerned. It runs under a distinct set of officials. Q. But the real ownership and control of the Ft. Worth & Rio Grande is in the Frisco? A. I cannot say. Q. Did you not state in answer to my first question that it was a part of the Frisco System? A. So far as my recollection goes, it was. Recross examination by Mr. Stevens: Q. You have no personal knowledge of what

the traffic arrangement is between the Ft. Worth & Rio Grande and the Frisco System? A. I have not; no, sir. Q. And you know from your railroad experience that the Ft. Worth & Rio Grande and the Frisco Railroad Company are operated by separate and distinct officials? A. They are, yes."

It is contended by counsel for plaintiff in error that the attempt of the plaintiff to show such connection or relation between the Ft. Worth & Rio Grande Railway Company, the initial carrier, and the St. Louis & San Francisco Railroad Company, the defendant in this case, as to make the defendant liable, was wholly unsuccessful; that the evidence offered was largely hearsay and entirely insufficient to fasten any liability upon the defendant company. This contention is well taken. Most of the evidence introduced over objections of counsel was hearsay, and all of it was incompetent for the purpose for which it was offered. On this ground alone the judgment must be reversed.

The judgment of the court below is reversed, and the cause remanded, with directions to grant a new trial.

DUNN, C. J., and WILLIAMS, HAYES, and TURNER, JJ., concur.

(26 Okl. 191)

ÆTNA BUILDING & LOAN ASS'N v. WILLIAMS et al.

(Supreme Court of Oklahoma. May 10, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 82*)—SETTING ASIDE JUDGMENT—APPEALABLE ORDER.

An order setting aside a judgment by default on a cross-petition, rendered and entered at the same term, is interlocutory, and not final, and no appeal lies therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 478; Dec. Dig. § 82.*]

Error from District Court, Kay County; W. M. Bowles, Judge.

Action by the First National Bank of Ponca City against Nathaniel Williams and others. The Ætna Building & Loan Association, defendant, filed a cross-complaint. From an order setting aside a default judgment under the cross-complaint, the association brings error. Dismissed.

James Q. Lothan, for plaintiff in error. W. H. Moore, for defendant in error.

TURNER, J. On December 12, 1908, the First National Bank of Ponca City, defendant in error, plaintiff below, sued Nathaniel L. Williams and Sara L. Williams to foreclose a mortgage given by them to secure a debt of \$770.63, evidenced by promissory note dated January 12, 1906, on certain lots in Ponca City. Ætna Building & Loan Association, plaintiff in error, and the Ponca State

Bank, were made parties defendant. On January 11, 1909, the loan association filed a general denial, and by way of cross-complaint set up and prayed the foreclosure of a mortgage executed to them by the same parties on the same property on January 24, 1908, to secure a note for \$850. After demurrer thereto filed and overruled by said Williams and wife, they were given time to answer, which they failed to do, and on June 23, 1909, the cause coming on to be heard, said association appeared and took judgment by default on its cross-petition against said bank and the Ponca State Bank and said Williams and wife, declaring said mortgage to be a first lien upon said land, and ordering the same sold to satisfy its mortgage debt. On the next day said Williams and wife appeared and moved to set aside said judgment, showing cause. On September 7, 1909, one of the regular days of the same term, pursuant to said motion, said judgment was set aside by the court, to which the loan association excepted, and brings said order to this court for review.

The motion to dismiss this proceeding in error, on the ground that said order is not a final order, and therefore not appealable, must be sustained. The law in this case is governed by the law as laid down by this court in *Town of Byars v. Sprouls*, 103 Pac. 1038. See, also, *Merle & Heaney Mfg. Co. v. Wallace et al.*, 48 Neb. 886, 67 N. W. 883; *Smith et al. v. Livesey et al.*, 67 N. J. Law, 269, 51 Atl. 453; *Freeman Ad. v. Ambrose*, 12 Wash. 1, 40 Pac. 381; 2 Am. & Eng. Law, 108, note 1; *McCulloch v. Dodge et al.*, 8 Kan. 476.

The petition in error is dismissed. All the Justices concur.

(25 Okl. 874)

ELLIS et al. v. CARR.

(Supreme Court of Oklahoma. March 8, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 564*)—CASE-MADE—EXTENSION OF TIME.

A trial judge, after the time for making and serving a case-made as previously extended by the court has expired, has no power to extend further the time for making and serving a case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506; Dec. Dig. § 564.*]

2. APPEAL AND ERROR (§ 511*)—CASE-MADE—EXTENSION OF TIME.

A purported order of a trial judge extending the time in which to make and serve a case-made is without force, where the case-made fails to show affirmatively that such order was made, and where it does not appear that such order was ever filed in the case in the lower court or entered upon the record of the journals of the court, as required by section 4731, *Wilson's Rev. & Ann. St.* 1903.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2319-2321; Dec. Dig. § 511.*]

Error from District Court, Murray County; R. McMillan, Judge.

Action between D. F. Ellis and others and H. M. Carr. From the judgment, Ellis and others bring error. Dismissed.

H. A. Ledbetter and Fagan & Kendrick, for plaintiffs in error. Blanton & Andrews, for defendant in error.

HAYES, J. This is an appeal from an order overruling a motion for a new trial made on the 4th day of January, 1909. On the day the motion for a new trial was overruled, plaintiff in error was granted 60 days within which to prepare and serve a case-made. On March 1, 1909, an extension of time for a period of 90 days from March 6, 1909, was granted by the trial judge. There is inserted in the case-made what purports to be an order of the trial judge extending the time for a further period of 30 days. This purported order is indorsed on the application of plaintiff in error for a further extension of time in which to make and serve a case-made. The application is dated the 5th day of June, 1909. The order fails to show the date upon which it was made, but it must be presumed that it was made after the application therefor. The case-made was served on counsel for defendant in error on the 19th day of June, 1909. The time within which service could be had under the order of extension made on March 1st expired on June the 4th. The last order of the court further extending the time for 30 days is therefore void, for the reason that neither the court nor the judge thereof in vacation after the time granted on March 1, 1909, had expired had the power to extend the time previously granted. *London & Lancashire Fire Ins. Co. v. Cummings et al.* (not yet officially reported) 99 Pac. 654.

The assignments of error relied upon and urged in brief by plaintiff in error for reversal are such as can be presented only by case-made or bill of exceptions; and the case-made, not having been legally served, is void, and there is therefore nothing before this court that can be reviewed.

The motion to dismiss also presents another valid objection to the purported order extending the time for serving case-made. It is inserted in the case-made, but the case-made contains no recital that such order was made in the case, nor is the order in any manner identified in the case-made as having been made in the action; nor does it appear that the same was ever filed in the trial court or entered of record therein, as required by the statute. Section 4731, *Wilson's Rev. & Ann. St.* The failure of the case-made to show affirmatively that the purported order was ever made by the court or judge, or that the same was ever filed in the court below or entered of record, renders such order without force in this court. *Springfield Fire & Marine Ins.*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Co. v. Gish, Brook & Company (not yet officially reported) 102 Pac. 708.

The motion to dismiss is sustained.

DUNN, C. J., and KANE and TURNER, JJ., concur. WILLIAMS, J., not participating.

(26 Okl. 243)

VANSELLOUS v. HUENE.

(Supreme Court of Oklahoma. May 10, 1910.)

(Syllabus by the Court.)

1. FORCIBLE ENTRY AND DETAINER (§ 11*)—NOTICE TO QUIT—SUFFICIENCY.

In forcible entry and detainer it is not necessary that the names of the parties who claim the property should appear in the body of the notice to quit. It is sufficient if the names are signed to the notice given.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 53; Dec. Dig. § 11.*]

2. FORCIBLE ENTRY AND DETAINER (§ 29*)—NATURE OF PROCEEDING—EVIDENCE.

"Forcible entry and detainer," or "forcible entry and unlawful detainer," is a proceeding at law, and the right to possession is the sole question involved, and evidences of title are only material in so far as they tend to show right of possession, and no equities of parties can be determined.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Dec. Dig. § 29.*]

Error from District Court, Kay County; Wm. M. Bowles, Judge.

Action by Charles A. Huene against W. H. Vansellous. Judgment for plaintiff, and defendant brings error. Affirmed.

A. W. Comstock and L. A. Maris, for plaintiff in error. Anderson & Stratford, J. F. King, and Henry S. Johnston, for defendant in error.

KANE, J. This was an action for unlawful detainer, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover the possession of certain real estate. The plaintiff purchased the land from the heirs of a deceased Indian, and deeds thereto were issued to him. The defendant was in possession under a lease, and after his term expired refused to deliver possession of the premises to the purchaser. A trial before a justice of the peace resulted in a judgment in favor of the plaintiff, and a like conclusion was reached on trial in the district court on appeal. To reverse the judgment of the district court this proceeding in error was commenced.

When the cause was called for trial in the district court, after counsel made his opening statement, in substance as above, the court called upon counsel for defendant to state their case, to which counsel replied, "We simply wish to raise some legal questions." There were no pleadings filed except the complaint of the plaintiff, and counsel stated they wished to raise their legal ques-

tions on the introduction of evidence. The first question raised and argued in their brief is the one which appears in the record as follows: "And I wish to make the further objection that no notice was served on the defendant, as required by law, in that said notice fails to disclose the owner of the premises." The notice referred to above reads as follows: "Oklahoma Territory, County of Kay—ss.: Notice. To W. H. Vansellous: You are hereby notified to quit and leave and deliver up to me, at once the premises described as follows: The southwest quarter of the southwest quarter of section twenty-three and south half of the southeast quarter of section twenty-two all in township twenty-five north of range one, east of the Indian Meridian, in Oklahoma Territory, containing one hundred twenty acres, being all of Ponca allotment numbered two hundred eighty as shown by the Ponca Allotment schedule; for the possession of which I shall bring suit after three days under the forcible entry and detainer act. You will govern yourself accordingly. Witness my hand this 17th day of May, 1907, Chas. H. A. Huene, Owner of Said Premises." The point sought to be made is that the name of the owner of the premises must appear in the body of the notice, and that the signature affixed to the foot thereof, conjointly with the use of the words date and owner of said premises, is not sufficient. In the case of Oklahoma City v. Hill, 4 Okl. 521, 46 Pac. 568, it was held by the Supreme Court of the territory that: "It is not necessary that the names of the parties who claim the property should appear in the body of the notice; it is sufficient if the names are signed to the notice given." To the same effect are Conaway v. Gore, 22 Kan. 216, and Douglass v. Whitaker, 32 Kan. 381, 4 Pac. 874. The foregoing decisions seem to be decisive of the first question raised by counsel for plaintiff in error.

The next objection raises the question of the sufficiency of the deed to the plaintiff, and puts in issue the title to the property. We do not deem this a proper subject for trial in the present case. "Forcible entry and detainer," or "forcible entry and unlawful detainer," is a proceeding at law, and the right to possession is the sole question involved, and evidence of title are only material in so far as they tend to show right of possession, and no equities of parties can be determined. Anderson v. Ferguson, 12 Okl. 307, 71 Pac. 225. There are a great many other cases to the same effect in this jurisdiction; but the question is so well settled here and elsewhere that we do not deem it necessary to cite them.

As the foregoing are the only questions argued by counsel for plaintiff in error in their brief, it follows that the judgment of the court below must be affirmed.

DUNN, C. J., and WILLIAMS, HAYES, and TURNER, JJ., concur.

26 Okl. 216)

BUTLER v. STINSON.

Supreme Court of Oklahoma. May 10, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*)—REVERSAL—FAILURE OF DEFENDANT IN ERROR TO FILE BRIEF.

Where plaintiff in error has completed his record and filed it in this court, and has served and filed a brief in compliance with the rules of the court, and defendant in error has neither filed a brief nor offered any excuse for such failure, the court is not required to search the record to find some theory upon which the judgment may be sustained; and, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the petition of plaintiff in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. 773.*]

Williams, J., dissenting.

Error from Bryan County Court; Chas. A. Phillips, Judge.

Action between John Butler and Lizzie Stinson. From the judgment, Butler brings error. Reversed and remanded.

Abbott & McPherran, for plaintiff in error.

DUNN, C. J. This case presents error from the county court of Bryan county. The plaintiff in error duly prepared and filed a petition in error, with a case-made, on September 29, 1908. Thereafter, and on August 1, 1909, he prepared, served, and filed a brief in support of his petition in error. No brief has been filed on the part of defendant in error to this date, and no excuse or reason offered for such failure. An inspection of the brief of plaintiff in error discloses that it reasonably sustains the assignable error made therein, and on the authority of Reeves & Co. v. Brennan, 106 Pac. 959, Buckner v. Oklahoma Nat. Bank et al., 106 Pac. 959, Ellis et al. v. Outler et al., 106 Pac. 957, and Butler et al. v. McSpadden, 107 Pac. 170, the judgment is reversed, and the cause remanded to the county court of Bryan county.

TURNER, HAYES, and KANE, JJ., concur. WILLIAMS, J., dissents.

26 Okl. 161)

SMITH-WOGAN HARDWARE & IMPLEMENT CO. v. JOS. W. MOON BUGGY CO.

Supreme Court of Oklahoma. May 10, 1910.)

(Syllabus by the Court.)

CONTRACTS (§ 238*)—VARYING OR ABROGATING—POWER OF PARTIES.

At any time after a written contract has been entered into the parties may orally, on a fresh consideration, vary or abrogate it; or they may substitute for it a new written one.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1123; Dec. Dig. § 238.*]

2. PLEADING (§ 214*)—DEMURRER TO ANSWER.

On demurrer to an answer as defective, in that it does not state facts sufficient to constitute a defense, the pleading must be liberally construed, and all its allegations for the purposes of the demurrer taken as true. And such demurrer can be sustained only where the answer presents defects so substantial and fatal as to authorize the court to say that, taking all the facts to be admitted, they constitute no defense to the cause of action stated in the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

Error from Caddo County Court; B. F. Holding, Judge.

Action by the Joseph W. Moon Buggy Company against the Smith-Wogan Hardware & Implement Company. A demurrer to the answer was sustained, and defendant brings error. Reversed and remanded.

McKnight & Heskett, for plaintiff in error. P. L. Jorgenson, for defendant in error.

KANE, J. This was an action on a promissory note, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. The defendant answered, alleging, in substance: That said note was executed and delivered by defendant to plaintiff in consideration for goods, wares, and merchandise sold and delivered by plaintiff to defendant, consisting of buggies and vehicles, manufactured and made by the plaintiff. That at the time said goods were sold to the defendant the plaintiff executed a written guaranty, as follows: "If because of bad material or workmanship a wheel, spring or axle breaks within a year from date of purchase, it may be sent to us and we will repair or send duplicate, paying charges one way. We deliver goods on board cars in good order, free of charge, after which our responsibility ceases. We are not responsible for damages or delay while in transit, and cannot allow such claims. We pay no repair bills." That, while said guaranty provides that plaintiff will pay no repair bills, it was agreed by and between the plaintiff and defendant subsequent to said purchase and the execution of said guaranty that the defendant might repair or have repaired any and all parts of said goods, including the goods embraced in the above guaranty, which should break or become inoperative by reason of bad material or workmanship, and that plaintiff would reimburse said defendant for the amount expended in said repairs, or would give defendant credit for the value of such repairs furnished or provided for by said defendant. That relying upon said oral promise of said plaintiff through its agent to reimburse said defendant for said repairs as above stated, and by reason of the unmerchantable and unfit condition of said goods, and by reason of said latent defects therein existing, the defendant paid out and expended for repairs on said goods the sum of \$184.03, for which sum

they prayed a credit. To this answer the plaintiff filed a demurrer, upon the grounds: First, that defendant's second amended answer does not state facts sufficient to constitute a defense. Second, and for a special demurrer plaintiff alleges that defendant's alleged defense of implied warranty does not constitute any sufficient defense to plaintiff's petition herein. Third, and for a further special demurrer plaintiff alleges that defendant's alleged defense of subsequent oral contract by agent does not constitute any sufficient defense to plaintiff's petition herein. This demurrer was sustained, and, the defendant electing to stand on its answer, judgment was rendered against it, to reverse which this proceeding in error was commenced.

As we view the case, the only question in it is whether the answer states facts sufficient to show the execution of an independent contract subsequent to the sale of the goods and the execution of the written contract, excerpts from which are set out above. There can be no doubt that under the original written contract there could be no recovery, for that contract specifically stipulated that, "We pay no repair bills." It has been held by this court, in *McNinch v. Northwest Thresher Company*, 100 Pac. 524, that: "The execution of a contract in writing supersedes all the oral negotiations or stipulations concerning its terms and subject-matter which preceded or accompanied the execution of the instrument, in the absence of accident, fraud, or mistake of fact; and any representation made prior to or contemporaneous with the execution of the written contract is inadmissible to contradict, change, or add to the terms plainly incorporated into and made a part of the written contract." But the rule laid down in that case, and analogous cases cited by counsel for defendant in error, have no application to the question involved here. Whilst it is admitted that under the terms of the original contract no recovery for repairs may be had, yet the rule is that "at any time after a written contract has been entered into the parties may orally, on a fresh consideration, vary or abrogate it, or they may substitute for it a written one." *Bishop on Contracts* (2d Ed.) 174, and cases cited. This is the principle counsel for plaintiff in error invoke. It is true the answer is not as definite and certain as it should be to fully meet the requirements of good pleading; but we think it sufficient to withstand a demurrer. On demurrer to an answer, as defective, in that it does not state facts sufficient to constitute a defense, the pleading must be liberally construed, and all its allegations for the purposes of the demurrer taken as true. And such demurrer can be sustained only where the answer presents defects so substantial and fatal as to authorize the court to say that, taking all the facts to be admitted, they

constitute no defense to the cause of action stated in the petition. 6 Enc. of P. & P. p. 348.

The judgment of the court below is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

DUNN, C. J., and WILLIAMS, HAYES, and TURNER, JJ., concur.

(28 Okl. 326)

THOMPSON v. FOLSOM.

(Supreme Court of Oklahoma. May 10, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1010*)—REVIEW—SUFFICIENCY OF EVIDENCE.

The syllabus in *Oklahoma Farmers', etc., Ins. Co. v. T. J. Smith*, 106 Pac. 861, is made the syllabus in this case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1910.*]

Error from Marshall County Court; J. W. Falkner, Judge.

Action by Annie May Folsom, by her next friend, J. B. Ryburn, against H. L. Thompson. Judgment for plaintiff, and defendant brings error. Affirmed.

Potter & Potter, for plaintiff in error. Geo. E. Rider, for defendant in error.

TURNER, J. On October 19, 1906, Annie May Folsom, by her next friend, J. B. Ryburn, defendant in error, sued H. L. Thompson, plaintiff in error, before a United States commissioner at Madill, Ind. T., for \$68.75 rent due; and to enforce her lien as landlord, she alleged statutory grounds (*Mansf. Dig. § 4459* [*Ind. T. Ann. St. 1899, § 2926*]), and sued out a writ of attachment, which was levied on the crop grown that year on the demised premises, to satisfy the debt. After answer filed there was trial and judgment for plaintiff and against defendant and his sureties on the retaining bond. On trial anew to the court in the county court of Marshall county, where the cause was transferred on the advent of statehood, there was judgment for plaintiff and against defendant and his said sureties for said amount, with interest and cost, and defendant brings the case here.

Defendant for error assigns that the judgment is contrary to law, because, he says, the evidence fails to prove the relation of landlord and tenant between plaintiff and defendant. No evidence was offered by defendant. The plaintiff's evidence reasonably tends to prove that, while defendant was in possession of certain lands lying in what is now Marshall county, Okl., the same were allotted to plaintiff in the spring of 1906; that thereafter defendant planted a crop thereon, and agreed to attorn to plaintiff; that when the rent became due he gave her a check for the amount, which, when

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

presented, was not paid at the instance of defendant; that thereupon this suit was brought. We think the testimony shows, *prima facie*, the relation of landlord and tenant between the parties, and that the court did not err in so holding, and rendering judgment for plaintiff. *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111; *Cressler v. Williams*, 80 Ind. 306; *Howe v. Gregory*, 2 Ind. App. 477, 28 N. E. 776; *Decker v. Hartshorn*, 65 N. J. Law, 680, 46 Atl. 755.

Affirmed. All the Justices concur.

(26 Okl. 343)

RENDER v. HOOKER.

(Supreme Court of Oklahoma. May 10, 1910.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 695*)—NECESSITY FOR BILL OF EXCEPTIONS.

Where a cause is referred to a referee, to find and report the facts and conclusions of law to the court, and no bill of exceptions is allowed and signed by the referee, preserving all the evidence, this court cannot consider the question of the sufficiency of the evidence to support the findings of the referee.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2915; Dec. Dig. § 695.*]

Error from District Court, Cleveland County; C. F. Irwin, Judge.

Action between S. P. Render and J. W. Hocker. From the judgment, Render brings error. Dismissed.

Newell & Jackson, for plaintiff in error. S. T. Bledsoe, C. L. Botsford, and J. B. Thompson, for defendant in error.

KANE, J. The only questions raised by counsel for plaintiff in error in their assignment of error, and argued in their brief, are such as would require an examination of the evidence to review. The cause was tried to a referee, and it does not appear that he made all the evidence taken before him a part of the record by bill of exceptions. This precludes this court from passing upon such questions. "Where a cause is referred to a referee, to find and report the facts and conclusions of law to the court, and no bill of exceptions is allowed and signed by the referee, preserving the evidence, this court cannot consider the question of the sufficiency of the evidence to support the findings of the referee." *Wichita Mining & Improvement Co. v. Hale et al.*, 20 Okl. 159, 94 Pac. 530; *Campbell et al. v. Sherman*, 20 Okl. 185, 95 Pac. 238.

It is true there is incorporated in the record what purports to be a bill of exceptions allowed by the referee, but it does not contain all the evidence. The certificate of the referee thereto states that it "contains all the evidence introduced on the hearing of said cause, with the exception of the books of the bank, which are referred to in said

record and made a part of said record, and also Exhibit A attached to defendant's third amended answer, which was introduced in evidence and made a part of said record." This is not sufficient. All the evidence must be preserved. The foregoing cases, tried before the Supreme Court of the state, follow a long line of decisions by the Supreme Court of the territory of Oklahoma; so this question of practice has long since ceased to be an open one.

The appeal must be dismissed.

DUNN, C. J., and WILLIAMS, HAYES, and TURNER, JJ., concur.

(26 Okl. 159)

FT. SMITH & W. R. CO. v. WALKER.

(Supreme Court of Oklahoma. May 10, 1910.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 300*)—WRIT OF ERROR—DISMISSAL—MOTION FOR NEW TRIAL.

Application for a new trial unless unavoidably prevented except for the cause of newly discovered evidence must be filed within three days after the verdict or decision is rendered; where more than three days are permitted to elapse before the filing of the said motion, the trial court commits no error in overruling the same, and a petition in error filed in this court in which errors alleged to have occurred on the trial are relied on for reversal, will, in such a case, be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1740-1742; Dec. Dig. § 300.*]

Error from Pittsburg County Court; R. W. Higgins, Judge.

Action by T. K. Walker against the Ft. Smith & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Dismissed.

C. E. Warner and Horton & Smith, for plaintiff in error. Wallace Wilkinson, for defendant in error.

DUNN, C. J. This case presents error from the county court of Pittsburg county, in an action brought by defendant in error as plaintiff against the plaintiff in error as defendant for damages. There was trial to a jury and a verdict for plaintiff, on which judgment was rendered, and defendant has prosecuted the case to this court on petition in error and case-made, relying on errors which are alleged to have occurred on the trial. Counsel for plaintiff have filed a motion to dismiss the petition in error for the reason that the motion for new trial was not filed within three days after the verdict was rendered, as required by section 5827, Comp. Laws, 1909. It appears from the record that the verdict was rendered on the 5th day of June, 1909, and the motion for a new trial was filed on the 9th day of June, 1909, or four days thereafter. No plea of newly discovered evidence is made, nor is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
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there any showing that defendant was unavoidably prevented from filing the motion earlier. The statute above referred to provides: "The application for a new trial must be made at the term the verdict, report, or decision is rendered, and, except for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented."

Under the authority of the case of Board of County Com'rs of Pottawatomie County v. Grace, 99 Pac. 653, and Joiner v. Goldsmith (an opinion of this court recently rendered but not yet officially reported) 107 Pac. 733, the motion of counsel for defendant must be sustained and the petition in error is accordingly dismissed.

TURNER, WILLIAMS, KANE, and HAYES, JJ., concur.

(37 Utah, 401)

TERRY v. PETERSON et al.

(Supreme Court of Utah. April 26, 1910.)

1. GAMING (§ 50*)—ACTIONS FOR RECOVERY OF MONEY—DIRECTION OF VERDICT.

Evidence in an action by a wife to recover the proceeds of the sale of the homestead, lost by the husband in gambling, held insufficient to require the court to direct a verdict in favor of plaintiff.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 103; Dec. Dig. § 50.*]

2. GAMING (§ 50*)—ACTIONS TO RECOVER MONEY—INSTRUCTIONS.

In an action by a wife to recover money lost by her husband in gambling, the money being the proceeds of the sale of their homestead, the court charged that if the jury found that the money was gambled by the husband with the knowledge and consent of plaintiff, and not against her will, then she was not entitled to recover, since, where money is loaned or advanced with the understanding between the parties that it should be gambled, the lender becomes particeps criminis, and cannot recover for the money, and that, where a party advancing money to be used in gambling participates and shares in the gambling transaction thus promoted by his act, he becomes a particeps criminis, and he cannot recover the money. Held, that the charge was not objectionable as suggesting that plaintiff could not recover because she was particeps criminis and an accomplice to the criminal transaction, nor did it differ in principle from a requested instruction of plaintiff that to entitle her to recover the jury must find, among other things, that plaintiff's husband gambled the money without her consent, and contrary to her wishes.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 50.*]

Appeal from District Court, Weber County; J. A. Howell, Judge.

Action by Emma Maud Terry against Frank Peterson and Charles Creighbaum, doing business as the St. Louis Gambling Hall, under the name of Peterson & Co.

Judgment for defendants, and plaintiff appeals. Affirmed.

J. D. Skeen, for appellant. E. T. Hulaniski and A. R. Heywood, for respondents.

STRAUP, C. J. Plaintiff's husband owned in Weber county, Utah, a parcel of ground upon which they and their children lived. He sold it, and gambled away a portion of the proceeds of the sale. The plaintiff brought this action in her own name to recover the money from the defendants, alleged to have been gambled and lost by her husband at the defendants' gambling house in Ogden City. The case was tried to the court and a jury. A verdict was rendered in favor of the defendants. The plaintiff appeals.

The assignments relate to alleged errors in the charge of the court and the court's refusal to direct a verdict in favor of the plaintiff. We have no statute in this state permitting a recovery of money lost at gambling or wagering. The theory upon which plaintiff's case is predicated, and as stated in her complaint, is that the real estate, the title of which was in her husband's name, constituted their homestead; that when it was sold and conveyed her husband, in consideration of plaintiff's signing the deed of conveyance, agreed with her "that the proceeds of said sale were to be used and retained for the purpose of purchasing another homestead," and that in pursuance of such agreement they entered into a contract with another to purchase another home; that the husband, "contrary to plaintiff's instructions and against her will, without any consideration whatever, placed \$1,641.20 of said money in the custody of said defendants in the St. Louis Gambling Hall," their alleged place of business, "and that they have since held and they now hold said money for the use and benefit of plaintiff and her said family," consisting of two minor children.

It was shown by the evidence that at the time of the transaction referred to the plaintiff knew that her husband was, and prior thereto had been, addicted to gambling, and that he was an habitué of gambling resorts. She testified that, when they concluded to "sell their home and buy another," she made him promise her before she signed the deed of conveyance "that he wasn't to gamble any of the money—that, if he hadn't done, I would never in the world have signed the deed"—and that she exacted the promise because she was apprehensive that he might gamble the money. She further testified that the real estate sold was originally purchased by them with her husband's money, and that the title thereof was in his name; that they and their children resided upon it, and that it was sold for the sum of \$1,960, to be paid in cash, and the purchaser assume a mortgage indebtedness upon it; that \$100

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the proceeds were paid to her husband at the time of the sale; that he applied \$50 on the purchase price of the new home, and gambled the other \$50; that in March, 1908, \$450 more of the proceeds were paid to her husband, who applied \$200 thereof on the purchase price of the new home, and gambled away \$250; that on the 27th day of March of the same year the balance of the proceeds of sale, amounting to \$1,410, was paid to her husband, who with her knowledge deposited it in his own name in the bank where he had a bank account and did a banking business. She further testified that, before the last payment was made, she knew that her husband had gambled the amounts testified to by her, and that "he promised me faithfully he would not gamble any more, and I supposed he wouldn't gamble any more. It went on and went on, and Mrs. Robinson (the vendor of the new home) wasn't ready for us to pay the rest on the farm, so Mr. Terry he goes and gambles the money in the bank. I talked to him and pleaded with him, but it was no use. He had lost \$600 or \$700 of the last money before I knew he had been gambling the last time. I came to town, and had people go and get him out of the gambling halls." She further testified that she made no complaint, however, to any one except to her husband. The plaintiff also put in evidence her husband's bank account which showed his deposits, and the amount of checks drawn against it, from November 14, 1907, to August 1, 1908. The account showed that on the 26th day of February, 1908, when the real estate in question was sold, he had no credit balance, and that the amount of his deposits between the 26th day of February and the 1st day of August, 1908, was \$2,310. Her husband testified in her behalf that such deposits consisted of \$1,810 derived from the proceeds of the sale, and \$500 won at gambling. The account showing the amount of checks drawn out at different times does not show in whose favor they were drawn. He, however, testified with respect to the checks drawn by him between the 26th day of February, 1908, and the 1st day of August, 1908, and that he gambled most of them "at the St. Louis Gambling Hall," the defendants' gambling place, amounting in the aggregate to \$1,818. He further testified that some times he lost and some times he won; that on one occasion he won \$875 or \$900, and took the money home in his pocket and told his wife about it, but that some days later he returned to the St. Louis Gambling Hall and there lost it; that during the period in question he lost at that place all that he won there. He also testified that he gambled at five or six other gambling places in Ogden City, but always won at such places, and then went to the defendants' gambling place and lost such winnings. Counsel for plaintiff called his attention to particular checks, one by one, as shown by the bank account,

from February 26, 1908, to August 1, 1908, and asked him, "What did you do with that?" He answered: "That was gambled. Where? At the St. Louis Gambling Hall." Nowhere is it made to appear by his testimony or by other evidence in the case that he directly or indirectly gave or paid or lost any of the money to the defendants or either of them, or to any one for them, or that they or either of them directly or indirectly received any from him. Each time when he was asked what he did with the money checked out of the bank by him on particular checks to which his attention was called he merely answered that he gambled it at the St. Louis Gambling Hall. He did not testify, nor was it otherwise made to appear as to the manner in which the business was conducted, what games he played, or with or against whom he gambled or played, or whether the defendants or the house won or received any of his money. All that is made to appear in that regard is that he checked money out of the bank on particular checks and gambled it at the St. Louis Gambling Hall, the defendants' place of business. There being no evidence to show that the defendants or either of them received any of the money gambled by plaintiff's husband, we need not consider the question of the alleged trust relation between the plaintiff and her husband arising out of the facts that the real estate sold was their homestead, in which the plaintiff, as a wife, had an interest, and likewise had an interest in the proceeds derived from the sale of it, and therefore could follow them into whosoever hands they may have come without a lawful or valuable consideration.

Furthermore, the court was justified in refusing to direct a verdict in favor of the plaintiff in the sum of \$1,641.20, as requested by the plaintiff, because the evidence rendered it uncertain as to the amount of the alleged trust fund gambled at defendants' gambling hall. True, plaintiff's husband testified that he gambled at that place \$1,818, which was checked from his bank deposits. The amount of the deposits, consisting of \$2,310, checked against, was made up of \$1,810 derived from the proceeds of sale and \$500 won at gambling. The two were commingled and checked against indiscriminately. Between the dates stated, February 26 and August 1, 1908, the whole of the bank deposits was checked out by him, \$1,818 of which he gambled at the defendants' place of business, and \$500 of which he spent elsewhere and for other purposes. Of the \$1,818 checked out and gambled by him at the defendants' place of business it cannot be ascertained how much of that amount was of the deposits made up from the proceeds of the sale, and how much of the deposits made up from the moneys won at gambling. If the entire amount of \$500 won at gambling and deposited in the bank was included in the \$1,818 checked out by him and

gambled at the defendants' place, then he gambled at that place but \$1,318 of the alleged trust fund, or the difference between \$1,818 and \$500. It is just as inferable that a portion of the alleged trust fund—to the extent of \$500—was spent elsewhere than at the defendants' place, as that the whole of such fund was spent at their place.

For both reasons no error was therefore committed in refusing to direct a verdict as requested.

What we have said in respect of the insufficiency of the evidence to show that the defendants received any of the moneys gambled at their place by plaintiff's husband might well also dispose of the complaint made of the charge. Still, for other reasons, the plaintiff has no cause to complain of that. The court, at plaintiff's request, and in accordance with her theory, charged the jury that if they found that plaintiff's husband owned the real estate which was sold, and upon which she and her husband with their children resided as a homestead, and that, when it was sold, she signed the deed because of the agreement with her husband that the proceeds of sale should be applied to the purchase of another home, and that except for such agreement she would not have signed the deed, and if in pursuance of such agreement the husband held the proceeds of sale in trust for such purpose, and that he gambled and lost \$1,641.20, or any portion of the proceeds, in the gambling house of the defendants, without the plaintiff's consent and contrary to her wishes, then the plaintiff had the right to claim such money as exempt as against the defendants, and was entitled to recover. The court, however, further charged the jury, to the effect, that if they found that such agreement was not had, or if they found that the money was gambled by the husband with the knowledge and consent of the plaintiff and not against her will, then she was not entitled to recover, "for the court charges you that, where money is loaned or advanced with the understanding between the parties that it should be used in gambling, such party becomes particeps criminis, and cannot recover in a suit for the money, and that where a party advancing money to be used in gambling participates and shares in the gambling transaction thus promoted by his act becomes particeps criminis, and he cannot recover in a suit for the money." The criticism made of the last instruction is that there was no evidence to "justify the court in throwing out the suggestion to the jury that she (the plaintiff) could not recover because she was particeps criminis, an accomplice to the criminal transaction." We think no such suggestion was made by the court. The charge of the court, as was requested by the plaintiff, that, to entitle her to recover, the jury must find, among other things, that

plaintiff's husband gambled the money without her consent and contrary to her wishes, and the charge that, if they found that the money was gambled with her knowledge and consent or was advanced to him by her for such purpose, then she could not recover, were but statements in different form of the same principle. The court did not say, nor suggest to the jury, as is contended, that the plaintiff was a particeps criminis. What the court said was that where one lends or advances money to another with the understanding that it is to be used in gambling, and where such party participates and shares in the gambling transaction promoted by his act, he is particeps criminis, and cannot recover. The criticism which is made of the charge is therefore unfounded. The court charged the jury upon the theory of the case as stated by the plaintiff in her complaint, and as requested by her. No other portion of the charge is in conflict therewith, nor was there a wrong or inapplicable principle of law announced in other portions. The plaintiff therefore has no just cause to complain of the charge.

The judgment of the court below must therefore be affirmed, with costs. Such is the order.

FRICK and McCARTY, JJ., concur.

(87 Utah, 407)

ERICKSON v. CHILDS.

(Supreme Court of Utah. April 27, 1910.)

APPEAL AND ERROR (§ 1011*)—REVIEW—EVIDENCE TO SUSTAIN FINDINGS.

Where findings for either party would have been supported by some substantial evidence, the Supreme Court cannot interfere with the judgment below on the sole ground that the findings are not supported by any substantial evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Appeal from District Court, Sanpete County; J. F. Chidester, Judge.

Action by L. H. Erickson against Moroni Childs. From a judgment for plaintiff, defendant appeals. Affirmed.

Lewis Larson, for appellant. Christenson & Woolley, for respondent.

FRICK, J. Respondent brought this action to recover damages for trespass alleged to have been committed by appellant's cattle by eating and destroying respondent's lucern, which had been cut for seed, and while in the stack on respondent's land. Appellant's defense consisted of a general denial. Respondent had alleged his ownership of the lucern and the value thereof; that appellant's cattle had trespassed on respondent's

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(37 Utah, 304)

land and had caused the alleged damages. At the trial respondent adduced some evidence, direct and inferential, in support of every material allegation of his complaint, and the appellant also adduced evidence which, if believed, would constitute a complete defense to respondent's cause of action. The evidence was submitted to the court without a jury. Upon consideration of all the evidence, the court found the issues in favor of respondent, and entered judgment accordingly. Appellant caused the evidence adduced at the trial to be preserved in a bill of exceptions, and now presents the same, together with the judgment, to this court for review on appeal.

The only error assigned and argued by counsel for appellant is that the evidence is insufficient to sustain the findings of the court in certain particulars, which are duly specified. In this contention we cannot agree with counsel. While counsel was not required to raise the question of law, he now raises by a motion for a nonsuit; and, while he has forfeited no legal rights by not presenting it in that form, yet, if he had raised it when respondent rested his case, the court, in view of the evidence, would not have been justified in granting the motion, and, if we view the case in the light of the evidence in support of respondent's contention alone, then respondent's case, by reason of some admissions made by appellant at the trial, was as strong, if not stronger, when appellant rested as it was when respondent rested. It would subserve no good purpose, nor be of any material benefit either to the parties to this action, or to any one else, for us to set forth the evidence pro and con, or to assign special reasons why we think there is ample evidence, direct and inferential, to support the court's findings and judgment. It may be conceded that if the trial court had believed all that appellant and his witnesses testified to that the findings should have been in his favor, but it must also be conceded that it was the province of the trial court to determine and say upon what side, in view of all the circumstances, the weight of the evidence preponderated.

After a careful reading of all the evidence contained in the bill of exceptions, the conclusion is forced upon us that the record presents a case where findings for either party would have been supported by some substantial evidence, and, in view of this, we cannot interfere upon the sole ground that the findings are not supported by any substantial evidence, and that hence the judgment is erroneous.

The judgment, therefore, should be, and it accordingly is, affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

TYNG v. CONSTANT-LORAIN INVESTMENT CO.

(Supreme Court of Utah. March 9, 1910.)

1. TRIAL (§ 252*)—SUBMISSION OF ISSUES TO JURY—EVIDENCE.

It is error to submit to the jury an issue as to which there is no evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 596; Dec. Dig. § 252.*]

2. PRINCIPAL AND AGENT (§§ 124, 174*)—AUTHORITY OF AGENT—RATIFICATION—QUESTION FOR JURY.

In an action by a purchaser of real estate to recover a deposit of earnest money made with a bank under a contract of sale by correspondence, evidence held insufficient to present a question for the jury as to the authority of the bank to execute a formal contract of sale or as to ratification of such contract by defendant.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 724, 725; Dec. Dig. §§ 124, 174.*]

3. VENDOR AND PURCHASER (§ 57*)—OPTION TO PURCHASE—EFFECT OF SUBSEQUENT CONTRACT OF SALE.

Where a defendant by letters and telegrams agreed to give plaintiff an option to purchase land, a deposit of earnest money to be made in a designated bank, and the bank, without authority from defendant, executed a formal contract of sale, the terms of the option contract were to be determined by the correspondence, and not by the writing executed by the bank.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 87; Dec. Dig. § 57.*]

4. VENDOR AND PURCHASER (§ 341*)—REMEDIES OF PURCHASER—RECOVERY OF PRICE—ISSUES.

Where defendant, through letters and telegrams, gave plaintiff an option to purchase land, the price of the option to be deposited in a bank, and the bank, without authority from defendant, executed a formal contract of sale, and plaintiff, in an action to recover the deposit, based his action on the written contract, he was not entitled to recover on the contract as evidenced by the letters and telegrams.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1011; Dec. Dig. § 341.*]

Appeal from District Court, Third District; Geo. G. Armstrong, Judge.

Action by Charles Tyng against the Constant-Lorraine Investment Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Howat & Macmillan, for appellant. Henderson, Pierce, Critchlow & Barrett, for respondent.

STRAUP, C. J. R. A. Rowan, of Los Angeles, Cal., the president of the Constant-Lorraine Investment Company, a corporation, also of that city, in December, 1905, conveyed to it by warranty deed a parcel of ground 53½ feet by 165 feet situate on the west side of State street, in Salt Lake City, Utah, and in the same deed quitclaimed to it a strip 1½ feet by 165 feet adjoining the 53½ feet on the south. The title so conveyed to the company was all the title held by Rowan. The strip quitclaimed was occupied by a wall of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a building on land of another adjoining the strip on the south. Neither Rowan nor the company ever had possession of the strip occupied by the wall. The deed from Rowan to the company was made subject to a mortgage of \$20,000 covering both strips (55 by 165 feet), and was recorded January 4, 1906. The plaintiff, residing at Salt Lake City, made known to the Equity Investment Company of Salt Lake City, and to Thomas E. Rowan, a real estate agent also of that city, a desire to purchase property on the west side of State street, and in the vicinity of the land in question. Thomas E. Rowan was not related to R. A. Rowan. On the 4th day of September, 1907, Thomas E. Rowan, at Salt Lake City, wired R. A. Rowan, at Los Angeles: "Advise cash price west side state taxes prorated whether leased." R. A. Rowan answered the next day: "Will accept fifty thousand dollars. Property now mortgaged for twenty thousand at five per cent. Leases very short. See Kelsey and Gillespie for exact information." On that day Thomas E. Rowan again wired R. A. Rowan: "Responsible party offers one thousand for thirty days' option recommend." R. A. Rowan answered by wire: "Los Angeles, Calif. Sept. 6, 7, 1907. Thos. E. Rowan, Salt Lake, Utah. Will accept one thousand for thirty days' option for property west side State street. Price fifty thousand subject to twenty thousand mortgage. Balance thirty thousand to be paid in cash on or before thirty days from date. Taxes to be prorated. One thousand to be deposited to my credit immediately with National Bank of Republic, they to notify me by wire. R. A. Rowan."

Upon receipt of this, plaintiff paid to the Equity Investment Company \$1,000, who deposited it with the National Bank of the Republic to the credit of R. A. Rowan. The bank thereupon gave the Equity Investment company the following receipt and writing: "Salt Lake City, September 9, 1907. Received of the Equity Investment Company one thousand (\$1,000) dollars as a deposit on account of the purchase price of the following described real property in the county of Salt Lake, state of Utah [describing the parcel of ground 55 feet by 165 feet], which property the Equity Investment Company agrees to buy for the sum of fifty thousand (\$50,000) dollars, payable as follows: Thirty thousand (\$30,000) dollars on or before thirty days from the date of this receipt. The above-mentioned deposit of one thousand (\$1,000) dollars to be applied as a part of said payment. The balance of twenty thousand (\$20,000) dollars to be covered by a mortgage for that amount now on the property, which mortgage the Equity Investment Company agrees to assume and pay. The property to be deeded by a warranty deed free of all incumbrances, except aforesaid mortgage of twenty thousand (\$20,000) dollars and the general taxes for the year 1907. The Equity Investment Company agrees to pay their proportion of the

said taxes from the date possession is delivered to them. This deposit is made with the National Bank of the Republic, and accepted by them under authority of the following telegram from R. A. Rowan: 'Los Angeles, Calif., Sept. 6, 7, 1907. Thos. E. Rowan, Salt Lake, Utah: Will accept one thousand for thirty days' option for property west side State street. Price fifty thousand, subject to twenty thousand mortgage. Balance thirty thousand to be paid in cash on or before thirty days from date. Taxes to be prorated. One thousand to be deposited to my credit immediately with the National Bank of Republic, they to notify me by wire.- R. A. Rowan.' If the Equity Investment Company does not complete the purchase of said property within the time and manner above specified, then this deposit shall be forfeited to the seller as liquidated damages. National Bank of the Republic, by Frank Knox, Pr."

At the same time and place the Equity Investment Company assigned and delivered the writing to the plaintiff. The assignment was indorsed on the back of the writing. On the 20th day of September, 1907, R. A. Rowan, as president, and P. D. Rowan, as secretary, of the Constant-Loralne Investment Company, at Los Angeles, executed and mailed to the bank at Salt Lake City a deed to the Equity Investment Company, conveying and warranting to it 53½ feet by 165 feet, and in the same instrument quitclaimed to it 1½ feet by 165 feet, the strip occupied by the wall, being all the title held by it to the property, and being the same and all the title theretofore conveyed to it by R. A. Rowan. On the 9th day of October, the last day of the option, the plaintiff tendered the bank \$29,000, and demanded a deed. The bank tendered him the deed, which was executed and forwarded by R. A. Rowan. The plaintiff refused to accept it on the ground that it contained a warranty for only 53½ feet, and demanded a warranty deed for the entire 55 feet, and as stipulated by the contract executed by the bank. He refused to pay any part of the \$29,000 until such a deed was executed and tendered by the defendant. Such a deed was not tendered.

In a letter from R. A. Rowan to Thomas E. Rowan, the former, on the 9th day of October, wrote: "I wired you yesterday as follows: 'No one ever had authority to sell the property in question for less than fifty thousand, and that is a special price, having always held it before at \$58,500. Can only sell the property as I bought it and giving the same deed I received. Mr. Holloran, the former owner, is acquainted with the particulars of this property, and am sure he will assist you in any way possible.' Of course, you understand that I have never given you the exact frontage of the State street lot, but have always said it was about fifty-five feet, and I believe that is the exact dimension, although we only have a warranty deed for 53½ feet, and a quitclaim deed for the balance which I am in turn giving to your peo

ple. I can only sell what I have, and I will not reduce the price from \$50,000 as I know this is less than it is worth. I hope that you will be able to put the sale through without any trouble."

The contention of the plaintiff is stated in a letter written by his counsel on the 9th day of October, 1907, and addressed to the bank, R. A. Rowan, and the Constant-Lorraine Investment Company. They wrote: "On the 9th day of September, 1907, you gave a contract to the Equity Investment Company to sell the following parcel of real estate, situate in Salt Lake county, Utah, to wit: [Describing a parcel of ground 55 by 165 feet.] At which time \$1,000 was paid upon the purchase price. The contract provides for the payment of \$29,000 more on or before the thirty days from date of the contract. Your contract also provides that you shall furnish a warranty deed to the property, and that the property shall be free of incumbrances except the \$20,000 mortgage. Upon the examination of the title to the property, I find that you can deliver only 53½ feet of the property; that the south 1½ feet is not owned by you or either of you, but is occupied by a wall on the adjoining property on the south. The contract above referred to has been assigned to me. This is to notify you of the facts stated in this letter, and also demand that you return to me forthwith the \$1,000 heretofore paid on the purchase price."

The \$1,000 was not returned. Thereupon the plaintiff brought this action against the Constant Lorraine Investment Company, based on an alleged breach of the contract or writing executed by the bank, arising from the failure of the Constant-Lorraine Investment Company to tender and give a warranty deed for the whole of the 55 feet as stipulated by the terms of that contract, and its refusal to return the \$1,000 paid by plaintiff or his assignor. A judgment was prayed for in the sum of \$1,000 and interest. The answer was in effect a general denial. The case was tried to a jury. A verdict was rendered for the plaintiff. The defendant appeals.

The defendant requested the court to direct a verdict in its favor on the grounds, among others, that there was not sufficient evidence to show that the bank had any authority to execute the contract sued on, or to bind either the defendant or Rowan thereto, or that the defendant had thereafter ratified or adopted the contract, and that it was not shown that the contract executed by the bank and declared on was made on behalf, or for the benefit, of the defendant; if the contract was not the personal contract of the bank but was made in behalf, or for the benefit, of another, it was for the use and personal benefit of R. A. Rowan and not the defendant. The court refused the request, and instructed the jury that before the plaintiff was entitled to recover he was required to prove that the writing or agreement executed by the bank and sued on "was made for and on behalf of, and

by the authority of, the said defendant (Constant-Lorraine Investment Company), or that after the making of the same said defendant ratified and adopted said agreement."

Assuming all that R. A. Rowan did in the premises was done for and in behalf of the defendant and for its benefit, and that the jury were justified in finding that his acts in the transaction were the defendant's acts, still we are of the opinion that there is not sufficient evidence to show that either R. A. Rowan or the defendant had conferred any authority upon the bank to execute the contract in question, or that either thereafter ratified or adopted it. On the face of the contract it appears to be signed by the bank in its own name, and not for or on behalf of either R. A. Rowan or the defendant. If, however, it was in fact signed by the bank in behalf, and for the benefit, of another, then the only evidence authorizing the bank to do so is the telegram attached to the contract. That telegram did not authorize it to do anything in the transaction except to receive the payment of the \$1,000 and to deposit it to the credit of R. A. Rowan. It did not authorize the bank to make a contract of purchase, nor to stipulate the terms thereof, nor to warrant the title to 55 feet, or to any other number of feet. So far as appears by the telegram, the only authority of the bank was that of a mere depository, which was disclosed to both the Equity Investment Company and to the plaintiff. There is no evidence to show that it had any other authority. When the court submitted to the jury the question whether the contract was made "by authority of said defendant," the jury had the right to assume that there was some evidence from which they might make a finding that the defendant had authorized the making of the contract. We find no such evidence.

Neither do we find any evidence that the "defendant ratified and adopted said agreement." So far as the record discloses, the first knowledge that R. A. Rowan had that the plaintiff claimed the right to a warranty deed for 55 instead of 53½ feet of ground was the telegram sent by Rowan to Thomas E. Rowan, the contents of which were stated in his letter of October 9th, heretofore referred to. But instead of ratifying, he repudiated the authority. Again, on the 24th day of October, the first time R. A. Rowan made any reference to the bank contract, he again wrote to Thomas E. Rowan: "Am having my attorney look over the contract given by the National Bank of the Republic, and if I am not legally bound to return this sum I will not do so, as I am not morally bound to return it, and in justice should not do so. My telegram was embodied in the contract, and the contract was really based upon the telegram, and from the best advice that I can get at this writing I do not believe that I will be obliged to return it." The correspondence from R. A. Rowan to Thomas E.

Rowan after the 9th day of October is, however, not of much significance, for at that time plaintiff, through his counsel, in a letter written by them and heretofore referred to, did not express a willingness to pay the \$29,000 on a tender of a good title by warranty deed to the 55 feet of ground, but unconditionally demanded a forthwith return of the \$1,000. By that letter the plaintiff regarded the breach complete, and, so far as he was concerned, treated the transaction as ended. Nothing is made to appear that anything subsequently said or done by R. A. Rowan or the defendant in any way influenced his conduct in the premises, or induced him to take any other or different position from that taken by him in his letter of October 9th, declaring a breach and an immediate and unconditional return of the \$1,000.

It, however, is claimed by counsel for respondent that R. A. Rowan "knew what was in that receipt, either by having a copy of it sent to him or else by having its contents communicated to him." There is no evidence that a copy was sent him, or that the contents thereof were otherwise made known to him before plaintiff's tender of the \$29,000 and his refusal to accept the tendered deed. If a copy of the contract was sent, or the contents thereof communicated, to R. A. Rowan before that time and before the controversy arose, such facts could readily have been shown. It is argued, however, that he must have known of the terms of the bank contract on September 20, 1907, when he executed the deed to the defendant, because he put the name of the Equity Investment Company in the deed as the grantee, and that the name of such grantee could not have been acquired except from the contents of the bank contract. The information that it was the Equity Investment Company who paid the \$1,000 and who held the option could readily have been obtained by R. A. Rowan from sources other than the contents of the contract. The question is not, Did Rowan know that the Equity Investment Company paid the \$1,000 and obtained the option? but, Did he know that the bank had agreed to convey and warrant 55 feet of ground, or that it had made any agreement in respect of the terms of the option and purchase? We do not think the evidence sufficient to show a ratification of the contract sued on.

Furthermore, we are of the opinion that the terms of the option are evidenced, not by the writing or receipt given by the bank, but by the telegrams which passed between Thomas E. and R. A. Rowan. In those are found the offer, the acceptance, and the terms of the option. It is unnecessary to determine the legal effect of the contract as evidenced by the telegrams, or whether the defendant complied with the terms thereof by tendering a warranty deed to only 53½ feet and a quitclaim deed to 1½ feet, for the reason

that the plaintiff did not declare on that contract, but did declare on the contract made by the bank. The case was predicated alone on the latter contract, and the court submitted it to the jury on that theory, and required them to find, before they could render a verdict for the plaintiff, that the contract signed by the bank was made by authority of the defendant, or that it was thereafter ratified and adopted by it. There being no evidence in support of such issues submitted to the jury, the court erred in refusing to take the case from the jury, and again erred in refusing the defendant's motion for a new trial.

The judgment of the court below is reversed and the case remanded for a new trial. Costs to appellant.

FRICK and McCARTY, JJ., concur.

(37 Utah, 212)

SOWARDS et al. v. MEAGHER et al.

(Supreme Court of Utah. Jan. 22, 1910.)

1. EVIDENCE (§ 34*)—JUDICIAL NOTICE—ACTS OF CONGRESS.

Judicial notice is taken of an act of Congress restoring Indian reserved lands to the public domain.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 49, 50; Dec. Dig. § 34.*]

2. WATERS AND WATER COURSES (§ 26*) — PUBLIC WATERS—APPROPRIATION.

The right to use unappropriated waters on the public domain and a right in the land itself are severable; the former not depending upon the latter.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 17; Dec. Dig. § 26.*]

3. WATERS AND WATER COURSES (§ 9*)—APPROPRIATION—LAWS GOVERNING.

Acquisition of the right to use unappropriated public waters, whether on the public domain, within a reservation, or elsewhere, is controlled by the laws and customs of the state in which the water is found.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 4; Dec. Dig. § 9.*]

4. WATERS AND WATER COURSES (§ 23*) — PUBLIC WATERS—RIGHT TO APPROPRIATE.

The right to use waters on the public domain for a beneficial purpose may be acquired by mere appropriation, and the first appropriator takes against the world to the extent of his established appropriation, though at the time of his application to the state engineer he has no present right in the lands bordering the source of supply nor in the lands to be benefited; he being entitled to conduct the water across intervening public land to irrigate lands held by him or others or to dispose of it for a beneficial purpose on lands held or owned by them.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 15, 18; Dec. Dig. § 23.*]

5. INDIANS (§ 12*)—RESERVATIONS NOT SUBJECT TO PRIVATE APPROPRIATION.

No private rights in the lands of an Indian reservation can be acquired.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 27, 28; Dec. Dig. § 12.*]

6. EVIDENCE (§ 23*)—JUDICIAL NOTICE—OPENING OF PUBLIC LANDS.

Judicial notice is taken of the opening of an Indian reservation in the state and restoration of the unallotted lands thereof to the public domain, but not that particular tracts thereof have since been occupied, claimed, or possessed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 29, 30; Dec. Dig. § 23.*]

7. WATERS AND WATER COURSES (§ 12*) — PUBLIC LANDS—ACQUISITION OF RIGHTS.

Under Comp. Laws, § 1288x et seq., prescribing procedure for the appropriation of public water, an inceptive right to use such water upon or within an Indian reservation can be initiated or acquired after issuance of a proclamation restoring the lands to the public domain but before they are subject to entry, if the application be made in good faith to appropriate the water for a beneficial use, and not for speculation or monopoly.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 5; Dec. Dig. § 12.*]

8. WATERS AND WATER COURSES (§ 12*)—"APPROPRIATION OF WATER"—ESSENTIALS.

To constitute a valid appropriation of water, there must be intent to apply it to a beneficial use, a diversion from the natural channel by a ditch, canal, or other structure, and an application of it to a useful industry within a reasonable time; the last-mentioned element being the most essential.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 5; Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, vol. 1, pp. 473, 474; vol. 8, p. 7580.]

9. WATERS AND WATER COURSES (§ 12*)—APPLICATION FOR APPROPRIATION—EFFECT.

An application to the state engineer for permission to appropriate public water is merely notice of intent to appropriate, and does not establish an appropriation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 5; Dec. Dig. § 12.*]

10. WATERS AND WATER COURSES (§ 24*)—APPROPRIATION—EXTENT OF RIGHTS.

Rights under an appropriation of water are limited to the quantity actually used for a beneficial purpose.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 16; Dec. Dig. § 24.*]

11. WATERS AND WATER COURSES (§ 19*)—APPROPRIATION—CONFLICTING RIGHTS.

To establish a right to appropriate water, one must rely on the strength of his own right, and not on the weakness of his adversary's.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 11, 12; Dec. Dig. § 19.*]

Appeal from District Court, Fourth District; J. E. Booth, Judge.

Action by N. G. Sowards and another against N. J. Meagher and others. From a judgment dismissing the action, plaintiffs appeal. Affirmed.

D. W. Moffat and N. T. Porter, for appellants. Thurman, Wedgwood & Irvine, for respondents.

STRAUP, C. J. The appellants, plaintiffs below, filed an application with the state

engineer for the appropriation of waters of the East fork of Lake fork of Green river, which has its source in Wasatch county, and flows southwesterly into the Du Chesne river, a tributary of the Green. By reason of such application, they claim to have initiated a right to the use of 300 second feet of water of such stream for irrigation purposes. Upon a protest filed by the respondents, the defendants below, who also filed applications for an appropriation of the same waters, plaintiffs' application was rejected and the respondents' approved by the state engineer. The plaintiffs then brought this action in the district court of the Fourth judicial district against the defendants to adjudicate the questions involved.

In their complaint it is alleged that on and prior to the 28th day of August, 1905, there were 300 second feet of unappropriated water of the stream, and that on that day, "at the hour of 20 minutes after 9 o'clock in the forenoon," they (the plaintiffs) "filed in the office of the state engineer of the state of Utah" their application in writing to appropriate 300 second feet of water to be used each year from January 1st to December 31st, to be diverted from the Green river system, Wasatch county, at a particularly described point on the East fork of Lake fork of Green river. In such application the diverting works and channels were described, the purpose of such appropriation stated to be for irrigation, and the lands proposed to be irrigated, consisting of a total area of 33,680 acres, described by reference to legal subdivisions. It is further alleged that the defendant Meagher on the 31st day of July, 1905, and the defendant Jarvis, on the 19th day of August, 1905, made applications to appropriate the same water by filing written applications with the state engineer, but that at the time of such filings "all of the said waters applied for" by them "the proposed point of diversion, and the lands proposed to be irrigated, were all a part of, and included in, an Indian reservation within the state of Utah set apart exclusively for the use and occupation of the Indian wards of the federal government, which was reserved from the public domain and under the exclusive control of the United States of America, and that all matters and things pertaining to the appropriation of said water were done upon the Indian reservation so exclusively controlled as herein set forth, and that these plaintiffs filed the first application to appropriate the waters" of the stream in question "after the opening of said reservation." It is further alleged that the rights of the defendants Meagher and Jarvis, acquired by them by reason of their applications, were assigned to the defendant the Dry Gulch Irrigation Company, who, in March, 1907, "protested the granting of these plaintiffs' ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plication," which was in June, 1907, rejected by the state engineer on the sole ground that their application "is in conflict with the prior applications" of the defendants Meagher and Jarvis. It is further alleged that the defendants have no right, title, or interest whatsoever in or to any portion of the water applied for by the plaintiffs; that they be required to set forth whatever rights or interests are claimed by them; that such claims be adjudged to be unfounded and of no effect; and that plaintiffs' rights and title in and to the use of the waters be determined, quieted, and confirmed. A general demurrer for want of facts was interposed to this complaint, which was sustained by the trial court. The plaintiffs stood on their complaint and declined to amend. The action was thereupon dismissed. They appeal.

The only question presented for review is the ruling of the court sustaining the demurrer. The statute (Comp. Laws 1907, § 1288x et seq.), so far as necessary here to notice, provides that, in order that one may acquire the right to the use of any unappropriated public water, he shall make an application in writing to the state engineer, setting forth, among other things, the nature of the proposed use for which the appropriation is intended, the quantity of water to be used, the time during which it is to be used each year, the name of the stream or source where the water is to be diverted, the nature of the diverting works, the dimensions, grade, shape, and nature of the proposed diverting channel, and such other facts as will clearly define the full purpose of the proposed appropriation. It further provides that, "if the proposed use is for irrigation, the application shall show, in addition to the above required facts, the legal subdivisions of the land proposed to be irrigated, with the total area thereof, and the character of the soil." It is further provided that, if the application is conformable to the requirements of the statute, the engineer shall receive and record it, and shall publish a notice of the application. At any time within 30 days after the completion of the publication, any person may file with the state engineer a written protest against the granting of the application. It then becomes the duty of the engineer to approve or reject the application. Either party aggrieved may then bring an action in the district court for the purpose of adjudicating the questions involved. It is further provided that, in his indorsement of approval of an application, the state engineer shall require that the actual construction work be commenced within six months from the date of such approval, and that it shall be completed within five years from such date. But the engineer may allow in some cases an extension of time to complete such work, or may limit the applicant to a less period of time. It is further provided that, upon the completion

of the work, proof shall be made and maps filed showing the nature and extent of the completed works, the stream or source, and place where the water, and the quantity thereof, is diverted, the character, grade, and dimensions of the diverting channel, and other things showing the diversion and appropriation of the water. Upon such proof a certificate of appropriation is then given the applicant, a copy of which is filed with the state engineer and one with the county recorder of the county where the water is diverted.

It may be judicially noticed, and here stated, that Congress in 1902 ordered the unallotted lands of the Indian reservation referred to in the complaint to be restored to the public domain on the 1st day of August, 1903. That time was extended to October 1, 1904, and again to March 10, 1905. On March 3, 1905, Congress again extended such time to September 1, 1905, but authorized the President of the United States by proclamation to fix an earlier time. Thereupon the President, on the 14th day of July, 1905, issued a proclamation restoring the unallotted lands of the reservation to the public domain, and declaring such lands open to entry, settlement, and disposition on and after the 28th day of August, 1905. It will be observed that it is alleged in the complaint that the defendants filed their applications with the state engineer for the appropriation of the waters in question on the 31st day of July, and the 19th day of August, 1905, after the proclamation was issued, but before the reservation was actually opened and the unallotted lands restored to the public domain, and were subject to entry, settlement, and disposition. Because of such fact, and of the further allegations in the complaint that "all of said water applied for and the lands proposed to be irrigated" by the defendants "were all a part of and included in" the Indian reservation, it is urged by appellants that no right or title in or to the use of the waters or the lands could then lawfully be acquired or initiated; that the state of Utah could not prior to the 28th day of August exercise any jurisdiction over the waters or the lands of the reservation; that the defendants were mere trespassers, and that their applications were void. But, since the appellants filed their application with the state engineer on the very day that the reservation was opened "at the hour of 20 minutes after 9 o'clock in the forenoon" of that day, it is asserted by them that a right in and to the use of the water and also in and to the lands proposed to be irrigated by them could then lawfully be acquired, and that a right in and to the use of the water was initiated and acquired by them by the filing of their application. Upon these premises, it is urged that the engineer erred in rejecting their application and approving the applications of the defendants, and that the court likewise erred in sustaining the de-

murrer. It is now well settled and recognized that there is a distinction between initiating or acquiring a right to the use of unappropriated public waters on the public domain, and a right or interest in or to the public lands themselves, and that the former is not dependent upon the latter. To initiate and acquire a right in and to the use of unappropriated public water, whether on the public domain or within a reservation or elsewhere, is dependent upon the laws or customs of the state in which such water is found. Property in and to the use of unappropriated waters of a stream or spring, or lake, on the public domain, or within a reservation, may be acquired for a beneficial purpose by mere appropriation, and the first appropriator, to the extent of his appropriation when completed and established, is the owner as against all the world. In order that the appropriator may be entitled to the use of such water, it is not essential that he should have located or taken possession of any tract or parcel of the public domain bordering upon the stream or lake from which the appropriation is made, or that he even have an interest in or to the lands proposed to be irrigated, if such be the beneficial purpose of the appropriation. An appropriation may be made of such water for the irrigation of lands not situated upon or near the stream or lake from which it is taken, and the water may be conducted by means of ditches or channels, or otherwise, across the intervening public lands, to irrigate lands possessed by the appropriator, or others, or he may sell and dispose of the water thus conducted to others to use it for a beneficial purpose on claims or lands possessed or owned by them, or in which they have an interest, and upon which the water may be and is applied for a beneficial purpose. These views are discussed and enlarged upon by Mr. Kinney in his work on Irrigation (chapters 6, 7) and by Mr. Farnham in his work on Waters and Water Rights (volume 3, c. 22). And it also has been held that a valid water right may be acquired even though there had been no compliance with the statute regulating the appropriation of unappropriated public waters, where the unappropriated water was actually diverted by means of a ditch or canal or otherwise and applied to a beneficial use before the inception of any adverse statutory claim. *Murray v. Tingley*, 20 Mont. 280, 50 Pac. 723, and cases there referred to. We have no doubt that unappropriated public water on a reservation or on the public domain is subject to appropriation, and may be appropriated for a beneficial purpose, though the appropriator has not, when his application is filed with the state engineer, a present right in or to the lands along the stream from which the water is proposed to be diverted, or in or to the lands proposed to be irrigated by him. In this respect the appropriation of unappropriated public water on a reservation and the location of a mining claim or other lands on or within a reservation rest on dif-

ferent foundations, and are controlled by different principles. The one is a proper subject of rightful acquisition. The other is not. An appropriation made of such waters will be protected, even as against the government of the United States. The location of mining claims or the taking up of lands on or within a reservation is void and of no effect, because the ores or lands sought to be taken, or acquired, are not then subject to private ownership or acquisition.

But the serious question in the case, and one not altogether free of doubt, is whether, to initiate a right in the use of unappropriated public water, it is essential, when the notice of intention to appropriate is given, or when, as required by the statute, a written application is made and filed with the state engineer, that the beneficial purpose or use for which the water is proposed to be appropriated shall be immediate and then existing, or whether the beneficial use may be contemplated or anticipated in the future. That is to say, when in an application filed to appropriate water in which the applicant is required, as by the statute provided, to set forth "the nature of the proposed use for which the appropriation is intended," the quantity of water to be used, etc., and such other facts as will clearly define the full purpose of the proposed appropriation, and, if the proposed use is for irrigation, in addition thereto, "the lands proposed to be irrigated, with the total area thereof," the question is, in order to properly initiate a right to the use of the water, whether "the lands proposed to be irrigated" must, when the application is made, be then subject to such a use and capable of being devoted to such a purpose, not necessarily by the applicant himself, but by some one. When the defendants made their applications to appropriate the waters for the purpose of irrigation, no one could then lawfully enter upon, occupy, possess, cultivate, farm, or otherwise use "the lands proposed to be irrigated," because they then were a part of, and included in, the reservation, and were then not open to entry, settlement, or disposition. Neither the applicants nor any one else could then lawfully use water on such lands. No present right permitting any one to make use of the beneficial purpose for which the proposed appropriation was made then existed. The incentive right initiated by the defendants in and to the use of the water by the filing of their applications depended upon several contingencies: One, upon the actual opening of the reservation for settlement; another, upon the entering upon, or settlement of, or taking up of, some or all of the lands proposed to be irrigated by some one entitled to enter upon such lands, or to take them up, after the reservation was opened; and, still another, the agreement or consent of such persons to take and use the water on such lands, or otherwise to permit them to be irrigated therewith, or the water to be used thereon for the purposes of the propos-

ed appropriation. Should any one of these contingencies fail, the proposed appropriation itself would prove abortive, because the application of the water to the proposed beneficial purpose—the absolute and indispensable essential to constitute a completed valid appropriation—could not be made in such case. In this respect the appellants, however, do not stand on much better ground than do the respondents. The only difference between the parties is this: It is alleged that the respondents made applications to appropriate the water in question to irrigate lands then alleged to be a part of the reservation, the appellants to irrigate lands then a part of the public domain. In neither instance is it alleged that any portion of the lands proposed to be irrigated had then been entered upon, or taken up, or occupied, or possessed, or claimed, by any one; or that the lands were then, or since have become, subject to such a use. So far as anything is made to appear to the contrary, the lands proposed to be irrigated by the appellants were, when their application was filed, “at the hour of 20 minutes after 9 o'clock in the forenoon” on the very day upon which the reservation was opened, and still are, a part of the public domain, unentered, unoccupied, unsettled, and unclaimed. It is alleged, and we may judicially notice, when the reservation was opened and the unallotted lands thereof restored to the public domain; but it is not alleged, nor can we judicially know, that the particular lands proposed to be irrigated were when the appellants filed their application, or since have been, occupied, claimed, or possessed by any one.

So far, then, as made to appear by the complaint, it is shown that, when the applications to appropriate the water were filed, the beneficial use for which the water was proposed to be appropriated did not then exist, but was, by both parties, contemplated and anticipated in the future. That is, we may well assume that, when the applications were filed, both parties contemplated and anticipated that within the time fixed by the engineer for the construction of the works and the diversion of the water, and by the time such works were completed, the water diverted and conducted upon “the lands proposed to be irrigated,” such lands would then be claimed, occupied, and possessed by some one entitled to claim and occupy them, and thus the water could, and would, be applied to the beneficial purpose of the proposed appropriation stated in the applications. May an application be made to appropriate water for a beneficial purpose so contemplated in the future? We confess that the question is open to debate, and is not free of doubt. We have, however, with some hesitancy, reached the conclusion that such an application may properly be made when it is made in good faith and with an actual bona fide intention and a present design to appropriate the water for a beneficial use, though contemplated in the fu-

ture, and when it is not made for the purposes of mere speculation or monopoly. That the applications were made by the respondents with an actual bona fide intention to appropriate the water for a beneficial purpose is not questioned, nor are their good intentions assailed in any other particular, except by the claim made that they could not lawfully initiate or acquire any right in and to the use of the water until the reservation was actually opened. The three principal elements to constitute a valid appropriation of water, and, as stated by the court in the case of *Low v. Rizer*, 25 Or. 557, 87 Pac. 82, and approved by the same court in the case of the *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 45 Pac. 472, 60 Am. St. Rep. 777, are: “(1) An intent to apply it to some beneficial use; (2) a diversion from the natural channel by means of a ditch, canal, or other structure; and (3) an application of it within a reasonable time to some useful industry.” Says Mr. Kinney, in his work on Irrigation (section 151): “There must be, first, some actual beneficial purpose existing at the time, or contemplated in the future, as the object for which the appropriator is to use the water.” The same doctrine is also stated in *Black's Pomeroy on Water Rights*, § 48. In *Nevada Ditch Co. v. Bennett*, supra, it was said: “The general purpose of an appropriation is to utilize the water in the arid regions, where the supply is limited, for the development and advancement of beneficial industries. In many localities where the water is difficult of diversion, and the expense considerable in conducting it to the place of use, if individual landholders, or even an aggregation of them, were required to make the appropriation for use upon their own possession, these general purposes would be entirely defeated simply for the reason that such holders could not bear the burden of making the appropriation. In such cases, other persons possessing capital are often willing to make the diversion for the benefit of those who have use for the water, but, unless they may contemplate a use which may be applied by the landowner to his possessions, they could not even initiate the appropriation until they had possessed themselves of lands in proportion to the amount of water it is desired to appropriate; so that if the user must be the appropriator, and the appropriator the landholder, the arid regions in many places would remain arid, whereas otherwise they could be made to teem with fertility. No sufficient reason has been suggested why the contemplated use may not be for and upon the possessions of a person other than the appropriator. The authorities we have seem to support the rule that it can be, and we believe it is, correct upon principle. We take it, therefore, that the bona fide intention which is required of the appropriator to apply the water to some useful purpose may comprehend a use to be made by or through another person, and upon lands and posses-

sions other than those of the appropriator. Thus the appropriator is enabled to complete and finally establish his appropriation through the agency of the user."

Of course, we are not unmindful that what was said by these writers and courts was with respect to appropriations not regulated by statute. But we think the filing of a written application with the state engineer, as required by the statute, is but declaring, or the giving of a notice of, an intention to appropriate unappropriated public water. The final step, and the most essential element, to constitute a completed valid appropriation of water, is the application of it to a beneficial purpose. Whatever else is required to be or is done, until the actual application of the water is made for a beneficial purpose, no valid appropriation has been effected. This was so before the statute, and it is still so under the statute. The filing of the application with the state engineer, as required by the statute, does not establish an appropriation of water. It but takes the place of, and is, the preliminary notice of intention to appropriate. Unless the construction of the works are commenced and completed within the time allowed by the engineer, and the water diverted and applied to the beneficial purpose of the proposed appropriation, the filing of the application is for naught, and no completed valid appropriation has been made. If, therefore, an application is made with a present design and an actual bona fide intention to appropriate unappropriated public waters for the irrigation of certain designated lands, a beneficial purpose, at a time when the applicant has no present right, title, or interest in or to the lands proposed to be irrigated therein, and, too, when such lands are then unoccupied and unclaimed and a part of a reservation, but it fairly is made to appear that when the proposed diverting channels and work prosecuted with reasonable diligence and dispatch are completed within the time fixed by the statute, or allowed by the engineer, the lands may then be lawfully claimed and occupied, and the water applied to the beneficial purpose for which the appropriation is proposed, we see no good reason why the application should not be received and the applicant protected in his inceptive right. One filing an application under such circumstances, commencing the construction of the works within six months from the approval of his application, prosecuting such proposed works to a completion within the time fixed by the statute or allowed by the engineer, and incurring the necessary expense to divert and conduct the water to the lands proposed to be irrigated, takes the risk that when such works are so completed, and the water diverted and conducted to such lands, they may then be lawfully claimed and occupied by some one who is willing to take the water and use it and apply it to the beneficial purpose for which the application was made to appropriate it.

Bearing in mind that an appropriation of the waters as here proposed by the applicants is not made until the waters have been applied to the beneficial purpose for which the proposed appropriation was applied for, the irrigation of certain designated lands, if, when the diverting channels and works, prosecuted with reasonable diligence, are completed, the water may not then lawfully be used on such lands because they remain and still are a part of the reservation, or of the public domain, unclaimed, unsettled, and unoccupied, or if the lands have since been restored to the public domain, and since have been lawfully claimed, occupied, and possessed, but such persons so occupying and possessing the lands refuse to take or use the water thereon or to apply it to the beneficial purpose for which the appropriation was applied for, the application, and the construction works, and the moneys expended thereon by the applicant are for naught. In other words, if the proposed appropriator is not able to complete and finally establish his appropriation by applying the water to, and using it for, the beneficial purpose for which it was proposed to be appropriated, either by himself or through the agency of some user, his appropriation fails. He may not file his application, construct his works, and then hold the water and wait for something to happen. He cannot withhold the water from the proposed beneficial use. He must not only be diligent in constructing the works, and in making the diversion, but he must also be reasonably diligent and expeditious in making application of the water to the beneficial use for which the appropriation was proposed, else he loses his inceptive right. His appropriation will be measured by the quantity of water actually used for the proposed beneficial purpose.

We are of the opinion that, upon the face of the complaint, it is not made to appear that the engineer wrongfully or erroneously approved the defendants' applications, which were prior in time. However, should we be in error in holding that an inceptive right in and to the use of unappropriated public water upon or within a reservation can be initiated or acquired after the issuing of the proclamation, but before the reservation was actually opened and the lands subject to entry, settlement, and disposition, a contrary holding would not materially aid the cause of the appellants for the reasons hereinbefore suggested. And since the appellants, if entitled to recover, must do so upon the strength of their own right or title, and not upon the weakness of that of their adversaries, it again follows that the demurrer was properly sustained.

We are therefore of the opinion that the judgment of the court below ought to be, and it therefore is, affirmed, with costs. Such is the order.

FRICK and McCARTY, JJ., concur.

(37 Utah, 410)

PATTERSON v. RYAN.

(Supreme Court of Utah. April 27, 1910.)

1. WATERS AND WATER COURSES (§§ 131, 133, 143, 145*) — APPROPRIATION — EXTENT OF RIGHTS.

Plaintiff's intestate in 1901 took possession of land surrounding springs on arid and unsurveyed public land, erected a cabin, constructed a corral, and fenced in a few acres. Until his death in 1905, he maintained the corral and fences, and a portion of time each year lived in the cabin, and while living there used the water for culinary purposes and to water a team and saddle horse, but never used it for irrigation. Prior to 1901 sheep and cattle men used the water, and thereafter intestate occasionally required the sheep men to pay for the water while the cattle men used it without, but neither disputed nor interfered with intestate's right to use the water. Defendant, a cattle man, watered his cattle at the springs for a number of years. *Held*, that intestate, although he might have been a trespasser on the land, acquired the right to use the quantity which he used, and, although he posted no notice that he intended to appropriate the water in accordance with the law in force in 1901, the notice and record thereof being merely prima facie evidence that the person giving the notice was applying the water to some beneficial use, so that plaintiff had the right to use the quantity of water used by intestate, and even if he had no right in the land surrounding the springs, he could divert it to some other place, if possible.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 152; Dec. Dig. §§ 131, 133, 143, 145.*]

2. WATERS AND WATER COURSES (§§ 131, 145*) — APPROPRIATION—NATURE AND EXTENT OF RIGHTS.

Trespassers upon land may acquire the exclusive right to the use of water either to irrigate land or for other purposes, and, when such right is acquired, it is paramount to the rights of the true owner or claimant of land, and the water claimant, when he is dispossessed of the land, may divert and use the water elsewhere, if he can so divert and use it.¹

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. §§ 131, 145.*]

Appeal from District Court, Beaver County; Joshua Greenwood, Judge.

Action by Edward Patterson, as administrator of John Patterson, deceased, against John Ryan. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

William F. Knox, for appellant. E. W. Senior and Allen T. Sanford, for respondent.

FRICK, J. This action was brought by appellant, as administrator of the estate of one John Patterson, deceased, to quiet title to the use of the water flowing from certain springs known as the Potsum Pah springs, situate in Pine Grove Valley, Beaver county, Utah.

The facts which we deem material, as developed at the trial, in substance, are: That the land on which the springs in question are situated is arid, and up to the time that this action was commenced continued to be unsurveyed public domain. In the year

1896 one Thomas McCune filed a desert entry on the lands surrounding the said springs, constructed one or two small reservoirs to hold the waters flowing therefrom, and thereafter placed troughs at the springs, conducted the water into them, and used the same to water live stock; that said desert entry was contested, and in August, 1903, was duly canceled by the local United States Land Office, and the action of the local office was approved by the Commissioner of the General Land Office at Washington, D. C., on the 19th day of January, 1905, and said McCune by said decision forfeited all rights under his desert entry aforesaid. In March, 1901, and while the desert entry of said McCune was still, prima facie at least, in force, but when said land and springs were seemingly abandoned and the water flowing from said springs was not being used by any one except as hereinafter stated, the deceased, John Patterson, took possession of the lands surrounding the springs and of the springs, erected a log cabin 16x14 feet near said springs and constructed a corral, and fenced in a few acres of the land near the springs, and, in connection with the improvements aforesaid, he also cleaned out the reservoirs constructed by said McCune. Said Patterson died on the 4th day of January, 1905. From March, 1901, to the time of his death, he maintained the corral and fences aforesaid, and a portion of the time during each year stayed in the cabin aforesaid, and at such times he used the water from the springs for his culinary needs and to water "a team and saddle horse," which the testimony shows he kept with him when staying in said cabin. While Patterson fenced in some land which the testimony shows could have been irrigated, it is clear that he never planted any crops or used any water for irrigation, except what by force of gravity ran over a portion of the inclosed lands where some "salt grass" was growing. The testimony also shows that for many years prior to 1901 both the sheep men and cattle men used the water of the springs to water their flocks and herds when they were ranging in the vicinity of the springs in the winter season; that in 1901 for several seasons and at various times the deceased, Patterson, would require the sheep men to pay him something for watering their sheep at the springs. The number of times that such charges were made is not clear, but it did not occur very often. Some of the sheep men, however, used the water to water their sheep at times during the years aforesaid without paying the deceased, or without asking him for the privilege to do so, and the cattle men, it appears, used the water from the springs without paying the deceased anything, but neither the sheep men nor the cattle men after March, 1901, disputed or interfered with the deceased's right to use the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

¹ Sullivan v. Mining Co., 11 Utah, 438, 40 Pac. 709, 30 L. R. A. 188.

water for the purposes he used it as aforesaid. The defendant was one of the principal cattle men who watered cattle at the springs for many years in the manner aforesaid, but he apparently had no special rights in the water of the springs up to the time this action was commenced, except to use it for his cattle, as above stated. There is much evidence in the record relating to entries of the lands surrounding the springs in question and the proceedings in the United States Land Office relative thereto, all of which we deem immaterial. The evidence is conclusive that the deceased at the time of his death had no right in or to the lands surrounding the springs or any lands in their vicinity, but both the legal and the equitable title to all of said lands was in the United States at the time aforesaid and when this action was commenced. After the death of said Patterson, to wit, on the 26th day of December, 1905, the defendant filed his application to appropriate the water of said springs with the state engineer of the state of Utah in accordance with chapter 108, Laws Utah 1905, but the state engineer, just before the time this action was commenced, rejected said application, and the defendant did not within the time, nor as provided by said chapter, bring an action in any court to review the action of said state engineer in rejecting said application, but he did set forth the facts with respect to said application and the rejection thereof in this action in the nature of a counterclaim.

Upon substantially the foregoing facts, the court found in favor of the defendant, and found that the said John Patterson, deceased, had acquired no rights to the use of the water of said springs or any part thereof, and adjudged the right to the use of the water thereof to be in the defendant. The administrator appeals from the court's findings and judgment.

Counsel for appellant urge that, in view of the undisputed facts, the court erred in its findings and judgment in so far as it adjudged that the plaintiff, as the administrator of the estate of said John Patterson, deceased, was not entitled to the use of the water of said springs, and also in its findings and judgment that said defendant was entitled to the use of said water. It seems to us that the court laid too much stress upon the question of the right of possession or ownership of the lands surrounding the springs. Even if it be assumed that some one of the different parties who at some time claimed some rights in said land at one time had some equitable right or title thereto, yet the evidence is conclusive that no one ever used, or attempted to use, the water on said land for irrigation or for the purpose of producing crops of any kind thereon, not even grass for pasture. In view of this fact, any one claiming the legal right to use said water had to base that right upon a

use and for a purpose other than irrigation. While the evidence shows that both the sheep men and the cattle men, among whom was the defendant, used the water of said springs for many years prior to the spring of the year 1901 when the deceased took possession thereof, yet this use was not an appropriation of the waters of said springs, and was not so intended, since it merely consisted in driving their flocks and herds to the springs for water the same as they might have done to any other stream or water which was suitable to water live stock. Moreover, the use of the water as aforesaid was merely sporadic and intermittent, and the quantity of the water used was so uncertain that under the evidence it would be impossible to determine the quantity of the water the defendant would be entitled to if it were found that, by reason of the foregoing facts, he at the time of said Patterson's death was legally entitled to claim any rights to the use of said water. It seems to us that the right of the deceased to the use of at least a portion of said water as against the defendant is based upon more substantial ground. As we have seen, when the deceased took possession of the springs, no one was using the water except that both sheep men and cattle men during certain portions of the year in the manner before stated drove their sheep and cattle to the springs. Again, it is made to appear that whatever rights Mr. McCune had in the use of said water, if any, he in effect surrendered (not transferred) to the deceased in 1902, and, after that time, it seems McCune made no further use of the water, or claim thereto, and his desert entry was canceled in 1903 by the United States Land Office, and he never appealed from that decision. Was it necessary for the deceased, Patterson, to have some right or title in and to the lands surrounding the spring, or any land upon which he applied the water for the purpose of irrigation, or, if he did not so apply the water, was he required to post notices under the law in force in 1901 that he intended to and did appropriate the water flowing from said spring for a specific purpose before he could acquire the legal and exclusive right to the use of all or any portion of said water? The right to the use of water in this state has always depended upon whether the person claiming the water applied it to a beneficial use, and the notice and record required by the statute was merely prima facie evidence of the facts recited therein, namely, that he was applying the water to some beneficial use. Any person, however, who actually used the water for a useful or beneficial purpose, acquired the right to take the water so used as against all subsequent claimants, regardless of whether the user had posted notices or not. Again, in so far as using the water for irrigation is concerned, the exclusive right to use certain

waters in this state has always been independent of and separate from the ownership of the land on which the water was used or the ownership of any land. To this effect is the case of *Sullivan v. Mining Co.*, 11 Utah, 438, 40 Pac. 709, 30 L. R. A. 186. The authorities generally support this view. *Well Water Rights, etc.* (2d Ed.) § 63. But the authorities are to the effect that even trespassers upon land may acquire the exclusive right to the use of water that is used either to irrigate such land or is used thereon for other purposes, and that such a right, when once acquired, is paramount to the rights of the true owner or claimant of the land, and the water claimant, when he is dispossessed of the land, may divert and use the water elsewhere than on the land if he can so divert and use it. *Smith v. Logan*, 18 Nev. 149, 1 Pac. 678; *Alta Land, etc., Co. v. Hancock*, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217; *Santa Paula Waterworks v. Peralta*, 113 Cal. 38, 45 Pac. 168.

In the California cases some distinction is made on account of riparian rights, which distinction, however, does not militate against or affect the principle just stated. The deceased, therefore, although he may have been a trespasser on the land, still had a right to appropriate and use the water from the springs in his cabin for culinary purposes, and for the purpose of watering his team and saddle horse. That he used a certain amount of water from said springs during a portion of each year from March, 1901, until the time of his death, January 4, 1905, no one disputes, and no one seems to have questioned his right to do so. Is there any doubt that the use the deceased made of the water was a beneficial use within the meaning of that term? We think not. If, therefore, the deceased commenced the use of the water from the springs at a time when he had a right to appropriate the water, or any part thereof, and if he applied it to a beneficial or useful purpose, why was he not at the time of his death entitled to so much of the water of said springs as he had appropriated and used for such purpose? Counsel for respondent, as we understand them, do not assert the contrary, except to claim in a general way that the deceased never acquired any right to use the water or any part thereof. In view of the evidence, we are unable to see upon what this claim rests. If, as the court seemingly concluded, the defendant could acquire some right to the use of the water of the springs by merely intermittently and at long intervals driving his cattle to drink the water, why could not the deceased acquire a right to at least a portion of said water by making a daily use of it for a beneficial purpose for a portion of each year for a term of years? In our judgment the defendant's use of the water was too intermittent and uncertain either as to time or quantity to prevent the deceased from acquiring

a right thereto, and, for the same reason, we think the claim to the water by appellant by reason of the fact that the deceased on different occasions required the sheep men to pay him for the use of the water in watering their flocks is too uncertain a use to authorize a court to find and adjudicate that the appellant has any right to the water by reason of what the deceased did or claimed in that regard. The number of times that the deceased exacted pay from the sheep men was comparatively small at best, and did not occur in every year, or always while the deceased was on the land near the springs. Nor did he ever exact pay from cattle men, nor from all the sheep men, although it appears from the evidence that quite a number of them watered their cattle and sheep at the springs during a part of the time when the deceased stayed in his cabin near the springs. It also appears from the evidence that neither the deceased nor his team and saddle horse were present at the springs or used the water as aforesaid, except during a portion only of each year commencing with March, 1901, and ending January 4, 1905, when the deceased died. Just what the exact time was does not appear, and is not found by the court, except the finding that the deceased used the water as aforesaid "a few months each year." Nor did the court find how much water in quantity, or what proportion of the springs the deceased used as aforesaid.

In view of all the facts and circumstances, we are of the opinion, therefore, that the appellant as administrator is entitled to a specific finding with respect to the quantity or proportion of the water from the springs that the deceased used for culinary purposes and to water his team and saddle horse, and the length of time that the water was used for those purposes each year from 1901 to 1905, and, when said quantity and time of use is ascertained, the appellant is entitled to a decree awarding him for the benefit of said estate the quantity of water so found for the time aforesaid. If it be found that the appellant has no right to use the water for the purposes aforesaid, or for any beneficial purpose, on the land surrounding the said springs, then he may, nevertheless, use the water in the quantity that it is found the deceased used it, and for the time that he used it, by diverting it to some other place if appellant can do so. *Smith v. Logan, supra*; *Santa Paula Waterworks v. Peralta, supra*. If appellant, however, has no right to use the water at or near the springs as the deceased used it, and if he will not divert and use it elsewhere or dispose of it to someone who will use the same, then appellant at some time in the future may be deemed to have abandoned the right to the use of the water the same as any one else would be deemed to have abandoned rights by nonuser.

From what has been said it follows that

the district court erred in its application of the law to the facts of this case. In view of the unsatisfactory state of the evidence upon the two questions, namely, the amount of water that the deceased, Patterson, used for culinary purposes and for his team and saddle horse, and the season or the length of time he so used it during each year, we are unable either to direct findings or to make any upon those questions. Since there must be findings upon these two questions before the case can be finally determined, nothing remains for us to do except to reverse the judgment, and to remand the cause for a new trial, with directions to the district court to proceed with the case in accordance with the views contained in this opinion. It is so ordered, appellant to recover costs.

STRAUP, C. J., and McCARTY, J., concur.

(37 Utah, 418)

STATE ex rel. NEWELL v. DISTRICT COURT IN AND FOR THIRD JUDICIAL DIST. et al.

(Supreme Court of Utah. April 27, 1910.)

1. RECEIVERS (§ 80*)—INSOLVENCY—RECEIVERS—RIGHTS OF ACTION.

A receiver of an insolvent corporation is authorized to intervene in an attachment suit against the corporation and file a motion to set aside an order of sale of the attached property.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 149; Dec. Dig. § 80.*]

2. EXECUTION (§ 163*)—INTERVENTION BY THIRD PERSON—REMEDY BY MOTION.

The general rule that none but parties to original actions can move the court to recall or quash an execution is subject to an exception in favor of persons not parties who will necessarily be prejudiced by the enforcement of the writ, such as subsequent purchasers, lienholders, and execution or judgment creditors.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 473; Dec. Dig. § 163.*]

3. RECEIVERS (§ 174*)—CLAIMS AGAINST PROPERTY—LEAVE OF COURT TO SUE.

The court appointing a receiver may, on proper application, grant leave to a person interested in the property in the receiver's hands to segregate it from the general mass and to sell the portion so segregated, and apply the proceeds to the payment of a lien existing in favor of the applicant.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 336; Dec. Dig. § 174.*]

4. EXECUTION (§ 160*)—ORDER OF SALE—RECALL OF EXECUTION.

Where the court makes a formal order for the sale of attached property, under Comp. Laws 1907, § 1414, providing for a sale of property under a special landlord's lien, and section 3080 providing for a sale of attached property after the recovery of judgment, a subsequent order of the court recalling a special execution issued in pursuance of the order is a nullity and does not affect the order of sale, since such order of sale is in the nature of a judgment which cannot be set aside except by formal proceedings recognized by law for that purpose.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 160.*]

5. CERTIORARI (§ 17*)—REVIEW OF VOID ORDER—RECALL OF EXECUTION.

Where the court in attachment proceedings makes a formal order of sale, in pursuance of which a special execution is issued, a subsequent order of the court recalling the execution, though void as beyond the power of the court, certiorari will lie to annul such subsequent order, since the petitioner cannot be required to expose himself and the officer to proceedings for contempt for disregarding the court's order.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 22; Dec. Dig. § 17.*]

Certiorari by the State, on the relation of Henry Newell, against the District Court for the Third Judicial District, Salt Lake County, and others to review an order of such court setting aside an order of sale in attachment proceedings. Order annulled.

M. E. Wilson, for plaintiff. Lawrence & Robertson, Stephens, Smith & Porter, Dean F. Brayton, and Allen T. Sanford, for defendants.

FRICK, J. This proceeding was instituted in this court under its original jurisdiction to obtain a writ of certiorari, which was prayed for to enable this court to review a certain order made by the district court of Salt Lake county, by which said court quashed or set aside a previous order entered by said court. The latter order directed the sale of certain personal property held under a writ of attachment issued in favor of the petitioner, and which property was held for the purpose of satisfying a judgment obtained by him in said court.

The facts briefly stated are: That on July 17, 1909, in a certain action then pending in the district court of Salt Lake county, wherein one Copeland was plaintiff and the Salt Lake Public Service Company, a corporation, and others were defendants, one W. B. Albertson was duly appointed receiver of, and took possession and retained possession of, the property and assets of said corporation for the purpose of winding up its affairs; that said corporation, as the tenant of the petitioner, became indebted to him in the sum of \$1,403.15 for rent; that, under our statute, sections 1407 to 1415, inclusive, Comp. Laws 1907, a lessor has a lien upon the property of the lessee for rent due and unpaid, which lien, under ordinary circumstances, is enforced by the commencement of an action, followed by an attachment by which the property of the lessee is seized and held pending the action and the entry of judgment therein; that on the 12th day of January, 1910, in an action duly commenced and pending in Salt Lake county, and in which an attachment had been duly issued, and certain property attached under the statute referred to, the petitioner, as lessor, obtained a judgment against the receiver of said corporation for the amount above stated; that before the bringing of said action the petition-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

er applied for and obtained leave from the district court aforesaid to bring the same against the receiver of said corporation, and obtained leave of said court to attach and take possession of certain property belonging to said corporation and in the possession of said receiver by virtue of said writ of attachment which was duly issued in said action; that after said property was surrendered by the receiver and seized under said writ of attachment, and after the judgment as aforesaid was obtained, said court ordered the attached property sold and the proceeds thereof to be applied to the satisfaction of said judgment to the extent of said proceeds; that after said order of sale had issued the defendants in this proceeding filed a motion in said district court to recall and quash said order of sale, or execution, as they call it, which motion was substantially based on the following grounds: That the movants appeared in the original action in which the receiver was appointed, and by way of cross-complaints there set forth that the defendant Savings & Trust Company, a corporation, had a valid and subsisting lien on all of the property, real and personal, of said Salt Lake Public Service Company by virtue of a trust deed or mortgage, and that the other two defendants had valid and subsisting statutory liens against said property, all of which the petitioner concedes to be true; that all of the property of said company at the time petitioner's action was commenced was in the possession of the receiver of said public service company, and that the same was by him held for the benefit of all the creditors of said company which was insolvent; that said defendants were not parties to nor appeared in the action of said petitioner, and that "it is an abuse of the process of this court to cause execution" to be levied upon the "property which is in the hands of the receiver"; and, further, "that it is unlawful and improper for said sheriff to interfere with the possession of said property." The district court granted the request of the defendants and entered an order recalling or quashing said order of sale or so-called execution. Counsel for petitioner in effect contend that the court was without jurisdiction to make said order (1) because there was no proper proceeding commenced or pending in which said court was authorized to act; (2) because the court was powerless to grant said motion for the reason that the movants had neither the right nor legal authority to make the motion or to obtain the relief sought by them in the manner and by the proceeding before stated; and (3) because the court in any event was without authority to recall said order of sale, and hence the order quashing the so-called execution is void.

It is fundamental that "every court has power to watch over the execution of its judgments," and thus has the power to recall or quash an execution or order of sale that has been improvidently or irregularly issued. *Rhodes v. Smith*, 66 Ala. 179; *Mat-*

stocks v. Judson, 9 Vt. 343. All courts have power to "revoke, correct, restrain, or quash their own process, in the course of their ordinary jurisdiction." *Robinson v. Yon*, 8 Fla. 355; *Eaton v. Cleveland*, St. L. & K. C. Ry. Co. (C. C.) 41 Fed. 422. The contention, therefore, that the court was without jurisdiction generally cannot be sustained.

Nor is the contention sound that the defendants had no legal right or authority to invoke the aid of the court by motion; nor that the court had no authority to pass upon the question upon a mere motion. While, no doubt, it is the general rule that none but parties to the original or principal action who are liable to be injured can complain, and thus move the court to recall or quash an execution, yet there is an exception to this rule which is as well recognized as is the rule itself. Mr. Freeman, in his excellent work on Executions, in referring to the general rule, says: "To this rule an exception probably exists in favor of persons who, though not parties to the action, must necessarily be prejudiced by the enforcement of the writ, such as subsequent purchasers, lienholders, and execution or judgment creditors." 1 Freeman on Executions (3d Ed.) § 75. That filing and serving a motion on the adverse party is the proper method of making the application, if made to the court in which the judgment is rendered, or out of which the execution is issued, whether the application be by a party to the action or by one affected as aforesaid, is also well settled, as appears from section 73 et seq. of the volume just cited. The doctrine, as stated by Mr. Freeman, is supported by the following authorities: *Canan v. Carryell*, 1 N. J. Law, 3; *Fox v. Union Turnpike Co.*, 37 Misc. Rep. 308, 75 N. Y. Supp. 464; *Harrington v. O'Reilly*, 9 Smedes & M. (Miss.) 216, 48 Am. Dec. 704; *Jaffray v. Saussman*, 52 Hun, 561, 5 N. Y. Supp. 629.

The only case found which is directly to the contrary is *Wallop v. Scarborough*, 5 Grat. (Va.) 1. There are, however, some other cases which are sometimes referred to as being in harmony with the Virginia case. Some of those cases, like those from Georgia, are, however, based upon special local statutes, and hence have no special bearing upon the question, while in others, of which *Hanika's Estate*, 138 Pa. 330, 22 Atl. 90, 21 Am. St. Rep. 907, is a type, the holding is really based on the question that the party who applied to set aside the execution was not prejudiced, and hence his application was denied. Under the great weight of authority we think it must be conceded that the defendants had sufficient interest in the property to entitle them to invoke the aid of the court in the premises, and that their application by motion was proper.

The real difficulty in this case, however, arises when we come to consider its real status. It is true, as counsel for the defendants contend, that the well-established rule is that

property in the hands of a receiver is in the custody of the court appointing him, and cannot, without special leave of said court, legally be meddled with by any person, with or without process. It is, however, equally true that the court may, upon proper application, grant leave to a person who is interested in the property which is in the receiver's hands to segregate it from the general mass and to sell it, or a part of it, and to apply the proceeds thereof to the payment of an existing lien, or to take it and dispose of it as the court may direct. That this is the law is well established by the authorities. In *Dugger v. Collins*, the Supreme Court of Alabama, in discussing this question in 69 Ala., at page 330, approves and adopts the language of Mr. High, as the same is found in section 141 of that author's work on Receivers, as follows: "So extremely jealous are courts of equity of any interference pendente lite with the possession of their receivers, that they will not ordinarily permit property which is the subject of a receivership to be sold on execution. * * * The proper remedy for a judgment creditor who desires to question the receiver's right to the property is to apply to the court appointing him to have the property released from the receiver's custody in order that he may proceed against it under his judgment." In 2 Story, Eq. Jur. § 833a, the same thought is expressed. To the same effect is *Stanton v. Heard*, 100 Ala. 515, 14 South. 359. The rule is also tersely stated in 34 Cyc. 235, and is fully discussed in the same volume at page 411 et seq. The undisputed facts show that the petitioner strictly complied with the law and the orders of the court having jurisdiction over both the receiver and the property. Leave of court was obtained not only for the purpose of bringing an action against the receiver, but leave was also asked for and granted to the petitioner to seize particularly described property from the possession of the receiver, and thus segregate it from the general mass of property in his hands under his appointment. All this was done under the writ of attachment authorized by the court in the action against the receiver and was permitted for the express purpose of satisfying the petitioner's statutory landlord's lien. The property seized under the writ of attachment issued as aforesaid was thus placed into the custody of the officer who acted for and represented the petitioner, and was held by said officer during the pendency of the petitioner's action and until his claim should be merged into a judgment, which, as we have seen, was entered on the 12th day of January, 1910. Counsel for defendants concede that the property was seized by and with the consent of the court, but they contend that it was not surrendered by the court except for the special purpose of permitting the petitioner to perfect or establish his landlord's lien. We are unable to assent to this view. In view that the receiver had been appointed and had pos-

sessed himself of the property, and had thus, in legal effect, placed it into the custody of the court, the court, no doubt, could have made the statutory lien of the petitioner effective without the formality of a special attachment proceeding. In an ordinary case the purpose of such proceeding no doubt is to bring the property into the custody of the law by seizing it under a writ of attachment, but, since the property in question was already within such custody, we can see no good reason for permitting the seizure in this instance except to have the receiver surrender the property for the benefit of the petitioner in view of his landlord's lien. The orders of the court in that regard still stand unaffected, and as long as they remain in full force and effect we cannot see how the court had any power or authority to interfere with the petitioner in carrying into effect the prior subsisting and undisturbed orders of the court.

Nor is the suggestion that the court, in quashing the so-called execution, recalled what it had authorized before of controlling force. The order of the court, authorizing the petitioner to seize the property in question, was in the nature of an adjudication that the facts and circumstances, set forth by him in his application for leave to sue the receiver and to seize said property, rendered it proper for the court to order said property turned over to the petitioner for the purpose of satisfying his lien. The exact time when the court made the foregoing adjudication as evidenced by the order to seize the property the record does not disclose, but it does show that it must have been made some time before the 30th day of July, 1909, as on that date the attachment was issued which was based on the order of the court by which the property was surrendered and taken for the benefit of the petitioner. The matter then remained in abeyance until January 12, 1910, when the judgment in favor of petitioner was entered. In that judgment the property released by the court and taken by the officer for the petitioner is particularly described, and in the judgment it is provided that it is "further ordered, adjudged, and decreed that the property above described be sold to satisfy the amount of said lien," namely, the petitioner's landlord's lien. In the motion of the defendants, neither the original order by which the property was by the court ordered released, nor the judgment in which said order is, by implication at least, approved and the property ordered to be sold, is assailed. All that is attacked and asked to be quashed is a subsequent order of sale which defendants call an execution. While it may be conceded that, if this were merely an ordinary case of attachment followed by a judgment, the court might have possessed the power to suspend the sale of the attached property at any time before sale on the motion of any one having a lien on or interested in the property, yet this is not such a case. In this case

the property, in contemplation of law, was not taken by virtue of an attachment, but it was taken, and could only have been legally taken, by virtue of the court's order authorizing it. That order, as we have seen, is not questioned by any one, but remains in full force and effect. Nor is the judgment in which the property was ordered sold to satisfy petitioner's lien attacked or questioned by any one. If it be conceded, therefore, that when defendants' motion was made to set aside the so-called execution, the motion was, made in time to authorize the court to modify its judgment, yet the motion was not made for that purpose; nor did the court modify it, or attempt to do so in the order it made and which is attacked in this proceeding. This being so, the pretended order of the court to quash the so-called execution was, in legal effect, merely an indirect attempt to modify a prior order and judgment of the court in an unauthorized manner.

It seems to us that whether the order of sale, or so-called execution, be considered in the light of section 3080, Comp. Laws 1907, which provides for the sale of attached property "if judgment be recovered" in an action, or in the light afforded by section 1414, which applies to sales under the special landlord's lien statute, the result must still be the same. In neither section is an order of sale or execution contemplated. Nor, in the absence of an express statute, can we see any good reason for any such order of sale or execution. The usual purpose of such orders or executions is to authorize the officer to seize the property of the execution debtor and to sell it as contemplated by the execution. In attachment proceedings the officer seizes and obtains possession of the property by virtue of the writ of attachment, and the statute, in express terms, authorizes the sale if a judgment is obtained. In such proceedings, therefore, the officer, in selling the attached property after judgment, acts by virtue of the statute, and not by virtue of special process. True, it may be convenient in practice, and may also be convenient for the officers and clerks, to issue a formal order of sale, but what legal efficacy such an order has, or what authority it confers upon the officer in selling attached property that he does not possess without it, in view of our statute, exceeds our comprehension. In this case the officer in taking the property acted under the direct order of the court by which the property was surrendered to him for the benefit of the petitioner, and in selling it the officer would have acted both by virtue of the statute and by the order contained in the judgment and decree to which we have referred. In granting the motion, therefore, to set aside the so-called execution, the court effected nothing. The court, however, did more than merely to set aside the execution. It ordered the sheriff not to sell the property. In mak-

ing this order we are of the opinion that the court exceeded its power and authority, and hence the order in that regard is void and of no effect. Although it was beyond the power of the court to make the order, yet the petitioner was not required to expose himself and the officer to proceedings for contempt by disregarding the court's order, but he could do what he has done—institute these proceedings to annul the court's unauthorized act.

In view of all the circumstances, we, after some hesitation, have been forced to the conclusions: (1) That the order made by the court setting aside the so-called execution is without force or effect; (2) that the further order of the court by which it ordered the officer not to sell the property in question was in excess of its power, and hence void and of no effect; and (3) that if the defendants had, or have, any remedy it is not by a motion by which they merely assail the order of sale, but they must, in some proceeding, assail the original order and judgment by which the property was surrendered by the court to the petitioner for the special purpose disclosed by the record and the judgment in which the court specially directed the officer to sell the property. We are of the opinion, therefore, that the pretended order or judgment of the district court quashing said order of sale or so-called execution and restraining the officer from selling said property should be, and it accordingly is hereby, annulled, set aside, and held for naught. The petitioner to recover costs.

STRAUP, C. J., and McCARTY, J., concur.

(37 Utah, 229)

YOUNG v. HYLAND.

(Supreme Court of Utah. Jan. 27, 1910.)

1. BOUNDARIES (§ 48*)—ACQUIESCENCE—EFFECT.

Where the owners of adjoining lands occupy their respective premises up to a certain line, which they recognized and acquiesced in as the boundary line for a long period of time, they and their grantees may not deny that the boundary thus recognized is the true one.¹

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 232-242; Dec. Dig. § 48.*]

2. BOUNDARIES (§ 49*)—ACQUIESCENCE—EFFECT.

The practical location of a boundary line may be established either by an express agreement or by acquiescence without surveys, and the practical location so fixed may be in accordance or in conflict with a prior or subsequent official survey, and, when a tract is laid off into city lots, the landowners may subsequently adopt a line as the boundary line, and recognize it as the boundary line.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 243-248; Dec. Dig. § 49.*]

3. BOUNDARIES (§ 48*)—ACQUIESCENCE—EFFECT.

Where a boundary is open and visible, marked by monuments, fences, or buildings, and

¹ *Holmes v. Judge*, 31 Utah, 269, 87 Pac. 1009; *Moyer v. Langton*, 106 Pac. 506; *Rydalch v. Anderson*, 107 Pac. 25.

is knowingly acquiesced in for a long term of years, the law will imply an agreement fixing the boundary as located, and will not permit the parties or their grantees to depart from such line.†

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 232-242; Dec. Dig. § 48.*]

4. BOUNDARIES (§ 48*)—ACQUIESCENCE—CONSTRUCTION OF DEED—LAND CONVEYED.

A deed of a part of a lot in a designated survey, which describes the part as beginning at a point 89.76 feet west of the southeast corner of the lot, and running thence west to the line of a street, thence north 34.6 feet, thence east a specified distance, and then south to the place of beginning, makes the south line of the tract conveyed the south line of the lot, and the boundary line between the lot and the adjoining lot as established by acquiescence is the boundary of the part of the lot conveyed.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 48.*]

5. BOUNDARIES (§ 49*)—ACQUIESCENCE.

Where, as between adjoining landowners, a practical boundary line was agreed on or acquiesced in for a long time, and all persons interested occupied up and claimed to the line, the line as between the landowners was the boundary line; and neither of the landowners or their grantees could depart therefrom and claim beyond it.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 243-248; Dec. Dig. § 49.*]

Appeal from District Court, Second District; J. A. Howell, Judge.

Action by Joseph T. Young against Elma Hyland. From a judgment for defendant, plaintiff appeals. Reversed, and remanded for new trial.

J. D. Skeen, for appellant. C. R. Hollingsworth, for respondent.

STRAUP, C. J. This case arose over a disputed boundary line. The appellant, who was the plaintiff below, owns a parcel of land in Ogden City, situate in the southerly portion of lot 10, block 10, facing west, on a street called Grant avenue. The respondent, the defendant below, owns a parcel of land lying to the south thereof in the northerly portion of lot 11. It is alleged in the complaint that the south line of plaintiff's land is bounded by an old fence line; that the plaintiff owns a parcel of land 34.6 feet north and south by 141.5 feet east and west, lying immediately north of the fence line; and that the defendant trespassed upon his land, and tore down and removed the fence. The plaintiff in this connection contended that as between the adjoining landowners the boundary line between lots 10 and 11 and the south line of his lot were fixed and established by a fence erected about the year 1869, which ever since and until it was torn down by the defendant, about a year prior to the commencement of this action, was recognized, and acquiesced in, as such boundary line by all parties interested. The defendant admitted in her answer that the plaintiff was the owner of a parcel of ground 34.6 feet by 141.5 feet, but alleged that such parcel was wholly within

lot 10, and that the south line of plaintiff's land and the south line of lot 10 were coextensive. She alleged that the boundary line of the two lots was not at the place as indicated by the fence line, but was at a point five feet north of the fence line, and as indicated by the "South Ogden survey," and hence the north boundary line of the defendant's land was five feet north of the fence line. The question in dispute, and which determined the judgment of the court below, therefore, involves the boundary line between lots 10 and 11. Upon a trial of the issues, the court found the boundary line to be as contended for by the defendant, five feet north of the old fence line, and at the place as shown by the survey referred to, and therefore awarded the ground in dispute, a strip five feet in width, to the defendant. From such judgment the plaintiff has prosecuted this appeal.

The findings and conclusions are assailed on the ground that they are not supported by, and are contrary to, the evidence. It is not essential to refer to the assignments in detail. The question presented on the appeal is pithily stated in the brief of counsel for the respondent. They say: "The sole question involved in this appeal is whether or not the said fence was the boundary line between said lots 10 and 11. If so, then the respondent committed the trespass alleged by the appellant." The ground owned by plaintiff was formerly owned by Joseph Parry, who sold it to Moroni Brown. The latter sold it to Francis Knapp, who sold it to plaintiff. Parry testified that in 1869 there was a willow fence on the south side of the land which was occupied and afterwards sold by him. At that time, he took down the willow fence, and put up "a lumber fence on the line of the willow fence." He testified that "the supposition was that it was on the line, on the proper line, and no one questioned that at the time of my occupancy"; that the ground was not then surveyed "into city lots," but was surveyed into blocks and acre lots; that it was surveyed into city lots "when the Liberal Council got in," which was about the year 1889. He further testified: "I bought up to that willow fence line, and I will also state that I pulled that willow fence down and put up a lumber fence right on the same line, and I occupied that land until I sold it to Mr. Brown in 1879." Brown testified that he was familiar with the ground for about 57 years, and knew the fence line "between lots 10 and 11 of block 10, South Ogden survey"; that the board fence was there when he bought the land, and that in 1883 he replaced it with a wire fence, which was placed on the same line; that he used, occupied, and claimed the land up to the fence. The plaintiff testified that, when he bought the land, the agent of his grantor went with him on the ground, and told him that it "runs to the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† *Holmes v. Judge*, 31 Utah, 281, 87 Pac. 1014.

fence." Later he built a house on the land purchased by him, the south side of which is about five feet north of the fence. The evidence so adduced, showing the existence, maintenance, and recognition of the fence as a boundary line between the lots for many years, and that the adjoining owners of the ground occupied up to the fence, and never claimed beyond it, is in no particular disputed nor contradicted. Indeed, the defendant did not offer nor introduce any evidence on such subjects. The contention made by her in that regard, again quoting from the brief of her counsel, is "that the fence was not upon the true boundary line between said lots 10 and 11, as shown by the plat of the said South Ogden survey," and that the true line is five feet north of the fence, and as shown by that survey, which was a resurvey made by or under the direction of the city council.

With respect to the difficulty in determining the corners of the original survey, the city engineer, after testifying that he was familiar with the land "a part of lot 10, block 10, South Ogden survey of Ogden City survey," testified, in response to questions asked him, as follows: "Q. I will ask you whether or not you are able to determine, or any of your employés have been able to determine, the location of the corners of the original survey of this tract of land? A. We have a great deal of difficulty in determining them, and we locate them the best we can from the old plat that was made in 1886. That plat is not consistent with itself. What I mean by that is that there are certain corners that you locate them from one direction and make a certain location, and you locate them from another direction and make another location, and you have to reconcile it as best you can. Q. In attempting to solve the difficulties, what do you take notice of on the ground, if anything? A. In some cases where we find an old corner, that the universal evidence or testimony of the owners there say—that is, the old original corner—why, we adopt that as the corner; otherwise we have to figure that as best we can from the plat, which is in nearly every case. Q. Are you able to determine the original corners of the survey of the South Ogden survey? A. No, sir." He further testified that one of the corners of the street on one side of the block in question within two years prior to the trial was moved about a rod from where it was shown to be by the old fence lines. No witness in the case testified that the boundary line between lots 10 and 11, according to any original or primary survey, was where claimed by the respondent, five feet north of the old fence line, or that there are any monuments, maps, plats, or filed notes of any such survey showing the boundary line to be at such place. The court in determining the boundary line disregarded the old fence line, and fixed it as shown by the new or resurvey.

We think the principle of law here involved was decided in the cases of *Holmes v. Judge*, 31 Utah, 269, 87 Pac. 1009, *Moyer v. Langton*, 106 Pac. 508, and *Rydalch v. Anderson*, 107 Pac. 25. In those cases the doctrine is recognized that, where the owners of adjoining lands occupy their respective premises up to a certain line which they recognized and acquiesced in as their boundary line for a long period of time, they and their grantees will not be permitted to deny that the boundary line thus recognized is the true line of division between their properties. It is, however, urged by the respondent that, inasmuch as the fence was originally erected before any official survey was made laying the tract of land off into city lots and blocks, it cannot be considered as constituting a boundary line. A practical location of a boundary line may be, and often is, agreed upon, fixed, and established, either by an express agreement, or by acquiescence, without surveys. It may be so agreed to and fixed before, as well as after, the making of an official survey. The practical location so fixed may be in accordance or in conflict with such survey. When the tract was laid off into city lots and blocks, we do not see any reason why the landowners could not thereafter adopt a fence, which was then there, as the boundary line between lots 10 and 11 to the same effect as though they had thereafter constructed, or agreed upon, or acquiesced in, a new fence, as and for the boundary line. The evidence shows that, after the tract was laid off into city lots and blocks, the old fence was for many years thereafter recognized and acquiesced in as and for the boundary line between lots 10 and 11. Mr. Freeman, in his notes to the case of *Washington Rock Co. v. Young*, 110 Am. St. Rep. 685, says: "If a fence has been built or a hedge has been set out as a boundary, and thereafter has been recognized as the true boundary by adjoining owners for many years, or if a fence already erected is maintained and treated and occupied up to as their line of division for a long period of time, they cannot as a rule question the correctness of its location." Many cases are cited by him in support of this principle. On page 682 of the same volume he also says: "It is a well-settled rule of law, resting upon public policy, that a practical location of boundaries which has been acquiesced in for a long period of years will not be disturbed. It is binding on the parties thereto and their privies in estate. This doctrine has been adopted as a rule of repose with a view of quieting titles and preventing litigation." In support of which, again, many cases are cited.

The practical location of the boundary line here in question was fixed and established by the old fence line, and, as such, was acquiesced in for a long period of years, and, until the alleged trespass of the defendant,

neither adjoining owners nor any of their predecessors in interest ever claimed beyond it. If the fence line was acquiesced in as the boundary line, the defendant, as against plaintiff's predecessors in interest, could not lawfully claim beyond it; and we see no good reason why she should be permitted to now claim beyond it as against the plaintiff. The respondent further urges that the starting point of the appellant's land and the respondent's land is the same. That is true. The starting point of appellant's land, as described by his deed, is the southeast corner of lot 10; respondent's, the northeast corner of lot 11. But where is that point? The respondent asserts, and the trial court held, that the southeast corner of lot 10 and the northeast corner of lot 11 is at the point as shown by the resurvey referred to. The appellant asserts, and we agree with him, that the point is as indicated by the old fence line which existed there for many years marking the boundary line between the two lots before and after the ground was laid off into blocks and lots, and which was recognized and acquiesced in as such boundary line by all parties concerned. Here the language of Mr. Justice Frick, in delivering the opinion of the court in the case of *Holmes v. Judge*, 31 Utah, at page 281, 87 Pac., at page 1014, is very pertinent. He there said: "In all cases where the boundary is open, and visibly marked by monuments, fences, or buildings, and is knowingly acquiesced in for a long term of years, the law will imply an agreement fixing the boundary as located, and will not permit the parties or their grantees to depart from such line."

The question here is not one of surplus ground, and who is entitled to it, as is incidentally argued by the respondent. The plaintiff purchased of his grantor 34.6 feet of ground situate in the southerly portion of lot 10. The description in his deed reads: "Beginning at a point 89.76 feet west of the southeast corner of lot 10, and running thence, west, 141.5 feet, to the east line of Grant avenue; thence, north, 34.6 feet; thence, east, 141.5 feet; thence, south, 34.6 feet, to the place of beginning." In other words, the south line of the land conveyed to him is the south line of lot 10. He has 34.6 feet of ground lying immediately to the north of the south boundary line of lot 10. He by that deed of conveyance obtained no more. He claims no more in his complaint. The south line of his land and the south line of lot 10 being coextensive, the question is: Where is that line? If it is determined to be at the place as shown by the official resurvey of the city, he has a parcel of land 34.6 feet by 141.5 feet lying immediately five feet north of the fence. If, on the other hand, the south line of lot 10 is

determined to be at the place as fixed and established and as indicated by the old fence line, he has a parcel of land 34.6 feet by 141.5 feet lying immediately to the north of the fence line. In either case he gets but 34.6 feet of ground, and no more. The only question is, Where is the south boundary line of the parcel which was conveyed to him by his grantor? The plaintiff asserts that it is the south boundary line of lot 10. So does the defendant. So reads the deed. But the plaintiff asserts that the south boundary line of the lot is as indicated by the fence, while the defendant asserts such boundary line to be five feet north of the fence line.

The contention made by the respondent that because in the deed the land purchased by plaintiff was described as a part of lot 10, in block 10, "of South Ogden survey in Ogden City survey," the plaintiff purchased with reference to that particular survey, and hence the starting point of the description of his land, the southeast corner of lot 10, must be determined and taken to be at the point as shown by, or according to, that survey, regardless of old fence lines, or other monuments, or expressed or implied agreements, or acquiescence, of the adjoining land owners, showing it and a boundary line coextensive therewith to be fixed and established at another place, was made and refuted in the case of *Moyer v. Langton*, supra. The pertinent question is not where is the southeast corner of lot 10 and the south boundary line of the lot coextensive therewith, according to some particular official survey made by or under the direction of Ogden City, but, as between the adjoining landowners, where is that point as it was originally fixed and established by an original or primary survey, or by a practical location agreed upon or acquiesced in for a long period of time by the persons interested. Upon the undisputed evidence it being conclusively made to appear that, as between the adjoining landowners, a practical boundary line was agreed upon, or acquiesced in, for a long period of time, and that all persons interested occupied up and claimed to the fence line, and that, until the alleged trespass, no adjoining claimant ever claimed beyond it, we are of the opinion that as between such landowners the fence line so agreed upon or acquiesced in became and is the boundary line between such lots, and that neither the parties having so recognized and treated it, nor their grantees, may now depart therefrom and claim beyond it.

It follows that the judgment of the court below is not in harmony with such holding, and hence must be reversed, and the cause remanded for a new trial, with costs to appellant. Such is the order.

FRICK and McCARTY, JJ., concur.

(87 Utah, 249)

LOCHWITZ et al. v. PINE TREE MIN. & MILL CO.

(Supreme Court of Utah. April 5, 1910.)

1. CORPORATIONS (§ 300*)—OFFICERS—POWERS OF PRESIDENT.

Under Comp. Laws 1907, §§ 315, 324, providing that the corporate powers of a corporation shall be exercised by the board of directors, which shall not be less than 3 nor more than 25, etc., the president of a corporation has ordinarily only the powers of a director, or such as may be directly conferred on him by the board of directors.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 300.*]

2. CORPORATIONS (§ 298*)—OFFICERS—BOARD OF DIRECTORS—QUORUM.

Under Comp. Laws 1907, §§ 315, 324, providing that the corporate powers of a corporation shall be exercised by the board of directors, consisting of not less than 3 nor more than 25, and that a majority of a quorum when duly assembled may bind the corporation, a quorum of the board of directors must act as a unit when discharging or authorizing any one to execute corporate powers.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 298.*]

3. CORPORATIONS (§ 411*)—OFFICERS—POWERS.

Where the president and secretary of a corporation entered into an option contract for the sale of corporate property for a fixed price payable in installments, pursuant to the authority of the board of directors to the president and secretary to contract for the sale of the property for a specified price, the president alone had no authority to extend the time of the payment of any installment; the contract making time of the essence.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 411.*]

4. VENDOR AND PURCHASER (§ 82*)—OPTION CONTRACTS—MODIFICATION—EFFECT.

Where an option contract for the purchase of property for a fixed price payable in installments on designated dates, made time of the essence, an extension of the time of the payment of the first installment is a modification of an executory agreement, and, in effect, the entering into a new agreement.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 138, 139; Dec. Dig. § 82.*]

5. CORPORATIONS (§ 426*)—ACTS OF OFFICERS—RATIFICATION.

The president and secretary of a mining corporation, pursuant to authority from the board of directors, made an option contract for the sale of corporate property for a specified price payable in installments on designated dates, and made time of the essence. The president alone extended the time for the payment of the first installment. The secretary was informed of the modification, and he then wrote to the president, who was absent from the state, inquiring about it. Nothing further was done by any one until the purchaser in the option contract learned that the corporation had refused to recognize the extension of time. *Held*, that the act of the president was not ratified, and the corporation was not bound thereby.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 426.*]

6. CORPORATIONS (§ 426*)—RATIFICATION OF UNAUTHORIZED ACT.

Where a corporate power is required to be exercised in a particular manner, a ratification

of an unauthorized exercise of the power must be effected in such manner.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 426.*]

Appeal from District Court, Third District; Geo. G. Armstrong, Judge.

Action by Adolph Lochwitz and another against the Pine Tree Mining & Milling Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Allan T. Sanford, for appellants. Smith & Price, for respondent.

FRICK, J. The appellants brought this action against the respondent, a corporation, to recover damages for an alleged breach of contract. In February, 1907, appellants and respondent entered into a contract whereby it was agreed that appellants should take possession of respondent's mine and develop certain specified portions thereof by working a certain number of men for a specified time. For all ores mined and sold appellants were to allow respondent a certain per cent., denominated "royalty." As a part of the foregoing agreement, appellants were also given an option to purchase respondent's mine at the agreed price of \$75,000, payable as follows: \$25,000 on or before the 1st day of September, 1907, and \$50,000 on or before the 1st day of December following. Time was made of the essence, and in case the \$25,000 payment was not made at the time specified, or within five days thereafter, appellants, by the terms of the contract, were to forfeit all rights thereunder, including the right or option to purchase. Appellants, in effect, alleged in their complaint that in June, 1907, the option agreement aforesaid was modified by the president of respondent by extending the time of making the first payment; that respondent, after granting said extension, refused to comply with the contract as modified, excluding appellants from the mine, preventing them from marketing certain ores which they had developed and which was of great value, forfeiting their rights under the option contract, and thus committing the alleged breach. The respondent, in its answer, denied that the contract was modified as alleged, and, further, affirmatively averred that, if the president of respondent did make the alleged modification, he did so without authority, and hence the modification, if made, was not binding on the corporation.

As we view the case, the questions for determination are: (1) Was the contract modified by the president of respondent and as contended by appellants? (2) If so, did the president act by virtue of authority so as to bind respondent? And (3) if the president acted without authority, was his act thereafter ratified so as to bind respondent? We shall, therefore, confine ourselves to a statement of the facts relating to the foregoing propositions.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The evidence adduced at the trial in support of the first proposition is as follows: One of the appellants, in stating what the president of respondent, in granting the extension of time, said, testified as follows: "Well, he said, 'I will extend you the \$25,000 payment, the first payment, to the last, so when it comes due, the last payment, you will have to pay \$75,000.' * * * He said, 'Yes, by the way, it might be such a thing that ought to be made in writing.' I said: 'Mr. Savage, I am no attorney. * * * If there is any writing to be done, you are the president. You and the secretary have the papers fixed up.' * * * So just before he went away I said: 'Now, Mr. Savage, we are both old people. Something may happen to one; something may happen to the other. I don't want to hurt you, and I am sure you don't want to hurt me.' * * * I said, 'Won't you tell your secretary about the extension, and please go to my attorney, Mr. Henry C. Lund, and tell him also that you have extended the time of the \$25,000 payment for 90 days longer?' He said, 'I will do it.' We parted." This witness said that he did not ask for the extension; that he "didn't have gall enough to ask him (the president) for it." The extension was thus granted voluntarily by the president.

The "last payment" mentioned in the foregoing statement referred to the \$50,000 payment due on or before December 1, 1907. The effect of the extension would thus have made both payments due at the same time and on the date last mentioned, and would, as appellants contend, have given them three months longer possession of the mine. Appellants did not obtain the record of the proceedings of respondent's board of directors showing the authority for entering into either the original option agreement or the alleged modification thereof. They, however, called the president of respondent as a witness for the purpose of showing his authority to act, and his testimony, in substance, is that there was a meeting of the board of directors at which the authority to enter into the original agreement was by a resolution duly passed conferred upon the witness and the secretary of the company, Mr. Price; that in the resolution appellants were mentioned as the parties with whom the president and the secretary might enter into a contract, but nothing was mentioned in the resolution with regard to the terms of sale except that the consideration was to be \$75,000; that the terms were not set forth in the resolution because it was not then known what terms the president and secretary would be able to obtain, and hence the matter of terms was left for them to agree upon; that there never was a meeting of the board of directors at which the modification of the contract was either discussed or passed on; that the board of directors conferred no authority upon the witness except what was contained in the resolution aforesaid.

The evidence of ratification, in effect, is that some time early in July one of the appellants went to the office of Mr. Price, the secretary of respondent, to pay him respondent's share of the proceeds derived from the sale of ore taken from the mine under the contract; that at that time the witness informed Mr. Price that the president of respondent had granted an extension of 90 days' time, and Mr. Price said he knew nothing about it. The witness then repeats what he told Mr. Price, as follows: "I said, 'Strange! Mr. Savage (the president) was out there (at the mine) a month ago, and he volunteered to give me that (the extension) without even asking for it. * * * Be kind enough to look into it and find out.' Something like that I said, and he (Mr. Price) said he would."

Nothing more appears to have been done or said about the alleged ratification until August 29, 1907, about two days before the first payment was due by the terms of the original contract. About this time appellants sold and transferred their interest in the option contract to one Schenck upon the representation by them that they had obtained an extension of 90 days in which to make the first payment. One of the appellants again went to see Mr. Price, the secretary, to inform him that they had sold their interest in the option contract. The question then came up about the payments, and the witness again claimed that an extension of time had been granted by Mr. Savage, the president of respondent. Mr. Price again said that he knew nothing about it. Mr. Price, then, in the presence of the witness, dictated a letter to Mr. Savage, the president, who was, and for some time prior thereto had been, absent from the state of Utah; and, as the witness says, Mr. Price did this to "find out something about it." The witness, in relating what he said to Mr. Price at that time, proceeds as follows: "I said: 'You can do whatever you please. You can't fool me with nothing. I know all about it.'" With respect to what Mr. Price wrote to Mr. Savage, the witness says: "As near as I can remember, he said, 'Mr. Lochwitz (the witness) is claiming an extension, and, if so, I do not know anything about it.' Or at least he didn't know anything about it. * * * He said, 'I am going to send that letter to-day, and we are going to get back the answer from Mr. Savage in about four or five days.'" Counsel for appellant then asked the witness: "Calling your attention to the dictation of that letter, was there anything said with reference to Mr. Savage letting him know whether he had made such an extension?" The witness answered: "Yes, sir; he said to let him know." The witness further said that he heard no more about the matter until he learned that respondent had entered into a contract with some one else and had refused to recognize the extension of time.

Upon substantially the foregoing evidence, the court, upon respondent's motion, granted

a nonsuit; and in making the ruling the court said, "No authority is shown for the making of the extension." Counsel for appellants strenuously insists that in view of the evidence the president of respondent had the authority as a matter of law to grant an extension; that he granted it; and that, if the evidence failed to show authority on the part of the president to grant an extension, the respondent is, nevertheless, bound, because the president's act was ratified by the secretary of the company. Are these contentions sound? The power of corporate officers or directors to act as the agent of the corporation may be affected in three ways: (1) By the statutes of the state in which the corporation is created; (2) by the articles of incorporation; and (3) by the by-laws of the corporation. If not so regulated, the exercise of the corporate powers are controlled by the common law. In this state, by virtue of section 324, Comp. Laws 1907, "the corporate powers of a corporation shall be exercised by the board of directors." By the same section it is provided that, if the number of directors constituting a quorum is not fixed by the articles of incorporation, a majority of the board of directors shall constitute a quorum, a majority of whom, when duly assembled, may bind the corporation by their acts. Section 315, among other things, provides that the board of directors of any corporation shall not be less than 3 nor more than 25, and a quorum shall not be less than one-fourth of the whole number of directors. Under our statute, therefore, the president, as such, of a corporation, has ordinarily only the powers of a director, or such as may be directly conferred upon him by the board of directors. Again, under statutes similar to ours, a quorum of the board of directors must act as a unit when discharging or when authorizing any one to execute corporate powers. 4 Thompson on Corps. 4619; 10 Cyc. 775. The rule is well and tersely stated in Cyc. in the following language: "The board of directors to whom the authority to bind the corporation is committed is not the individual directors scattered here and there, whose assent to a given act may be collected by a diligent canvasser, but it is the board sitting and consulting together in a body. Individual directors, or any number of them less than a quorum, have no authority as directors to bind the corporation. And this is equally the rule, although the director who assumes to do so may own a majority of the shares."

Nothing is made to appear from the record with respect to how many directors constitute the board of respondent. All that does appear is that there were at least four directors chosen at some time. Nor does it appear how many of the board constitute a quorum. As we have seen, it does appear, however, that the directors held a meeting at which they authorized the president and secretary of respondent to enter into the original option contract with appellants, and that

the board took no further action upon that subject. The evidence is also beyond dispute that the president alone volunteered to grant appellants the alleged extension. This was therefore an attempted modification of an existing executory agreement. In legal effect it was entering into a new agreement. Applying the law to the undisputed facts, if we assume that what the president did amounted to an extension of time in fact, yet we think it is clear that as a matter of law such an extension was not binding upon the respondent because the president was legally powerless to grant it. But counsel for appellant seriously contends that the acts of the president were ratified and thus became binding on the corporation. We have set forth the effect of all the evidence upon the question of ratification. We are of the opinion that as a matter of law it falls far short of establishing any of the elements of a ratification of an executory contract or agreement. As we have pointed out, under our statute the powers of the corporation must be exercised by a quorum of the board of directors when assembled as a body. The president, therefore, could not make a binding contract nor modify an existing one unless authorized to do so by such a quorum. In the resolution testified to by the president it required the joint act of the president and the secretary to make a binding contract. This they did by entering into the original option agreement. Nothing is made to appear from which it could be inferred that the president and the secretary could enter into more than one agreement with appellants. But, assuming that the powers of the president and secretary were not exhausted when they had executed the original option contract, yet the modification or new agreement was not made by the president and secretary, but was made by the president alone. The resolution of authority gave him no power to act alone. His individual act was, therefore, of no binding force or effect upon respondent. Did the secretary ratify the act of the president? Did he have the power to do so without acting jointly with the president? The general rule that, where a corporate power is required to be exercised in a particular manner, a ratification of an unauthorized exercise of such power must, in order to bind the corporation, be effected in the same manner that is required of the exercise of the original power. In 3 Cl. & Marsh. on Private Corps. the rule is admirably stated, at page 2190, in the following words: "If it is necessary that authority to do a particular act or enter into a particular contract shall be given in a certain mode, either by reason of a mandatory charter or statutory provision, or by reason of the common-law rule, ratification of such act or contract must be in the prescribed form or mode. The ratification of an act, done by one assuming to be an agent, relates back, and is equivalent to prior authority. * * * When,

therefore, the adoption of any particular form or mode is necessary to confer the authority in the first instance, there can be no valid ratification except in the same manner.' Thus, if a corporation can only authorize a particular act or contract by a power under seal, or by formal vote, ratification of such an act or contract must be under seal or by a formal vote, as the case may be." *Despatch Line, etc., v. Bellamy, etc., Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Blood v. La Serena, etc., Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

Nelther the facts nor the law, therefore, warrant the conclusion that there was any intention or effort to formally ratify the act of the president in modifying the original agreement. Is the evidence such as would warrant a jury to find that Mr. Price, as the secretary of the company, ever manifested an intention to or did ratify the president's act? We think not. All that there is in the evidence is that Mr. Price was informed by one of the appellants that the president had modified the contract by granting an extension of time in which to make the first payment. Whether any other provision of the contract was modified, or whether all other provisions were to remain in force notwithstanding the alleged modification, it seems, no one knew. In view of the nature of the contract and its numerous provisions to merely inform Mr. Price that the time of making the first payment had been extended, it was hardly sufficient to enable him to act intelligently if he felt disposed to do so with respect to ratifying the president's alleged modification of the original contract. Price therefore acted as any prudent man would have done under the circumstances. He wanted to know what the president had done, and this it was not only his duty to ascertain, but, we think, clearly was his privilege before he was required to act. In view that the president was absent from the state of Utah when Mr. Price was told of the extension of time. It seems he did not communicate with the president, and, when the time arrived for the appellants to make the first payment, Mr. Price still insisted that he had no knowledge with regard to the alleged extension of time, and, in the presence of one of the appellants, dictated a letter to the president, who was still absent from the state, to ascertain from him the facts with regard to the alleged modification of the

original option agreement. If there is the slightest evidence of an intention to ratify or of a ratification of the president's act in granting the extension of time by Mr. Price, we fail to see it. Merely informing Mr. Price that the president had modified the contract was, under the circumstances, and in view of the nature of the contract, not enough to require him to act either one way or the other. If it be the law that, if one director enters into an unauthorized contract, the corporation is bound because one or more of the other directors were informed of what the first director had done, then an easy way has been discovered by which corporate contracts and obligations may be either created or modified to the detriment, if not ruin, of both the corporation and the innocent stockholders. Such is not the law. There are circumstances under which notice to a single director, or to individual directors, or to an officer, or particular agent of the corporation, may be notice to the corporation itself, and in this connection it may be that under peculiar circumstances the corporation would be held to have notice of the unauthorized act or contract so as to require it to take some timely action with regard to it, and in case it failed to do so it might be sufficient to estop it from afterwards repudiating the unauthorized act or contract. This rule, however, can have no application to facts and circumstances such as are disclosed by the evidence in this record. 4 *Thompson on Corps.* §§ 5221, 5307; 3 *Cl. & Marsh. on Corps.* § 718. This doctrine is well illustrated and applied in *First Nat. Bank v. Drake*, 29 Kan. 311, 44 Am. Rep. 646, where will be found a very interesting and instructive discussion upon the subject by Mr. Justice Brewer.

In view of the whole evidence, no jury would have been authorized to find that there had been either a formal ratification of the president's act in granting the extension of time, nor that the respondent was estopped from ignoring the alleged extension of time by reason of anything that Mr. Price did or omitted to do. The court, therefore, did not err in granting the motion for a nonsuit. In view of this conclusion, the other matters discussed by counsel become immaterial.

The judgment is, therefore, affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

(37 Utah, 334)

SALT LAKE INVESTMENT CO. v. FOX.

(Supreme Court of Utah. March 25, 1910.)

1. QUIETING TITLE (§ 52*)—FINDINGS—JUDGMENT.

In a suit to quiet title, the court found that defendant was the owner in fee, subject to the interest and claim of plaintiff by virtue of the payment of taxes for certain years, no finding was made that the property was sold or purchased for taxes, and there was no evidence that plaintiff obtained any interest save an equitable lien for taxes paid. *Held*, that a judgment vesting title in plaintiff unless defendant pay to him the amount expended by plaintiff in payment of taxes within a specified time was not warranted, but should have been that on defendant's default to pay the taxes the property should be sold and the proceeds applied to plaintiff's claim, any surplus to be paid to defendant.

[Ed. Note.—For other cases, see *Quieting Title*, Dec. Dig. § 52.*]

2. TRIAL (§ 396*)—ISSUES—FINDINGS.

In a suit to quiet title, plaintiff alleged that he was the owner and entitled to the land in question, and prayed that his title be quieted. Defendant denied plaintiff's ownership, alleged ownership in himself, and prayed that his title be quieted. *Held*, that a finding that plaintiff had paid taxes on the land which belonged to defendant, and that plaintiff was entitled to an equitable lien therefor, was not without the issues.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 396.*]

3. APPEAL AND ERROR (§ 173*)—PRESENTATION OF QUESTIONS BELOW.

In a suit to quiet title by one who had paid taxes on the land, a claim that plaintiff should, if given a lien for taxes paid, be charged with rents and profits derived from the property, could not be made for the first time on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 173.*]

Appeal from District Court, Third District; M. L. Ritchie, Judge.

Action by the Salt Lake Investment Company against Jesse M. Fox. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Gatrell & Johnson, for appellant. Patterson & Moyer, for respondent.

STRAUP, C. J. This is an action to quiet title. The plaintiff alleged that it was the owner, in possession, and entitled to the possession of the land in question; that the defendant claimed an interest therein adverse to the plaintiff, and that he be required to set it forth, and that it be adjudged that it is unfounded, and that the title to the property be quieted in the plaintiff. The defendant denied plaintiff's ownership and right of possession, alleged ownership and right of possession in himself, and prayed that the title be quieted in him. The court found that the defendant, subject to the interest and claim of the plaintiff "by virtue of the payment of taxes from 1895 to 1906," amounting to \$278.13, including interest, was the owner in fee and entitled to the possession of the property. It was further found by the court,

that, after the trial and submission of the case, the court made an order that a decree be entered quieting the title in the defendant upon the condition that he, within 30 days after notice of the entry of the order, pay to the plaintiff the sum of \$278.13, and that the defendant failed and refused to pay the same. As conclusions of law the court held that the defendant, prior to the making of the order, "was the owner of and entitled to the possession of the property," and "was entitled to a decree against the plaintiff quieting the title in the defendant" subject to the claim of the plaintiff for the repayment of taxes, and upon the condition that the defendant repay the taxes to the plaintiff as specified in the findings. The court further held "that by reason of the failure of the defendant to pay the said sum of \$278.13 the plaintiff has become entitled to a decree vesting in it the title to said premises, and that such decree is in the nature of a foreclosure of the equitable lien of the plaintiff on said real estate and sale thereof because of said default; that the defendant is entitled to the benefit of an equitable application, as nearly as may be, of the provisions of the statutes relating to the redemption of real estate sold upon execution, to his rights herein, and therefore to the right to redeem said real estate upon the payment within six months after legal service of a copy of the decree herein of said sum of \$278.13, with interest at the rate of 6 per cent. per annum from the date of the service of a copy of such decree, and with any other lawful charges that may accrue by virtue of the provisions of section 3262 of the Compiled Laws of Utah of 1907." A decree or judgment was entered by the court that the plaintiff "have judgment as prayed for in its complaint against the defendant quieting the title of the said plaintiff to all of the property described in its complaint, against all claims, pretensions, or demands of the said defendant, * * * on condition, however, that if the defendant shall pay or cause to be paid within six months after service or notice of the entry of the decree the sum of \$278.13, with interest thereon, * * * then, upon such payment, the defendant will be entitled to a decree of this court that he is the owner of and entitled to the possession of the property hereinafter described, and quieting his said title thereto against all claims whatsoever of the plaintiff, but that if the payment of said sum or sums be not paid as herein provided, then the defendant shall stand barred and foreclosed of any and all interest whatsoever in said property." From the judgment so entered, the defendant has prosecuted this appeal.

We are of the opinion that the judgment is not responsive to, and is not supported by, the findings. The judgment was evidently entered, and is defended, on the theory that,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in equity, the defendant was not entitled to the relief quieting the title of the property in him until he himself did equity by paying the taxes, together with legal interest. Conceding that the court, under circumstances, could properly so have withheld such relief from the defendant, yet, upon the findings, we find no basis for a judgment in favor of the plaintiff quieting the title of the property in it. No finding is made by the court showing that the plaintiff had title, or right of possession, or that it had acquired or held any right, title, or interest in or to the property, except that it paid the taxes from 1895 to 1906, and that such payments by plaintiff "tended to preserve the property for the defendant." No finding is made that the property was sold or purchased for nonpayment of taxes, or that any certificate of sale or tax deed was held by plaintiff or was issued, or that the plaintiff otherwise obtained or acquired any title to, or estate in, the property, or any right to possess it. To the contrary, the court expressly found "that the plaintiff has no other right, title, estate, or interest in, or claim to the property in question than that set forth in these findings growing out of the payment of the taxes aforesaid." Notwithstanding such findings, the court nevertheless entered a decree that, if the defendant failed to repay the amount of the taxes within six months, "the title of the property should be quieted in the plaintiff against all claims and demands of the defendant," and that the defendant be barred and foreclosed of any and all interest whatsoever in and to the property. There is, therefore, no finding to support the judgment that the plaintiff is the owner or entitled to the possession of the property, or to a "judgment as prayed for in its complaint" quieting the title in itself and decreeing that the defendant has no interest or estate therein. Neither do we find anything in the evidence to justify a finding that the plaintiff had obtained any such title, or right of possession, or other interest, except, as found by the court, an equitable lien for taxes paid. Now, assuming that the court, on equitable principles, could have refused to declare the defendant vested with fee-simple title as against plaintiff's claim or lien, until the defendant repaid the taxes, still, there being no finding and no evidence to show that the plaintiff had title or was the owner or entitled to the possession of the property, and it being found and shown by the evidence that it had no interest in or to the property except an equitable lien for the payment of the taxes, the court was not justified in rendering a judgment that it became the owner and was entitled to the possession of the property upon the defendant's mere default to pay the taxes as required by

the court. The court could not thus divest the defendant of the fee-simple title found to be in him, and vest the plaintiff with title found not to be in it. Under the circumstances, and in view of the findings, we think the judgment which ought to have been entered by the court is that the defendant is the owner of the property subject to plaintiff's claim, and that upon the defendant's default to pay the taxes and discharge the lien as required by the court, to order the property sold under the direction of the court, and the proceeds of sale applied in payment of plaintiff's claim, and the surplus, if any, yielded to the defendant.

We think that the contention made by the appellant that the court's findings in respect of the plaintiff's payment of taxes, and declaring it entitled to an equitable lien therefor on the property, were not within the issues, is not well founded. Nor, in view of the record, is the further claim tenable, which is made by the appellant, that if the plaintiff be given a lien for the payment of the taxes it ought to be charged with the reasonable rents and profits derived by it from the property. Such a claim is urged for the first time in this court. No such issue was tendered, and no such claim was made in the court below. It is not shown what the rents and profits were, nor was there any evidence offered or introduced on such a subject. This case has been tried twice, and has twice been here on appeal. We see no merit to this appeal, except the question relating to the form of the judgment as rendered and entered. We think this litigation ought to end, and see no good purpose in remanding the case for a new trial. It is therefore adjudged by this court that the judgment of the court below as entered be set aside, and the case remanded to the trial court with directions to enter a judgment that the defendant is the owner and entitled to the possession of the property subject to plaintiff's lien for the payment of the taxes amounting to \$278.13, together with accrued interest and costs, that the defendant be required to pay the same to the plaintiff, or to the clerk of the district court for its use, within 30 days after the entry of such judgment, and in default thereof the property be sold under the order and direction of the court, and the proceeds of sale applied, first, to the costs of sale, then in payment of plaintiff's claim together with accrued interest and costs, and the surplus, if any, yielded to the defendant; and that the defendant be given the right of redemption as in case of sales under execution. Costs to appellant.

It is so ordered.

FRICK and McCARTY, JJ., concur.

MEMORANDUM DECISIONS.

PEARCE v. TERRITORY. (Supreme Court of Arizona. April 2, 1910.) Appeal from District Court, Maricopa County; before Justice Edward Kent. Jesse R. Pearce was convicted of murder in the second degree, and appeals. Affirmed. John B. Wright, Atty. Gen., for the Territory.

PER CURIAM. Appellant was convicted of murder of the second degree, and appeals. He has made no appearance by counsel, but, as required by the statute, we have carefully examined the record. We find no error therein, and therefore affirm the judgment of the district court.

KENT, C. J., not sitting.

ROSE v. TERRITORY. (Supreme Court of Arizona. April 2, 1910.) Appeal from District Court, Graham County; before Justice Ernest W. Lewis. Justin O. Rose was convicted of murder, and he appeals. Reversed, and defendant discharged. A. C. Baker and John McGowan, for appellant. John B. Wright, Atty. Gen., for the Territory.

PER CURIAM. Appellant was convicted of the murder of one Con Sullivan, and appeals. A number of questions are raised by the assignments of error, but, in the view we take of the case, we need consider but one. It is urged that the testimony is insufficient to support the verdict of guilty. A careful consideration of the record compels us to hold that this assignment is well taken. Much of the testimony is hearsay. It was received without objection. Being in the record, it no doubt served to mislead the jury. We do not conceive that a statement of the testimony will serve any useful purpose. There not being sufficient competent evidence of guilt to sustain the verdict, the judgment entered thereon is reversed, and the defendant ordered discharged from custody.

DOAN, J., concurs in the result. LEWIS, J., not sitting.

WOODDELL v. TERRITORY. (Supreme Court of Arizona. April 2, 1910.) Appeal from District Court, Pima County; before Justice John H. Campbell. R. D. Wooddell was indicted for embezzlement in the district court of Pima county, and tried for that offense in the October term, 1909. From the judgment of conviction, and the denial of a motion for a new trial, he appealed, and assigned as errors: (1) The overruling of his demurrer to the indictment; (2) the exclusion of evidence on the trial; (3) that the verdict of the jury is contrary to the law and evidence; (4) the refusal of the court to give an instruction requested by the defendant. Affirmed by divided court. Worsley & Feier and Josiah Ide, for appellant. John B. Wright, Atty. Gen., for the Territory.

PER CURIAM. The court is equally divided as to the reversal of the judgment in this case. As an expression of opinion would be but that of a minority of the court, the judgment of the trial court is affirmed, without a discussion of the questions presented by the appellant.

CAMPBELL, J., not sitting.

SHEA v. BUTTE ELECTRIC CO. et al. (Supreme Court of Montana. Oct. 22, 1909.) Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge. On mo-

tion to dismiss appeal. W. M. Bickford, Geo. F. Shelton, and H. C. Hopkins, for appellants. Breen & Hogevoil, for respondent.

PER CURIAM. It is ordered that the appeal in the above-entitled cause be, and the same is, hereby dismissed, in accordance with stipulation of counsel.

STATE v. JOHNSTON. (Supreme Court of Montana. Nov. 22, 1909.) Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge. On motion to dismiss appeal. W. B. Rodgers, for appellant. Albert J. Galen, Atty. Gen., for the State.

PER CURIAM. It is ordered that the appeal in the above-entitled cause be, and the same is, hereby dismissed, in accordance with stipulation of counsel.

STATE v. PLATT. (Supreme Court of Montana. May 7, 1909.) Appeal from District Court, Jefferson County; Lew L. Callaway, Judge. On motion to dismiss appeal. Denny & Davis and Mrs. Ella Knowles Haskell, for appellant. Albert J. Galen, Atty. Gen., for the State.

PER CURIAM. It is ordered that the appeal in the above-entitled cause be, and the same is, hereby dismissed, in accordance with motion of the Attorney General, supported by affidavit, setting forth that brief of appellant had not been served upon counsel for the state within 45 days, or at all.

STATE ex rel. JOHNSON v. FOURTH JUDICIAL DISTRICT COURT et al. (Supreme Court of Montana. June 23, 1909.) Original application for writ of prohibition. Marshall & Stiff, for relator.

PER CURIAM. Relator's petition for writ of prohibition herein is, after due consideration by the court, denied.

STATE ex rel. KNUCKLEY v. DISTRICT COURT OF SECOND JUDICIAL DIST. et al. (Supreme Court of Montana. Oct. 11, 1909.) Original application for writ of prohibition. John A. Davies and Maury & Templeman, for relator.

PER CURIAM. Relator's application for writ of prohibition, heretofore submitted, is, after due consideration by the court, denied.

In re THRESHER. (Supreme Court of Montana. May 24, 1909.) B. S. Thresher, for complainant.

PER CURIAM. Applicant's petition for a writ of habeas corpus is, after due consideration by the court, denied.

SAULECK v. STATE. (Criminal Court of Appeals of Oklahoma. April 12, 1910.) Appeal from Pittsburg County Court; R. W. Higgins, Judge. Frank Sauleck was convicted of violation of the prohibition law, and appeals. Dismissed.

PER CURIAM. Plaintiff in error was convicted in the county court of Pittsburg county

for a violation of the prohibition law, and was on the 13th day of January, 1910, sentenced to serve a term of 30 days in the county jail and to pay a fine of \$50, from which judgment he appealed by filing in this court on March 5, 1910, petition in error with case-made attached. Now, on this 12th day of April, 1910, plaintiff in error files his motion to dismiss said appeal. Wherefore it is by the court ordered that said appeal be, and is hereby, dismissed, and the case remanded, with direction to the county court of Pittsburg county to cause the judgment and sentence to be carried into execution.

WHITE v. STATE (two cases). (Criminal Court of Appeals of Oklahoma. April 12, 1910.) Appeals from Creek County Court; Josiah G. Davis, Judge. W. E. White was twice convicted of illegally selling liquor, and appeals. Dismissed. J. L. Byrne, for plaintiff in error.

PER CURIAM. Plaintiff in error was convicted in the county court of Creek county in two cases for the crime of having possession of intoxicating liquor with intent of selling the same, and was on the 12th day of November, 1909, in one case sentenced to pay a fine of \$300 and be imprisoned in the county jail for 60 days, and in the other case he was sentenced to pay a fine of \$50 and be imprisoned in the county jail for 30 days, from which judgments he appealed. On April 5, 1910, while said appeals were pending, Acting Governor Bellamy granted him an unconditional pardon in each case, and he has filed a certified copy of the same in this court. The facts as to the pardon in these cases are the same as in the case of Hollis Gilmore v. State (decided at this term) 108 Pac. 416, and the principles of law are the same, and the decision the same. Therefore it is considered that said appeals be, and the same are, hereby dismissed, and the cases remanded to the county court of Creek county.

BROWN v. KILDEA et al. (Supreme Court of Washington. May 26, 1910.) Action by J. R. Brown against J. P. Kildea and others. Heard on plaintiff's exceptions to an item in the cost bill. Item allowed to a certain extent, and disallowed as to the remainder.

PER CURIAM. The appellants have filed a cost bill for \$193.50 for printing their brief

on appeal. No reply brief was filed. The opening brief contains 254 pages. The respondent has filed exceptions to this item, and contends that the issues could have been properly presented in a brief of 75 pages. He has also filed an affidavit showing that the current rate for printing briefs in Spokane, where the case was appealed, was at the time of the printing of the appellants' brief, 75 cents per printed page. The case is reported in 108 Pac. 452. The issue was a simple one, involving the construction of two sections of the statute. We think the appellants' view of the case could have been presented in a brief of 75 pages. This item will be allowed to the extent of \$57, and disallowed as to the remainder.

SAMPSON v. CITY OF SEATTLE. (Supreme Court of Washington. May 18, 1910.) Department 2. Appeal from Superior Court, King County; John F. Main, Judge. Action by G. W. Sampson against the City of Seattle. From a judgment for defendant, plaintiff appeals. Affirmed. Chas. M. Fouts and Kill Gould, for appellant. Scott Calhoun and Bruce C. Shorts, for respondent.

PER CURIAM. This appeal presents the identical questions decided by this court in *Fisher v. Seattle*, 104 Pac. 655; and for the reasons there stated, the judgment is affirmed.

(83 Kan. 800)

FUNK v. SHAWNEE FIRE INS. CO. (Supreme Court of Kansas, July 9, 1910.) On rehearing. Petition denied. For former opinion, see 108 Pac. 832.

PER CURIAM. In a petition for a rehearing in this case it is suggested that it might be inferred from the opinion filed that this court holds the evidence to be conclusive upon the various questions of fact involved. The opinion is not to be so interpreted. The decision is merely that there was evidence enough to withstand a demurrer. Further, it is suggested that the agent, Fast, could not act in a dual capacity, and, having been employed by Funk, the latter is concluded by Fast's conduct. Fast could act as scrivener for Funk and Nuss in the preparation of their papers, and then act as agent for the company in effecting an assignment of the policy without violating any rule of propriety. The petition for a rehearing is denied.

